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(2021)03ILR A1
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.02.2021

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Misc. Bail Application No. 4718 of 2021

Amit Kumar Kataria ...Applicant(In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Anurag Khanna(Senior Adv.), Sri Raghav Dev Garg

Counsel for the Respondents:
A.G.A., Sri Dileep Chandra Mathur

A. Civil Law - Central Goods and Services Tax Act, 2017-Section 69,70, 132(1)(c) and 132(1)(i)-application- modification of bail order condition-applicant directed to deposit remaining amount of ITC Rs. 4 Crore 51 lac-unsustainable, because it is too harsh and unreasonable where the investigation is still pending and applicant has already deposited Rs. 5 Crore out of disputed amount of Rs. 9 crore 51 lac-under the Act, there is no staturtory provision for compelling the applicant to deposit the entire amount without completing the inquiry or without initiating any recovery proceedings u/s 73 or 74 of the C.G.S.T. Act-object of imposing bail conditions is to secure attendance of the accused and to protect the interest of revenue not ruin the business of accused-applicant to submit security equivalent to remaining disputed amount other than cash and bank gurantee along with affidavit before the Senior Intelligence Officer.(Para 1 to 25)

The Bail Application is disposed of. (E-5)

List of Cases cited: -

1. Sandeep Jain Vs NCT of Delhi, (2000) 2 SCC 66

2. Amarjit Singh Vs St. of NCT of Delhi, JT (2002) SC 291

3. Sheikh Ayub Vs St. of M.P., (2004) 13 SCC 457

4. Ramathal & ors. Vs Insptr. Of Police & anr., (2009) Cr.L.J. 2271

5. Munish Bhasin & ors. Vs St. of NCT of Delhi & anr., (2009) 4 SCC 45

6. Sumit Mehta Vs St.of NCT of Delhi,(2013) 15 SCC 570

7. Dilip Singh Vs St. of M.P. & anr., CRLA No. 53 of 2021

8. Suresh Kumar P.P. & anr. Vs The Deputy Director, Directorate General of GST Intelligence (DGGI) & ors.(SLP(C) No. 13128 of 2020

9. Vikalp Jain Vs U.O.I. & ors.,(Matter U/A 227 No. 5789 of 2019

(Delivered by Hon'ble Sanjay Kumar Singh, J.)

1. Second supplementary affidavit dated 22.02.2021 filed on behalf of the applicant and supplementary counter affidavit dated 22.02.2021 filed on behalf of opposite party No. 2, are taken on record.

2. Heard Mr. Anurag Khanna, learned Senior Advocate assisted by Mr. Raghav Dev Garg, learned counsel for the applicant, Mr. Rabindra Singh, learned Additional Government Advocate for the State/opposite party No.1 and Mr. D.C. Mathur, learned counsel appearing on behalf of opposite party No.2, Directorate General of G.S.T. Intelligence, Kaushambi, Ghaziabad.

3. This application under section 439 (1)(b) of Code of Criminal Procedure has been filed by the applicant to set aside the condition No. 4 of the bail order dated 24.11.2020 passed by the Special Chief Judicial Magistrate, Meerut, whereby following conditions have been imposed upon the applicant while granting bail to him:

"*1. अभियुक्त द्वारा अंकन बीस–बीस लाख रुपये की दो जमानत व सामान धनराशि का निजी बंध पत्र दाखिल करने पर जमानत पर रिहा किया जाये। दो जमानतियों में से एक जमानती अभियुक्त के परिवार का नजदीकी सदस्य हो।*

2. अभियुक्त को आदेशित किया जाता है कि यदि वह पासपोर्ट धारक हो तो वह अपना पासपोर्ट अविलम्ब न्याययलय में जमा कराये।

3. जमानत पर छूटने के पश्चात अभियुक्त विभागीय जांच में सहयोग करेगा।

4. अभियुक्त को यह भी आदेशित किया जाता है कि वह आई0 टी0 सी0 की शेष धनराशि 3 माह में विभाग में जमा कराकर न्यायालय को अवगत कराना सुनिश्चित करेगा। अभियुक्त इस आशय की अन्डर टेकिंग दाखिल करेगा।"

4. The brief facts of the case, which are relevant for the purpose of deciding this case, as submitted by the learned counsel for the applicant, are that the applicant is the sole proprietor of firm registered in the name and style of M/s LAN Engineering and Technologies. The firm is involved in the business of manufacturing and supply of meter boxes and distribution boxes to Government utilities. The applicant is also taking care of another firm namely, M/s Neelu Packing Industries, of which Mr. Balbir Singh, who is the father of the applicant, is the sole proprietor. On 06.08.2020, a joint team of officers of Department of C.G.S.T. Commissionerate, NOIDA and C.G.S.T. Commissionerate, Meerut, visited the premises of M/s LAN Engineering and Technologies and M/s Neelu Packing Industries. Thereafter, on 11.11.2020 summons under section 70 of Central Goods and Services Tax Act, 2017 (herein-after referred to as "C.G.S.T Act") was served upon the applicant requiring his presence on 11.11.2020 at 14:00 hours before Senior Intelligence Officer, DGGI, Ghaziabad. The applicant appeared before the Authorities concerned on behalf of both the aforesaid firms and his statement under section 70 of C.G.S.T. Act was recorded on 11.11.2020. Main allegation against the applicant is that the four firms, namely, M/s Jain Polymer, M/s Keval Polymer, M/s Balaji Trading Company and M/s Sai Nath Plastics, which are supplier's firms of plastic scrap for both the aforesaid firms of the applicant, are not found in existence as per information of the Department. M/s LAN Engineering and Technologies and M/s Neelu Packing Industries have fraudulently availed input tax credit approximately, a sum of Rs. 9,51,00,000/- (Rupees nine crores fifty one lac only), out of which rupees six crore sixty lac for M/s Neelu Packing Industries and rupees two crore ninety one lac for M/s LAN Engineering and Technologies. After recording the statement of the applicant under section 70 of C.G.S.T. Act, he was arrested on 12.11.2020 in accordance with the provisions of section 69 of C.G.S.T. Act, as the response of the applicant was not found satisfactory, and he was sent in judicial custody for the offence under section 132 (1)(c) and 132(1)((i) of the C.G.S.T. Act, 2017, and thereafter he was granted bail vide order dated 24.11.2020 passed by Special Chief Judicial Magistrate, Meerut, subject to above-mentioned conditions.

5. Main substratum of argument of Mr. Anurag Khanna, learned Senior Advocate appearing on behalf of the applicant is that out of disputed amount of

Rs. 9,51,00,000/- (Rupees nine crore fifty one lac only), the applicant has already deposited a sum of Rs. 5,00,00,000/- (rupees five crore only) under duress and coercion on 21.11.2020 on account of putting extreme pressure upon the applicant by the Department. It is vehemently urged by the learned counsel for the applicant that till date neither any criminal complaint has been filed nor any proceedings under section 73 or 74 of the C.G.S.T. Act, has been initiated against the applicant by the Department and enquiry proceedings is still under process. It is also submitted by the learned counsel for the applicant that since the determination of input tax credit wrongly availed has not been finally made by the Department and no order under section 83 of C.G.S.T. Act, 2017 for provisional attachment of any property including bank account belonging to the applicant has been made, therefore, the applicant cannot be directed and forced to deposit the remaining disputed amount of Rs. 4,51,00,000/- (rupees four crore fifty one lac only). It is next submitted by the learned counsel for the applicant that under the C.G.S.T. Act, there is no statutory provision for compelling the applicant to deposit the entire amount without completing the investigation/enquiry or without launching prosecution by filing complaint or without initiating any recovery proceedings under section 73 or 74 of C.G.S.T. Act. Much emphasis has been given that under Chapter XV, there is a complete procedure for demand and recovery, therefore, without following the same, the applicant cannot be compelled to deposit the entire disputed amount. It is submitted that any act done by the Department otherwise in due course of law as provided under C.G.S.T. Act, can be termed as illegal action. It is also pointed out by the learned counsel for the applicant that vide two letters dated 23.11.2020 addressed to Senior Intelligence Office, Group D, DGGI, Ghaziabad, Regional Unit, undertakings were given by the applicant with regard to disputed amount against the aforesaid firms of the applicant, by submitting that he has voluntarily deposited a sum of Rs. 1,50,00,000/- (Rupees one crore fifty lac only) on 21.11.2020 with regard to liability against M/s LAN Engineering and Technologies, NOIDA and Rs. 3,50,00,000/- (rupees three crore fifty lac only) on 21.11.2020 with regard to liability against M/s Neelu Packing Industries, against reversal of disputed ITC of IGST availed by him during the period April, 2018 to March, 2019 on the strength of supply made by M/s Jain Polymer, M/s Keval Polymer, M/s Balaji Trading Company and M/s Sai Nath Plastics, and assured that rest of the disputed ITC of IGST will be deposited within six months and he will fully cooperate with the investigation, copies of undertaking along with copies of Chalan have been brought on record as annexure-8 to the bail application. It is also pointed out by the learned counsel for the applicant that the applicant, after granting bail on 24.11.2020, has also given an undertaking on the same day, i.e. 24.11.2020 in terms of conditions imposed upon him in the bail order dated 24.11.2020.

6. Here, it is also relevant to mention the contents of paragraph 2 of the second supplementary affidavit filed today on behalf of the applicant, which are reproduced here-in below:

"That the applicant submits that if the Hon'ble Court is pleased to modify the condition No 4 in the order dated 24.11.2020 passed by the Chief Judicial Magistrate to the extent that instead of

depositing Rs. 4.5 crores (remaining amount of disputed ITC availed) in cash, the applicant be directed to deposit any security, other than cash or bank guarantee, the applicant undertakes that he shall adhere to the same and shall submit as security, the property papers of the land being lease hold property No. "100" with an area admeasuring 496 Sq. Mtr., situated at Block "C", Sector 50, NOIDA, Gautam Buddh Nagar. The property is in the name of the applicant's father and as per the latest available valuation, the same is worth approximately Rs. 5,60,20,000/-, which is more than Rs. 4.5 Crores. The applicant further submits that the aforementioned land is free from all encumbrances."

7. On the strength of aforesaid facts, it is submitted by the learned counsel for the applicant that condition No. 4 of the bail order dated 24.11.2020 is onerous and unreasonable under the facts of this case. Object of imposing conditions is to secure the attendance of the accused and to protect the interest of revenue, instead ruins the business of accused, therefore he can be directed to give security other than cash or bank guarantee as per his undertaking, as mentioned in paragraph 2 of the second supplementary affidavit dated 22.02.2021.

8. In support of aforesaid contentions, learned counsel for the applicant has placed reliance upon the following judgments of the Supreme Court:

1. ***Sandeep Jain v. National Capital Territory of Delhi,*** 2000 (2) SCC 66,

2. **Amarjit Singh v. State of NCT of Delhi**, JT 2002 (1) SC 291,

3. ***Sheikh Ayub vs State of M.P.***, 2004 (13) SCC 457

4. ***Ramathal & others vs Inspector of Police & Another***, 2009 Cr.L.J. 2271,

5. ***Munish Bhasin & Others vs State (Govt. of N.C.T. of Delhi) & Another***, 2009 (4) SCC 45,

6. ***Sumit Mehta vs State (N.C.T. of Delhi)***, 2013 (15) SCC 570,

7. ***Dilip Singh vs State of M.P. and another,*** Criminal Appeal No. 53 of 2021 decided on 19.01.2021.

9. In the case of **Sandeep Jain** (supra) the Apex Court held that:

"We are unable to appreciate even the first order passed by the Metropolitan Magistrate imposing the onerous condition that an accused at the FIR stage should pay a huge sum of Rs. 2 lakhs to be set at liberty. If he had paid it is a different matter. But the fact that he was not able to pay that amount and in default thereof he is to languish in jail for more than 10 months now, is sufficient indication that he was unable to make up the amount. Can he be detained in custody endlessly for his inability to pay the amount in the range of Rs. 2 lakhs. If the cheques issued by his surety were dishonoured, the Court could perhaps have taken it as a ground to suggest to the payee of the cheques to resort to his legal remedies provided by law. Similarly if the court was dissatisfied with the conduct of the surety as for his failure to raise funds for honouring the cheques issued by him, the court could have directed the appellant to substitute him with another surety. But to keep him in prison for such a long period, that too in a case where bail would normally be granted for the offences alleged, is not only hard but improper. It must be remembered that the Court has not even come to the conclusion that the allegations made in the

FIR are true. That can be decided only when the trial concludes, if the case is charge-sheeted by the police".

10. The Apex Court in **Amarjit Singh** (supra), held as under:-

"4. Having regard to the facts and circumstances of the present case, we have no hesitation in coming to the conclusion that the imposition of condition to deposit the sum of Rs. 15 lacks in the form of FDR in the Trial Court is an unreasonable condition and, therefore, we set aside the said condition as a condition precedent for granting anticipatory bail to the accused/appellant....."

11. In the case of ***Sheikh Ayub*** (supra), facts of the case before the Apex Court were that by the impugned order the appellant was granted bail and directed to deposit Rs.2,50,000/- which is alleged to be the amount misappropriated by the appellant. There was also condition for furnishing surety bond for Rs. 50,000/-. In the circumstances of the case, Apex Court held that direction to deposit Rs. 2,50,000 was not warranted, as part of the conditions for granting bail and observed that the direction to deposit Rs. 2,50,000/- is deleted and subject to this modification the order passed by the learned Single Judge granting bail is confirmed.

12. In ***Ramathal & Ors*** (supra), the Apex Court has again considered the issue of imposing onerous conditions while granting Anticipatory bail to accused. Relevant observations made by the Apex Court in the said case are as follows:

"7. On perusal of the submissions made and material on record, the High Court passed an order granting anticipatory bail as prayed for on condition that in the event of arrest, the appellants shall be enlarged on bail on their depositing Rs. 32,00,000/- to the credit of Crime No. 56 of 2008 before the Judicial Magistrate No. 1, Coimbatore and also on their executing a personal bond of Rs. 1,00,000/- with two sureties each for the like sum to his satisfaction.

8. Aggrieved by the aforesaid order, the appellants approached this Court on the ground that the conditions imposed by the High Court while granting anticipatory bail are not only unreasonable and onerous but the same also amounts to putting a fetter on the right of appellants being admitted to bail, in terms of the order passed.

15. It appears that in the aforesaid facts and circumstances, the High Court passed the impugned order with the intention of protecting the interest of the complainant in the matter. In our considered opinion, the approach of the High Court was incorrect as under the impugned order a very unreasonable and onerous condition has been laid down by the Court as a condition precedent for grant of anticipatory bail."

13. In the case of ***Munish Bhasin*** (supra), the Apex Court has held that:

"10. It is well settled that while exercising discretion to release an accused under Section 438 of the Code neither the High Court nor the Sessions Court would be justified in imposing freakish conditions. There is no manner of doubt that the court having regard to the facts and circumstances of the case can impose necessary, just and efficacious conditions while enlarging an accused on bail under Section 438 of the Code. However, the accused cannot be subjected to any irrelevant condition at all.

11. The conditions which can be imposed by the court while granting anticipatory bail are enumerated in sub-section (2) of Section 438 and sub-section (3) of Section 437 of the Code. Normally, conditions can be imposed (i) to secure the presence of the accused before the investigating officer or before the Court, (ii) to prevent him from fleeing the course of justice, (iii) to prevent him from tampering with the evidence or to prevent him from inducing or intimidating the witnesses so as to dissuade them from disclosing the facts before the police or court, or (iv) restricting the movements of the accused in a particular area or locality or to maintain law and order etc. To subject an accused to any other condition would be beyond jurisdiction of the power conferred on court under Section 438 of the Code.

12. While imposing conditions on an accused who approaches the court under Section 438 of the Code, the court should be extremely chary in imposing conditions and should not transgress its jurisdiction or power by imposing the conditions which are not called for at all. There is no manner of doubt that the conditions to be imposed under Section 438 of the Code cannot be harsh, onerous or excessive so as to frustrate the very object of grant of anticipatory bail under Section 438 of the Code.

13. In the instant case, the question before the Court was whether having regard to the averments made by Ms. Renuka in her complaint, the appellant and his parents were entitled to bail under Section 438 of the Code. When the High Court had found that a case for grant of bail under Section 438 was made out, it was not open to the Court to direct the appellant to pay Rs. 3,00,000/- for past maintenance and a sum of Rs.12,500 per month as future maintenance to his wife and child. In a proceeding under Section 438 of the Code, the Court would not be justified in awarding maintenance to the wife and child."

14. In the case of ***Sumit Mehta (supra)***, the only point for consideration was whether the condition of depositing an amount of Rs. 1,00,00,000/- in fixed deposit for anticipatory bail is sustainable in law and whether such condition is outside the purview of Section 438 of the Code?

The observations made by the Apex Court while deciding the aforesaid issue are as under:

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.

13. We also clarify that while granting anticipatory bail, the courts are expected to consider and keep in mind the

nature and gravity of accusation, antecedents of the applicant, namely, about his previous involvement in such offence and the possibility of the applicant to flee from justice. It is also the duty of the court to ascertain whether accusation has been made with the object of injuring or humiliating him by having him so arrested. It is needless to mention that the courts are duty-bound to impose appropriate conditions as provided under sub-section (2) of Section 438 of the Code.

14. Thus, in the case on hand, fixed deposit of Rs. 1,00,00,000 for a period of six months in the name of the complainant and to keep the FDR with the investigating officer as a condition precedent for grant of anticipatory bail is evidently onerous and unreasonable. It must be remembered that the Court has not even come to the conclusion whether the allegations made are true or not which can only be ascertained after completion of trial. Certainly, in no words are we suggesting that the power to impose a condition of this nature is totally excluded, even in cases of cheating, electricity pilferage, white-collar crimes or chit fund scams etc.

15. The words "any condition" used in the provision should not be regarded as conferring absolute power on a court of law to impose any condition that it chooses to impose. Any condition has to be interpreted as a reasonable condition acceptable in the facts permissible in the circumstance and effective in the pragmatic sense and should not defeat the order of grant of bail. We are of the view that the present facts and circumstances of the case do not warrant such extreme condition to be imposed.

15. Quite recent the Apex Court on January 19, 2020 has again considered the issue of imposing onerous conditions while granting Anticipatory bail to accused in case of ***Dilip Singh v. State of Madhya Pradesh and Another*** in Criminal Appeal No.53 of 2021. Facts , observations and findings of the Apex Court are as follow :

"2. This appeal is against an order dated 11 September 2019 passed by the High Court granting anticipatory bail to the appellant, subject to the condition of deposit of Rs 41 lakhs in court and upon his furnishing personal bond in the sum of Rs 50,000 with one solvent surety in the like amount to the satisfaction of the arresting officer. It was directed that the order would be governed by condition Nos 1 to 3 of sub-Section 2 of Section 438 of the Code of Criminal Procedure. The trial court was directed to deposit the amount so deposited by the appellant with any nationalized bank.

3. Ex facie, the disputes in the instant case are civil in nature. It is the contention of the complainant that despite having paid Rs 41 lakhs to the appellant pursuant to an agreement for purchase of agricultural land, the appellant has not executed the deed of sale in respect of the same. It appears that the complainant has also filed a civil suit for specific performance of the said agreement, which is pending adjudication.

4. By imposing the condition of deposit of Rs. 41 lakhs, the High Court has, in an application for pre-arrest bail under Section 438 of the Criminal Procedure Code, virtually issued directions in the nature of recovery in a civil suit.

5. It is well settled by a plethora of decisions of this Court that criminal proceedings are not for realization of disputed dues. It is open to a Court to grant or refuse the prayer for anticipatory bail, depending on the facts and circumstances

of the particular case. The factors to be taken into consideration, while considering an application for bail are the nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution; reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses; reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence; character behaviour and standing of the accused; and the circumstances which are peculiar or the accused and larger interest of the public or the State and similar other considerations. A criminal court, exercising jurisdiction to grant bail/anticipatory bail, is not expected to act as a recovery agent to realise the dues of the complainant, and that too, without any trial.

6. We accordingly modify the order impugned before us by deleting the direction to deposit Rs. 41 lakhs as directed by the High Court. Needless to mention, the grant of anticipatory bail shall be governed by the conditions in Section 438(2) of the Code of Criminal Procedure. "

16. Per contra, Mr. Rabindra Singh, learned Additional Government Advocate for the State of U.P./opposite party No.1 and Mr. D.C. Mathur, learned counsel appearing for opposite party No. 2 submit that since, the applicant has already given undertaking on 23.11.2020 before the Senior Intelligence Office, Group-D, DGGI, Ghaziabad, Regional Unit, therefore, he cannot deviate from his undertaking and as such, condition No. 4 as imposed in the bail order dated 24.11.2020 passed by Special Chief Judicial Magistrate, Meerut, is not liable to be interfered with, but they do not dispute the aforesaid factual aspect of the matter as argued by learned counsel for the applicant. In paragraph 21 of the counter affidavit of opposite party No. 2, it is stated that proceedings for demand and recovery of disputed ITC availed by M/s NPI and M/s LE & T under section 73 and 74 of the C.G.S.T. Act, 2017 is the action after completion of the investigation, which is under progress. It is also submitted that applicant voluntarily deposited tax amount of Rs. 5,00,00,000/- (rupees five crore only) under section 74(5) of the C.G.S.T. Act.

17. Mr. D.C. Mathur, learned counsel for opposite party No. 2 has placed reliance upon the following judgments:

1. ***Suresh Kumar P.P. & another vs The Deputy Director, Directorate General of GST Intelligence (DGGI) & others*** (Petition for Special Leave to Appeal (C) No. 13128 of 2020 decided on 07.01.2021.

2. ***Vikalp Jain vs Union of India and others,*** (Matter under Article 227 No. 5789 of 2019) decided on 02.08.2019.

18. In the case of ***Suresh Kumar*** (supra), the petitioner prayed for setting aside the impugned notice, invalidation of search and seizure proceedings, refund or amount collected under duress and also challenged the simultaneous proceedings of investigation under section 67 of the C.G.S.T. Act having been commenced when already an audit under section 65 of C.G.S.T. Act is in progress and the issue in the said case was also regarding grant of opportunity of hearing before attachment of the bank account under section 83 of the C.G.S.T. Act, therefore the aforesaid case relied upon by learned counsel for opposite party No. 2 is distinguishable on facts and not applicable in the facts of present case.

19. In the case of ***Vikalp Jain*** (supra), the fact of the case was that the applicant was actively involved in evasion of G.S.T. to the tune of more than Rs. 94,00,00,00/- (rupees ninety four crore only) in violation of provisions of C.G.S.T. Act, 2017 and the applicant was released on bail subject to condition to deposit Rs. 1,00,00,000/- (rupees one crore only) within three months from the date of release on bail vide order dated 19.07.2019. In the said case, prayer was made to waive or reduce one of the conditions of bail to deposit Rs. 1,00,00,000/- (rupees one crore only). The said writ petition was dismissed. Here, it is relevant to mention that in the said case, against the alleged evasion of tax of Rs. 94,00,00,000/- (rupees ninety four crore only), the petitioner had not deposited any amount, whereas in the present case against the evasion of tax of Rs. 9,51,00,000/- (rupees nine crore fifty one lac only), the applicant has already deposited more than 50% of the disputed amount, therefore, on facts the said case is also not helpful to opposite party No. 2.

20. It is well settled that every case turns on its own facts. Even one additional or different fact may make big difference between the conclusion in two cases, because even a single significant detail may alter entire aspect.

21. Here it is relevant to quote ***Sub-section (3) of Section 437 Cr.P.C.,*** which inter alia, provides that:

"when a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), the court shall impose the conditions-

"(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence."

and may also impose, in the interests of justice, such other conditions as it considers necessary."

22. In view of aforesaid discussion, this Court is of the view that conditions for grant of bail ought not to be so strict as to be incapable of compliance, thereby making a grant of bail illusory. The conditions while granting bail should be reasonable, so that it may not frustrate the very object of granting bail. Discretion exercised by the Court while imposing conditions should not be arbitrary, but it should be keeping in mind to strike balance between the accused and prosecution. In the present case, it is admitted facts to the counsel for the parties that as on date out of disputed amount of Rs. 9,51,00,000/- (rupees nine crore fifty one lac only), the applicant has already deposited a sum of Rs. 5,00,00,000/- (rupees five crore only). Till date neither any criminal complaint has been filed, nor any proceedings under section 73 or 74 of the C.G.S.T. Act has been initiated against the applicant by the Department. The enquiry proceedings is still under process. The determination of

input tax credit wrongly availed has not been finally made by the Department and no order under section 83 of the C.G.S.T. Act for provisional attachment of any property including the bank account belonging to the applicant has been made. The order granting bail to the applicant has also not been challenged by the Department.

23. Considering the facts and circumstances of the case as well as averments as mentioned in paragraph 2 of the second supplementary affidavit dated 22.02.2021, this Court is of the view that condition No. 4 imposed by Special Chief Judicial Magistrate, Meerut directing the applicant to deposit remaining amount of ITC Rs. 4,51,00,000/- (rupees four crore fifty one lac only) before the Department within three months while granting bail to the applicant, is unsustainable, as it is too harsh and unreasonable, particularly in the situation where enquiry/investigation is still pending and applicant has already deposited Rs. 5,00,00,000/- (rupees five crore only), out of disputed amount of Rs. 9,51,00,000/- (rupees nine crore fifty one lac only). In view of above, in order to save the Government revenue, the interest of justice would be served in case, the condition No. 4 of bail order dated 24.11.2020 is modified directing the applicant to submit security equivalent to remaining disputed amount of Rs. 4,51,00,000/- (rupees four crore fifty one lac only), other than cash and bank guarantee along with his affidavit in place of deposit the remaining amount of ITC of IGST, before the Senior Intelligence Officer, DGGI, Regional Unit, Ghaziabad within three weeks from today, as per the undertaking given by the applicant before this Court.

24. In view of aforesaid facts and for the reasons stated above, the condition No. 4 of the bail order dated 24.11.2020 is modified to the extent as mentioned above. On non-furnishing security by the applicant as per his undertaking before this Court, it is open for opposite party No. 2 to move bail cancellation application.

25. Accordingly, the bail application under section 439 (1)(b) of the Code of Criminal Procedure, is disposed of in the aforesaid terms.

(2021)03ILR A10
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.02.2021

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Criminal Misc. Bail Application No. 5704 of 2021

Ram Awatar & Anr. ...Applicants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicants:
Sri Kameshwar Singh

Counsel for the Opposite 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-she has hanged herself as per medical report-no evidence collected during investigation that husband abetted her or conspired or intentionally aided her-However, she used to tell the atrocities and mal treatment to her parents-affidavits of informant, his wife and his son within 16 days of her untimely death by somersaulting and diluting the entire

story, cursing their own daughter(deceased), being short and ill tempered lady, is nothing but for monetary consideration arrived between them-the state is a Prosecutor whereas informant and others are only to assist their prosecutor-thus, without taking the prosecutor into confidence,, the informant on his own, can not absolve the accused persons from the guilt that too outside the Court with motive(Para 1 to 21)

B. The informant can not permitted to withdraw the proceeding according to his choice and whims. These proceedings were not initiated by the informant for joy ride or to achieve his ulterior motive. the law courts cannot sit with its eyes closed or in the stage of oblivion to the ground realities of the society whereby such type of truce are rampant between rival parties for the obvious considerations. Such types of affidavits in the midst of he investigation or at any other stage should take stringent action against the deponent of such affidavits who want to derail the prosecution against the wrong doer. It is the binding duty of the court to discourage, deprecate and shall not become party to such type of nefarious design and motivated friendship between the rival parties, it would lead to far-reaching adverse impact overt the society. (Para 18)

The Bail Application is allowed. (E-5)

(Delivered by Hon'ble Rahul Chaturvedi, J.)

[1] Heard Sri Kameshwar Singh, learned counsel for the applicants and learned A.G.A. and perused the record.

[2] The applicants who are aged old parents-in-law are facing prosecution in case crime no.162 of 2020, under sections 498A, 304-B IPC and Section ¾ of D.P. Act, Police Station-Atarra, District-Banda and behind the bars since 01.09.2020.

[3] Submission made by learned counsel for the applicants, is that the applicants reside at Mohallah-Ambedekar Nagar, Ward No.6, Nagar Panchayat Oran, Bisanda, District-Banda but the informant has purposely shown their address in the FIR as Mohallah-Krishna Nagar, Gutthilla Purwa, Police Station-Attara, District-Banda. This by itself shows that the applicant has got two distinct places of residences, one at Police Station-Bisanda and another is at Attara.

[4] It is contended that the FIR was got registered by Ram Pratap Kori on 30.08.2020 at 20:26 hours for the alleged unfortunate incident said to have taken place at 5:00 am on the same day. The next submission is that informant's daughter Bandana got married with Rajju@Pawan on 29.05.2019. After three months of her marriage when she came from her 'sasural' to her parent's place, then she shared the atrocious behaviour qua her, by none other than her own husband and other in-laws in connection with motorcycle, golden chain and Rs.50,000/- as an additional dowry. It is further submitted that almost on the regular basis, threats were extended to her with regard to the aforesaid demand of additional dowry but keeping in view the future of her daughter, the informant did not take any legal recourse or prosecuted them for alleged dowry related atrocities. On the eve of "Rakshabandhan" when the deceased came to her parent's place, again, she reiterated the same sad saga regarding step-motherely treatment to her for want of additional dowry. She has scarcely informed that there is persistent demand for above articles and cash amount else anything untoward may happen to her.

On 28.08.2020, around six in the morning, the son-in-law of the informant,

informed him about the untimely and mysterious demise of Bandana(hence deceased). Soon thereafter, the informant and other relatives reached to the spot, and saw that after assaulting her daughter, all the named accused persons killed her and her dead body was lying on the bed with number of bruises over her person. From the FIR , it is explicitly clear that the SCRIBE of the FIR was none other than the first informant Ram Pratap Kori himself, showing his address as Mohallah-Ambedekar Nagar, Ward No.6, Nagar Panchayat Oran, Bisanda, District-Banda. Thus, on the hand written chik report by the informant Ram Pratak Kori over which he has put his own signatures, the FIR was got registered within reasonable time of the incident.

On the aforesaid prosecution story, it was pointed out by learned counsel for the applicants, that it is the applicant no.1 who has informed the police on the same day by G.D. Entry no.020 dated 28.08.2020 at 12:48 hours, informing that her daughter-in-law has committed suicide by hanging herself. Thus, it was argued by learned counsel for the applicant that no effort was made on the part of the applicant either to fled away from the site or to do any other action to hide or dilute the gravity of the offence. On the contrary, applicant no.1 himself informed the police about this unfortunate incident that his daughter-in-law has committed suicide. Thereafter, the formalities of the inquest was performed on the same day in which the informant and his brother put his signatures as one of "Panch". On this, it is further argued that, there is no whisper of any dowry related harassment or demand by the named accused persons from informant or his brother who were present during the inquest proceedings. It was unanimously decided by all the 'PANCHS', that probably she has committed suicide by hanging herself but in order to ascertain exact cause of her death, her autopsy was required. Accordingly, on the same day, her autopsy was done i.e. on 28.08.2020 by the doctor and as per post mortem report, there is obliquely placed ligature mark around the neck with a gap. Except the aforesaid, there is no mark of injury over the person of the deceased as asserted by the informant in its FIR as well as in the 161 Cr.P.C. statement. In addition to this, her saliva was drooling from the left side of the mouth. On this, it was opined by Dr.Balbir Sahu that the deceased died on account of 'asphyxia as a result of ante mortem hanging'. During investigation, the police recorded the statements of the first informant Ram Pratap Kori and his wife Prema, annexure nos.4 and 5 respectively who gave the statement on the dotted lines supporting the prosecution case mentioned in the FIR. Thus, the informant and his wife who initiated the criminal prosecution by setting up a particular story of dowry related harassment and atrocities upon their daughter, and these greedy persons(named accused persons) on this account has created such a situation for her that she has left with no other option but to commit suicide within one and half years of her marriage at her husband's place.

[5] Learned counsel for the applicant has canvassed his lengthy arguments but for the sake of brevity that are being formulated hereinbelow :-

(a) It is the applicant who has given the news to the police on the same day of the incident by G.D. Entry no.020 dated 28.08.2020 at 12:48 hours. Had there been any ill-motive on the part of the applicant, he along with other co-accused might have fled away from the place of

occurrence. Their conduct shows their bona-fides beyond reasonable doubt.

(b) There is inordinate delay of more than two days in lodging of the FIR for which there is no justification coming forward to bridge this time gap.

(c) While the informant and other relatives who were signatories of the inquest, were present but there is no whisper with regard to the alleged additional dowry or its related atrocities upon her daughter. The theory of the additional dowry has been tailored after legal consultation.

(d) General and omnibus allegation has been levelled against all the named accused persons who used to harass and ill-treat her daughter(deceased) during her life time for account of aforementioned additional dowry.

(e) The doctors has opined that the deceased has committed suicide by hanging herself and there could be thousand reasons for taking this extreme step within short span of time of her marriage.

There is no other mark of any injury over her person belying the allegations made in the FIR that she was subject matter of physical assault prior to her death by the accused/applicant. In paragraph no.29 of the affidavit, it has been mentioned that small 'kid' of the deceased-Bandana was fallen down from the bed while sleeping in the night and consequently, her husband Rajju@Pawan scolded her and manhandled her for this carelessness. On account of this, she felt annoyed and committed suicide by hanging herself. And lastly the applicants are elderly person of 60+ years suffering from number of age related ailments. In addition to above, it has also been argued that presently, the applicants are permanent resident of Mohallah-Ambedekar Nagar, Ward No.6, Nagar Panchayat Oran, Bisanda, District-Banda whereas the incident took place at Mohallah-Krishna Nagar, Gutthilla Purwa, Police Station-Attara, District-Banda and thus the applicants have got no say in the internal matter of husband and wife. Last but not the least, it has been submitted that after fourteen days of the incident on 14.09.2020 and 16.09.2020, the informant, his wife Smt. Prema and son-Umesh Kumar have given their respective affidavits addressed to the Superintendent of Police, Banda somersaulting from her earlier stand regarding dowry related atrocities upon her daughter, rather, accusing her own late daughter for being stubborn and hot & short tempered lady and thereafter giving a clean chit to the named accused persons.

[6] Learned A.G.A. vehemently opposed the bail application of the applicant who are parent-in-laws of the deceased by inviting the attention of the Court to the provisions of Section 113(A) of the Indian Evidence Act. The deceased has committed suicide within one and half of years of her marriage under mysterious and unnatural circumstances at the place of her husband. The aforesaid provision regarding the presumption would apply to its full force in a given set of circumstance. It has been further argued that despite of stringent enactment, this social menace is not coming under the control. Bride burning, dowry related atrocities and killing the brides after the marriage for want of additional dowry is now become order of the day. Under the circumstances, it has been urged that no leniency is required to be shown for such type of offenders.

[7] After hearing the aforesaid submissions made by learned counsel for the

applicant, the Court feels that there is distinct place of residence as shown. It is highly unlikely that the applicants constantly tease or harass her daughter for want of additional dowry. Moreover, they are elderly person and senior citizen suffering from number of ailments. There is little chance regarding their involvement in the present offence. These facts receive greater significance when general and omnibus role has been attributed to all the accused persons for the dowry related harassment to her. There could not be any denial of the fact that she has committed suicide by hanging herself at Mohallah-Krishna Nagar, Gutthilla Purwa, Police Station-Attara, District-Banda where she resided with her husband. It is the husband who should have been much more responsible to secure and protect his wife. The applicants have given the information to the police at the earliest, should also be taken in account while deciding the bail application of the applicant. If the Court takes cumulative effect of all these factors mentioned above, at least the applicants who are elderly persons, have made out the case for bail in their favour. However, the bail application of the husband would be on the different footing and shall be decided with distinct and more stringent parameters.

[8] Keeping in view the nature of the offence, evidence and elderly age of the applicants, the complicity of the accused in commission of the offence and lastly the inter se relationship of the applicant with the deceased, and having regard that they reside in separate place of residence as canvassed by learned counsel for the applicants, I am of the view that the applicants have made out a fit case for bail.

[9] Let the applicant, **Ram Awatar and Smt. Rajapati,** who are involved in case crime no.162 of 2020, under Section 498-A, 304-B IPC and Section 3/4 of the Dowry Prohibition Act, Police Station-Atarra, District-Banda, be released on bail on their 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 APPLICANTS SHALL FILE AN UNDERTAKING TO THE EFFECT THAT THEY SHALL NOT SEEK ANY ADJOURNMENT ON THE DATE FIXED FOR EVIDENCE WHEN THE WITNESSES ARE PRESENT IN COURT. IN CASE OF DEFAULT OF THIS CONDITION, IT SHALL BE OPEN FOR THE TRIAL COURT TO TREAT IT AS ABUSE OF LIBERTY OF BAIL AND PASS ORDERS IN ACCORDANCE WITH LAW.

(ii) THE APPLICANTS SHALL REMAIN PRESENT BEFORE THE TRIAL COURT ON EACH DATE FIXED, EITHER PERSONALLY OR THROUGH THEIR COUNSEL. IN CASE OF THEIR ABSENCE, WITHOUT SUFFICIENT CAUSE, THE TRIAL COURT MAY PROCEED AGAINST THEM UNDER SECTION 229-A IPC.

(iii) IN CASE, THE APPLICANTS MISUSE THE LIBERTY OF BAIL DURING TRIAL AND IN ORDER TO SECURE THEIR PRESENCE PROCLAMATION UNDER SECTION 82 CR.P.C., MAY BE ISSUED AND IF APPLICANTS FAIL TO APPEAR BEFORE THE COURT ON THE DATE FIXED IN SUCH PROCLAMATION, THEN, THE TRIAL COURT SHALL INITIATE PROCEEDINGS AGAINST THEM, IN ACCORDANCE WITH LAW, UNDER SECTION 174-A IPC.

(iv) THE APPLICANTS SHALL REMAIN PRESENT, IN PERSON,

BEFORE THE TRIAL COURT ON DATES FIXED FOR (1) OPENING OF THE CASE, (2) FRAMING OF CHARGE AND (3) RECORDING OF STATEMENT UNDER SECTION 313 CR.P.C. IF IN THE OPINION OF THE TRIAL COURT ABSENCE OF THE 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 THEM 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 APPLICANTS.

[10] In case of breach of any of the above conditions, it shall be a ground for cancellation of bail without any reference to this Court.

[11] *It is made clear that observations made in granting bail to the applicants shall not in any way affect the learned trial Judge in forming his independent opinion based on the testimony of the witnesses.*

[12] Since, the bail application has been decided under extra-ordinary circumstances, thus in the interest of justice following additional conditions are being imposed just to facilitate the applicant to be released on bail forthwith. Needless to mention that these additional conditions are imposed to cope with emergent condition-:

1. The applicants shall be enlarged on bail on execution of personal bond without sureties till normal functioning of the courts is restored. The accused will furnish sureties to the satisfaction of the court below within a month after normal functioning of the courts are restored.

2. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

3. The computer generated copy of such order shall be self attested by the counsel of the party concerned.

4. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

'To the court concerned against the deponent of the Affidavit' :-

[13] As mentioned above, learned counsel for the applicants have laid excessive stress upon the affidavits of first informant Ram Pratap Kori, Prema Devi and Umesh Kumar addressed to the Superintendent of Police, Banda, while pressing the bail application. The Court, is not at all impressed by these affidavits of informant, his wife and son which are annexed as Annexure-8 to the affidavit. The Court has seen those affidavits and its text. These affidavits are of 14.09.2020 and 16.09.2020 respectively. By these affidavits the informant, his wife and son have completely changed the texture and nature of the entire prosecution story. It is indeed shocking that the parents and his son have taken a sharp somersault from the prosecution story set up by none other than the informant Ram Pratap Kori himself and in their respective 161 Cr.P.C. statement, the said story was supported by his wife Prema Devi and his son Umesh Kumar. Thereafter, within sixteen days of her untimely demise, the aforesaid

affidavits addressed to the Superintend of Police, Banda came into picture whereby all of them accuses their own daughter(deceased) for being ill and short tempered lady. The contents of the affidavits and its timing speaks oceans about the nature, character and the psyche of the informant and his family members. The text of the affidavit sworn by informant Ram Pratap Kori dated 14.09.2020 reads thus :-

"1- यह कि शपथकर्ता ने अपनी पुत्री वन्दना उम्र 21 वर्ष की शादी रज्जू उर्फ पवन पुत्र रामऔतार निवासी गु

3– यह कि शपथकर्ता की पुत्री जिद्दी स्वभाव की, गुस्सैल प्रकृति की थी। मामूली बात पर अपना सन्तुलन खो देती थी। शपथकर्ता की लड़की वन्दना की मृत्यु दिनांक 28.08.2020 को सुबह 4–5 बजे के लगभग फांसी लगाने के कारण हुयी है।

4– यह कि वन्दना के पति रज्जू ने इसकी सूचना शपथकर्ता को दी थी, उसी सूचना पर शपथकर्ता पहुंचा, देखा कि वन्दना बेड में मृत पड़ी थी। शपथकर्ता यह सदमा बर्दास्त नहीं कर सका तथा उसके दिमाग ने काम करना ही बन्द कर दिया था। शपथकर्ता बदहवास हालत में हो गया था।

5'– यह कि मुल्जिमान के गांव के लोगों ने बताया कि वन्दना को मार डाला गया है। उसने फांसी नहीं लगायी है। उसी आधार पर सूचना देने थाने गया था। थाने की पुलिस से मुल्जिमान के गांव के लोगों ने बात किया, फिर पुलिस व गांव के लोगों ने रिपोर्ट का मजबून बनाकर तहरीर थाने में बनी है। शपथकर्ता ने केवल दश्कत बना दिया था। शपथकर्ता ने स्वयं बोलकर रिपोर्ट नहीं लिखायी है। रिपोर्ट पढ़कर भी नहीं सुनाई गयी है। शपथकर्ता बहहोश हालत में था। बाद में शपथकर्ता ने जानकारी किया, तब पता चला कि अभियुक्तगण ने वन्दना को मारा नहीं है, बल्कि वन्दना स्वयं फांसी पर लटक कर जान दिया है। वन्दना व उसके पति से मामुली कहा सुनी हुयी थी।

6– यह कि शपथकर्ता को यह भी पता चला कि जिन लोगों ने बरगला कर अभियुक्तगण की रिपोर्ट करायी है, वह अभियुक्तगण से रंजिश मानते हैं, तब शपथकर्ता बिना दबाव के व बगैर लालच के यह हल्फिया बयान श्रीमान् जी के समक्ष दे रहा है, ताकि वक्त पर काम आवे।"

[14] Though, this affidavit is sworn by the informant but the rest of two affidavits are of Prema Devi and Umesh Kumar, son of the informant. The contents of the affidavits are on the same lines with minor changes. From the text of the affidavits, a clean chit was given to his counter parts as well as the husband. Not only this, they have accused their own deceased daughter for lady of being stubborn in nature and ill-tempered who used to loose her mental balance quite often. It has been mentioned in the affidavit that after receiving the information, the informant too lost his mental cool and in the bewildered stage of mind, lodged the present FIR. Paragraph nos.5 and 6 of the affidavit is per se misleading on the face of record. It has been mentioned that some unknown scribe has prepared the chik FIR and informant has only put his signature over it, in a disturbed state of mind. The keen perusal of the FIR blatantly exposes the falsehood and attempt to mislead the Court by the informant in this regard.

[15] It is interesting that the FIR was lodged by none other than the informant Ram Pratap Kori himself on 30.08.2020 for the incident said to have taken place on 28.08.2020 against six named accused persons related to husband Rajju@Pawan. As pointed earlier part of this order, fortunately, the scribe of the chik FIR is Ram Pratap Kori himself by which the present FIR came into existence with the specific allegation that there was demand of one motorcycle, a golden chain and Rs.50,000/- as an additional dowry by the named accused persons. All of them used to

maltreat her and at times became physical also. The deceased quite often shared these atrocities with her parents. Even five days prior to the incident on the eve of "Rakshabandhan", when she visited her place, she repeatedly shared the ill-treatment faced by her. Eventually within one year and three months of her marriage, she was done to death under mysterious circumstances at her matrimonial place by hanging herself.

[16] On this prosecution story, the first informant has mobilized all the limbs of the State Machinery. The chik report too was in own handwriting and after third day of the incident, giving ample time to the informant Ram Pratap Kori to collect the material and other relevant information regarding the incident, cool down and get himself satisfied regarding the involvement of named accused persons in the offence. It is literally mind-boggling for the Court, as to what transpired to the informant, his wife and his son to give their respective affidavits, within sixteen days of her untimely death by somersaulting and diluting the entire prosecution case up-side down, cursing their own daughter(deceased), being short and ill tempered lady. The reason seems to be quite obvious. The Court cannot accept this alleged "sudden wisdom" dawn upon them to get the nature of the offence changed. Such type of affidavits are rampant now-a-days for simple reason. This alleged truce between the rival parties outside the Court is nothing but for monetary considerations arrived between them.

[17] Section 304-B IPC prescribes punishment relating to dowry deaths is a serious and heinous offence, a crime against the society. The legislature in its own wisdom in order to curb this heinous offence with iron hands, has made it non-bailable and cognizable offence in which rigorous imprisonment for seven years to life imprisonment is prescribed. This is non-compoundable offence. No person or the informant is permitted to by-pass the due procedure of law or abandon the proceeding initiated by him with a specific allegation with regard to the dowry related atrocities upon the deceased and thereafter killing or creating such a situation where she commits suicide under unnatural circumstances within seven years of her marriage for want of additional dowry at her matrimonial place.

Let us examine the legal sanctity of these three affidavits given by the informant, wife and his son in the light of above discussion. The informant is now not permitted to withdraw the proceeding according to his choice and whims. As mentioned earlier that these criminal proceedings are solemn proceedings, after lodging of the FIR, all the wings of the State got charged and are on their toes. These proceedings were not initiated by the informant for a joy ride or to achieve his ulterior motive or purpose. The informant is not permitted to use the present criminal prosecution just to twist the arm of his opponent for some ulterior monetary gains. The law-courts cannot sit with its eyes closed or in the stage of oblivion to the ground-realities of the society whereby such type of truce are rampant between the rival parties for the obvious considerations. The law-courts are bound to hold the majesty and the rule of law and consequently for a orderly society, they must ignore such type of affidavits in the midst of the investigation or at any other later stage and should take stringent action against the deponent of such affidavits who want to derail the prosecution against the wrong doer. It is the binding duty

of the courts to discourage, deprecate and shall not become a party to such type of nefarious design and motivated friendship between the rival parties. If these affidavits are accepted, and consequently prosecution against the wrongdoers are abandoned, it would lead to far-reaching adverse impact over the society.

Yet another legal aspect of the issue is initiation of criminal prosecution after lodging of the FIR. The 'State' is a prosecutor whereas informant and others are only to assist their prosecutor. Thus, without taking the prosecutor into confidence, the informant on his own, cannot absolve the accused persons from their guilt that too outside the Court with motive. This would amount to the mockery of criminal judicial dispensation system and has to be discouraged, deprecated by all means and might.

[18] This Court is not at all inclined to accept these affidavits Annexure-8 sworn by Ram Pratap Kori, Prema Devi and Umesh Kumar. This Court directs to the court concerned having competent jurisdiction to hold in-depth probe into the matter engaging some senior police officer at least of a C.O. rank to verify and explore, whether the prosecution story narrated by the informant in the FIR, is true and correct OR the averements made and signed by the aforesaid persons in their respective affidavits are correct? If any such "deal" is there between them, then what was the monetary considerations were passed? This probe must conclude within fifteen days from the release of the applicants on bail and thereafter, the court concerned, if some material are surfaced against the informant, his wife and son, should register miscellaneous case against the erring persons under Section 211 IPC or under any other relevant provisions of IPC after strictly adhering due process of law prescribed in Code of Criminal Procedure in this regard. This miscellaneous criminal proceeding must conclude within six months from the date of the registration.

[19] If the legislation in its wisdom has enacted the stringent action under Section 304-B IPC to deal with such heinous offences and has prescribed the serious punishment against the wrongdoers, then on the same breath, no one is permitted to give a hoax call by initiating a proceeding and in the midst of the said proceeding, abandon the same for his ulterior motive or monetary gains.

[20] Let copy of this order be transmitted to the learned Sessions Judge, Banda with the expectation that he would monitor the above-said miscellaneous proceeding against the informant Ram Pratap Kori, his wife Prema Devi and son Umesh Kumar to its logical conclusion within time specified.

[21] With the above observations, the present bail application stands allowed against the named accused persons.

(2021)03ILR A18
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.02.2021

BEFORE

THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Misc. Bail Application No. 19456 of 2019
connected with
Criminal Misc. Bail Application No. 23928 of 2019
connected with
Criminal Misc. Bail Application No. 29678 of 2019

Wasi Ahmad ...Applicant(In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Archna Hans, Sri Shashank Mishra

Counsel for the Opposite Parties:
A.G.A., Sri Nayab Ahmad Khan, Sri Sharique Ahmed, Sri Sheshadri Trivedi, Sri Sumit Kumar Srivastava

A. Criminal Law - Indian Penal Code,1860-Sections 147,148, 149, 302, 504-application-rejection- Honour killing-death of the deceased due to ante-mortem firearm injuries-number of injuries found on the dead bodies in the post-mortem is in support of FIR version in terms and manner (indiscriminate firing) of murder-accused trying to confuse the criminal justice process as 3 years after filing of charge-sheet, they kept away from criminal process and 4 others accused are still absconding-For such harsh criminals there cannot be any room for sympathy-chargesheeted persons are active members of the gang of Ateeq and they have long criminal history.(Para 1 to 18)

B. Bail jurisdiction is not exercised mechanically, it has to be considered keeping in view the gravity of offence, the manner of the commission of offence, its impact on society and the antecedent of the individual accused, the likelihood of his tampering are relevant considerations. For a serious charge where two murders have been committed by indiscriminate firing, eyewitness have seen the incident and prompt and named FIR has been lodged, merely because some accused persons, against whom charge-sheets have been filed after further investigation which took place after filing of charge-sheet against the present accused applicants and who were not named in FIR, have been granted bail earlier, the present accused cannot get benefit of the principle of parity. (Para 10)

The Bail Application is rejected. (E-5)

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

1. All the three bail applications have been arising out of same Case Crime Number and are being disposed of by a common order.

2. Heard Sri Manish Tiwari, learned Senior Advocate assisted by Ms. Archana Hans & Praveen Kumar Pandey, learned counsel for the accused applicants Wasi Ahmad and Sabir, Shri G.S. Chaturvedi, learned Senior Counsel assisted by Sri Shashank Mishra, learned counsel for the applicant Zaabir Hussain, Shri Satish Trivedi, learned Senior Advocate assisted by Mr. Sheshadri Trivedi, learned counsel for the intervenor, Sri Sumit Kumar Srivastava, learned counsel for the informant and learned AGA for the State and perused the record.

3. These bail applications have been given by the accused applicants **Wasi Ahmad, Sabir** and **Zaabir Hussain** in Criminal Case No. 5100 of 2016, arising out of Case Crime No. 634 of 2015, under Sections 147, 148, 149, 302, 504 IPC, PS - Dhoomanganj, District - Allahabad (Prayagraj)

4. Submission of the learned Senior Advocate/ Counsel for the applicants is that the accused applicants are in jail from more than 22 months and charge-sheet has already been filed against the accused applicants and 4 more accused persons under aforesaid sections. Further submission is that, in respect of the incident, informant Abid lodged an FIR making allegation that on 25.09.2015 at 8:30 PM the incident took place and the FIR has been lodged at 9:30 PM on the same date. The accused applicants with other four are named accused persons in the FIR. Out of 7 accused, 3 accused persons have given these bail applications and the

others are still absconding. The allegation is that the deceased Alkana and her driver Surjeet were going and Surjeet was driving the Fortuner Car to take her to her village. Accused persons Sabir, Wasi Ahamad, Maqsood Ahamad, Kammu, Jabir, Tauseef and Intekhab Alam came and opened fire by their rifles and killed them. The informant Abid who was going in another car behind the car of the deceased with Asif, Munna and Farhan, stopped and stepped down from his car, concealed themselves in the nearby field and saw the whole incident in the headlights of the car. Hearing the sound of firing, nearby villagers reached there raising their voice, whereupon the accused persons, threatening and firing, escaped from the place. Earlier also they had threatened the deceased with dire consequences. The matter was investigated by police and charge-sheet was submitted on 07.01.2016 on which cognizance was also taken by the court below on 03.05.2016.

5. One Asiya Begam gave application dated 18.06.2016, the IG, UP, finding certain shortcomings in the investigation, issued a letter to SSP, Allahabad indicating certain points which were needed to be further investigated, whereupon, on 21.07.2016, SSP Allahabad directed for further investigation by Crime Branch. During the further investigation, one Julficar @ Tota was arrested who made confessional statement giving details of the incident and from him one pistol was also recovered. After further investigation, charge-sheet dated 16.11.2017 was submitted against accused Akbar alone in which it was mentioned that investigation is continuing. Subsequently on 01.01.2018, an another charge-sheet against Abid, Mazid, Azaz, Javed, Abubakar, Sheru, Munna, Farhan, Aashif, Pappu and Faisal was filed.

6. Submission of the learned Senior counsel is that in the subsequently filed charge-sheet, newly incorporated accused persons such as Azaz Akhtar, Javed, Munne @ Munna, Mazid, Pappu @ Imtiyaz, Abu Bakar, Faisal, Akbar, Sheru, Asif, Julficar @ Tota have been granted bail by the coordinate Benches of this Court and some of the bail orders are enclosed with the bail applications. The learned Senior counsel has submitted that by letter dated 11.12.2015, SSP, Allahabad, in response to a government letter dated 10.11.2015, conveyed no objection and recommended for transfer to and investigation by CBCID indicating that Inspector Mahendra Singh Dev was investigating into the offence and he was in agreement with the opinion of the IO. It is not clear whether the investigation was transferred to CBCID or not, as the charge-sheet dated 7.1.2016 was submitted by Inspector Mahendra Singh Dev. Subsequently, when further investigation by Crime Branch was directed by SSP vide order dated 21.7.2016, the charge-sheet was already filed and cognizance by the court below was taken.

7. The Crime Branch started further investigation, reconstructed the crime scene in presence and on saying of the first informant and the result was found contrary to the FIR version. It has also been submitted that in view of the site map, when the eyewitness saw the accused applicants committing the offence, they were 40 feets away from the place and they further went to 20 feets away in the field. The incident took place in the night, and without disclosing the source of light, it cannot be believed that they saw the accused persons and identified them. Moreover, during investigation, although, sign and damage caused to the car by bullet shot was found, yet it could not be shown

that any bullet got penetrated into the car and, therefore, the manner of assault is highly doubtful. It has been also submitted that the widow of the deceased Surjeet moved to the High Court for transferring the investigation to the CBI but the prayer was not accepted by the High Court and a simple direction was passed for fair investigation. It has been also submitted that the SSP, Allahabad ordered for further investigation under section 173(8) Cr.P.C. and that order was never challenged. The charge-sheet was submitted against the informant and others on the basis of statement of the widow and other witnesses recorded by the Investigating Officer. He submits that the incident is honour killing as both the deceased were in relationship. It has been also submitted that the subsequently charge-sheeted accused persons are active members of the gang of Ateeq and they have long criminal history. The accused applicants were implicated and charge-sheeted at the instance of the said Mafia don who happened to be very influential, politically and otherwise.

8. It has been also submitted that the ballistic report shows that different bores of weapon were used in causing fire arm injuries and blackening was present whereas it has been no where stated that the accused persons fired from a close range. It has been also submitted that the location of the applicants at the relevant time was not found around the location of crime in view of the CDR collected by the IO and the accused persons whose locations were found near the spot and from whom weapon of assault was recovered have already been granted bail. Further submission is that a report dated 17.11.2017 was submitted to CJM by SO, Dhoomanganj Nagesh Kumar Singh and he has mentioned that the named accused persons are not wanted in the case and in further investigation, sufficient evidence has been found against informant Abid and others. Accused applicant Wasi has no criminal history and other two against whom criminal history has been shown have been released on bail in all those cases. The other four accused persons are still absconding and the applicants are in jail from the last about two years. The case is not committed to sessions and there is no possibility of trial to commence and dispose of in near future. The investigation has been completed by the Officers of Crime Branch on the basis of order passed by Superintendent of Police and charge-sheet has been submitted against the informant and others and they have been released on bail. Therefore, on the basis of parity also, the applicants are entitled to be released on bail.

9. Learned GA, learned counsel for the informant and learned Senior Advocate for the intervener have vehemently opposed the bail applications and have submitted that prompt and named FIR has been lodged. It is a high profile well planned murder case in which two persons have lost their life in indiscriminate firing and in such cases liberal approach cannot be adopted in granting bail. Submission of learned Senior Advocate is that the subsequent investigation is not legal as the charge-sheet filed against the accused applicants was earlier in time and cognizance was already taken by court below and without obtaining any order from the concerned court for further investigation, no further investigation could be conducted. He has submitted that the second set accused persons have been falsely implicated because of the influence of Mafia don Ateeq. The second submission is that the accused applicants

who are three in numbers have their long criminal history. Further submission is that in the incident Alkama died and she sustained 17 gun shot injuries whereas Surjeet also died and he had sustained 13 gun shot injuries and it indicates how horrendously the deceased persons were killed and the accused persons ensured the death by indiscriminate firing. Further submission is that the accused applicants have tendency of running away from judicial process as the charge-sheet was submitted after concluding the investigation against them in absconding and they remained absconding for almost three years and still the remaining 4 accused persons who have been charge-sheeted have not put in their appearance and are still absconding, despite the fact that the accused persons filed miscellaneous applications under sections 482 CrPC and Miscellaneous Application No. 11516 of 2018 filed by Maqsood Ahamad & 2 others was dismissed vide order dated 12.7.2018, Miscellaneous Application No. 28407 of 2018 filed by Tausif and another was dismissed vide order dated 18.8.2018 and Miscellaneous Application No. 13850 of 2019 filed by Qammo (Qamrul Hasan) was dismissed vide order dated 11.4.2019. Therefore, it has been submitted that where the accused applicants and their associates have tendency of tampering with the judicial process by absconding, in such case the bail should not be granted. In respect of parity, it has been submitted that the accused persons whose names have been mentioned in the subsequent charge-sheet have been granted bail because of peculiar situation as they were not named in the FIR and one of them was the first informant. Charge-sheet was already filed against the accused applicants and their associates much prior to the direction for further investigation. They are named in the FIR which was lodged very promptly and therefore, it has been submitted that the prayer of parity will not come to help such accused persons.

10. Upon hearing the submissions made from both sides and after giving a thoughtful consideration to the arguments, it is clear that the accused applicants have laid emphasis, firstly, on parity as subsequently charge-sheeted accused persons for the aforesaid offences have been granted bail by the Co-ordinate Benches of this Court. The law of parity is a principle of equality and it requires that identically placed accused should be given benefit of parity in releasing on bail. It is settled law that parity is one of the consideration in allowing bail application but on the ground of parity alone, an accused cannot be released on bail, nor there can be such hard and fast rule. Bail jurisdiction is not exercised mechanically and each case has to be considered on its own factual matrix keeping in view the gravity of offence, the manner of the commission of the offence, its impact on society and the antecedent of the individual accused. Thus nature of the offence and its gravity and seriousness ; character of the evidence; circumstances peculiar to the accused; likelihood of the accused fleeing from judicial process; the impact of release on the witnesses, its impact on the society; and likelihood of his tampering are relevant considerations in bail matters. For a serious charge where two murders have been committed by indiscriminate firing; eyewitnesses have seen the incident and prompt and named FIR has been lodged; merely because some accused persons, against whom charge-sheets have been filed after further investigation which took place after filing of charge-sheet against the

present accused applicants and who were not named in FIR, have been granted bail earlier, the present accused applicants cannot get benefit of the principle of parity. The case of the accused applicants is certainly different if considered in its entirety. Even this cannot be a ground for releasing them on bail that they are in jail and there is no possibility of trial being concluded very soon. Two of the accused applicants have a long criminal history also. The interesting part is that both the sides claim in writing against each other that they have backing of Mafia don Ateeq.

11. The learned Senior Advocate for the intervener has argued that when charge-sheet was already filed and cognizance was taken by court below, there was no occasion for the police authorities to direct for further investigation without approval of court below and further investigation and filing of charge-sheet against the informant side is illegal. This is not a fact which can be considered at present at the time of disposal of the bail application. Moreover, when the charge-sheet has been filed and cognizance has been taken by the court below, this argument has lost its significance. Similarly, the argument of the learned Senior Advocate and learned counsel for the applicants with regards to manner of assault, weapon used and no possibility of witnesses and informant having seen the incident from distance in the night and the differences in view of ballistic and forensic reports, cannot be looked into thoroughly and in microscopic details during disposal of bail application. That is an area which can only be examined by the trial court. Again, the argument that the case of the applicants is on much better footing as the CDR shows the presence at relevant time around spot and murder weapons have been recovered from concealed places from the accused persons who have been granted bail and nothing incriminatory has been recovered the applicants, this cannot be determined at this stage. It is an intricate area to be examined during trial.

12. The accused applicants are named in FIR which has been lodged promptly. In the incident, two persons, one driver and other sitting on back seat sustained firearm injuries in indiscriminate firing and died. The sign of gunshots have been found on the front, bonnet, glass and door and so far as the argument that no bullet was found having penetrated inside to hit the deceased persons is concerned, there is nothing on record in which it has been said that no bullet penetrated inside the car. This is an aspect on which a finding at this stage is neither warranted nor can be given.

13. The firearm injuries caused to the deceased persons also show that it was ensured that, in all certainty, the death must result by indiscriminate firing. A glance at the post-mortem report reveals this fact. Deceased Alkana sustained 17 injuries which include several firearm entry and exit wound. From the typed copy of post-mortem report which has been filed by the applicants shows following injuries on the dead body-

1. Cutting injury seen in right side hand medial side 8 cm x 5 cm with fracture of middle, ring finger and little finger.

2. Entry wound present in right lateral side elbow 2 cm x 4 cm in size, injury is corresponding with wound of exit.

3. Present on the right medial side of elbow size 10 cm x 8 cm with fracture of both bone margins inverted.

4. Entry wound present in right side arm lateral side size 1.5 cm x ½ cm, inverted margins 13 cm below the shoulder

tip which is communicating with wound of exit no 5.

5. Exit wound present on right arm medial side 14 cm x 4.5 cm, margins inverted, small piece of metal part recovered.

6. Right side breast show 15 cm x 7 cm wound (illegible) inverted margins.

7. Entry wound 1 cm x 1 cm left back of forearm 10 cm above wrist and 4 cm below the entry wound (illegible) present on cutting pieces of metal found and preserved.

8. Entry wound present in left lateral side of thighs with inverted margins with blackening around the wound 2.5 cm x 4 cm in size, it is communicating with wound of exit.

9. On medial side of thigh, size 4 cm x 3 cm margins inverted, 11 cm from knees.

10. Right thigh medial side slant entry wound size 9 cm x 6 cm, 15 cm below (illegible) which is communicating exit wound 11.

11. 17 cm below the (illegible) 12 cm x 7 cm.

12. Wound of entry present in the back (illegible) (illegible) (illegible) size 1 cm x 1.5 cm, inverted margins with blackening.

13. Abrasion present on the stems 4 cm below the stem of neck, 1 cm x 1 cm in size.

14. Abrasion present on the interior side of the (illegible) 3 cm left to medial size 1 cm x 0.5 cm.

15. Multiple abrasion present on the lip interior side (illegible) size 6 cm x 4 cm, 6 cm above knees.

16. Entry wound present on the left lateral side of knees size 1 cm x 1.5 cm inverted margins communicating with wound of exit.

17. Size 6 cm x cm (illegible) left avial medial side of knees margins inverted..... of injury no. 12 is common with right side back wound on (illegible).

14. The post-mortem report of deceased Surjeet reveals following injuries on the dead body-

1. Firearm wound of entry 1.5 cm x 01 cm x muscle deep present on right forearm 06 cm below elbow. Blackening present. Communicating to injury no. 2. Blackening present, margins inverted.

2. Firearm wound of exit 02 cm x 02 cm x muscle deep present over right forearm 03 cm above injury no 1 and communicating to injury no. 1 on probing (illegible).

3. A firearm cutter injury 15 cm x 10 cm x muscle and bone deep on posterior aspect of right elbow. Blackening present, bone fractured.

4. A firearm wound of entry 02 cm x 1.5 cm communicating to (5) present on left upper abdomen 15 cm above umbilicus at 11'O clock position 05 cm from mid line. Blackening present. Margin inverted.

5. A firearm wound of exit 14 cm x 6 cm x muscle deep communicating to injury no. (4).

6. A firearm wound of entry 1.5 cm x 1.5 cm x communicating to injury no. (7), just above left elbow. Blackening present. Margins inverted.

7. A firearm wound of exit 12 cm x 28 cm communicating to (6), underlying bone fracture.

8. A firearm wound of entry 2.5 cm x 02 cm x communicating to (9) present on right side chest 7 cm above nipple at 10'O clock position. Blackening present.

9. A firearm wound of exit 11 cm x 08 cm x communicating to (8). Margins inverted.

10. A wound of entry 03 cm x 02 cm x communicating to (11) present on right side chest 02 cm below nipple at 5'O clock position. Blackening present.

11. A firearm wound of exit 03 cm x 02 cm communicating to (10) present on back.

12. A firearm wound of entry 01 cm x 01 cm on left scapula region, blackening present.

13. A firearm wound of exit 03 cm x 02 cm x communicating to (12) present on right upper chest.

15. In the opinion of doctor, death of both the deceased must have occurred about ¾ days prior to the time of post-mortem because of shock and haemorrhage due to ante-mortem firearm injuries. Post-mortem of deceased Surjeet took place at 2 PM and of deceased Alkana at 2.45 PM on 26.9.2015 and it corroborates the time of incident which is 8.30 PM on 25.9.2015.

16. The number of injuries found on the dead bodies in the post-mortem is in support of FIR version in terms of time and manner (indiscriminate firing) of murder. It also goes to show that the assailants intended to cause death and ensured that much of injuries which must result in death of the deceased persons.

17. It appears to be a peculiar case and the murder has been committed in most professional, organized and planned way. The execution has been brutal, dreadful and frightening which shows extreme culpability on the part of the accused applicants. It introduces a new facet of crime and criminal world where the endeavour of the key player is to confuse the criminal justice process and explore advantage. Moreover, the accused applicants have shown a great tendency to run away from the process of the criminal justice system and even though, the charge-sheet was submitted against them and co-accused persons in absconding, about three years after the filing of charge-sheet, they kept away from the criminal process and 4 co-accused persons are still absconding. They approached to this Court by filing applications under section 482 CrPC; those applications have been dismissed on merits; the Supreme Court also dismissed Special Leave to appeal (Crl.) No(s) 9282 of 2018 vide order dated 12.7.2018 and there is every reason to believe that despite knowledge, they kept absconding from the judicial process. Therefore, the response to such crime and criminals is required to be harsh and there cannot be any room for sympathy.

18. In view of the above, I find the offence to be very grave and serious and there is no reason for allowing the bail applications at this stage. The bail applications of the accused applicants **Wasi Ahmad, Zabir Hussain** and **Sabir** are therefore, rejected.

19. However, the applicants may move second bail application after statement of the fact witnesses and such bail application shall be decided on merits without being influenced by any observation made during the course of disposal of this bail application.

20. Committal of case be ensured in accordance with law within eight weeks from the date of production of this order. Trial to proceed thereafter expeditiously and be disposed of according to law.

(2021)03ILR A26
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.03.2021

BEFORE

THE HON'BLE SANJAY KUMAR PACHORI, J.

Criminal Misc. Bail Application No. 20991 of 2018

Vijay Gupta ...Applicant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Adeel Ahmad Khan, Sri Janardan Shukla, Sri Neeraj Singh

Counsel for the Opposite 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-deceased had a newborn daughter of 10 days-she found dead on railway track where she went to attend the natural call-inquest report was got prepared on the spot before the father-in law of the applicant and villagers-FIR lodged after 16 days without explaining such delay- no evidence collected during investigation that husband abetted her or conspired or intentionally aided her.(Para 1 to 7)

The Bail Application is allowed. (E-5)

List of Cases cited: -

1. Rajasthan Vs Bal Chandra, (1977) 4 SCC 308

2. Gudikanti Narasimhulu & ors. Vs PP, HC of A.P.,(1978) AIR SC 429

(Delivered by Hon'ble Sanjay Kumar Pachori, J.)

1. Heard Sri Neeraj Singh learned counsel for applicant and Sri Sanjay Kumar Singh, learned A.G.A. and perused the material brought on record.

2. The present first bail application has been filed on behalf of applicant (husband) with a prayer to release him on bail in Case Crime No. 132 of 2017, under Sections 498-A, 304-B I.P.C. and 3/4 of Dowry Prohibition Act, Police Station-Gauri Bazar District- Deoria, during pendency of trial.

3. The submission advanced by learned counsel for applicant; he is innocent and has falsely been implicated in the present case during the course of investigation. It has been further contended that the applicant is husband and not named in the F.I.R. The charge sheet has been filed under Sections under Sections 498-A, 304-B I.P.C. and 3/4 of Dowry Prohibition Act only against the applicant. The marriage of the deceased was solemnized with applicant on 19.05.2015 and from the wedlock of the applicant and the deceased, they have a new born daughter of 10 days and she is living with applicant in applicant's house. The incident took place on 28.04.2017 at 04:00 A.M. and the dead body of the deceased was found inside the railway track where she went to attend the natural call and the train just crushed her and the first information report has been lodged on 13.05.2017, i.e., after 16 days. The inquest report of the dead body of the deceased was got prepared on the spot at 11:00 A.M. on 28.04.2017 on the basis of information received at 07:25 A.M. Corpse of deceased Reena was identified by the father-in-law as well as villagers. The

father-in-law of the applicant was also present at the time of preparation of the inquest report Hence, he should have lodged F.I.R. of the alleged incident promptly on the said date, there appears no reason to lodge the F.I.R. after such delay of 16 days and that there is no explanation of such delay. Further, it is relevant that railway employee himself reported to the local police regarding commission of alleged incident. The post-mortem report reveals that the deceased have received as many as eight injuries which are as follows:-

(i) brain matter right side out of the skull, right temporal region;

(ii) upper hand deep lacerated wound bone seen;

(iii) left lower hand deep lacerated wound deep the bone;

(iv) brushed injury right chest,

(v) back of side of chest lacerated wound;

(vi) right lower leg am-bladed all punja & toes;

(vii) left side knee joint lacerated wound deep the bone;

(viii) brushed injury back side of the chest, ribs and chest wall of all ribs right and left side, cause and manner of death was hemorrhage and shock, due to ante-mortem crushed injury.

4. He further submits that the injuries received by the deceased which clearly depicted the actual position of the incident that the injuries caused to the deceased must have been caused by train accident. He next submitted that co-accused Ram Chandra (father-in-law) and Sripati @ Srimati (mother-in-law) have already been granted bail by this Court in Criminal Misc. Bail Application No. 10951 of 2018 vide order dated 23.3.2018, who are named in the F.I.R. The applicant is languishing in jail since 09.10.2017, having no criminal history nor there is any likelihood of fleeing from course of justice or tempering with evidence in case of released on bail.

5. Learned A.G.A. has vehemently opposed the prayer for bail by refuting the arguments advanced on behalf of learned counsel for the applicant regarding information of the incident as alleged to have been given by the father-in-law of the deceased.

6. It is settled position of law that bail is the rule and committal to jail and exception in the case of State of **Rajasthan Vs. Bal Chandra (1977) 4 SCC 308,** the Apex Court observed that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution and opined para 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." and considering the facts of the case and keeping in mind, the ratio of the Apex Court's judgment in the case of **Gudikanti Narasimhulu And Ors vs Public Prosecutor, High Court Of Andhra Pradesh, AIR 1978 SC 429,** larger mandate of Article 21 of the constitution of India, the nature of accusations, the nature of evidence in support thereof, the severity of punishment which conviction will entail, the character of the accused-applicant, circumstances which are peculiar to the accused, reasonable possibility of securing the

presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interest of the public/ State and other circumstances, but without expressing any opinion on the merits, I am of the view that it is a fit case for grant of bail.

7. Let the applicant **Vijay Gupta** involved in the aforesaid crime, be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions that :-

1. The applicant shall not tamper with the prosecution evidence by intimidating/ pressurizing the witnesses, during the investigation or trial.

2. The applicant shall cooperate in the trial sincerely without seeking any adjournment.

3. The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

4. In case the applicant has been enlarged on short term bail as per the order of committee constituted under the orders of Hon'ble Supreme Court his/her bail shall be effective after the period of short-term bail comes to an end.

5. The applicant shall be enlarged on bail on execution of personal bond without sureties till normal functioning of the courts is restored. The accused will furnish sureties to the satisfaction of the court below within a month after normal functioning of the courts are restored.

8. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

9. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

10. 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.

(2021)03ILR A28
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.03.2021

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Misc. Bail Application No. 21722 of 2020

Rakesh Kumar Rathore
...Applicant(In Jail)
Versus
Union of India ...Opposite Party

Counsel for the Applicant:
Sri Ram Prakash Dwivedi, Sri Deelip Kumar, Sri Pranshu Dwivedi, Sri Manish Kumar

Counsel for the Respondents:
Sri Narendra Deo Rai, Sri Krishna Agarawal

A. Criminal Law - Narcotics Drugs and Psychotropic Substances,Act,1985-Section 8/22,30 -application-rejection-challenge to-refusing default bail u/s 167(2) Cr.P.C.-Narcotics drugs were recovered from the godown of the applicant-applicant had no licence for godown nor he had any bill of recovered drugs-prosecution filed an application u/s 36A(4) of the Act, seeking extension of time for investigation-application for default bail rejected by giving further 4 months time to investigate-the period of 180 days prescribed u/s 36A(4) of the Act for completing the investigation and filing

chargesheet expired on 19.04.2020, but before expiry of said period, Apex Court order dated 23.03.2020 (Sou Motu cognizance due to Covid-19 Pandemic) was operative-due to Covid 19 Pandemic, the remedies effected by limitation period provided under Special Acts-on account of this reason, the argument of the applicant that order dated 23.03.2020 has not been passed for the benefit of the prosecution, is not liable to be accepted.(Para 1 to 19)

The Bail Application is rejected. (E-5)

List of Cases cited: -

1. Sudhakar & ors. Vs St. of U.P., (1985) 1 Crimes, (HC) SC, 582

2. Abhishek Srivastava Vs St. of U.P., (2020), B.A. No. 5384 of 2020

3. M. Ravindran Vs Intelligence Officer, Directorate of Revenue Intelligence, (2020) AIR SC 5245

4. In Re: Cognizance for Extension of Limitation,Suo Motu Writ Petition(C) No.s 3/2020

5. Settu Vs St., HC of Madras (2020) 3 MLJ Crl. 570

6. S. Kasi Vs St. thru Insptr. Of Police,Samaynallur P.S., Madurai Distt.,(2020) SCC OnLine SC 529

(Delivered by Hon'ble Sanjay Kumar Singh, J.)

1- Heard Mr. Deelip Kumar, learned Senior counsel assisted by Mr. Ram Prakash Dwivedi and Mr. Manish Kumar learned counsel for the applicant and Mr. Krishna Agarawal, learned counsel appearing on behalf of opposite party/(Union of India through Central Bureau of Narcotics, Gwalior). Perused the record.

2- In the present case applicant is accused for the alleged offence under Section 8/22 and 30 of the N.D.P.S. Act and is aggrieved on account of refusing default bail to him under Section 167(2) of the Code of Criminal Procedure, by the trial Court vide order dated 17.07.2020.

Suo Motu order dated 23.03.2020 passed by the Hon'ble Supreme Court, In Re : Cognizance for Extension of Limitation.

3- Here it would be apt to mention that applicant is in jail since 22.10.2019 and before expiry of 180 days (i.e. on 19.4.2020) limitation period for completing investigation, as provided under Section 36A(4) of the N.D.P.S. Act, the Apex Court considering the situation arising out of challenge faced by the country on account of Covid-19 virus passed the order dated 23.03.2020 in Suo Motu Writ Petition (Civil) No(s). 3/2020 extending the period of limitation prescribed under the general law of limitation or special laws (both Central and/or State) w.e.f. 15.03.2020 till further order/s. The aforesaid order dated 23.03.2020 of the Apex Court is reproduced herein below :

"This Court has taken Suo Motu cognizance of the situation arising out of the challenge faced by the country on account of Covid-19 Virus and resultant difficulties that may be faced by litigants across the country in filing their petitions/applications/suits/appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under Special Laws (both Central and/or State). To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the

limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings.

We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities.

This order may be brought to the notice of all High Courts for being communicated to all subordinate Courts/Tribunals within their respective jurisdiction.

Issue notice to all the Registrars General of the High Courts, returnable in four weeks."

Issue involved in the matter.

4- The issue which arises for consideration in the present case before this Court is "what would be effect of order dated 23.3.2020 (supra) passed by the Apex Court in Suo Motu Writ Petition (C) No(s). 3/2020, In Re : Cognizance for Extension of Limitation, on the right of applicant in granting default bail, who is accused for the alleged offence under N.D.P.S. Act (Special Act) and whether accused applicant is entitled to be released on default bail ignoring the order dated 23.3.2020".

Prosecution case.

5- The prosecution case in brief is that on the basis of information, the officers of the Central Bureau of Narcotics, Gwalior searched the godown of the applicant Rakesh Kumar Rathore on 22.10.2019, which is situated near New Gupta Transport, Free Ganj, P.S. Hari Parvat, District-Agra and recovered 81528 Buprenorphine 2ml Inj. 0.3mg/ml, 73900 Pentazocine 1ml Inj. 30ml/mg, 760737 Alprazolam Tab 0.5 mg, 608000 Tramadol tab. 100Mg, 185856 Tramadol tablet 50 mg, 4000 Tramadol 37.5 mg, 19725 Diazepam 2ml Inj. 5mg/ml, 11400 Nitrazepam Tab. 10mg and 20000 Zolpidem Tab 10 mg. On being asked about the aforesaid recovery, the applicant disclosed that he does not have any document or bill of recovered psychotropic drugs and does not have license for the godown, where the aforesaid psychotropic drugs were kept. The godown from where the psychotropic drugs have been recovered is in the ownership of Mrs. Sunita Devi wife of Rakesh Kumar Rathore as the same had been taken on lease by her for a period from 15.09.2016 to 04.09.2022. It is further the case of the prosecution that inventory of aforesaid seized material in 135 bags was prepared at the godown of the applicant and since there was no arrangement of light in the godown and also considering the security issues to the seized material, goods were shifted to C.G.S.T. Office for completing further legal formalities i.e. drawl of batch-wise sample from the recovered psychotropic drugs. As such, rest of the proceedings were completed at the C.G.S.T. Office, Sanjay Place, Agra.

6- In view of above, the applicant was arrested on 22.10.2019 and remanded to the judicial custody on the same day i.e. on 22.10.2019 for the alleged offence punishable under Section 8/22, 30 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short "the N.D.P.S. Act").

About bail application of the applicant.

7- Initially this bail application under Section 439 Cr.P.C. dated 20.12.2020 has

been filed on behalf of the applicant after rejection of his regular bail application vide order dated 19.12.2020 of Additional Session Judge, Agra with a prayer to release him on bail in Case Crime No. 03 of 2019, under Section 8/22 and 30 of the Narcotic Drugs and Psychotropic Substances Act, 1985, Central Bureau of Narcotics, Gwalior during the pendency of trial.

8- The applicant during pendency of his aforesaid bail application before this Court filed an application dated 14.05.2020 seeking default bail under Section 167(2) of the Code of Criminal Procedure, 1973 before the Court of Sessions Judge/Special Judge (N.D.P.S. Act), Agra, whereas the prosecution has filed an application under Section 36A(4) of the N.D.P.S. Act dated 29.06.2020 seeking extension of time to conclude the investigation. Learned Special Judge (N.D.P.S. Act) Agra vide order dated 17.07.2020 decided both the aforesaid applications and allowed the application dated 29.06.2020 of the prosecution granting four months further time to complete the investigation and simultaneously rejected the application dated 14.05.2020 of the applicant for default bail under Section 167(2) Cr.P.C.

9- The aforesaid order dated 17.07.2020 has been filed by the applicant in the instant bail application before this Court through supplementary affidavit dated 26.08.2020 and thereafter applicant has come up with the plea therein that applicant is entitled for grant of default bail as per the provisions of Section 167(2) of Cr.P.C. On 17.08.2020, prosecution has filed complaint dated 17.08.2020 before the trial court and copy of the same has also been brought on record before this Court as Annexure No. C.A.-1 to the counter affidavit dated 19.10.2020.

Submissions on behalf the accused applicant.

10- Mr. Deelip Kumar, learned counsel for the applicant challenging the order dated 17.7.2020 (supra) rejecting the prayer for default bail of the applicant submitted that:-

10.1-On 22.10.2019 the applicant was arrested and remanded to judicial custody for the alleged offence punishable under Section 8/22, 30 of the N.D.P.S. Act. The period of 180 days prescribed under Section 36(4) of the N.D.P.S. Act for completing the investigation and filing charge sheet/complaint expired on 19.04.2020, but no complaint was filed by the prosecution (Central Bureau of Narcotics), therefore, legal right for grant of default bail to the accused applicant had accrued on 20.04.2020. When right has been accrued to the applicant for grant of default bail, the same cannot be taken out by any means or order.

10.2-The Court concerned had no power to remand the applicant beyond the stipulated period of 180 days. He must pass an order of default bail and communicate the same to the accused applicant to furnish the requisite bail bonds.

10.3-Since the court of learned Special Judge (N.D.P.S.), Agra was not functioning at that time, on account of pandemic COVID-19, therefore, on opening the court, applicant filed application dated 14.05.2020 under Section 167(2) Cr.P.C. seeking default bail.

10.4-The application dated 29.06.2020 of the prosecution seeking

extension of time to conclude the investigation in view of Section 36A(4) of N.D.P.S. Act was filed after expiry of 180 days without disclosing any reason, therefore, application dated 29.06.2020 of the prosecution was not maintainable.

10.5-During pandemic COVID-19 also there was no prohibition for the prosecution to complete investigation and to file charge sheet or complaint against the applicant.

10.6-So far as above referred Suo Motu order dated 23.03.2020 passed by Hon'ble Apex Court extending the period of limitation prescribed under the general law of limitation or special laws (both Central and/or State) is concerned, it is submitted that the said order has been passed for the benefit of litigants, who are represented by lawyers and not for the benefit of the prosecution. Said order has come to the rescue of the accused. It is further submitted that the law of limitation bars the remedy, but not the right of accused, therefore indefectible right of the accused applicant cannot be taken out under the garb of order dated 23.03.2020 of the Apex Court.

10.7-Lastly, on the strength of aforesaid submissions, it is prayed that applicant is entitled to be released on default bail under Section 167(2) of Cr.P.C.

10.8-Learned counsel for the applicant relied upon following three judgments :

i)-1985 (1) Crimes (High Court) SC 582, Sudhakar and others Vs. State of U.P.

ii)-Order dated 25.11.2020 passed in Bail Application No. 5384 of 2020 (Abhishek Srivastava Vs. State of U.P) by the Lucknow Bench of this Court.

iii)- M. Ravindran Vs. Intelligence Officer, Directorate of Revenue Intelligence, reported in AIR 2020 SC 5245.

11- Here, it is also pertinent to note that learned counsel for the applicant advanced his argument only on the issue of right of default bail to the accused applicant and did not press the bail application of the applicant on its merit.

Submissions on behalf of opposite party.

12- Per contra, Shri Krishna Agarwal, learned counsel appearing on behalf of the prosecution/Union of India through Central Bureau of Narcotics, Gwalior (opposite party) refuting the aforesaid submissions of learned counsel for the applicant submits that:-

12.1- The applicant was arrested on 22.10.2019 in connection with recovery of huge quantity of contraband of commercial quantity for the offence under Section 8/22 and 30 of the N.D.P.S. Act. Period of 180 days prescribed for completion of investigation under Section 36A(4) of the N.D.P.S. Act was completed on 19.04.2020, but before expiry of the said period, the Apex Court on 23.3.2020 (supra) exercising power under Article 142 read with Article 141 of the Constitution of India, ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s, which is still operative.

12.2 -On 24.03.2020, the complete nationwide lockdown had been declared by the Government of India vide order dated 24.03.2020 for a period of 21 days w.e.f. 25.03.2020, considering the several proactive preventive and mitigating measures after declaring the Covid-19 as pandemic by World Health Organization.

Thereafter, the said lockdown was further extended on 14.04.2020 till 03.05.2020, on 01.05.2020 for two weeks and lastly it was extended on 17.05.2020 till 31.05.2020.

12.3- It is submitted that on 08.06.2020, 01.07.2020, 01.08.2020 and 29.08.2020 unlock 1, 2, 3 and 4 were enforced gradually to withdraw lockdown as per the guidelines mentioned therein.

12.4 Much emphasis has been given by contending that the month of March 2020 to June 2020 was peak time of spread of corona virus and at that time all the efforts were being made for enforcing guidelines laid down by the Government of India strictly regarding nationwide lockdown maintaining social distancing, etc. Various places of the state were also declared hotspot and it was not allowed to go there, therefore it was not possible at all to complete the investigation, which requires travel and physical intervention with the persons, who were to be examined in the case. It is submitted that on account of the aforesaid reasons, the prosecution could not file complaint and the application for extension of time within 180 days (before 19.04.2020).

12.5-It is further submitted that after unlock-1, the prosecution has moved an application dated 29.06.2020 seeking extension of time for a period of four months to complete the investigation, because under Section 36A(4) of the N.D.P.S. Act, there is a statutory provision that if it is not possible to complete the investigation within the said period of 180 days, special court may extend the said period upto one year at the report of Public Prosecutor indicating the progress of investigation and specific reasons for detention of the accused beyond the said period of 180 days. It is pointed out that in the application dated 29.06.2020 the progress report of the investigation and the specific reason of not completing the investigation within 180 days has been mentioned in Paragraphs 5 and 6 of the application dated 29.06.2020, which are as follows :

"5. It is submitted that the offence involves commercial quantity and accordingly 180 days to conclude the investigation has expired on 19.04.2020. The investigation was underway with sincere efforts to complete it within the time limit of 180 days despite being voluminous, meanwhile, it got halted due to nation-wide lockdown on account of Corona virus (COVID-19). In the given circumstances, it was not possible to conclude the investigation by 19.04.2020. Looking at the current outlook of COVID outbreak and with ever emergence of new cases everyday, it may take at least 4 more months to become the situation conducive to complete the investigation which requires travel and physical intervention with the persons who are yet to be examined in the case. However, it is provided under Section 36A(4) of NDPS Act, 1985 that if it is not possible to complete the investigation within the said period of 180 days, the Special court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of investigation and specific reasons for detention of the accused beyond the said period of 180 days.

6. It is in the fitness of things and interest of justice that time to conclude the investigation may be extended for 4 months considering the extraordinary situation in the country owing to outbreak of COVID-19."

12.6-The application dated 29.06.2020 of the prosecution under Section 36A(4) of N.D.P.S. Act for extension of time has been allowed vide order dated 17.07.2020 of the trial court

granting four months further time to complete the investigation and within said period prosecution has filed the complaint dated 17.08.2020 on 17.08.2020.

12.7-It is pointed out that the said order dated 17.07.2020 granting four months further time to the prosecution for completing the investigation has become final, as the same has not been challenged by the applicant.

12.8-In view of the order dated 23.03.2020 of the Apex Court, extension application dated 29.06.2020 of the prosecution shall be treated within time.

12.9-Lastly, it is prayed that under the facts and special circumstances of this case as mentioned above, the applicant is not entitled to be released on bail on the ground of default bail under Section 167(2) of the Cr.P.C., in the light of order dated 23.03.2020 passed by the Apex Court.

12.10-Learned counsel for the opposite party heavily relied upon the following order/judgments:-

i- Order dated 23.03.2020 passed by the Apex court in Suo Motu Writ Petition (C) No(s). 3/2020, In Re : Cognizance for Extension of Limitation.

ii- Paragraph no.15 of Judgment dated 08.05.2020 of the High Court of Madras in the case of Settu Vs. State, 2020 (3) MLJ (Crl) 570,

iii- S. Kasi Vs. State Through The Inspector of Police Samaynallur Police Station, Madurai District, 2020 SCC OnLine SC 529.

13- Before delving into the matter, it is useful to quote Section 167(2) of the Cr.P.C. and Section 36A(4) of N.D.P.S. Act, which are as follows :

"Section 167(2) of The Code Of Criminal Procedure, 1973

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that -

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused in produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend

further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

[Explanation I.-For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.]

[Explanation II.-If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be:]....."

"Section 36A(4) of the N.D.P.S. Act

(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure (2 of 1974), thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days":

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days."

Discussion of judgments relied upon by the parties.

14- Firstly, I shall deal with the judgments relied on behalf of the applicant.

14.1-In the case of **Sudhakar & others (supra)** the accused was arrested on 10.04.1984 for the offences punishable under Sections 147, 148, 149 and 302 of I.P.C. The period for completing investigation within 90 days, had expired on 08.07.1984, but charge sheet was not submitted. On the next day of expiry of period of 90 days i.e. on 09.07.1984, an application was moved before the Judicial Magistrate Ist of District Etawah under Section 167(2) Cr.P.C. for grant of default bail, but the said application was not disposed of on 09.07.1984 and charge sheet was submitted on 10.07.1984. The learned Magistrate passed impugned order dated 13.07.1984 to the effect that he had taken cognizance of the offence and in view provisions of Section 173 (8) of the Cr.P.C., the accused were not entitled to bail. The said order was challenged before the High Court in Criminal Revision, in which the High Court held that the Magistrate acted in violation of proviso (a) to Section 167(2) Cr.P.C. by postponing the consideration of the application for bail till the charge sheet was filed and till he had taken cognizance of the case. Accordingly, revision was allowed and application of the accused for default bail was also allowed.

14.2-In the case of **Abhishek Srivastava (supra)** the accused after arrest was taken in judicial custody on 16.01.2020 with passing of remand order on 16.01.2020, thereafter the judicial custody continued from time to time and

lastly the remand was extended on 11/12.03.2020 for a period of 14 days i.e. 25.03.2020. Before the said date, nationwide lockdown was imposed on 24.03.2020 and the functioning of the courts stood obstructed rather completely closed expect for urgent work as per directives issued by Hon'ble the Chief Justice from time to time considering the pandemic Covid-19 directing that all the courts subordinate to the High Court, Commercial Court, Motor Accident Claims Tribunal and Land Acquisition Rehabilitation and Resettlement Authorities across the U.P. shall remain closed till further orders and remand and bail of accused persons shall be done as per holiday practice. Due to closure of courts from 24.03.2020, no remand orders were passed from 25.03.2020 to 26.06.2020 and in the meantime period of 90 days expired on 14.04.2020 and in absence of any remand order since 25.03.2020, the accused continued in jail till the filing of charge sheet on 01.05.2020, and thereafter until the rejection of default bail on 18.06.2020. On the aforesaid facts, High Court held that during lockdown period and irrespective of the facts that the courts were closed, remand matters were bound to be taken up and wherever the indefeasible right of personal liberty accrued to an accused incarcerated in jail, he ought to have been offered default bail in the manner prescribed under Section 167(2) of the Cr.P.C. Accordingly, the court of Magistrate was directed to release the accused Abhishek Srivastava on default bail on furnishing bail bonds to the satisfaction of the court concerned.

14.3-In the matter of **M.Ravindran (supra),** the issues regarding default bail has been considered by the Apex Court. Facts of that case were that accused was arrested and remanded to judicial custody on 04.08.2018 for the alleged offence punishable under Section 8(c) read with Sections 22(c), 23(c), 25A and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. After completion of 180 days from the remand date, that is, 31.1.2019, the accused filed application for bail under Section 167(2) of the Code of Criminal Procedure, on 1.2.2019 at 10:30 a.m. before the Trial Court, Chennai on the ground that the investigation was not complete and charge-sheet had not yet been filed. During course of hearing of bail application after completion of argument of the counsel for accused, complainant filed an additional complaint against the accused on 1.2.2019 at 4:25 p.m. and sought dismissal of the bail application on the said basis. On 5.2.2019 the trial court allowed the bail application granting bail to accused on the ground that the court has no power to intervene with indefeasible right of accused conferred on him by the legislative mandate of Section of 167(2) Cr.P.C. Complainant challenged the said bail order before the High Court. The High Court cancelled the bail order granted by the trial court. The accused challenged the said order of the High Court before the Apex Court. The impugned judgment of the High Court was set aside by the Apex Court confirming the order of trial court granting default bail to accused.

15- After going through the aforesaid judgments relied upon by the learned counsel for the applicant, I find that in case of **Sudhakar and others (supra)** and **Abhishek Srivastava (supra)**, offence against the accused was punishable under Indian Penal Code, therefore, in both the above cases the provisions of Section 167(2) of Cr.P.C. were applicable, in which there is no provision for extension of

limitation period after 60 or 90 days, therefore order dated 23.03.2020(supra) of the Apex Court was not applicable in the case of **Abhishek Srivastava,** whereas in the present case offence is under N.D.P.S. Act, therefore, provisions of Section 36(A)(4) of the N.D.P.S. Act is applicable regarding limitation period for completing investigation and there is provision for extension of time also with the permission of the Court concerned, therefore order dated 23.03.2020 of the Apex Court is applicable in the case in hand. As such, both the aforesaid cases are distinguishable on facts and law, hence not applicable under the facts of the present case. So far as third case **M. Ravindran (supra)** is concerned, it is relevant to note that in the said case though the offence against the accused was under N.D.P.S. Act, but limitation period of 180 days prescribed for completing the investigation already expired on 13.01.2019, much before coming into force the order dated 23.03.2020 of the Apex Court, whereas in the case in hand before expiry of limitation period of 180 days (i.e. on 19.4.2020), the order dated 23.03.2020 of the Apex Court already came into force w.e.f. 15.3.2020, therefore, said judgment is also not applicable on the facts of this case.

16- Now I shall deal with the order/ judgments cited on behalf of the prosecution:-

16.1-Apex Court in Suo-Motu order dated 23.03.2020 (as mentioned above in paragraph no.3) has clearly observed that "We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities".

In view of such observation, this Court is of the view that it is equally binding and applicable upon accused as well as prosecution, if they were being effected by limitation period provided under Special Act, in any manner during pandemic COVID-19/lockdown period.

16.2-In the case of **Settu Vs. State (supra),** the offence against the accused was under Sections 392 and 397 of I.P.C. In the said case also period as provided under Section 167(2) Cr.P.C. for completing investigation was applicable. The effect of aforesaid order dated 23.03.2020 of the Hon'ble Apex Court was also considered by the High Court of Madras. In the said case, the High Court while granting bail to accused made following observations in paragraphs no.14 & 15 of judgment.

Finding recorded in para no.14 is applicable to such cases, in which limitation period for filing charge sheet is governed by the provisions of Section 162(2) of Cr.P.C., whereas finding recorded in para 15 is applicable for those cases, in which limitation period is governed by any Special Act like N.D.P.S. Act, which is applicable in the case in hand.

"14. Personal liberty is too precious a fundamental right. Article 21 states that no person shall be deprived of his personal liberty except according to procedure established by law. So long as the language of Section 167(2) of Cr.P.C. remains as it is, I have to necessarily hold that denial of compulsive bail to the petitioner herein will definitely amount to violation of his fundamental right under Article 21 of the Constitution of India. The noble object of the Hon'ble Supreme Court's direction is to ensure that no litigant is deprived of his valuable rights. But, if I accept the plea of the respondent police, the direction of the Hon'ble

Supreme Court which is intended to save the preserve rights would result in taking away the valuable right that had accrued to the accused herein.

15. *Of course, the construction placed by me will have no application whatsoever in the case of certain offences under certain special laws, such as Unlawful Activities (Prevention) Act, 1967 and NDPS Act, 1985. For instance Section 36-A(4) of the NDPS Act enables the investigation officer to apply to the special court for extending the period mentioned in the statute from 180 days to 1 year if it is not possible to complete the investigation. Thus, under certain statutes, the prosecution has a right to apply for extension of time. In those cases, the benefit of the direction of the Hon'ble Supreme Court made 23.03.2020 in Suo Motu Writ Petition (Civil) No. 3 of 2020 will apply. But, in respect of the other offences for which Section 167 of Cr.P.C. is applicable, the benefit of the said direction cannot be availed."*

16.3-In the case of **S. Kasi (supra),** the aforesaid judgment dated 08.05.2020 of the High Court of Madras in the case of **Settu (supra)** was further considered by the Hon'ble Supreme Court. In the said case finding recorded by the High Court of Madras in Paragraphs 14 and 15 of judgment, in case of **Settu v/s. State** has been approved by the Apex Court. The relevant extract of Paragraphs 27 and 30 of the said judgment are quoted herein below:

"27. There is one more reason due to which the impugned judgment of the learned Single Judge deserves to be set aside. A learned Single Judge of Madras High Court in Crl.OP(MD)No. 5291 of 2020, Settu v. the State, had already considered the judgment of this Court dated 23.03.2020 passed in Suo Moto W.P(C)No.3 of 2020 and its effect on Section 167(2) Cr.P.C. The above was also a case of a bail where the accused was praying for grant of default bail due to non-submission of charge sheet. The prosecution had raised objection and had relied on the order of this Court dated 23.03.2020 passed in Suo Moto W.P(C)No.3 of 2020 claiming that period for filing charge sheet stood extended until further orders. The submission of prosecution was rejected by learned Single Judge. The learned Single Judge had made following observations in paragraphs 14 and 15:-

"14. Personal liberty is too precious a fundamental right. Article 21 states that no person shall be deprived of his personal liberty except according to procedure established by law. So long as the language of Section 167(2) of Cr.P.C. remains as it is, I have to necessarily hold that denial of compulsive bail to the petitioner herein will definitely amount to violation of his fundamental right under Article 21 of the Constitution of India. The noble object of the Hon'ble Supreme Court's direction is to ensure that no litigant is deprived of his valuable rights. But, if I accept the plea of the respondent police, the direction of the Hon'ble Supreme Court which is intended to save and preserve rights would result in taking away the valuable right that had accrued to the accused herein.

15. Of course, the construction placed by me will have no application whatsoever in the case of certain offences under certain special laws, such as Unlawful Activities (Prevention) Act, 1967 and NDPS Act, 1985. For instance, Section 36-A (4) of the NDPS Act enables the investigation officer to apply to the special court for extending the period mentioned in the statute from 180 days to 1 year if it is not possible to complete the investigation.

Thus, under certain statutes, the prosecution has a right to apply for extension of time. In those cases, the benefit of the direction of the Hon'ble Supreme Court made 23.03.2020 in Suo Motu Writ Petition (Civil) No.3 of 2020 will apply. But, in respect of the other offences for which Section 167 of Cr.P.C. is applicable, the benefit of the said direction cannot be availed."

30. *Rajasthan High Court had occasion to consider Section 167 as well as the order of this Court dated 23.03.2020 passed in Suo Moto W.P(C)No.3 of 2020 and Rajasthan High Court has also come to the same conclusion that the order of this Court dated 23.03.2020 has no consequence on the right, which accrues to an accused on non-filing of charge sheet within time as prescribed under Section 167Cr.P.C. Rajasthan High Court in S.B. Criminal Revision Petition No. 355 of 2020 - Pankaj Vs. State decided on 22.05.2020 has also followed the judgment of learned Single Judge of the Madras High Court in Settu v. The State (supra) and has held that accused was entitled for grant of the default bail. Uttarakhand High Court in First Bail Application No.511 of 2020 - Vivek Sharma v. State of Uttarakhand in its judgment dated 12.05.2020 has after considering the judgment of this Court dated 23.03.2020 passed in Suo Moto W.P(C)No.3 of 2020 has taken the view that the order of this Court does not cover police investigation. We approve the above view taken by learned Single Judge of Madras High court in Settu v. The State (supra) as well as the by the Kerala High Court, Rajasthan High Court and Uttarakhand High Court noticed above."*

Conclusion.

17- After considering the submissions of the learned counsel for the parties, perusing the record and going through the judgments cited on behalf of the parties as well as legal position, this Court arrived at following conclusions:-

17.1-There are two categories of cases regarding period prescribed in law for completing investigation, if accused is in jail. One category for those cases, regarding which the period of 60 or 90 days as the case may be, prescribed under Section 167(2) Cr.P.C. are applicable and another category of cases, which are governed by the period provided under any Special Act, like present case, in which procedure prescribed under Section 36 A(4) of the N.D.P.S. Act is applicable. A plane reading of Section 167 Cr.P.C., it is also clear that under Section 167 Cr.P.C. there is no provision for seeking extension of period of investigation, whereas under Section 36A(4) of the N.D.P.S. Act, Investigating Officer can apply to the special court for extending the period mentioned therein from 180 days to one year, if it is not possible to complete the investigation.

17.2 This Court is of the view that suo-motu order dated 23.03.2020 (supra) is not applicable with regard to such cases, which are governed by the period prescribed under Section 167(2) Cr.P.C., because there is no provision for extension of time, but said order dated 23.03.2020 of the Apex Court is applicable in those cases, which are governed by any Special Act, in which there is provision for extension of period to complete investigation.

17.3-The prosecution in paragraphs no. 5 & 6 of extension application dated 29.06.2020 has given specific reasons of delay in completing investigation due to nation-wide lock down on account of the COVID -19 pandemic. Therefore, argument on behalf of the applicant that extension application dated

29.06.2020 has been filed by the prosecution without disclosing any reason is not liable to be accepted.

17.4-The Apex Court in catena of judgments has settled the law with regard to grant of default bail to the accused on non-submission of police report or complaint within time period prescribed under Section 167(2) Cr.P.C. or any Special Act in favour of accused. It is also well settled that right to default bail under proviso (a) to Section 167(2) of the Cr.P.C. is absolute. It is a legislative command and not Court's discretion. If the investigating agency fails to file a charge sheet within 60 or 90 days, as the case may be, the accused in custody should be released on bail, but the difficulty in the present case is that the applicant is accused for the alleged offence under NDPS Act, which is a Special Act, therefore provisions provided under Section 36A(4) of the N.D.P.S. Act are applicable in this case, in which Investigating Officer can apply to the special court for extending the period mentioned therein from 180 days to one year, if it is not possible to complete the investigation. As such, order dated 23.03.2020 passed by the Apex Court in Suo Motu Writ Petition (Civil) No(s). 3/2020 extending the period of limitation prescribed under the general law of limitation or special laws (both Central and/or State) w.e.f. 15.03.2020 till further order/s is applicable in the present case.

17.5- The finding recorded by the High Court of Madras, in Paragraphs 14 & 15 of the judgment dated 08.05.2020 in the case of **Settu Vs. State (supra)** has been approved by the Apex Court in the case of **S. Kasi Vs. State (supra)**. I also concur with the exposition of law as laid down in Paragraph 15 of the judgment of the High Court of Madras.

17.6-In the said order dated 23.03.2020 (supra), specific observation has been made by the Apex Court that the said order has been passed in exercise of power under Article 142 read with Article 141 of the Constitution of India and declared that this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities.

17.7- It is admitted facts to the parties concerned that the applicant was arrested and remanded to judicial custody on 22.10.2019 for the alleged offence punishable under Section 8/22, 30 of the N.D.P.S. Act. The period of 180 days prescribed under Section 36A(4) of the N.D.P.S. Act for completing the investigation and filing charge sheet/complaint expired on 19.04.2020, but before expiry of said period, Apex Court order dated 23.03.2020 was already operative w.e.f.15.03.2020.

17.8- Judgments cited on behalf of the applicant are not helpful to him, particularly in this case, in the light of Suo-motu order dated 23.03.2020 passed by the Apex Court. It is also well settled that every case turns on its own facts. Even one additional or different fact may make a big difference between the conclusion in two cases, because even a single significant detail may alter entire aspect.

17.9-There is no dispute that since 24.03.2020, nation-wide lockdown was enforced due to pandemic COVID-19, and it was difficult situation for the accused persons and other litigants to avail legal remedy as well as for prosecuting agencies to perform their duty. Therefore, the order dated 23.03.2020 of the Apex Court is equally applicable and binding upon accused, other litigants as well as prosecution, if their remedies were being effected by limitation period provided under Special Acts, in any manner during pandemic COVID-19/lockdown period. Prosecuting agencies (State/Central) also

comes under the purview of the litigants. On account of this reason, the argument on behalf of the applicant that order dated 23.03.2020 has not been passed for the benefit of the prosecution, is not liable to be accepted.

Result

18- In view of above, this Court cannot ignore the order dated 23.03.2020 of the Apex Court, which is binding upon this Court. Accordingly the claim of the applicant for grant of default bail to him in this case is not liable to be accepted in the light of discussion, as mentioned above considering the order dated 23.03.2020(supra) of the Apex Court.

19- As a fallout and consequence thereof, instant bail application is **rejected.**

20- However, considering the facts and circumstances of the case, the trial Court is directed to make an endeavor to conclude the trial expeditiously preferably within a period of **one year** from the date of production of copy of this order without granting unnecessary adjournment to either of the parties.

(2021)03ILR A41
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.02.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 3140 of 2021

Amarjeet ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Surendra Kumar

Counsel for the Respondents:
C.S.C.

(A) Civil Law - Code of Civil Procedure ,1908 - Sections 96 or 97 - U.P. Revenue Code 2006 - Section 207 - first appeal, Section 209-bar against certain appeals, Section 210 - revision Section 116 - Suit for division of holding, Section 117 - Duty of the court in suits for division of holdings , Revenue Rules, 2016 -Rule 107-Suit for division of holding, Rule 108-Suit for division of several holdings , Rule 109 - Preliminary and final decrees-powers of revision under Section 210 of the U.P. Revenue Code - wide enough to examine the legality, propriety and regularity of any order passed in a suit or proceeding by any Subordinate Revenue Court in which no appeal lies - no fetters like those provided in Section 115 of the Code of Civil Procedure. (Para - 78)

Petitioner is a tenure holder - filed an application for division of holdings under Section 116 of the U.P. Revenue Code 2006 before the Sub-Divisional Magistrate - Sub-Divisional Magistrate passed a preliminary decree about the shares of the tenure holders relying upon the revenue records - preliminary decree was challenged by filing a First Appeal under Section 207 of the U.P. Revenue Code 2006 before Additional Commissioner - preliminary objection before the Additional Commissioner regarding maintainability of the Appeal - Present writ petition filed by the petitioner for quashing the order passed by the Additional Commissioner in Appeal. (Para -1,2)

HELD: -The Appeal was wrongly admitted by the Additional Commissioner, and also because the Additional Commissioners' order does not give any reason for entertaining the Appeal, the order impugned is set aside. (Para - 79)

Writ Petition allowed. (E-6)

List of Cases cited: -

1. National Institute of Technology & ors. Vs Niraj Kumar Singh, (2007) 2 SCC 481

2. Buddharaj Vs St. of U.P. & ors., (2017) 3 ADJ 465, and Hariom Vs St. of U.P. & ors., (2013) 6 ADJ 345

3. Secretary and Curator Victoria Memorial Vs Howrah Gantantrik Nagrik Samiti & ors., JT 2010 (2)

4. Chitturi Subbanna Vs Kudapa Subbanna, 1965 SCR (2) 661

5. Venkata Reddy Vs Pethi Reddy, AIR 1963 SC 992

6. Mool Chandra & ors. Vs Deputy Director of Consolidation & ors., (1995) 5 SCC 631

7. Venkat Reddy Vs Pethi Reddy, AIR 1963 Supreme Court 992

8. Gyarsi Bai Vs Dhansukh Lal, AIR 1965 Supreme Court 1055

9. Bhivchandra Shankar More Vs. Balu Gangaram More & ors., (2019) 6 SCC 387

10. Hari Shankar Vs Rao Girdhari Lal Chowdhury, 1963 AIR SC 698

11. Shiv Shakti Cooperative Housing Society Vs M/s Swaraj Developers & ors., (2003) 6 SCC 659

12. Pankajakshi (dead through legal representatives) & ors. Vs Chandrika & ors., (2016) 6 SCC 157

13. Custodian of Evacuee Property, Bangalore Vs Khan Saheb Abdul Shukoor,(1961) 3 SCR 855

14. Maru Ram Vs U.O.I., (1981) 1 SCC 107

15. L.I.C. Vs DJ Bahadur & ors, (1981) 1 SCC 315

16. M/s Atmaram Properties Pvt. Ltd. Vs Oriental insurance Comp. Pvt. Ltd., (2018) 2 SCC 27

17. Gobind Sugar Mills Ltd. Vs St. of Bihar, (1999) 7 SCC 76

18. Commercial Tax Officer Vs Binani Cements Ltd., (2014) 8 SCC 319

19. State of Bihar & ors. Vs Bihar Raj M.S.E.S.K.K. Maha Sangh & ors., (2005) 9 SCC 129

20. U.O.I. & ors. Vs Ajit Singh, (2013) 4 SCC 186

21. Iridium India Telecom Ltd. Vs Motorola Inc., (2005) 2 SCC 145

22. State (NCT Delhi) Vs Narender, (2014) 13 SCC 100

23. Shankar Balwant Lokhande Vs Chandrakant Shankar Lokhande, (1995) 3 SCC 413

24. Phoolchand Vs Gopal Lal, AIR 1967 Supreme Court 1470

25. (Shankar Balwant Lokhande Vs Chandrakant Shankar Lokhande, (1995) 3 SCC 413

26. Bikoba Deora Gaikwad Vs Hirabai Maruthi Rao Ghorghare, (2008) 8 SCC 198

27. S. Satnam Singh Vs Surinder Kaur, (2009) 2 SCC 562

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

Heard Sri Sunendra Kumar, learned counsel for the petitioner.

The petition is ***allowed.***

The order dated 21.01.2021 passed by the Additional Commissioner (Judicial), Lucknow, is set aside.

Detailed reasons to follow.

Learned counsel for the petitioner and learned standing counsel may give written submission and case laws with regard to the arguments made today.

Hon'ble Mrs. Sangeeta Chandra,J.

1. By means of the present writ petition the petitioner seeks a writ in the nature of Certiorari quashing the order dated 21.01.2021 passed by the Additional Commissioner (Judicial), Lucknow Division, Lucknow in Appeal No. 01741 of 2020 Amrik Singh and others vs Amarjeet Singh and others. The petitioner is a tenure holder of Gata no. 48/2, ad-measuring 1.207 ha situated at village Bahadur Nagar, Pargana Aurangabad, Tehsil Mithauli, District Lakhimpur Kheri and on 19.11.2020, the petitioner had filed an application for division of holdings under Section 116 of the U.P. Revenue Code 2006 before the Sub-Divisional Magistrate Mithauli Kheri, which was registered as Case No.04112 of 2002: Amarjeet and others versus Subash Chander and others. On 23.12.2020, the Sub-Divisional Magistrate Mithauli, Kheri, had passed a preliminary decree about the shares of the tenure holders relying upon the revenue records.

2. The preliminary decree dated 23.12.2020 was challenged by Amrik Singh and others by filing a First Appeal under Section 207 of the U.P. Revenue Code 2006 (hereinafter referred to as "the Code of 2006") which was registered as Appeal No.01741 of 2020. The petitioner had already filed a caveat application and when the Appeal was listed on 04.01.2015 for admission, the counsel for the petitioner raised a preliminary objection in writing with regard to the maintainability of the Appeal. The petitioner specifically mentioned before the Additional Commissioner that the Appeal is not maintainable because it has been filed only against a preliminary decree, which is an order of an interim nature, because the remaining proceedings are still to be concluded before the Sub-Divisional Magistrate and Section 207 of the Code of 2006 states that an Appeal would lie only against a final order or decree. It was also argued that the impugned order is of an "interim nature' and further proceedings under Rule 109 still remain to be completed, and the Sub Divisional Magistrate has called for objections to be filed by the parties. It was also argued that the First Appeal was barred under Section 209 sub clause (f) of the Code of 2006, because the said Section specifically states that no Appeal shall lie against any order or decree, where such order and "decree is of an interim nature", yet the Additional Commissioner admitted the Appeal of the contesting respondents by a non-speaking order.

3. The learned counsel for the petitioner has referred to Section 207 of the Code of 2006 to state that under the said Section, a provision has been made for filing First Appeal and any party aggreived by a final order or decree passed in any suit, application or proceeding specified in column 2 of the Third Schedule, may prefer a First Appeal to the Court or Officer specified against it in column 4, where such order or decree was passed by a court or officer specified against it. The emphasis has been laid upon the word "final order" or "decree". It has been argued that the preliminary decree is not a final decree against which a first Appeal would lie under the Revenue Code.

4. The learned counsel for the petitioner has argued on the basis of Blacks' Law Dictionary, defining a preliminary decree as follows:- *"decrees in equity are either final or interlocutory. Final decree is one which fully and finally disposes of the*

*whole litigation, determining all questions raised by the case and leaving nothing that requires further judicial action. An interlocutory decree is a provisional or a preliminary decree, which is not final and does not determine the suit, but directs some further proceedings preparatory to the final decree. It is a decree pronou*nced for the purpose of ascertaining matter of law or fact preparatory to a final decree."

5. It has been submitted on the basis of Websters' Legal Dictionary that the word "interim" means *"in the meantime"*, or *"temporary"* and a preliminary decree is only a temporary decree, as further proceedings under Section 116, Rule 109, are still to be concluded before the Sub-Divisional Magistrate.

6. The learned counsel for the petitioner has also referred to the Hindi translation of Section 207 of the Revenue Code wherein the word used are *"Antim Adesh Ya Decree"*, to argue that First Appeal is maintainable only against a final Adjudication and not at the interim stage when a preliminary decree is passed by the Court concerned in a partition suit.

7. The learned counsel for the petitioner has also referred to Section 209 sub-clause (f), which starts with a *non-obstante* clause, and says that *"notwithstanding anything contained in sections 207 and 208, no Appeal shall lie against any order or decree..... where such order or decree is of an interim nature."* It has been submitted that Section 209 creates a bar against filing Appeals against orders or decrees which have been mentioned in the sub-clauses thereof. The Revenue Court being a special Statute and enacted later in point of time than the Civil Procedure Code, shall override any provision in Sections 96 or 97 of the C.P.C. which permit the filing of an Appeal against a preliminary decree also. It has been argued that the legislature is supposed to know all the law existing on the Statute Book before it enacts a special legislation. If the legislature has barred any Appeal then the Civil Procedure Code which is only procedural law cannot provide that which is specifically barred into substantial provisions of a Special Statute. Procedural law can supplement the Statute but it cannot be enforced contrary to the original Statute. If Section 209 (f) specifically says that against an interim decree no Appeal lies, then such Appeals cannot be entertained contrary to the specific substantive provisions.

8. Learned counsel for the petitioner has referred to judgement rendered by the honourable Supreme Court in the case of *Kiran Singh and others versus Chaman Paswan and others, AIR 1954 Supreme Court 340, to say that a "decree passed by a Court without jurisdiction is a nullity and it's invalidity could be set up whenever and wherever it is sought to be enforced and relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."*

The learned counsel for the petitioner placed reliance upon another Supreme Court decision rendered in *National Institute of Technology and others versus Niraj Kumar Singh* (2007) 2 SCC 481, wherein observations to the same effect have been made in paragraph 22 of the Report.

9. The learned counsel for the petitioner has further argued that if this court is pleased to hold that the Appeal is maintainable before the Additional Commissioner, even then the order of the Additional Commissioner would still be vitiated as the Supreme Court in several cases has already held that a statutory authority is bound to pass a reasoned order. The order passed by the Additional Commissioner impugned in this writ petition being a non-reasoned order cannot be sustained. To give reasons is the Rule of natural justice and not recording of reasons, non consideration of evidence, or consideration of inadmissible evidence, renders the order to be unsustainable and further, failure to disclose reasons in an order renders it indefensible/unsustainable.

10. The learned counsel for the petitioner has placed reliance upon Coordinate Bench decisions rendered by this Court in *Buddharaj vs. State of U.P. and others, (2017) 3 ADJ 465, and Hariom vs. State of U.P. and others, (2013) 6 ADJ 345*; wherein this Court had placed reliance upon judgement of the Supreme Court rendered in the case of the *Secretary and Curator Victoria Memorial vs Howrah Gantantrik Nagrik Samiti and others JT 2010 (2)* Supreme Court 566; paragraph 31 to 33 whereof are being quoted here in below :-

"31. It is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of an order in exercise of judicial power in a judicial forum is to disclose its reasons by it self, and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of justice delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The giving of reasons for a decision is an essential attribute of judicial, and, judicious disposal of matters before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind. (vide State of Orissa versus Dhani Ram Luhar JT 2004 (2) Supreme Court 172 , and State of Rajasthan versus Sohan Lal and others (2004) 5 SCC 573)".

The Supreme Court went on to observe :-"

32. "Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. (Raj Kishore Jha versus State of Bihar and others AIR 2003 Supreme Court 4664; Vishnu Deo Sharma versus State of Uttar Pradesh and others (2008) 3 SCC 172; Steel Authority of India Limited versus Sales Tax Officer Rourkela 1, Circle, and others (2008) 9 SCC 407; State of Uttaranchal and another versus Sunil Kumar Singh Negi AIR 2008 Supreme Court 2026; U.P.S.R.T.C. versus Jagdish Prasad Gupta, AIR 2009 Supreme Court 2328; Ram Pal versus State of Haryana and others (2009) 3 SCC 258; Mohammad Yousuf versus Faiz Mohammad and others (2009) 3 SCC 513; State of Himachal Pradesh versus Sada Ram and another (2009) 4 SCC 422)"

33. "Thus it is evident that the recording of reasons is a principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected may know as to why his application has been rejected."

11. Sri Hemant Kumar Pandey, learned Standing Counsel, argued that under Section 207 of the Revenue Code, 2006 appeal would lie against *"Final order or Decree"*. The expression does not say that "Final order or final Decree" or "Final order and Decree". The use of word "or" between "Final order" and "decree" clearly indicates that both the expressions "Final order" and "decree" are separate to each other. The word 'or' is disjunctive, not conjunctive. Thus the provision is clear and unambiguous, and the word 'or' cannot be read as 'and', therefore, the word "decree" is separate from expression "Final order".

12. It has been argued by learned Standing Counsel that the use of the word 'or' and 'and' whether conjunctive and disjunctive in form has been discussed in Chapter-V Syn.7 by the author Justice G.P. Singh in his book "Principles of Statutory Interpretation", (9th Edition, 2004) at page 404, which read as follows:-

"The word 'or' is normally disjunctive and 'and' is normally conjunctive at times but they are read as vice-versa, to give effect to the manifest intention of the Legislature as disclosed from the context. One can read 'or' as 'and' in a statute. But it cannot be done unless one is obliged because 'or' does not generally mean 'and' and 'and' does not generally mean 'or'. According to Lord Halsbury the reading of 'or' as 'and' is not to be resorted to, "unless some other part of the same statute or the clear intention which requires that to be done". But if the literal reading of the words produces an unintelligible or absurd result 'and' may be read as 'or even though the result of so modifying the words is less favourable to the subject, provided that the intention of the legislature is otherwise quite clear. Speaking generally, a distinction may be made between positive and negative conditions prescribed by statute for acquiring a right or benefit. Positive conditions separated by 'or' are read in the alternative but negative conditions connected by 'or' are construed as cumulative and 'or' is read as 'nor' or 'and' (Ref. G.P. Singh on Principles of Statutory Interpretation).

13. The second argument raised by learned Standing Counsel is that Rule 109 (1) of the Revenue Rules, 2016 provides that 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. Therefore, after institution of the suit for partition under section 116 of the Revenue Code, only the provisions of the Code of Civil Procedure, 1908 would apply. Thus the only remedy available against the Preliminary decree is to file an appeal under section 207 of the Revenue Code, 2006 read with Third Schedule (for sections 206, 207 and 208) of the Revenue Code, 2006, and if the petitioner fails to file an appeal against a preliminary decree he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

14. Learned Standing Counsel has submitted that under Section 97 of the C.P.C., it has been provided that where any party aggrieved by a preliminary decree

passed after the commencement of this Code does not Appeal from such decree, he shall be precluded from disputing its correctness in any Appeal which may be preferred from the final decree. It has been argued by the counsel for the State Respondents Sri Hemant Kumar Pandey that unless the litigant challenges the preliminary decree in a First Appeal, he cannot challenge the correctness of such Decree in any Appeal which he may prefer later on from the final decree.

15. The failure to appeal against a preliminary decree is a bar to raising any objection to it in the appeal against a final decree. The Hon'ble Supreme Court in the case of *Chitturi Subbanna vs Kudapa Subbanna* 1965 SCR (2) 661 provides that, the object of the section is that questions which have been urged by the parties and decided by the Court at the stage of the preliminary decree will not be open for re-agitation at the stage of preparation of the final decree. It would be considered as finally decided if no appeal is preferred against it.

16. It has been argued further by Sri Hemant Kumar Pandey that in the case of *Venkata Reddy v. Pethi Reddy* AIR 1963 SC 992, the Supreme Court laid down the following principle on this aspect of the matter:--

"A decision is said to be final when, so far as the Court rendering it is concerned, it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as res judicata between the parties if it is not sought to be modified or reversed by preferring an appeal or revision or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees -- a preliminary decree and a final decree--the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages, and though the suits in such cases can be regarded as fully and completely decided only after a final decree is made, the decision of the Court arrived at the earlier stage also has a finality attached to it. Section 97, Code of Civil Procedure clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the Court passing that decree."

17. It has been pointed out by Sri Hemant Pandey that the Supreme Court in *Mool Chandra and others versus Deputy Director of Consolidation and others* (1995) 5 SCC 631 was considering the effect of a notification under section 4 of the U.P. Consolidation of Holdings act as provided under section 5(2) of the said Act, on a Preliminary decree and whether it would also be abated even if it was not put under challenge in Appeal in the suit which stood abated under section 5(2). It was contended by the Respondents that a suit for partition or for that matter any other suit, for example, a suit for redemption or foreclosure, based on the mortgage, in which two decrees, viz, a preliminary decree and a final decree are passed, has to be distinguished from an ordinary suit in

which only one decree is passed, and said that in the case before it if a preliminary decree for partition had already been passed, the notification under Section 4 read with Section 52 of the Act would have the effect of abating the proceedings for preparation of final decree which were at the relevant time pending in the Court but the preliminary decree would not be abated as it had attained finality. It was contended that since the rights of the parties had already been determined by a preliminary decree for partition, the consolidation authorities as well as the High Court was justified in relying upon that decree and in granting a share to the respondents in the plots in question. The Supreme Court considered Sections 4 and section 5 (2) of the Consolidation of Holdings Act and the definition of decree given in Section 2 (2) of Code of Civil Procedure and the Explanation appended to it. It further observed while referring to Order 20 Rule 18, and Order 26 Rules 13 and 14, in paragraphs 12 to 18, that under Order 20 Rule 18 which provides for a decree in a suit for partition of property or separate possession of a share therein, the decree shall declare the rights of several parties interested in the property and shall direct the partition or separation of the said shares to be made by the officer deputed in this behalf, and if such a decree relates to movable property whose the partition or separation cannot be conveniently made without further enquiry, pass a preliminary decree declaring the rights of the several parties interested in the property, and give such further directions as may be required. Sub rule (2) of Rule 18 would indicate that the Court has to pass a preliminary decree where it cannot immediately partition the property in respect of which the suit was filed. Under Order 26 Rules 13 and 14, it is provided that where a preliminary decree for partition has been passed the Court may issue a commission to such person as it thinks fit, to make partition or separation according to the rights as declared in such decree. The commissioner shall after such enquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties and may award sums to be paid for the purpose of equalising the value of the shares. The commissioner shall then prepare a signed report or the Commissioner may prepare even separate reports, appointing the share of each party and distinguishing each share by metes and bounds. The Court after hearing any objections which the parties may make to the report or reports, shall confirm vary or set aside the same. Whether the Court confirms or varies the report or reports, it shall pass a decree in accordance with the same as confirmed or varied; but where the court sets aside the report or reports, it shall either issue a new commission or make such order as it thinks fit. The court observed in paragraphs 15, 16 and 17 thus:-

15. "the definition of decree contained in section 2(2) read with provisions contained in Order 20 Rule 18 (2) as also Order 26 Rule 14 of the Code indicates that a preliminary decree has first to be passed in a partition suit and thereafter a final decree is passed for actual separation of shares in accordance with the proceedings held under Order 26. There are, thus, two stages in a suit for partition. The first stage is reached when The preliminary decree is passed under which the rights of parties in the property in question are determined and declared. The second stage is the stage when a final decree is passed which concludes the proceedings before the Court and the suit is

stated to have come to an end for all practical purposes. (emphasis supplied)

16. "Unless otherwise expressly provided, suits filed in revenue court under U.P.Z.A. & L.R. Act are regulated by provisions of the Code of Civil Procedure as provided by Section 341 of that Act."

17. "A suit for partition of a holding is filed under Section 176 of the U.P. Z.A. & L.R. Act; and Section 178 provides for the modes of division and Sections 179, 180, 181 and 182 (B) are other relevant sections. Under Rule 157, before making a decision the Court shall determine separately the shares of the plaintiff and each of the other co-tenure holders, and record which, if any, of the co-tenure holders wish to remain joint, then make a valuation of the holding or holdings in accordance with the rent rate applicable to each plot in the holding and, determine separately the value of the share of the plaintiff and each of the co-tenure holder."

The Supreme Court observed in paragraph 19 as follows:

19. "From a perusal of the above provisions it would appear that in a suit for partition, the revenue court also, like the civil court, has first to pass a preliminary decree determining and declaring the rights of the parties and their shares, if any, in the holding. Thereafter, proceedings for preparation of the final decree are initiated under Rules 158 to 164, which lay down the various modes in which a decree for partition can be implemented and the respective shares of the tenure holders separated, in accordance with the rights and shares already determined under the preliminary decree."

18. It has been argued by Sri Hemant Kumar Pandey that in *Mool Chandra* (supra), the question therefore was, *"whether a notification under Section 4 of the Consolidation of Holdings Act would abate the entire suit or will it not affect the proceedings up to the stage of and including, preliminary decree, if the notification was issued after the passing of the preliminary decree?"*

18A.The Supreme Court observed in Mool Chandra Yadav (supra) paragraph 29 thus:-

29. "there is, thus, a distinction between a case in which an Appeal is filed against a preliminary decree and a case in which a preliminary decree is not Appealed against and its correctness is not assailed. If, therefore, a notification under Section 4 of the Act is issued in a case where an Appeal against the preliminary decree was not pending, the latter, viz., the preliminary decree, will remain unaffected and will not abate but if the preliminary decree has been assailed in Appeal, and the Appeal is pending on the date of notification, it will have the effect of abating the entire suit/proceedings including preliminary decree passed therein. On the contrary, if an Appeal is filed against the final decree without there being any Appeal against the preliminary decree, and the preliminary decree becomes unassailable on account of section 97 of the C.P.C., the notification under section 4 would abate the proceedings relating to the final decree, without in any way touching, impairing or affecting the preliminary decree. The reason, to repeat, is obvious. Once a preliminary decree is passed, the proceedings so far as the declaration of rights or interest in the land are concerned, come to an end. Those rights are to be worked out by the final decree. In a case, therefore where a preliminary decree has already been passed and only the proceedings relating to preparation of final decree are pending in any court, either at

the original stage or at the appellate or revisional stage, it cannot be said that the proceedings relating to "declaration or determination of rights in the land" within the meaning of Section 5(2) of the Act are pending."

19. The Supreme Court observed that a preliminary decree is an Appealable decree and under Section 97 of the Code, if an Appeal is not filed against a preliminary decree, its correctness it is not challenged, it becomes final and the party aggrieved there by will not be permitted to challenge its correctness in an Appeal against the final decree.

20. The Supreme Court relied upon the observations made in *Venkat Reddy versus Pethi Reddy,* AIR 1963 Supreme Court 992; where it was held that the impact of section 97 is that the preliminary decree, so far as the matter is covered by it are concerned, is regarded as embodied in the final decision of the Court passing the decree. It was observed in the said case of Venkat Reddy thus: - *"A preliminary decree passed, whether it is in the mortgage Suit or a partition suit, is not a tentative degree but must, in so far as the matters dealt with by it are concerned, be recorded as imparting - - - the final decision of the court passing that decree.*

21. The Supreme Court relied upon observations made in Gyarsi Bai versus Dhansukh Lal, AIR 1965 Supreme Court 1055 wherein it was observed :- *"it is true that a preliminary decree is final in respect of the matters to be decided before it is made..... It is undisputable that in a mortgage suit there will be two decrees namely, preliminary decree and final decree, and that ordinarily the preliminary decree settles the rights of the parties and the final decree works out those rights."*

22. *Recently in the case of Bhivchandra Shankar More vs. Balu Gangaram More and Ors,* (2019) 6 SCC 387, the Hon'ble Supreme Court observed that where any party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree. The object is that the questions decided by the Court at the stage of passing preliminary decree cannot be challenged at the time of final decree. If no appeal had been preferred against the preliminary decree, the suit filed by the Respondents-plaintiffs being a suit for partition, the Appellant would be deprived of the opportunity in challenging the decree on merits.

23. With regard to the arguments raised by the learned counsel for the petitioner that the respondent had remedy of filing a Revision before this court or the Board of Revenue under Section 210 of the Code of 2006, learned counsel for the State Respondents has submitted that the jurisdiction in Revision is very limited. The Supreme Court in *Hari Shankar vs Rao Girdhari Lal Chowdhury,* 1963 AIR SC 698, emphasized the basic distinction between an Appeal and a Revision:

"The distinction between an appeal and a revision is a real one. A right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way as, we find, has been done in second appeals arising under the Code of Civil Procedure. The power to hear a revision is generally given to a superior Court so that it may satisfy itself that a particular case has been decided according to law. Under section 115 of the

Code of Civil Procedure the High Court's powers are limited to see whether in a case decided, there has been an assumption of jurisdiction where none existed, or a refusal of jurisdiction where it did, or there has been material irregularity or illegality in the exercise of that jurisdiction. The right there is confined to jurisdiction and jurisdiction alone. In other acts, the power is not so limited, and the High Court is enabled to call for the record of a case to satisfy itself that the decision therein is according to law and to pass such orders in relation to the case, as it thinks fit."

24. The same principle was enunciated in a subsequent decision in *Shiv Shakti Cooperative Housing Society vs. M/s Swaraj Developers and Others*, reported at 2003 (6) SCC 659 where it was held as follows:

"An appeal is continuation of the proceedings; in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to statutory limitations prescribed. But in the case of revision, whatever powers the revisional authority may or may not have, it has no power to review the evidence, unless the statute expressly confers on it that power."

25. It has also been argued by the learned counsel appearing for the State Respondents that under Rule 109 of the Rules framed under the Revenue Code, it has been provided that a Suit under Section 116 of the U.P. Revenue Code *shall* be registered as a regular suit and it shall proceed in accordance with the provisions of the Civil Procedure Code. It has hence been argued that it is settled law that once the word "shall" is used, it is mandatory in nature and therefore all the provisions of the C.P.C. relevant for deciding the partition suit would apply in matters filed under the Revenue Code under

26. Having heard the learned counsel for the parties, this Court shall consider the statutory provisions first. Under the U.P. Revenue Code 2006 Section 4 sub-section 26 of the Definitions clause says, "decree" shall have the same meaning as assigned to it in the Code of Civil Procedure, 1908.

Under the Code of Civil Procedure, 1908 Definitions clause, under sub-section 2 states, that "decree" *''means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and maybe either preliminary or final.'* It shall be deemed to include the rejection of plaint, and the determination of any question within section 144, but shall not include: a) any adjudication from which an Appeal lies as an Appeal from an order, or any order of dismissal for default. In the Explanation attached to sub-section 2, it has been mentioned that *"a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."*

27. Section 96 of the C.P.C. refers to an Appeal from an original degree. It provides thus:- "1) *Save as otherwise expressly provided* in the body of this Code or, by any other law for the time being in force, an Appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear Appeals from the decisions of such Court;

2) an Appeal may lie from an original decree passed ex parte; 3) no Appeal shall lie from the decree passed by the court with the consent of the parties; 4) no Appeal shall lie except on a question of law from a decree in any suit of the nature cognizable by the Courts of Small Causes, when the amount of value of the subject matter of the original suit does not exceed Rs.10,000.

28. It is apparent from a bare perusal of the language of Section 96 that it provides for *an Appeal against any decree unless it is otherwise provided for under the C.P.C., or under any other law for the time being in force.* This Court shall also consider as to whether the Revenue Code 2006 can be considered to be special law governing the right to prefer an Appeal?

29. Section 97 of the CPC provides:-

"Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."

30. The relevant provisions of the U.P. Revenue Code are now being considered. The relevant extract of Section 116 and 117 of the Code of 2006 is being quoted hereinbelow:-

*"**Section 116.** Suit for division of holding - (1) A Bhumidhar may apply 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 a division is not possible, the trees, wells and other improvements aforesaid, and valuation thereof, shall be divided and adjusted in the manner prescribed.

4) to every suit under this section, the gram Panchayat concerned shall be made a party.

***Section 117 Duty of the court in suits for division of holdings - (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.

(c) a division of holding referred to in section 116 shall not affect the joint liability of the tenure holders thereof in respect of the land revenue payable before the date of the final decree."

31. The supplemental procedural provisions to Section 116 of the Code are given under Rule 109 of the Rules. Rule 109 is a part of a group of rules relating to division of holdings starting from rule 107 on words and ending with rule 109. The relevant rules are being quoted here in below: -

*"**107. Suit for division of holding** (section 116)- Every plaint in a suit for division of holding (including trees, wells and other improvements) shall contain the following particulars - (1) name, parentage and address of the plaintiff. (2) name parentage and address of other co-sharers of the holding. (3) share claimed by the plaintiff. (4)Share of other co tenure holders ;(5)Detailed particulars of the holding including plot numbers, area and land revenue.; (6)whether the plaintiff is a recorded or unrecorded tenure holder./ The plaint shall be accompanied by a certified copy of the Khatauni and other documents relied upon by the plaintiff.*

*"**108. Suit for division of several holdings** (section 116) - where the suit relates to the division of more than one holding, the particulars as 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 the written statements. The suit shall then be Decided according to the provisions of the Code of Civil Procedure 1908.(2) before making a decision the court shall -*

A) determine separately the shares 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 eachLot in the holding.

(3) if the suit is to be decreed, the court shall pass a preliminary decree declaring the share of the plaintiff.

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

(5) the Lekhpaal 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 is 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 excess of his share;

(f) if the plot or any part thereof is of commercial value or is adjacent to the road, Abaadi 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 the 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 Lekhpaal the objection shall be invited thereon and thereafter an 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 Lekhpaal.

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

(8) It is at the stage of final decree, the court shall -

(a) separate the share of the plaintiff from that of the defendants 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 a period of six months and if the suit is not decided within such period, the reason shall be recorded."

32. Section 207 of the Code of 2006 provides for a first appeal by any party aggrieved by a final order or decree passed in any suit, application or proceeding and such first appeal can also be against an order of the nature specified in Section 47 of the Code of Civil Procedure 1908 relating to execution proceedings, or, in Section 104 of the said Code or in Order 43 Rule 1, of the First Schedule to the said Code.

33. Section 209 specifies the orders which are not appealable under sections 207 and 208 of the Revenue Code.

34. The Second Schedule relatable to section 206 subsection (2) enumerates the matters excluded from the jurisdiction of the civil court and in entry 15 and 16 mention is made of any claim regarding possession over any land and any claim to establish the rights of a co tenure holder in respect of any land, taking such claims out of the jurisdiction Of the civil court.

35. The Third Schedule relatable to Sections 206, 207 and 208 mentions under Column 1 section 116, and corresponding entries to the said section mention the court of the Sub Divisional Officer as having original jurisdiction, and the First Appeal lying with the Commissioner, and Second Appeal lying with the Board of revenue.

36. It has been submitted by the learned counsel for the petitioner that the Revenue Code is a special enactment and has a *non-obstante* clause and the Civil Procedure Code does not contain such a non obstante clause. The primacy of the statute would have to be determined on the basis of the intention of the legislature. While the normal principle is that a later enactment will prevail in cases where the latter enactment has a non obstante clause, that is, giving it an overriding effect and secondly, if it is also held to be a special enactment with regard to the matter in issue.

37. A Constitution Bench of the Supreme Court in *Pankajakshi (dead through legal representatives) and others versus Chandrika and others*, (2016) 6 SCC 157, was considering the reference to a Larger Bench made by 2 three Judges Benches on the question whether section 23 of the Travancore-Cochin High Court Act would remain to be in the nature of a special provision while section 98 (2)of the C.P.C. would be in the nature of a general law? Whether as between the two, the former would apply in preference to the latter?

38. The Supreme Court considered firstly section 4 of the Code of Civil Procedure which is the "savings clause' and which says that *"in the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force, or any special jurisdiction or power conferred or any special form of*

procedure prescribed by or under any other law for the time being in force."

39. The Court also considered Section 96 (1) of the C.P.C. which provide that "Save as otherwise expressly provided in the body of this Code, or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court. "The Court also considered the provisions of the Travancore- Cochin High Court Act 1125, and the Kerala High Court Act 1958, and Section 9 thereof by which the provisions of the Travancore-Cochin High Court Act were repealed in so far as the said Act related to matters provided in the Kerala High Court Act.

40. The court observed that in the judgement rendered by it in *Custodian of Evacuee Property, Bangalore versus Khan Saheb Abdul Shukoor* 1961 (3) SCR 855, it was held that where two Acts dealt with Evacuee property, the fact that the scheme under the second Act was different from the first, would make no difference as the subject matter that was dealt with was in substance the same. Applying the said law the Court observed that firstly the subject matter of the two Statutes must essentially be the same and/or that the main object and purpose of the Statutes should be substantially similar for the later law to be referred to as the "corresponding" statute.

41. The Supreme Court observed that the main object and purpose of the Travancore-Cochin Act is to lay down the jurisdiction and powers of the High Court that was established in the said State. On the other hand, the subject matter of the Code of Civil Procedure is to lay down procedure in all civil matters and no others. Also the said Code would apply to all courts which deal with civil matters, subject to exceptions contained therein, and not only the High Courts. The High Court exercises not only civil jurisdiction but decided criminal and other matters as well. It was therefore difficult to say that the Code of Civil Procedure corresponds to the Travancore-Cochin High Court Act.

42. The Supreme Court observed that the scheme of section 4(1) of the C.P.C., as its marginal note provides, is to save any special or local Law from the applicability of the Civil Procedure Code. The said section, therefore states that whenever there is a special, local or other law which deals with any matter specified in the Code, those laws will continue to have full force and effect notwithstanding that they deal with the same matter as is contained in the Code of Civil Procedure. From this, however an exception is carved out, and that exception is that there should not be any "specific provision" to the contrary contained in the Code itself.

43. The Court then proceeded to make an enquiry as to the meaning of the expression "specific provision" to the contrary. In *Maru Ram versus Union of India* 1981(1) SCC 107, a Constitution Bench dealt with pari materia provision to section 41 of the Code of Civil Procedure, contained in section 5 of the Code of Criminal Procedure. The Supreme Court relied upon decisions of the Lahore High Court and the Allahabad High Court to explain as to what is meant by "specific provision". It was observed that the dictionary meaning of specific is "precise', "Definite', "explicit' or "exactly named' or "indicated in particular'. A specific provision would require something which

is plain, certain and intelligible, and not merely a matter of inference or implication to be drawn from the statute generally.

44. The Constitution Bench in Maru Ram (supra) had observed in Para 38 as follows:-*"....Sometimes what is specific may be special but yet they are distinct in semantics, it was held that the Criminal Procedure Code is a general code and the remission rules are special laws but Section 433 A is a specific, explicit, definite provision, dealing with a particular situation or narrow class of cases, as distinguished from the general class of cases covered by Section 432 Cr.P.C. Section 433 A takes out of a mass of imprisonment cases a specific class of life imprisonment cases and subjects it explicitly to a particular type of treatment. It follows that section 433 A applies in preference to any special or local law because Section 5 expressly declared that specific provision, if any to the contrary will prevail over any special or local law. We have said enough to make the point that "specific "....is specific enough and even though special to specific is near, a light and thin partition do their bounds divide, the two are different. Section 433 A enacted an exclusion of section 5..."*

45. The Constitution Bench in Pankajakshi (supra) observed in paragraph 19 ...*"this specific provision must mean that the particular provision in the Code of Civil Procedure must clearly indicate in itself and not merely by implication, that the special law in question is to be affected... It is important to know that one of the meanings of the word specific is that it is distinct from something that is general. In Maru Ram (supra) Section 433 A of the Code of Criminal procedure 1973 was challenged as being against various provisions of the Constitution. That challenge was repelled by this Court. Section 433 A begins with a non obstante clause specifically dealing with a particular situation, that is, where a sentence of imprisonment for life is imposed in certain circumstances, then notwithstanding the power of remission contained in section 433, such person is not to be released from prison unless he has served at least fourteen years of imprisonment."*

46. In applying Section 5 of the Code of Criminal Procedure 1973 to section 433A, great emphasis was placed on the "non obstante clause' contained in section 433A, it was ultimately held that section 433A takes out of a mass of imprisonment cases a specific type of case, namely, life imprisonment cases and subjects such cases explicitly to a particularized treatment.

47. The Supreme Court then observed that the expression specific provision as used in Section 4(1) of the Code of Civil Procedure calls out an exception to the special, local or other laws which deal with the same subject matter as the Code of Civil Procedure but get overridden by the Code of Civil Procedure. The court observed that it had to discover whether the various provisions of the Code of Civil Procedure can be said to be specific provisions to the contrary, for the purpose of Section 4(1) of the Code of Civil Procedure. The court also considered the language of Section 97 of the Code of Civil Procedure (Amendment Act) 1976, and observed that section 97 (1) of the Amendment Act only provides that where a State Legislature makes an amendment in the Code of Civil Procedure, which amendment will apply only within the four corners of the State, such amendment shall

stand repealed if it is inconsistent with the provisions of the principal Act as amended by the Parliament enactment contained in 1976 amendment to the Code of Civil Procedure.

48. The Supreme Court Considered the decision rendered by it in *L.I.C. versus DJ Bahadur and others, 1981 (1) SCC 315*, where the working test was laid down by the court to determine which statute is general and which special in paragraph 52 thus:-

"In determining whether a statute is a special or a general one, focus must be on the principle subject matter plus the particular perspective. For certain purposes, an act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law. In law we have a Cosmos of relativity, not absolutes - so too in life. The Industrial Disputes Act is a special statute devoted wholly to investigation and settlement of industrial disputes which provides only for the nature of Industrial disputes coming within its ambit. It creates an infrastructure for investigation into, solution of, and adjudication upon industrial disputes. It also provides the necessary machinery for enforcement of awards and settlements. From Alpha to Omega the Industrial Disputes Act has one special mission - the resolution of industrial disputes through specialized agencies according to specialized procedures and with special reference to the weaker categories of employees coming within the definition of workmen. Therefore, with reference to industrial disputes between employers and workmen, Industrial Disputes Act is a special statute and the LIC Act does not speak at all with specific reference to workmen. On the other hand, its powers relate to the general aspects of nationalisation of management when private businesses are nationalized and a plurality of problems which, incidentally, included transfer of service of existing employees of insurers. The workmen qua workmen and industrial disputes between workmen and the employer as such, are beyond the ambit of and have no specific or special place in the scheme of the L.I.C. Act. And whenever there was a dispute between workmen and management, the Industrial Disputes Act mechanism was resorted to."

49. The Supreme Court further observed that there is no specific provision in the C.P.C. whereas a special procedure is prescribed in the Travancore-Cochin High Court Act therefore, the Section 23 of the Travancore-High Court

Act would remain unaffected by any provision to the contrary contained in section 98 sub-clause (2) of the Civil Procedure Code.

50. Now, we shall consider whether the Code of 2006 would be considered as a special act with a specific provision therein in the context of Procedure for a Partition Suit. If we consider the Long Title of UP Revenue Code 2006 which says that it is an act to consolidate and amend the law relating to land tenures and land revenue in the State of U.P., and to provide for matters connected therewith and incidental thereto, it is evident that the Act is a special law covering all land tenures and dealing with land revenue and matters connected therewith and incidental thereto.

51. The Statement of Objects and Reasons of the UP Revenue Code 2006,

says that there were as many as 39 Acts relating to revenue law in force in the State of Uttar Pradesh. Out of these Acts the most important were the U.P.Z.A. & L.R. Act 1950 and the U.P. Land Revenue Act 1901. Some of the enactments of the British period had become obsolete. Some of the enactments were inconsistent with each other. On account of different provisions in different enactments relating to revenue law, the revenue litigations had considerably increased. Consequently revenue cases were pending for disposal for a very long period. Under these circumstances, *it had become necessary to consolidate with modifications, all the relevant provisions of all these enactments into a single enactment. "It had therefore been decided to provide for consolidating and amending the laws relating to land tenures and land revenue in the State and for matters connected therewith and incidental thereto."*

52. The Civil Procedure Code 1908 on the other hand had been enacted to provide the procedural provisions for dealing with claims, for declaration of rights, for execution of decrees of Courts deciding all kinds of disputes of civil nature. Thus the Code of Civil Procedure 1908 may be considered to be an earlier general law relating to procedural aspects not giving any substantive rights as such to any party except the one that in all claims of civil nature to be decided by Civil courts the procedure prescribed therein shall be followed.

53. The Supreme Court in *M/s Atmaram properties Private Limited versus Oriental insurance Company Private Limited* 2018 (2) SCC 27, was considering whether the amendment to The NDMC Act of 1994 which is a later enactment would prevail over the Delhi Rent Control Act 1958 in so far as property tax has been made recoverable as part of rent from the tenant under the NDMC Act. The Court considered the question whether non-payment of property tax recoverable from the tenant as rent can be a ground for eviction from the premises it held that although the NDMC Act is a later Act, it is still a general Act in so far as the relationship between the landlord and the tenant is concerned. The Delhi Rent Control Act 1958 although an earlier Act in point of time gives a protection to the tenant from eviction which could not be said to have been overridden by the landlords entitlement to recover under Section 121 of the NDMC Act the enhanced amount of house tax from the tenant notwithstanding the contract of tenancy and the provisions of subsection (2) of Section 7 and Section 4 of the Delhi Rent Control Act 1958.

54. The Supreme Court considered the observations made by it in the case of *Gobind Sugar Mills Ltd versus state of Bihar* (1999) 7 SCC 76 where in paragraph 10 it was observed that *"while determining the question whether a statute is a general or special one, focus must be on the principle subject matter coupled with a particular perspective with reference to the intendment of the Act"*. The court also considered judgement rendered in *Commercial Tax Officer versus Binani Cements Ltd (2014) 8 SCC 319*, where it was held that when a general law and a special law dealing with the same aspect dealt with by the general law are in question, the general law to the extent dealt with by the special law is impliedly repealed. The Supreme Court held that the object of the Rent Act is to provide protection to tenants who under common

law, including the Transfer of Property Act, would be evicted from the premises let out to them at any time by the landlord on the termination of the tenancy. It restricts The right of the landlord to evict the tenant at their will. It is a special law in relation to Landlord and tenant issue. Therefore, the Rent Act has to prevail in so far as the landlord and tenant issue is concerned. The NDMC Act is not a special enactment in so far as the landlord tenant issue is concerned and it contains Section 411 which provides that other laws are not to be disregarded.

55. Now this Court would deal with the argument raised by learned counsel for the petitioner regarding Section 209(f) of the Code of 2006, starting with a *non-obstante* clause. A *non-obstante* clause is generally appended to a section with a view to give the connecting part of the section, in case of conflict, an overriding effect over the other provisions in the same or any other Act mentioned in the *non-obstante* clause. It is equivalent to saying that in spite of the provisions of the Act mentioned in the *non-obstante* clause, the provision following it will have its full operation or the provision enumerated in the *non-obstante* clause will not be an impediment for the operation of the enactment or the provision in which the *non-obstante* clause occurs.

56. The Supreme Court in *State of Bihar and others versus Bihar Raj M.S.E.S.K.K. Maha Sangh and others* (2005) 9 SCC 129 relied upon the observations of Justice GP Singh in Principles of Statutory Interpretation (ninth edition, Chapter 5 synopsis 4) in paragraph 45, 46 and 47 of the judgement. In paragraph 47 the Supreme Court observed normally the use of the phrase by the legislature in a statutory provision like *"notwithstanding anything to the contrary contained in this Act"* is equivalent to saying that the other provisions in the Act shall be no impediment to the enforcement of the Section. The use of "non obstante clause' is another way of saying that the provision in which the *non-obstante* clause occurs usually would prevail over other provisions in the Act.

57. In ordinary course the *non-obstante* clause in a statute gives overriding effect to the provisions covered by the *non-obstante* clause over the other provisions in theStatute to which it applies. A *non-obstante* clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or in some other enactment, that is to say, to avoid the operation and effect of all contrary provisions.

58. Justice G.P. Singh in his Principles of Statutory Interpretation (in Chapter 5 synopsis 4) has discussed the effect of a *non-obstante* clause. A clause beginning with "notwithstanding" anything contained in this Act "or in some Particular provision in the Act, or in some particular Act or in any law for the time being in force, is sometimes appended to a section in the beginning, with a view to give the following part of the section, in case of a conflict, an overriding effect over the provision or Act mentioned in the non obstante clause. The phrase *"notwithstanding anything"* is used in contra distinction to the phrase *"subject to"*, the latter conveying the idea of a provision being subservient to another provision or other provisions to which it is made subject to. If the *non-obstante* clause refers to any particular provision which it intends to

override then it would take effect no matter, the provision to which it refers enacted something to the contrary.

59. The Supreme Court has held in *Union of India and others versus Ajit Singh* (2013) 4 SCC 186, that the *non-obstante* clause contained in various provisions of the Juvenile Justice (Care and Protection of Children) Act 2000, particularly Sections 6, 15, 16, 18, 19 and 20, among others unambiguously render the Legislative intent behind the Act, which is that the same, being a special law, would have overriding effect on any other statute for the time being in force.

60. The Supreme Court went on to observe in the case of *Iridium India Telecom Ltd versus Motorola Inc.* (2005) 2 SCC 145, that the *non-obstante* clause in that section was indicative of Parliament's intention to prevent the application of the C.P.C. in respect of civil proceedings on the original side of the High Courts, which are to be governed by the Rules made by the High Court. These rules which the High Court makes will prevail over the rules contained in the C.P.C.

61. The Supreme Court while interpreting Sub-sections (1) and (2) of Section 59 of the Delhi Excise Act 2009, in the case of State *(NCT Delhi) vs. Narender* (2014) 13 SCC 100, had observed that section 58 of the Excise Act provides that *"notwithstanding anything contained in any other law"*, where anything liable for confiscation under Section 58 is seized or detained, the officer seizing and detaining such thing shall produce the same before the Deputy Commissioner who, if satisfied that the offence under the Act has been committed, may order confiscation of such property. Section 61 of the Act further provides that no court shall, *"notwithstanding anything to the contrary contained in any other law for the time being in force, will have jurisdiction to make any order with regard to such property seized or detained under the Act."* The Supreme Court held that the legislature has used a *non-obstante* clause in Section 59 and 61 of the Act as a legislative device to give effect to the enacting part of the sections in case of conflict. Therefore, neither the magistrate nor the High Court have the power under section 451, 452 and 457 of the Cr.P.C. to pass an order dealing with the interim custody of a vehicle, which has been seized in connection with an offence under the Excise Act or on payment of security, order its release.

62. Justice G.P. Singh in Principles of Statutory Interpretation has further observed that sometimes one finds two or more enactments operating in the same field and each containing a *non-obstante* clause stating that its provisions will have effect *"notwithstanding anything"* inconsistent having been contained in any other law for the time being in force. The conflict in such cases is resolved on the consideration of purpose and policy underlying the enactment and the language used in them. Another test that is applied is that the latter enactment normally prevails over the earlier one.

63. It is also relevant to consider as to whether any of the two enactments can be described as a special one? In that case the special one may prevail over the more general one, notwithstanding that the general one is later in time. We have found from a discussion of the subject matter of the Code of 2006 that it is both a later law and a special law in so far as it deals with revenue bearing lands.

64. We will now consider whether a preliminary decree under Rule 109 of the Rules of 2016 can be considered to be a decree of an interim nature?

65. A preliminary decree under Rule 109(3) declares the rights or shares of parties to the partition. Once the shares have been declared and a further inquiry still remains to be done for actually partitioning the property and placing the parties in separate possession of divided property then such inquiry shall be held, and pursuant to the result of further inquiry a final decree shall be passed.

66. In a suit for partition of property or separate possession of a share therein, Order XX Rule 18 of the CPC comtemplates a decree to be passed in the terms of Sub Rule 2. The relevant extract of which is quoted as under :-

"Order XX Rule 18.

Decree in suit for partition of property or separate possession of a share therein. - Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,

.....

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties, interested in the property and giving such further directions as may be required."

The partition suit is decided at two stages i.e. at first stage preliminary decree is passed and at second stage, a final decree. Passing of the preliminary decree does not decide the suit finally. Preparation of final decree is continuation of the same suit.

67. In *Shankar Balwant Lokhande versus Chandrakant Shankar Lokhande,* (1995) 3 SCC 413; while considering the provisions of Order 20 Rule 18, Code of Civil Procedure, and also the period prescribed for execution of a decree under the Limitation Act, it was observed as under: -

4. "Thus it could be seen that where the decree relates to any immovable property and the partition or separation cannot be conveniently made without further enquiry, then the court is required to pass a preliminary decree declaring the rights of several parties interested in the property. The court is also empowered to give such further directions as may be required in this behalf. Preliminary decree in a partition action, is a step in the suit which continues until the final decree is passed. In a suit for partition by coparcener or co-sharer, the court should not give a decree only for the plaintiffs share, it should consider shares of all the heirs after making them parties and then to pass a preliminary decree. The words "declaring the rights of several parties interested in the property" in Sub Rule 2 would indicate that the shares of the parties, other than the plaintiff(s), have to be taken into account while passing a preliminary decree. Therefore, preliminary decree for partition is only a declaration of the rights of the parties and the shares they have in the joint family or coparcenary property, which is the subject matter of the suit. The final decree should specify the division by metes and bounds and it needs to be endorsed on stamped paper."

(emphasis supplied)

68. A preliminary decree merely declares the rights and shares of the parties and leaves room for some further inquiry to be held and conducted pursuant to the

directions made in the preliminary decree which inquiry having been conducted and the rights of the parties finally determined, a decree incorporating such determination needs to be drawn up which is the final decree.

69. A preliminary decree first determines the rights and interests of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum i.e. after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree re-determining the rights and interests of the parties having regard to the changed situation.

70. In *Phoolchand versus Gopal Lal*, AIR 1967 Supreme Court 1470; the Supreme Court observed as follows:-

"We are of the opinion that there is nothing in the Civil Procedure Code which prohibits the passing of more than one preliminary decree, if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree, some parties died and the shares of other parties are thereby augmented. We have already said that it is not disputed that in partition suits the Courts can do so even after preliminary decree is passed. It would in our opinion be convenient to the Court and advantageous to the parties, Specially in partition suits, to have the disputed rights finally settled and specification of shares in the preliminary decree varied before a final decree is prepared. If this is done there is a clear determination of the rights of the parties to the suit on the questions in dispute and we see no difficulty in holding that in such cases there is a decree deciding these disputed rights; If so, there is no reason why a second preliminary decree correcting the shares in the partition suit can be passed by the Court. So far as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the Court can and should do so; and if there is a dispute in that behalf, the order of the Court deciding the dispute and making the variation in shares specified in the preliminary decree already passed, is a decree in itself , which would be liable to Appeal..... There is no prohibition in the Civil Procedure Code against passing a second preliminary decree in such circumstances and we do not see why we should rule out a second preliminary decree in such circumstances only on the ground that the Civil Procedure Code does not contemplate such a possibility. In any case, if two views are possible - and obviously this is so because the High Courts have differed on the question - we would prefer the view taken by those High Courts which held that a second preliminary decree can be passed, particularly in partition suits where the parties have died after preliminary decree and shares specified in the preliminary decree have to be adjusted. We see no reason why in such a case if there is a dispute, it should not be decided by the Court which passed the preliminary decree. For it must not be forgotten that the suit is not over till the final decree is passed and

the court has jurisdiction to decide all disputes which may arise after preliminary decree particularly in a partition suit due to deaths of some of the parties..... We therefore hold that in the circumstances of this case It was open to the court to draw up a fresh preliminary decree as two of the parties had died after the preliminary decree and before the final decree was passed." (emphasis supplied)

71. The word a "preliminary decree" has been considered in several judgements of this Court and of the Supreme Court. "Preliminary Decree" is one which declares the rights and liabilities of the parties, leaving the actual result to be worked out in further proceedings. Then, as a result of the further enquiry that is conducted pursuant to the preliminary decree, the rights of parties are fully determined and a decree is passed in accordance with such determination which is final. Both the decrees are in the same suit. "Final decree" may be said to become final: a) when the time for Appeal has expired without any Appeal being filed against the preliminary decree or the matter has been decided by the highest court, b) when as regards the Court passing the decree, the same stands completely disposed of. It is in the latter sense that the word decree is used in section 2(2) of the C.P.C. *(Shankar Balwant Lokhande versus Chandrakant Shankar Lokhande; 1995 3 SCC 413).*

72. The Supreme Court in the case of Bikoba Deora Gaikwad versus Hirabai Maruthi Rao Ghorghare (2008) 8 SCC 198, has observed thus:- *"A decree may denote final adjudication between the parties and against which an Appeal lies, but only when a suit is completely disposed of, thereby a final decree would come into being.* A decree may be partly preliminary and partly final..... *A decree whether preliminary or final is binding on the parties but the same does not mean that all decrees would be final decrees. Section 2 sub-clause 2, clearly shows as to the nature of the decrees that a court may pass. For the purposes of considering the nature of the decree, one has to look to the terms thereof rather than speculate upon the court''s intentions." (emphasis supplied)*

73. In *S. Satnam Singh versus Surinder Kaur* **(2009) 2 SCC 562**, the Supreme Court laid down certain tests to determine the question as to whether an order passed by a Court is a decree or not. To be considered a decree, the order must satisfy the following tests:- 1) there must be an adjudication, 2) such adjudication must have been given in a suit; 3) it must have determined the rights of the parties with regard to all or any of the matters in dispute, 4) such determination must be of a conclusive nature, 5) There must be a formal expression of such decree.

74. Section 209 of the U.P. Revenue Code provides that appeals may not be filed against merely procedural or interlocutory orders which are steps taken towards the final adjudication and for assisting the parties in prosecution of the case in the pending proceedings. The legislature could not have intended that the parties would be harassed with endless expenses and delay by appeals from such procedural orders. No doubt the U.P. Revenue Code does refer in the language of Rule 109 that whenever a partition suit shall be filed and the plaint is found in order it shall be registered as a regular suit and further proceedings shall be taken in accordance with the procedure prescribed under the Civil Procedure Code, but would such a provision make the consideration of a partition suit by a

revenue court not feasible but that it would have to be considered by the civil court?

75. Truly speaking, under Rule 109 a partition suit would continue to remain a suit to be decided by a revenue court as under Section 206 of the Revenue Code it has been clearly provided that *"notwithstanding anything contained in any law for the time being in force, but subject to the provisions of the Revenue Code', no civil court shall entertain any suit, application or proceeding to obtain a decision or order on any matter in which the State Government, the Board, or any revenue court or revenue officer is, by or under this Code, empowered to determine, decide or dispose of.'*

It also provides that no civil court shall exercise jurisdiction over any of the matters specified in the Second Schedule and no court other than the revenue court or the revenue officers specified in column 3 of the Third Schedule shall entertain any suit, application or proceeding specified in column 2 there of. Section 206 sub clause 2(b) refers to the matters specified in the Third Schedule to the Revenue Code and provides that only that Court or Officer which is specified in column 3 there of shall entertain any suit, application or proceeding mentioned in column 2. The relevant entry in Schedule III talks of a partition suit being cognizable by the Sub Divisional Officer and the appeal against his order would lie to the Commissioner and thereafter to the Board.

76. Hence, a partition suit under section 116 of the U.P. Revenue Code would remain to be a partition suit under the Code and shall not become a partition suit under the C.P.C. merely because the procedure that has to be followed by the revenue court in deciding the partition suit would be the same as is followed by the civil court under the C.P.C. An appeal against the decree by the revenue court would also lie under the U.P. Land Revenue Code and Rules made thereunder. No doubt Rule 109 of the Rules made under the U.P. Revenue Code do employ the words *"It shall be registered as a suit and the defendant shall be called upon to file the written statement. That suit shall then be decided according to the provisions of the Code of Civil Procedure 1908,*" but that would not make a partition suit for division of a holding filed under section 116 of the U.P. Revenue Code, a suit for division of properties under the Civil Procedure Code.

77. In view of the fact that an issue of division of holding between parties to the agricultural land can only be decided by the revenue court, it cannot be said that an appeal shall lie under Section 97 of the C.P.C. to the first Appellate court mentioned in the C.P.C. In case of properties other than lands liable to payment of land revenue, the civil court normally passes a preliminary decree which is followed by a final decree, the proceedings between preliminary decree and final decree are analogous to the proceedings before the Collector for the partition of lands amenable to payment of land revenue. It cannot be disputed that the final decree of a court which allocates specific properties to different shareholders involves the rendering of decision and the passing of a decretal order. But in the Revenue Code it is the Collector alone who has the jurisdiction with regard to questions involved in the partition of revenue paying lands.

78. It must be remembered that the powers of revision under Section 210 of the

U.P. Revenue Code are wide enough to examine the legality, propriety and regularity of any order passed in a suit or proceeding by any Subordinate Revenue Court in which no appeal lies. There are no fetters like those provided in Section 115 of the Code of Civil Procedure. We must remember that when the Revenue Code was framed the legislature had before it the provisions of Section 96 and 97 and 100 of the Code of Civil Procedure. Had the Legislature intended that even a preliminary decree in a partition suit may be challenged in a regular first appeal, then it would have provided so either in the main section i.e. Section 207, or at least not created a specific bar under Section 209 to entertaining certain appeals including an appeal against a decree which is of an interim nature.

79. For the reasons as aforesaid, this Court finds that the Appeal was wrongly admitted by the Additional Commissioner, and also because the Additional Commissioners' order does not give any reason for entertaining the Appeal, the order impugned dated 21.01.2021 is set aside.

80. The writ petition stands ***allowed.***

(2021)03ILR A65
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.03.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Misc. Single No. 7153 of 2021

Nusrat Ali ...Petitioner
Versus
Nagarpalika Sitapur & Anr. ...Respondents

Counsel for the Petitioner:
Ravindra Bajpai, P.R.S. Bajpai

Counsel for the Respondents:
Rajiv Raman Srivastava

(A) Civil Law - Code of Civil Procedure, 1908 - Section 115 - Revision, Order 15 Rule 5 - Striking off defence for failure to deposit admitted rent, etc., Order 20 Rule 4 - judgments of a court of Small Causes need not contain more than points of determination and decision thereon, Provincial Small Causes Courts Act,1887 - Section 25 - Revision of decrees and orders of Courts of Small Causes.

Case filed by the opposite party no.2(deceased) for arrears of rent and ejectment before the Judge, Small causes court - petitioner had appeared and filed his defence - not made compliance of Order 15 Rule 5 of CPC - defence was struck off - Petitioner filed a revision which has been dismissed. (Para - 4)

HELD: - This Court is of the view that merely because the points of determination have not been set out is no ground for setting it aside. As the judgment has been passed after considering the material and evidence on record in accordance with law. Merely because a case on Section 115 CPC has been considered cannot be a ground to challenge the order. As such this Court does not find any illegality or error in the impugned orders. (Para - 7,10)

Writ Petition dismissed. (E-6)

List of Cases cited: -

1. Mukesh Gupta Vs Vidit Kalsi, UP/2237/2014;2014(8) ADJ 733

2. Atar Singh & ors. Vs D.J., Jhansi & ors., AIR 1994 ALLD. 295

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

(1) Heard Sri P.R.S. Bajpai, learned counsel for the petitioner and Sri Rajiv

Raman Srivastava,Advocate who is appearing for the opposite party no.1.

(2) This petition has been filed challenging the judgment and order dated 11.12.2019 passed in Revision No.03/2016 and judgment and order dated 29.02.2016 passed in Case No.02/2016.

(3) Submission of learned counsel for the petitioner is that the impugned orders have been passed by the small Cause Court without making any point of determination in violation of Order 20 Rule 4 of CPC. He further submitted that the revision has been dismissed relying on a judgment of this Court in the case of Janak Raj V. Smt. Indu Nath 2018 (36) LCD 2314 in which Section 115 of CPC has been relied whereas the revision was filed under Section 25 of the Provincial Small Causes Courts Act,1887.

(4) Having considered the submissions of learned counsel for the petitioner and having perused the orders passed by the courts below and the documents placed on record, this Court finds that the case was filed by the opposite party no.2(deceased) for arrears of rent and ejectment before the Judge, Small causes court. The petitioner had appeared and filed his defence but since he had not made compliance of Order 15 Rule 5 of CPC, therefore his defence was struck off by means of the order dated 08.07.2014. Revision filed against the said order was also dismissed. Thereafter after considering the case on merit and hearing learned counsel for the plaintiff but no arguments were advanced by the defendant, the order dated 29.12.2016 was passed and the suit was decreed and the petitioner was directed to vacate the shop in question. The petitioner filed a revision which has been decided by means of the order dated 11.12.2019 after considering the grounds raised by the petitioner.

(5) It appears that the shop in question was given to the petitioner on a rent of Rs.600/- per month for a period of 11 months with an advance amount of Rs.4,000/-. After expiry of the aforesaid period, notice was given to the petitioner and the tenancy was terminated. The suit was decreed and it was provided that Rs.4,000/- given in advance shall be adjusted in the due rent.

(6) Order 20 Rule 4 of CPC provides that judgments of a court of Small Causes need not contain more than points of determination and decision thereon. Therefore it cannot be said that the judgment of a court of Small Causes must necessarily contain points of determination. As such a party alleging non compliance is also required to establish not mere non framing of point of determination but consequent failure of justice also to the party.

(7) The petitioner had not made compliance of the Order 1 5 Rule 5 of CPC. Hence, his defence was struck off and the revision was also dismissed. Therefore it cannot be said that the suit has been decided in violation of Order 20 Rule 4 of CPC. The point of determination could have been framed only if the defence was on record and there were any points to be determined. Therefore it cannot be said that there was any illegality or irregularity in passing the order without point of determination. Therefore this Court is of the view that merely because the points of determination have not been set out is no ground for setting it aside. As the judgment has been passed after considering the material and evidence on record in accordance with law.

(8) This Court in the case of ***Mukesh Gupta versus Vidit Kalsi;UP/2237 /2014;2014(8)ADJ 733*** considered the

identical issue of non-framing of point of determination after considering several judgements and held that the said omission, if any, would not vitiate trial of the suit where parties appeared in case fully knowing rival claims and the defendant appeared in the case although his evidence was struck off and the Court passed the judgment and order after considering the case in accordance with law.

(9) This Court in the case of ***Atar Singh and others versus District judge, Jhansi and others; AIR 1994 ALLD. 295*** has held that the judgment can be challenged in execution proceedings only on the ground of lack of inherent jurisdiction and there is no provision that if the decree is not in accordance with order XX Rule 4 CPC it shall be treated as a nullity. The relevant paragraphs 10 and 13 are extracted below:-

"10. The revisional court may set aside the decision of a Judge, Small Causes Court which is not in accordance with the provisions of O.XX, R.4, C.P.C. but such judgment cannot be said to be without jurisdiction and a nullity merely because the judgment is not in accordance with the provisions of O. XX, R. 4, C.P.C. There is a distinction between a decree which is a nullity and a decree which is not according to law. A decree is nullity when the court lacks inherent jurisdiction to pass a decree or it is against a dead person or passed against some substantive provisions of law which prohibits passing of a decree but a decree which is not according to law cannot itself be treated as a nullity. This is clear from the decision of the Supreme Court in Kiran Singh v. Chaman Paswan, AIR 1954 SC 340. In Hira Lal Patni v. Sri Kali Nath, AIR 1962 SC 199, their Lordships of the Supreme Court observed (at p. 200):--

"The validity of a decree can be challenged in execution proceedings only on the ground that the Court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted, or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it. But in the instant case there was no such inherent lack of jurisdiction."

13. Learned counsel for the petitioner placed reliance upon the decision Smt. Kau-shalya Devi v. K. L. Bansal, AIR 1970 SC 838. In this case a compromise was entered into between the parties and such compromise decree was sought to be executed. The Supreme Court held that the decree was passed on the basis of a compromise which was in contravention of Section 13(1) of the Act. In that case the decree was against the substantive provision of the Act. Their Lordships of the Supreme Court held that (at p. 839):

"On the plain wording of Section 13(1) the Court was forbidden to pass the decree. The decree is nullity and cannot be enforced in execution."

There is no provision under the Code of Civil Procedures or the Provincial Small Cause Courts Act, 1887 that if a decree which is not in accordance with order XX, Rule 4 C.P.C. shall be treated as a nullity. In this case it is relevant to note that the petitioner had not filed any written statement in the suit. The case proceeded ex parte against him. The plaintiff

examined himself and produced the papers. In these circumstances, there was no controversy raised before the Judge, Small Causes Court and the Judge, Small Causes Court had only to consider the case of the plaintiff and evidence produced by him. It was not a case where the judgment itself could have been treated as a nullity if the judgment was not written in accordance with the provisions of Order XX, Rule 4 C.P.C.

(10) The revision has also been decided after considering the grounds raised by the petitioner. Therefore merely because a case on Section 115 CPC has been considered cannot be a ground to challenge the order. As such this Court does not find any illegality or error in the impugned orders dated 11.12.2019 and 29.02.2016.

(11) In view of above, the writ petition is misconceived and lacks merit. It is accordingly **dismissed.** No order as to costs.

(2021)03ILR A68
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.03.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Misc. Single No. 7693 of 2021

Riyazuddin @ Puttan ...Petitioner
Versus
Commissioner Devi Patan Gonda & Anr. ...Respondents

Counsel for the Petitioner:
Rajesh Kumar

Counsel for the Respondents:
G.A.

(A) Civil Law - Uttar Pradesh Goonda Act, 1970 - Section 2 - Gonda - Section 3(1) - Externment, etc. of Gondas , Section 6 - Appeal - not only an administrative but also a judicial order must be supported by reasons, recorded in it - cardinal principle which must be observed by every authority while passing an order, from which civil/criminal consequences flow, to assign reasons for reaching at such conclusion - This rule to be observed by every authority while sitting into capacity of judicial, quasi-judicial as well in administrative capacity whatsoever may be.(Para - 8,12)

Dispute is between two individually litigating parties only with regard to the dispute as to landed property - considering the matter under Goondas Act - no discussion on the applicability of the Act - impugned order passed by the District Magistrate is lacking and non-speaking in this regard. (Para -11)

HELD: - The Commissioner directed to decide the Appeal filed under Section 6 of Uttar Pradesh Goonda Act, 1970 on merit expeditiously with all practicable promptness within a period of one month by a reasoned and speaking order or if by reason of any administrative business it is not possible to decide the same within aforesaid period of one month, to decide on such other date not beyond three months from the date, the certified copy of the order is placed before him. (Para - 15)

Writ petition disposed of. (E-6)

List of Cases cited: -

1. St. of Orissa Vs Dhaniram Luhar, (2004) 5 SCC 568

2. Secretary & Curator, Victoria Memorial Hall Vs Howrah Ganatantrik Nagrik Samity & ors., (2010) 3 SCC 732

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called out.

2. Learned counsel for the petitioner, Sri Rajesh Kumar, Advocate and learned A.G.A. for the State Sri S.P. Tiwari, Advocate are present in the Court.

3. The present writ petition under Article 226 of the Constitution of India is filed to stay the operation and implementation of orders dated 10.03.2021 passed by respondent no.1, Commissioner, Devipatan Division, Gonda in Appeal No.00223/2021 (Computer No. C202108000000223), filed under Section 6 of Uttar Pradesh Goonda Act, 1970 so far it relates to denial in granting interim relief as well as order dated 23.02.2021 passed by respondent no.2, the District Magistrate, Bahraich in Case No.01004/2018 (Computer Case No. D201808150001004), under Section 3(1) of U.P. Goonda Act, 1970, during pendency of present writ petition.

4. On perusal of the impugned order passed by the respondent no.1, Commissioner, Devipatan Division, Gonda, admitted the appeal against the order dated 23.02.2021, passed by respondent no.2, the District Magistrate, Bahraich under Section 3(1) of U.P. Control of Goondas Act, 1970 but denying the prayer to stay the operation of the order of the District Magistrate, Bahraich on the ground that there are criminal cases registered against the appellants.

5. Apparently, the order of respondent no.1, as appellate authority is not a speaking order.

6. Prima facie the impugned order passed by the respondent no.1 is unreasoned and non-speaking, as such, indicates failure on the part of aforesaid respondent no.1 to discharge his duty.

7. Why the reason is said to be heart of every conclusion, has been discussed in the case of ***State of Orissa Vs. Dhaniram Luhar*** reported in ***(2004) 5 SCC 568*** in para 8, which is quoted as under:-

"Even in respect of administrative orders Lord Denning, M.R. in Breen v.Amalgamated Engg. Union [(1971) 1 All ER 1148 : (1971) 2 QB 175 : (1971) 2 WLR 742 (CA)] observed: "The giving of reasons is one of the fundamentals of good administration." In Alexander Machinery (Dudley) Ltd. v. Crabtree[1974 ICR 120 (NIRC)] it was observed: "Failure to give reasons amounts to denial of justice." "Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The "inscrutable face of the sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance."

8. The necessity of reasons for reaching at a conclusion further finds place in another decision of Hon'ble the Supreme Court in the case of ***Secretary and Curator,***

Victoria Memorial Hall Vs. Howrah Ganatantrik Nagrik Samity and others reported in ***(2010) 3 SCC 732,*** in para 40, which is quoted hereunder:-

"It is a settled legal proposition that not only an administrative but also a judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of justice-delivery system, to make known that there had been proper and due application of mind to the issue before the court and also as an essential requisite of the principles of natural justice. "The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the court concerned had really applied its mind." (Vide State of Orissa v.Dhaniram Luhar [(2004) 5 SCC 568 : (2008) 2 SCC (Cri) 49 : AIR 2004 SC 1794] and State of Rajasthan v. Sohan Lal [(2004) 5 SCC 573 : (2008) 2 SCC (Cri) 53])"

9. In the present context, it would be pertinent to have a look upon the order of District Magistrate, Bahraich impugned in the appeal pending before the respondent no.1, which refers three criminal cases pending against the accused-appellant, which are as follows:-

(i) Case Crime No.27/2018, under Sections 452, 323, 504, 506 of I.P.C.

(ii) Case Crime No.2423/2017, under Sections 447, 323, 504, 506 of I.P.C.

(iii)Beat information report No.29 at 20:16 dated 23.07.2018.

10. With regard to above criminal cases, the order of District Magistrate, Bahraich itself mentioned the explanation submitted by the accused-appellant that there was a dispute between the parties to the incident, as to a landed property, wherein he has been bailed out by order of the competent court, as the aforesaid cases were instituted against him falsely, as a matter of fact, he use to live in Delhi in connection with his employment. This would also be pertinent to keep into mind the definition of "Goonda" given under Section 2 of U.P. Control of Goondas Act, 1970, which runs as under:-

"(b) 'Goonda' means a person who-

(i) either by himself or as a member or leader of a gang, habitually commits or attempts to commit, or abets the commission of an offence punishable under Section 153 or Section 153-B or Section 294 of the Indian Penal Code or Chapter XV, Chapter XVI, Chapter XVII or Chapter XXII of the said Code; or

(ii) has been convicted for an offence punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956; or

(iii) has been convicted not less than thrice for an offence punishable under the U.P. Excise Act, 1910 or the Public Gambling Act, 1867 or Section 25, Section 27 or Section 29 of the Arms Act, 1959; or

(iv) is generally reputed to be a person who is desperate and dangerous to the community; or

(v) has been habitually passing indecent remarks or teasing women or girls; or

(vi) is a tout;"

11. On perusal of the order of District Magistrate, Bahraich, it appears that there is no mention of offence affecting the general public at large, however, the dispute is between two individually litigating parties only with regard to the dispute as to landed property, as such, while considering the matter under Goondas Act, there should be a discussion on the applicability of the Act also, but the impugned order passed by the District Magistrate, Bahraich is lacking and non-speaking in this regard, as discussed hereinabove.

12. This is cardinal principle which must be observed by every authority while passing an order, from which civil/criminal consequences flow, to assign reasons for reaching at such conclusion. This rule to be observed by every authority while sitting into capacity of judicial, quasi judicial as well in administrative capacity whatsoever may be.

13. Learned A.G.A. at this stage submitted that he would have no objection, if any, such direction is issued to decide the interim stay on application or the appeal pending before the Commissioner, Devipatan Division, Gonda (respondent no.1) by way of speaking and well reasoned order within a period specified by the Court.

14. The necessity of service of notice upon the opposite parties are dispensed with as learned A.G.A. is present on behalf of all the opposite parties.

15. The Commissioner, Devipatan Division, Gonda is directed to decide the Appeal No.00223/2021 (Computer No. C202108000000223), filed under Section 6 of Uttar Pradesh Goonda Act, 1970 on merit expeditiously with all practicable promptness within a period of one month by a reasoned and speaking order as discussed hereinabove or if by reason of any administrative business it is not possible to decide the same within aforesaid period of one month, to decide on such other date not beyond three months from the date, the certified copy of the order is placed before him.

16. Meanwhile, the enforcement, effect and operation of the order of District Magistrate, Bahraich dated 23.02.2021 in Case No. 01004/2018 (Computer Case No. D201808150001004), under Section 3(1) of U.P. Goonda Act, 1970 shall remain in abeyance.

17. Deputy Registrar (Criminal) is to communicate the order of the Court promptly to the Commissioner, Devipatan Division, Gonda.

18. With the aforesaid directions, the present petition is ***disposed of.***

(2021)03ILR A71
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.02.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE RAJEEV SINGH, J.

Misc. Bench No. 9727 of 2020

Sukh Lal Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ajai Krishna Yadav, Nikhil Kumar

Counsel for the Respondents:
G.A., Amarendra Pratap Singh, Shishir Jain

(A) Civil Law - Uttar Pradesh Lokayukta & Up-Lokayuktas Act, 1975 - Indian Penal Code, 1860 - Sections 409/120B I.P.C. - Prevention of Corruption Act, 1988 - Section 13, Code of criminal procedure, 1973- Section 197, Section 216- Prevention of Corruption Act, 1947 - Section 6 (1) - no Court shall cognizance of an offence alleged to have been committed by the public servant, except with the previous sanction of the authority specified in the sub-section - in order to constitute a valid sanction, it must be established that the case was given in respect of the facts constituting the offence with which the accused is proposed to be charged - An order of sanction cannot be assailed or tested on the ground that the evidence does not established the charge - an order of sanction can be assailed only on two grounds viz. (1) it has been granted by an authority who was not competent to do so; and (2) it has not been given in respect of the facts constituting the offence charged - grant of sanction is an administrative act.(Para -38,39,42)

The petitioner has challenged the order by which sanction has been granted for his prosecution under Sections 406/120B I.P.C. and under Section 13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, 1988 as contemplated by Section 197 Cr.P.C.

HELD: - The impugned order is a communication letter to the State Government and actual order of prosecution has not been challenged by the petitioner. Even otherwise, on perusal of the entire material on record, we are of the view that at this juncture, the sanction order is a valid one. Moreso, there is neither any pleading nor any ground in the writ petition that the Managing Director, who has passed the order of sanction, was not legally competent to grant sanction and, therefore, the order of sanction cannot be assailed on the ground of competency of sanctioning authority. The petitioner is at liberty to seek remedy under Section 438/439 Cr.P.C. (Para - 43,47)

Writ Petition dismissed. (E-6)

List of Cases cited: -

1. Ajai Kumar & anr. Vs St.of U.P. & ors. , Writ Petition No. 792 of 2020 (M/B)

2. Rajeev Garg Vs St. of U.P. & ors., Misc. Bench No. 19087 of 2020

3. Chhatra Pal Singh (C.P. Singh) Vs St. of U.P. & ors. , Misc. Bench No. 16340 of 2020

4. Gokulchand Dwarka Das Morarka Vs The King, AIR 1948 PC 82

5. Madan Mohan Vs St. of U.P.: AIR 1954 SC 637: (1954 Crl. LJ 1656) & Som Nath Vs U.O.I. : (1971) 2 SCC 387 : AIR 1971 SC 1910 : 1971 Crl. LJ 1422.

6. Madan Mohan Vs St. of U.P., AIR 1954 SC 637

7. Maj. Som Nath Vs U.O.I., 1971 (2) SCC 387.

8. P.C. Joshi Vs St. of U.P., AIR 1961 SC 387

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

1. By means of the instant writ petition, the petitioner is challenging the correctness and validity of the sanction order dated 31.08.2019 passed by the respondent no.3-Managing Director, U.P. Rajkiya Nirman Nigam Ltd., Lucknow contained in Annexure no.1 to the writ petition, whereby prosecution sanction for prosecuting the petitioner under Sections 409/120B I.P.C. and under Section 13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, 1988, has been granted. He has also challenged the report prepared by the Lokayukta, U.P. contained in Annexure No.2 to the writ petition. He has also sought a writ of mandamus restraining the respondents not to further proceed with the matter on the basis of the impugned inquiry report of the Lokayukta, Uttar Pradesh and order dated 31.08.2019.

2. The brief facts of the case are that in the year 2007, the State Government took a decision for construction of memorials and parks in Lucknow and NOIDA. In pursuance thereof, a three Members Committee consisting of Managing Director of U.P. Rajkiya Nirman Nigam Ltd., Lucknow, the Director, Department of Geology and Mining and its Joint Director, was constituted for the purposes of ascertaining the sufficiency of pink stones in the Ahraura region of District Mirzapur. The Committee, after due inquiry, found that pink sandstone is available in sufficient quantity. Thereafter, another Committee of seven officials including three officers of earlier Committee submitted its report indicating therein that it is not feasible to obtain approximately 2.00 Lakh cubic feet of sandstone from single area and such supply should be obtained from a number of lease areas and it was further recommended that a consortium of lease holders should be constituted for the purposes of entering into an agreement regarding supply of sandstones.

3. The work in question was done upto 2011 and, thereafter, on some complaint, the matter was referred to Lokayukta by the State Government for inquiry into the matter. As per provisions of the Uttar Pradesh Lokayukta & Up-Lokayuktas Act, 1975 (hereafter referred to as **"Act, 1975"** for the sake of brevity), the inquiry was conducted without giving any proper opportunity of hearing to the petitioner and the Lokayukta submitted an inquiry report to the State Government vide its letter no. 2115-2012/87/2064 dated 20.05.2013. On the basis of the aforesaid inquiry report of Lokayukta, the State Government took a decision for lodging an F.I.R. and also ordered for investigation of the same by the Vigilance Establishment.

4. Rejoinder affidavit filed today on behalf of the petitioner is taken on record.

5. The pleadings between the parties have been exchanged.

6. Heard Sri Ajai Krishna Yadav, learned Counsel for the petitioner, Sri S.P. Singh, learned A.G.A. for the State/respondents no. 1, 2, 4, 6 and 7, Ms. Ashmita Singh, holding brief of Sri Shishir Jain, learned Counsel for the respondent no.3-U.P. Rajkiya Nirman Nigam Ltd. and Sri Amrendra Pratap Singh, holding brief of Sri A.P. Singh, learned Counsel for the respondent no.5-Lokayukta.

7. The learned Counsel for the petitioner submits that no role of the petitioner was found in the inquiry/investigation of the Lokayukta but under the orders of the State Government, an F.I.R. was lodged at Police Station Gomti Nagar, District Lucknow on 01.01.2014, which was registered as Case Crime No. 1 of 2014, under Sections 406/120B I.P.C. and under Section 13 (1) (D) read with Section 13 (2) of the Prevention of Corruption Act, 1988, against 19 persons i.e. two Ex-Ministers of the State and 17 Government officials.

8. It has been argued by the learned Counsel for the petitioner that though in pursuance of the order of the State Government, Vigilance Department had started investigation but during the course of investigation, the version of the petitioner was never considered. Thereafter, Investigating Officer requested the appointing authority to grant sanction prosecution of its officials. In the meantime, 35 officials of the Uttar Pradesh Rajkiya Nirman Nigam Ltd. made a representation to the Managing Director of the Uttar Pradesh Rajkiya Nirman Nigam Ltd. and a three members Committee was constituted but during pendency of the said representation, sanction was granted without considering the representation of the petitioner and other officials by way of

the impugned order dated 31.08.2019 contained in Annexure No.1 to the writ petition.

9. Elaborating his submission, learned Counsel for the petitioner has submitted that while granting sanction prosecution, the mandatory provisions were not complied with by the sanctioning authority. He submits that the petitioner has never worked as Accountant at NOIDA Park but he worked as Assistant Accountant at NOIDA park only for a brief period of nine days. He submits that all these facts were not considered, therefore, kind indulgence of this Court is necessary.

10. Learned Counsel for the petitioner has drawn our attention to the order dated 18.06.2020 passed in Writ Petition No. 792 of 2020 (M/B) : *Ajai Kumar and another Vs. State of U.P. and others* and order dated 8.12.2020 passed in Misc. Bench No. 19087 of 2020 : *Rajeev Garg Vs. State of U.P. and others* and in Misc. Bench No. 16340 of 2020 : *Chhatra Pal Singh (C.P. Singh) Vs. State of U.P. and others*, by a Co-ordinate Benches of this Court and has submitted that same sanction order dated 31.08.2019 passed by the Managing Director, Rajkiya Nirman Nigam Ltd. was challenged in writ petition No. 792 (M/B) of 2020 (supra), wherein a Co-ordinate Bench of this Court treating the said order as valid sanction order disposed of the writ petition with certain direction to the Investigating Agency as well as learned Court below and it was provided that till the decision is taken by the Competent Court in regard to the sanction of prosecution against the writ petitioner that whether the same is valid or not, no coercive action shall be taken against him. Thereafter, two identical writ petitions i.e. writ petition nos. 19087 of 2020 (M/B) and 16340 of 2020 (M/B) have been filed and another Co-ordinate Bench of this Court has granted the benefit of the order dated 18.06.2020 (Supra) to the writ petitioners of two writ petitions vide judgment and order dated 8.12.2020. He, therefore, submits that the aforesaid cases are related to the same crime number and with respect of the same offence as well as for the same occurrence. Thus, the benefit of the order dated 18.06.2020 and order dated 8.12.2020 passed by a Co-ordinate Bench of this Court may also be granted to the present writ petitioner.

11. Learned Counsel for the petitioner has further submitted that a perusal of the order dated 31.08.2019 indicates that the sanctioning authority has granted the prosecution sanction vide order dated 31.08.2019 for taking cognizance and trial of the petitioner by the competent Court of law and, therefore, there was no occasion for passing a subsequent order of alleged sanction dated 16.12.2019 contained in Annexure No. CA-1 to the counter affidavit.

12. Refuting the submissions of the learned Counsel for the petitioner, learned AGA has submitted that the impugned order dated 31.08.2019 is a communication to the State Government sent by the Managing Director, Rajkiya Nirman Nigam Ltd. and not a sanction order. The sanction order dated 16.12.2019 has not been assailed in the present writ petition. Thus, the present writ petition is liable to be dismissed on this ground alone.

13. While drawing attention to the order dated 16.12.2019 contained in CA-1 to the counter affidavit, learned AGA has submitted that the competent authority, while passing the order dated 16.12.2019,

applied his mind and after going through the materials pertaining to investigation had passed the sanction order, in which there is no lacuna in any manner.

14. Elaborating his submission, learned AGA has submitted that after receipt of the report from the Lokayukta in relation to corruption and financial embezzlement for construction of memorials and parks in Lucknow and NOIDA, it came to the knowledge that out of total expenditure i.e. 41,48,54,80,000/-, the State has lost the revenue of about 34 per cent of the total expenditure i.e. Rs.14,10,50,63,200/- due to the act of the accused persons. The proper opportunity was given to the person(s) concerned during the course of investigation. Since evidences so collected during the course of investigation was found against the accused persons, therefore, entire material was placed before the Sanctioning Authority by the Investigating Officer and after going through the entire material and evidences so collected by the Investigating Officer during the course of inquiry, individual orders were passed in respect of further investigation against the other accused persons for grant of sanction. In the case of the petitioner also, the sanction order was passed vide order dated 16.12.2019 contained in Annexure No. CA-1 to the counter affidavit.

15. Learned AGA has further submitted that co-accused Anjana and others had filed writ petition No. 2245 of 2020 (M/B) : Anjana & others, wherein a Co-ordinate Bench of this Court, vide order dated 27.01.2020 (Annexure CA-2 to the counter affidavit), was declined to interfere and refused to quash the First Information Report. He submits that the sanction order dated 16.12.2019 passed by the Managing Director, Uttar Pradesh Rajkiya Nirman Nigam Ltd., Lucknow reflects that after considering all the evidences collected by the Investigating Officer including the statement of the witnesses as well as documentary evidences, sanction order was granted to prosecute the petitioner. Thus, the present writ petition is liable to be dismissed.

16. Learned Counsel for the respondent no.3 has reiterated the submissions of the learned AGA and has submitted that entire case material was placed by the Investigating Officer and, thereafter, sanction order was passed.

17. Learned Counsel for the respondent no.5 also submitted that detailed inquiry/investigation was made and, thereafter, report was submitted to the State Government to act thereupon. Thereafter, it was decided to lodge the F.I.R. and after lodging the F.I.R., detailed investigation was conducted.

18. Considering the arguments of the learned Counsel for the respective parties and going through the record, it is evident that in relation to financial irregularities in the construction of memorials and parks in Lucknow and NOIDA between 2007 to 2011, the matter was investigated/enquired by the Lokayaukta, Uttar Pradesh. After due inquiry, it was found that two Ex-Ministers, some Government officials and some private contractors were involved in committing the financial irregularities in the construction of memorials and parks in Lucknow and NOIDA between 2007 to 2011 and, therefore, the Lokayaukta has submitted a report dated 20.05.2013 in this regard to the State Government.

19. On receipt of the report of Lokayukta, the State Government

considered the report of the Lokayukta and decided to lodge the F.I.R. against two Ex-Ministers and 17 Government Officials and also directed to make enquiry of the case through Vigilance Establishment. Pursuant to the aforesaid direction, F.I.R. was lodged at Police Station Gomti Nagar, District Lucknow on 01.01.2014, which was registered as Case Crime No. 1 of 2014, under Sections 406/120B I.P.C. and under Section 13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, 1988, against 19 persons i.e. two Ex-Ministers of the State and 17 Government officials.

20. During the course of investigation in the aforesaid case, the Vigilance Department found the involvement of the petitioner in the aforesaid case and, therefore, entire material was placed by the Investigating Officer before the appointing authority to grant the sanction order. Thereafter, the sanction order dated 16.12.2019 was issued by the Managing Director, Uttar Pradesh Rajkiya Nirman Nigam Ltd., Lucknow.

21. As the sanction order dated 16.12.2019 clearly reveals that all the materials collected by the Investigating Officer were placed before the Sanctioning Authority and after going through the entire material, sanction order was passed, who also recorded his satisfaction.

22. It is also evident from the record that the aforesaid sanction order dated 16.12.2019 is not challenged by the petitioner and he has only challenged the communication letter to the State Government dated 31.08.2019.

23. As the petitioner prayed for quashing of the report of the Lokaykta and also prayed that respondents may also be restrained not to further proceed in the matter on the basis of the enquiry report of the Lokaykta, it is relevant to mention here that on the basis of the report of the Lokayukta, the State Government had decided to lodge the F.I.R. and the F.I.R. was lodged on 01.01.2014 and after investigation, sanction order has already been granted. In such circumstances, the plea of the petitioner to quash the report of Lokayukta and restrain the respondents not to proceed any further in the matter on the basis of report of Lokayukta is not substantiated and, therefore, it is rejected.

24. The much emphasis has been laid by the learned counsel for the petitioner upon the decision of a Co-ordinate Bench of this Court dated 18.06.2020, parity of which has been granted by another Co-ordinate Bench of this Court vide order dated 8.12.2020 and prayed that the benefit of the aforesaid orders may also be granted to the petitioner of the instant writ petitioner.

25. From perusal of the order dated 18.06.2020, it reflects that the Co-ordinate Bench of this Court has though dealt with the purpose and object of sanction as also the stage at which its validity can be challenged during trial but on one hand, the Co-ordinate Bench of this Court had not entered into the question of validity of sanction and on the other disposed of the writ petition by giving protection to the writ 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.

26. In the instant case, the petitioner has challenged the order by which sanction

has been granted for his prosecution under Sections 406/120B I.P.C. and under Section 13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, 1988 as contemplated by Section 197 Cr.P.C.

27. The question which requires consideration is on what grounds an order granting sanction can be challenged at the very initial stage before the parties had any opportunity to lead evidence in support of their case.

28. Sub-section (1) of Section 197 Cr.P.C. shows that sanction for prosecution is required where any person who is or was a judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Central Government or State Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of official duties, no Court shall take cognizance of such offence, except with the previous sanction of the appropriate Government.

29. Article 311 of the Constitution of India lays down that no person who is a member of a civil service of the Union or State or hold a civil post under the Union or State shall be removed by an authority subordinate to that by which he was appointed. It, therefore, follows that protection of sub-section (1) of Section 197 of Cr.P.C. is available only to such public servants whose appointing authority is the Central Government or the State Government and not to every public servant.

30. The legislation has given great importance to sanction will be evident from the Scheme of Code of Criminal Procedure. Section 216 of the Code of Criminal Procedure gives power to the Court to alter or add to any charge at any time before judgment is pronounced but Sub-section (5) thereof provides that if the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded. This was emphasised by the Privy Council in the leading case of **Gokulchand Dwarka Das Morarka Vs. The King** : AIR 1948 PC 82, where in para 9, it was observed as follows at page 85 :

".....The sanction to prosecute is an important matter; it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction. They are not, as the High Court seem to have though, concerned merely to see that the evidence discloses a prima facie case against the person sought to be prosecuted."

31. In para-10 of the aforesaid judgment, following observation has been made by the Privy Council :

"10. Mr. Megaw for the respondent has suggested that this view of the law would involve in every case that the Court would be bound to see that the case proved corresponded exactly with the case for which sanction had been given. But this is not so. The giving of sanction confers jurisdiction on the Court to try the case and the Judge or Magistrate having jurisdiction must try the case in the ordinary way under the Code of Criminal Procedure. The charge need not follow the exact terms of

the sanction, though it must not relate to an offence essentially different, from that to which the sanction relates."

32. The aforesaid case i.e. *Gokulchand Dwarka Das Morarka Vs. The King (supra)* was considered by the Hon'ble Supreme Court in **Madan Mohan Vs. State of U.P.** : AIR 1954 SC 637 : (1954 Crl. LJ 1656) and **Som Nath vs. Union of India** : (1971) 2 SCC 387 : AIR 1971 SC 1910 : 1971 Crl. LJ 1422.

33. Clauses (a) and (b) of sub-section (1) of Section 197 Cr.P.C. show that the sanction in the case of a person who is or was employed at the time of commission of the alleged offence in connection with the affairs of the Union of India has to be granted by the Central Government, and, in the case of a person who is or was employed at the time of commission of the alleged offence in connection with the affairs of a State, by the State Government, as the case may be. If the sanction is not accorded by the competent authority of the Central Government or the State Government, as the case may be, the order of sanction would be invalid. It, therefore, follows that an order of sanction can be assailed on the ground that the same had been granted by a person who did not have the authority to grant sanction as contemplated by Section 197 Cr.P.C.

34. What would constitute a valid sanction, was examined by the Privy Council in **Gokul Chand Dwarka Das Morarka Vs. The King (Supra)** with reference to Clause 23 of Cotton Cloth and Yarn Control Order, 1943, which required that no prosecution for the contravention of any of the provision of the control order shall be instituted without the previous sanction of the Provincial Government and it was held as follows :

"A sanction which names the person to be prosecuted and specifies the provision of the Order which he is alleged to have contravented is not a sufficient compliance of Cl. 23. In order to comply the provisions of Cl. 23, it must be proved that the sanction was given in respect of the facts constituting the offence charged. It plainly desirable that the fact should be referred to on the face of the sanction, but this is not essential since Cl. 23 does not re-charged are not shown on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority."

35. Section 6 (1) of the Prevention of Corruption Act, 1947 provided that no Court shall cognizance of an offence alleged to have been committed by the public servant, except with the previous sanction of the authority specified in the sub-section. What would constitute a valid sanction with reference to the aforesaid provision, was examined in **Madan Mohan Vs. State of Uttar Pradesh** : AIR 1954 SC 637 and the Apex Court after relying upon the dictum of the Privy Council in **Gokulchand Dwarka Das Morarka Vs. The King (supra)** held as under :

"The burden of proving that the requisite sanction has been obtained rests on the prosecution and such burden includes proof that the Sanctioning authority had given the sanction in reference to the facts on which the proposed prosecution was to be based; and these facts may appear on the face of the sanction or may be proved by extraneous

evidence. Where the facts constituting the offence do not appear on the face of the letter sanctioning prosecution, it is incumbent upon the prosecution to prove by other evidence that the material facts constituting the offence were placed before the sanctioning authority. Where this is not done, the sanction must be held to be defective and an invalid sanction cannot confer jurisdiction upon the Court to try the case."

36. Similar view was taken by the Apex Court in **Maj. Som Nath Vs. Union of India** : 1971 (2) SCC 387.

37. In **P.C. Joshi Vs. State of U.P.** : AIR 1961 SC 387, the Apex Court while examining the same question as to what would constitute a valid sanction held as follows in paragraph-4 of the reports :

"Mere production of a document, which sets out the names of the persons to be prosecuted and the provisions of the statute alleged to be contravented, and purporting to bear the signature of an officer competent to grant the sanction where such sanction is a condition precedent to the exercise of jurisdiction does not invest the Court with jurisdiction to try the offence. If the facts which constitute the charge do not appear on the face of the sanction, it must be established by extraneous evidence that those facts were placed before the authority competent to grant the sanction and that the authority applied his mind to those facts before giving sanction."

38. It is, therefore, well settled that in order to constitute a valid sanction, it must be established that the case was given in respect of the facts constituting the offence with which the accused is proposed to be charged. The facts may be stated in the order granting sanction or may be proved by extraneous evidence. If the facts do not appear on the face of the sanction, the prosecution must prove it by other evidence that the material facts constituting the offence were placed before the sanctioning authority and he had granted the same after consideration of the said facts. It follows as a corollary that where the facts constituting the offence do not appear on the face of the sanction, it will be open for the prosecution to lead evidence that the material facts were place before the sanctioning authority before grant of sanction, and the occasion for leading the evidence can arise only during the course of trial.

39. The aforesaid discussion shows that an order of sanction can be assailed only on two grounds viz. (1) it has been granted by an authority who was not competent to do so; and (2) it has not been given in respect of the facts constituting the offence charged. However, if the challenge to sanction is based upon the ground that the facts constituting the offence do not apepar on the face of the sanction, then, such a plea cannot be entertained at the initial stage before the trial has commenced, as the prosecution can have no opportunity to lead evidence in order to show that the sanction had been granted after consideration of relevant material. Therefore, such a plea cannot be entertained and examined in any proceedings including a writ petition under Article 226 of the Constitution of India before commencement of the trial. It is only after the trial has concluded and the prosecution has been given the opportunity to lead evidence that the validity of the sanction can be examined on this ground.

40. In the writ petition, the entire effort of the petitioner has been to show

that he has not misappropriated the funds. These are all questions which go to the merits of the case, namely, whether the charge against the petitioner that he misappropriated the public finds is established or not. These are matters to be seen in the trial after the prosecution and the accused had the opportunity to lead evidence in support of their case. An order of sanction cannot be assailed or tested on the ground that the evidence does not established the charge. This is the function of the Court trying the case and not the sanctioning authority. The sanctioning authority has merely to see whether the facts alleged against the accused constitute an offence and whether he should be tried by a competent Court for the said offence.

41. In order of sanction, it is recited that the authority had carefully examined all the papers and had, thereafter, come to the conclusion that the petitioner should be prosecuted for the offence committed by him before a competent Court.

42. It is settled law that grant of sanction is an administrative act. The purpose is to protect the public servant from harassment by frivolous or vexatious prosecution and not to shield the corrupt. The question of giving opportunity to the public servant at that stage does not arise. Further the sanctioning authority has only to see whether the facts would *prima facie* constitute the offence on the basis of relevant material collected during the course of investigation and placed before it, which warrants trial of public servant for which requisite sanction is required.

43. As stated hereinabove, the impugned order is a communication letter to the State Government and actual order of prosecution dated 16.12.2019 has not been challenged by the petitioner though a copy of the same has been enclosed as Annexure No. CA-1 to the counter affidavit filed by the State, which we have also perused and have taken into consideration. Even otherwise, on perusal of the entire material on record, we are of the view that at this juncture, the sanction order is a valid one. Moreso, there is neither any pleading nor any ground in the writ petition that the Managing Director, U.P. Rajkiya Nirman Nigam Ltd., Lucknow, who has passed the order of sanction, was not legally competent to grant sanction and, therefore, the order of sanction cannot be assailed on the ground of competency of sanctioning authority.

44. During the course of arguments, learned AGA has informed that the prosecuting agency has already collected credible and incriminating evidence against the petitioner too. The investigation of the case has already been concluded. The draft final report had already been approved by the State Government on 15th July, 2019 and, therefore, only the charge-sheet is to be filed before the competent Court but due to pendency of the present writ petition, charge-sheet could not be filed before the competent Court.

45. Considering the aforesaid facts and circumstances of the case, we are not satisfied with the plea of the petitioner that the petitioner is also entitled to get the interim protection as has been given by the Co-ordinate Bench of this Court vide orders dated 18.06.2020 (supra) and 8.12.2020 (supra). Moreover, the Co-ordinate Bench has also observed the sanction order to be valid vide order dated 18.06.2020 passed in Misc. Bench No. 792 of 2020 : *Ajay Kumar & another Vs. State*

of U.P. (Supra), which is reproduced as under :-

"The submission made by learned counsel for the petitioner is that the impugned sanctioned order has been passed by the competent authority without application his mind, rather under the pressure of the higher authority, the same is illegal and arbitrary in nature. **The validity of the sanction order is perfectly valid as per law laid down by Hon'ble the Apex Court in the case of Mansukhlal Vitthaldas (Supra) in which it has been observed that "Sanction lifts the bar for prosecution.** The grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to the government servants against frivolous prosecution. Sanction is a weapon to ensure discouragement of frivolous and vexatious prosecutions and is a safeguard for innocent but not a shield for the guilty as the validity of sanction depends on the applicability of mind by the sanctioning authority to the facts of the case and also the material and evidence collected during investigation. Sanctioning authority has to apply its own independent mind for generation of genuine satisfaction whether prosecution has to be sanctioned or not."

46. For the aforesaid reasons, there is no merit in the writ petition, which is, accordingly, **dismissed**.

47. It is needless to say that the petitioner is at liberty to seek remedy under Section 438/439 Cr.P.C., as the case may be, if so advised.

(2021)03ILR A81
ORIGINAL JURISDICTION
CIVIL SIDE

DATED: LUCKNOW 01.03.2021

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE MANISH KUMAR, J.

Misc. Bench No. 14199 of 2020

Moksh Innovations Inc. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Desh Mitra Anand, Ashish Bhatt, Rajendra Kumar

Counsel for the Respondents:
C.S.C., Brijesh Kumar Tiwari, Gaurav Dhama, Naresh Chandra Mehrotra, R.P. Singh

(A) Constitution of India,1950 - Article 226 - Rejection of technical bid - in regard to allotment of contract the action of the Government or its instrumentality are subject to judicial review - a tender submitted in response to a NIT(Notice Inviting Tender) is only an offer which the Government or its instrumentality are under no obligation to accept - a party having participated in the tender knowing that it was unsuccessful ordinarily, cannot be permitted to challenge the conditions of tender, as such afterthought action on the part of the unsuccessful bidder is impermissible to be entertained by the Courts - a tenderer having accepted the tender conditions and submitted the tender does not have locus to challenge the conditions of tender for the reason that in such a situation any party aggrieved by the conditions of tender ought to have challenged the NIT before submitting its tender pursuant to such notice.(Para -10)

Proceedings instituted by the petitioner-firm - to judicially scrutinize the action on the part of the respondent-corporation - in rejecting the

technical bid offered by it - after having failed in its bid to get the contract for the work of Supply and Installation of Way Finding and Traffic Enforcement Solution. (Para -1)

HELD: - A person who participated in the tender process cannot be permitted to challenge the tender condition for the reason that if any such condition in the views of the tenderer suffers from any vice, the same must be raised at the first instance and unsuccessful tenderer cannot raise a ground that tender condition was in any manner unlawful so as to vitiate the decision. In this view of the matter, the petitioner-firm has completely failed in its attempt to challenge the decision rejecting its technical bid on the ground that the petitioner-firm was not registered with the Corporation. The grounds taken by the petitioner-firm assailing the reasons (B), (C) and (D) given by the respondent-corporation-firm not accepting the technical bid also fail. (Para -13,15)

Writ Petition dismissed. (E-6)

List of Cases cited: -

1. Tata Cellular Vs U.O.I., (1994) 6 SCC 651

2. Municipal Corporation, Ujjain & anr. Vs BVG India Ltd. & ors., (2018) 5 SCC 462

3. AFCONS Infrastructure Ltd. Vs Nagpur Metro Rail Corporation Ltd. & anr., (2016) 16 SCC 818

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.
&
Hon'ble Manish Kumar, J.)

1. Having failed in its bid to get the contract for the work of Supply and Installation of Way Finding and Traffic Enforcement Solution at Naimisharanya, District-Sitapur, these proceedings under Article 226 of the Constitution of India have been instituted by the petitioner-firm impressing upon the Court to judicially scrutinize the action on the part of the respondent-corporation in rejecting the technical bid offered by it.

2. Heard Shri Desh Mitra Anand, learned counsel appearing for the petitioner, Shri N. C. Mehrotra, learned counsel representing the U.P. State Construction and Infrastructure Development Corporation Ltd. (hereinafter referred to as "the Corporation") and Shri R. P. Singh, learned counsel representing the respondent no.8-firm in whose favour the contract in question has been awarded.

3. The petitioner has prayed that the award of contract dated 18.08.2020 in favour of respondent no.8 be quashed and it be declared that technical bid offered by the petitioner-firm was fit and accordingly the petitioner-firm be also declared to be successful bidder in the financial bid as well.

4. The respondent-corporation issued Notice Inviting Tender (hereinafter referred to as "NIT") on 14.07.2020 for the work of Supply and Installation of Sinage Board at various locations for Naimisharanya Dham, District-Sitapur. The NIT was, however, cancelled and a fresh NIT was issued for the work of Supply and Installation of Way Finding and Traffic Enforcement Solution at Naimisharanya, District-Sitapur on 17.07.2020. Pursuant to the said NIT the petitioner-firm submitted its bid, however, the technical bit submitted by the petitioner-firm was rejected vide Technical Evaluation Report on 16.08.2020. The financial bid was thus opened on 16.08.2020 and after preparation of tender summary report the final outcome of bid evaluation was declared on 18.08.2020 whereby the contract for the work has been awarded to the respondent no.8.

5. The reasons indicated in the Technical Evaluation Report dated 16.08.2020 whereby the technical bid submitted by the petitioner-firm was rejected are as follows:

" Not qualified, reasons mentioned below

(A) Not registered in Nigam.

(B) As per clause no.2 of page no.4 bidder has not submitted the 3 years outdoor weathering test report of retro reflective sheeting from an Indian Lab from the manufacturers. Although clause no.3 page no.4 allows the bidders to submit alternate certificate conforming to ASTM (D4956-09) on artificial accelerated weathering from an Indian Lab in lieu of above outdoor weathering test report from Indian Lab along with the performance guarantee issued from nationalized bank given by retro reflective sheeting manufacturer. But bidders has not submitted these documents as well.

Apart from it other certificate as asked mentioned in clause under AFP and flexible median marker in NIT page no.5 are also not submitted by bidder. Hence this bid is not found suitable for this tender.

(C) Test report by Indian Govt. Lab for Rebound Ability not found.

(D) Test sample physically not submitted"

6. Challenging the said rejection of technical bid, it has been stated by the learned counsel for the petitioner that rejection of the technical bid of the petitioner was made on untenable grounds. In respect of reason (A) *"not registered in Nigam"*, it has been submitted by the learned counsel for the petitioner that this condition of registration of a contractor intending to participate in bid process is contrary to the aim and objective of global tender. It has further been argued that in view of general principle a selected firm is required to get it registered within 30 days. The reason for disqualifying the petitioner is against the natural law of justice and hence it is not sustainable in the eyes of law.

7. Regarding reason (B), it has been submitted by learned counsel for the petitioner that the requisite report was submitted by the petitioner online by uploading the same. Regarding reason (C), it has been stated that none of the participants had submitted Rebound Ability Test Report, however, it is only the petitioner who has been declared disqualified. It has also been stated that Rebound Ability Test Report is not required in respect of nature of work.

8. As regards reason (D), the submission made on behalf of the petitioner is that the petitioner was unable to upload the sample for testing online and further that no opportunity was offered at any point of time to submit the sample physically for testing as no date, time, place or mode is mentioned for the said purpose in NIT.

9. In respect of reason (A), further argument has been made on behalf of the petitioner that the Registration Certificate of respondent no.9 was renewed on 21.07.2020 i.e. after the NIT was issued. Yet another argument has been made by the learned counsel for the petitioner that atleast three terms and conditions out of thirteen as mentioned in NIT dated 14.07.2020 were reduced in the subsequent NIT dated 17.07.2020 only with a view to make respondent nos.8 and 9 eligible for the tender. It has further been argued that the petitioner is a registered firm with the

Public Works Department of Uttar Pradesh as "A' Grade Contractor under Sinage category and since as a general practice a selected firm is required to get registered within 30 days, hence rejecting the technical bid on the ground of non-registration with the corporation is not tenable.

10. The first and foremost question which falls for our consideration is as to what is the scope of judicial scrutiny in relation to a challenge made by an unsuccessful bidder, to a tender condition. There is no doubt that in regard to allotment of contract the action of the Government or its instrumentality are subject to judicial review, however, it is also equally well settled that a tender submitted in response to a NIT is only an offer which the Government or its instrumentality are under no obligation to accept. It is only that the participating tenderer should be dealt with in a fair and non-discriminatory manner in the matter of evaluation of tenders. Ordinarily scope of judicial scrutiny of a tender matter implies that terms of tender are not open to judicial scrutiny unless it is found that the same have been tailor-made to benefit a particular party or class of tenderers. It is also equally settled by a long line decisions by Hon'ble Supreme Court that a party having participated in the tender knowing that it was unsuccessful ordinarily, cannot be permitted to challenge the conditions of tender, as such after thought action on the part of the unsuccessful bidder is impermissible to be entertained by the Courts. It is trite law that a tenderer having accepted the tender conditions and submitted the tender does not have locus to challenge the conditions of tender for the reason that in such a situation any party aggrieved by the conditions of tender ought to have challenged the NIT before submitting its tender pursuant to such notice. In the case of ***AFCONS Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. and Another,*** reported in ***[(2016) 16 SCC 818]***, Hon'ble Supreme Court has laid down clear parameters as to when the decision making process in case of a tender can be interfered with. Relevant portion of the said judgment in the case of ***AFCONS Infrastructure Ltd. (supra)*** is quoted hereunder:

"Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)[2] it was held by this Court, relying on a host of decisions that the decision making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us."

11. In the case of ***Tata Cellular vs. Union of India,*** reported in [(1994) 6 SCC 651], Hon'ble Supreme Court has though observed that principles of judicial review would apply to exercise of contractual powers by the Government bodies in order to prevent arbitrariness or favouritism, however, there are inherent limitations in exercise of power of judicial review in such

matters. The questions usually raised in a challenge in relation to tender process adopted by the Government and its agencies have been answered by Hon'ble Supreme Court in the case of ***Municipal Corporation, Ujjain and another vs. BVG India Ltd. And Ors,*** reported in ***[(2018) 5 SCC 462]***. In paragraph 64 in the said case of ***Municipal Corporation, Ujjain and another*** (supra) such questions have been answered by Hon'ble Apex Court as follows:

64.1 Under the scope of judicial review, the High Court could not ordinarily interfere with the judgment of the expert consultant on the issues of technical qualifications of a bidder when the consultant takes into consideration various factors including the basis of non-performance of the bidder;

64.2 A bidder who submits a bid expressly declaring that it is submitting the same independently and without any partners, consortium or joint venture, cannot rely upon the technical qualifications of any 3rd Party for its qualification.

64.3 It is not open to the Court to independently evaluate the technical bids and financial bids of the parties as an appellate authority for coming to its conclusion inasmuch as unless the thresholds of mala fides, intention to favour someone or bias, arbitrariness, irrationality or perversity are met, where a decision is taken purely on public interest, the Court ordinarily should exercise judicial restraint.

12. Thus, in para 64.3 of the aforesaid judgment, Hon'ble Apex Court has stated that it will be impossible for the Court to independently evaluate the technical bids and financial bids of the parties as an appellate authority to come to its own conclusion unless the action under challenge suffers from the vice of mala fides, intention to favour someone or bias, arbitrariness, irrationality or perversity.

13. We have, thus, to examine the submissions made in support of the petition in the light of the law laid down by Hon'ble Supreme Court, as discussed above. The petitioner-firm admittedly is not registered with the Corporation as Class "A' Contractor. One of the conditions in the NIT was only Class "A' or above class Contractors or firms which are registered with the Corporation can participate in the tender process. The petitioner at the time of issuance of NIT was aware about this tender condition. The petitioner-firm accepted the conditions stipulated in the tender notification and accordingly submitted its bid before the last date. Having participated in the tender, when the petitioner came to know that it is unsuccessful, the petitioner cannot be permitted to say that condition is void or mala fide. As a matter of fact, pre-bid meeting held on 27.07.2020 in which the petitioner-firm had also participated, issue of registration with the Corporation was not raised though certain other issues were raised which led to issuance of corrigendum dated 20.07.2020. Accordingly, in our considered opinion a person who participated in the tender process cannot be permitted to challenge the tender condition for the reason that if any such condition in the views of the tenderer suffers from any vice, the same must be raised at the first instance and unsuccessful tenderer cannot raise a ground that tender condition was in any manner unlawful so as to vitiate the decision. In this view of the matter, the petitioner-firm has completely failed in its attempt to challenge the decision rejecting its

technical bid on the ground that the petitioner-firm was not registered with the Corporation.

14. So far as the submission of the learned counsel for the petitioner that certain favours were extended to respondent nos.8 and 9 in their registration, we may only note, as can be deduced from the averments made in the counter affidavit filed by the Corporation, that registration of respondent no.8 was renewed on 26.06.2020 as is apparent from a perusal of the document annexed at page 71 of the writ petition. Thus, the renewal was prior to issuance of the NIT. So far as renewal of the registration of respondent no.9 is concerned, we may notice that firstly, the contract has not been awarded to the respondent no.9 and secondly, the registration was renewed on 21.07.2020 pursuant to a letter requesting for renewal of registration submitted on 26.05.2020. So far as the other reasons, namely, reasons (B), (C) and (D) are concerned, the respondent-corporation in its counter affidavit has denied that the petitioner-firm submitted three years outdoor weathering test report of retro reflective sheeting from an Indian Lab from the manufacturers. The respondent-corporation has further stated that though in lieu of outdoor weathering test report from Indian Lab the bidders were permitted to submit a tender certificate conforming to ASTM (D4956-09), however, the petitioner-firm did not submit this document as well. It has been denied in the counter affidavit that none of the participants submitted Rebound Ability Report; rather it has been submitted that all other tenderers had uploaded their reports as per the terms and conditions and this report to be submitted, was an essential feature. The respondents have also stated that the petitioner did not submit the sample for testing. In respect of reasons (B), (C) and (D) as given for not accepting the technical bid submitted by the petitioner-firm, we only observe that this Court while exercising its jurisdiction of judicial review cannot sit in appeal over the decision of the experts. The reasons (B), (C) and (D) clearly lie in technical realm and such technical issues and subjects can be better analyzed by the persons with the technical knowledge.

15. For the said reasons, the grounds taken by the petitioner-firm assailing the reasons (B), (C) and (D) given by the respondent-corporation-firm not accepting the technical bid also fail.

16. In view of the discussions made above, we find the writ petition is devoid of merit which is hereby **dismissed**.

17. Interim order, if any, shall stand discharged.

18. In the facts of the case, the parties to bear their own costs.

(2021)03ILR A86
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.03.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE RAJEEV SINGH, J.

Misc. Bench No. 22682 of 2017

Prakashvati Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ishan Baghel, Parikshit Singh

Counsel for the Respondents:
Govt. Advocate, Nandita Bharti, Vivek Raj Singh

(A) Maintainability of miscellaneous application in a decided writ petition for any direction - Writ petition against the impugned order-applicant-respondent No.5 prematurely released under Article 161 of the Constitution of India-which was allowed by this Court - Chief Judicial Magistrate, was directed to take the respondent No.5 into custody forthwith and send him to jail to serve out the remaining sentence as awarded by the trial court-applicant-respondent No.5 prayed by way of present application - grant of time to avail the appropriate remedy before the Hon'ble Supreme Court against the judgment and order passed by this Court- HELD - No miscellaneous application is maintainable in a decided writ petition for any direction. (Para - 4,6)

Miscellaneous application rejected. (E-6)

List of Cases cited: -

1. St. of U.P. Vs Brahm Datt Sharma & anr., (1987) 2 SCC 179

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

C.M. Application No.36216 of 2021

1. Shri Kunwar Raj Singh (deponent), who is the son as well as pairokar of the respondent No.5, has appeared in person to argue the present application and stated that in compliance of the Court's order dated 03.03.2021, he had informed about the said order to Shri Ishan Baghel, learned counsel for the petitioner, who in turn stated that the lawyers are abstaining from judicial work today, therefore, he will not appear before this Court.

2. In view of the same, we proceed to hear the present application filed on behalf of the respondent No.5.

3. Heard Shri Kunwar Raj Singh, deponent in person and Ms. Nand Prabha Shukla, learned A.G.A. appearing for the State.

4. Shri Kunwar Raj Singh, deponent-in-person has submitted that the petitioner had moved present writ petition against the impugned order dated 15.03.2017 by which the applicant-respondent No.5 was prematurely released under Article 161 of the Constitution of India, which was allowed by this Court vide order dated 26.02.2021 and the Chief Judicial Magistrate, Bulandshahar was directed to take the respondent No.5 namely Jaini Singh into custody forthwith and send him to jail to serve out the remaining sentence as awarded by the trial court, and the applicant-respondent No.5 has prayed by way of present application for grant of time to avail the appropriate remedy before the Hon'ble Supreme Court against the judgment and order dated 26.02.2021 passed by this Court.

5. Learned A.G.A. has opposed the prayer of applicant-respondent No.5 and submitted that in a decided petition, no miscellaneous application for any further direction is maintainable, and she has also submitted that it is always open to the applicant-respondent No.5 to avail appropriate remedy against the order passed by this Court.

6. Considering the arguments of Shri Kunwar Raj Singh appearing in person on behalf of the applicant-respondent No.5 and learned A.G.A. and also going through the facts and circumstances of the case as

well as judgment and order dated 26.02.2021 and the law laid down by the ***Hon'ble Supreme Court*** in the case of ***State of U.P. vs. Brahm Datt Sharma and Another reported in (1987) 2 SCC 179*** in para 10 that no miscellaneous application is maintainable in a decided writ petition for any direction, hence, the present application is hereby ***rejected***.

(2021)03ILR A88
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.03.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Application U/S 482/378/407 No. 1324 of 2021

Radha Krishna Upadhyay ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Pranshu Agrawal, Divya Singh, Dr. Krishna Singh

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 395 - punishment for dacoity, Sections 397 - Robbery, or dacoity, with attempt to cause death or grievous hurt , Sections 412 - Dishonestly recieving property stolen in the commission of a dacoity, Sections 384 - punishment for extortion , Sections 417 - punishment for cheating, Sections 420 - Cheating and dishonestly inducing delivery of property, Sections 216A -penalty for harbouring robbers or dacoits , Arms Act, 1959 - Section 30 - punishment for contravention of liscence or rule

Present application moved by applicant, who was identified by the other co-accused - the complainant of the case on the basis of CCTV footage, involved in commission of the crime under the incident reported on 09.03.2019 - police submitted the charge sheet on the basis of evidences collected during investigation - Charge framed - Discharge application, preferred by the petitioner has been rejected.(Para - 3,6)

HELD:- There is no fact or circumstance pleaded in the application which manifest the abuse of power by the trial court while passing the impugned order .There is no illegality in the order of the trial court in rejection of the application to discharge the accused-applicant and to frame the charge.(Para - 9)

Application u/s 482 Cr.P.C. dismissed. (E-6)

List of Cases cited: -

1. Inder Mohan Goswami & anr. Vs St. of Uttaran. & ors. , (2007) 12 SCC , Page 1

2. St.of Har. & ors. Vs Bhajan Lal & ors., 1992 Supp (1) SCC 335

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called out.

2. Learned counsel for the applicant and learned A.G.A. for the State are present in the Court.

3. The present application under Section 482 Cr.P.C. is moved to quash the order dated 08.03.2021 passed by the Court of Additional Sessions Judge, Court No.1, Lucknow in case arising out of Sessions Trial No.775/2019, bearing Crime No. 141 /2019, under Sections 395 /397 /412 /384 /417/420/216A of I.P.C. & Section 30 of Arms Act, 1989, Police Station Gosaiganj, District Lucknow, therein framing charge against the petitioner under Section 395/397/384/417/420 of I.P.C. and to quash the order dated 01.02.2021, wherein the

Discharge Application, preferred by the Petitioner has been rejected.

4. Perused the F.I.R. No.141/2019, under Sections 395/397/412/384/417/420/216A of I.P.C. & Section 30 of Arms Act, 1989, on the complaint made by one Ankit Agrahari in Police Station Gosaiganj, District Lucknow on 09.03.2019 with regard to incident dated 09.03.2019, happened about 07:00 A.M. in morning, the said F.I.R. is made annexure no.3 to the application.

5. On perusal of F.I.R., it appears that on the date of incident, seven unknown persons entered into the apartment, over powered the watch man, knocked the door of the complainant's flat and when the door was opened by him, the assailants entered forcibly in the house. They were armed and beaten the applicant and his companions. One assailant was being called by others with the name of Madhukar Mishra and alongwith whom two assailants were in the robes of police men, to whom the Madhukar Mishra was calling with the name of Pawan Mishra and Ashish Tiwari. Four other unknown assailants were involved in beating and putting in their bags, the money looted from the hosue. Their name was not called intentionally by the other assailants. The informant reported that at the time of incident, the companions of the complainant, Sachin Katare, Ashiwani Pandey, Kuldeep Yadav, Jitendra Tomar, Abhisek Singh, Abhisek Verma and Shubham Gupta were present and got injuries due to having been beaten up by the assailants. The assailants fled away after committing the incident, to whom, he claimed that he can identify them when would be confronted face to face. The complainant have assessed that the assailants have looted a huge amount of money approximately one crore and 85 lacs. The complainant informed that he is under a profession of trading of coal and maurang sand, running from the Omex Residency, Tulip Tower No.104 on rent, when the incident took place.

6. The police registered the first information report and started investigation, three men were identified by their name and face, however, annexure no.4, the recovery and arrest memo bears a fact found in investigation on the basis of CCTV footage. The police arrested Pradeep Kumar Singh, Anand Kumar Yadav and Pawan Kumar identified from the CCTV footage that alongwith them, the two unknown persons are known as Radha Krishna Upadhyay and Yash Raj Tiwari, who were beating and collecting the money, kept under the box of the bed and putting into their bags in the course of incident.

6. This is pertinent here that the present application under Section 482 Cr.P.C. with the aforesaid relief is moved by that Radha Krishna Upadhya, who was identified by the other co-accused and the complainant of the case on the basis of CCTV footage, involved in commission of the crime under the incident reported on 09.03.2019. The police has submitted the charge sheet on the basis of evidences collected during investigation, pursuant to the F.I.R. dated 09.03.2019.

7. Apparently, without going deeply into the evidence, there is no doubt that the present accused-applicant was involved in the offence as reported by the opposite party no.2-Ankit Agrahari, the complainant of the F.I.R. No.141/2019 dated 09.03.2019. It would be pertinent that the quashing of the F.I.R., the charge sheet or

cognizance by the Court concerned of the offence on the basis of charge sheet, further proceeding consequent thereupon may be quashed only on some exceptional circumstances as envisaged decision of Hon'ble the Supreme Court otherwise a criminal proceeding which prima facie genuine cannot be stifled by exercising inherent power under Section 482 Cr.P.C.

8. Section 482 Cr.P.C. is being quoted hereunder :-

"482. *Saving of inherent powers of High Court. 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."*

9. The present application is moved under Section 482 Cr.P.C. and there is no fact or circumstance pleaded in the application which manifest the abuse of power by the trial court while passing the impugned order dated 01.02.2021 and 08.03.2021. The order dated 01.02.2021 passed by the Sessions Court is made annexure to the present application which is a reasoned order. Learned trial court (the court of Sessions) while considering the application to discharge moved by the present applicant, perused the entire facts and circumstances coming out from the first information report, prima facie the evidences collected by the Investigating Officer in submitting the charge sheet and concluded that charge can be framed even on the basis of strong suspicion founded upon materials before the court which leads the court a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged. It relied on the various decisions of Hon'ble the Supreme Court on reaching this conclusion. As such, there is no illegality in the order of the trial court in rejection of the application to discharge the accused-applicant and to frame the charge.

10. The Hon'ble Apex Court in the case of ***Inder Mohan Goswami and Another Vs. State of Uttaranchal and others reported in [(2007) 12 SCC, Page 1],*** in Paragraph nos. 26, 27 and 32 held as under:-

"26. In R.P. Kapur Vs. State of Punjab reported in AIR 1960 SC 866, this Court summarized some categories of cases where inherent power can and should be exercised to quash the proceedings:-

(i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings;

(ii) where the allegations in the first information report or complaint taken at their fact value and accepted in their entirety do not constitute the offence alleged.

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge."

27. The powers possessed by the High Court under section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court should normally refrain from giving a prima facie decision in a case where all the facts are incomplete and hazy; more so,

when the evidence has not been collected and produced before the court and the issues involved, whether factual or legal, are of such magnitude that they cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage."

32. In ***State of Haryana & Others v. Bhajan Lal & Others, [1992 Supp(1) SCC 335]*** *this court in the backdrop of interpretation of various relevant provisions of the Cr.P.C. 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 of the Constitution of India or the inherent powers under section 482 Cr.P.C. gave the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of the court or otherwise to secure the ends of justice. Thus, this court made it clear that 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 to myriad kinds of cases wherein such power should be exercised:*

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

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

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

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

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

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

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

11. On the basis of aforesaid discussions, the application under Section 482 Cr.P.C. lacks merit and therefore liable to be ***rejected.***

12. Accordingly, the application under Section 482 Cr.P.C. is ***dismissed.***

(2021)03ILR A92
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.02.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE SAURABH LAVANIA, J.

Application U/S 482/378/407 No. 3044 of 2017

Shueb Mahmood Kidwai @ Bobby ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Shishir Singh Chauhan

Counsel for the Opposite Parties:
Govt. Advocate

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 228 - framing of charge, Section 232 - reference by Single Judge - acquittal ,U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986 - Section 2/3 - Jurisdiction of the High Court is not barred in a challenge to an order framing charge irrespective of the label of a petition be it under Section 397 or 482 Cr.P.C. or Article 227 of Constitution of India - challenge to an order of charge should be entertained in rarest of rare case only to correct the patent error of jurisdiction and not to re-appreciate the matter - Availability of an alternative remedy under the Cr.P.C. does not put an absolute bar on the exercise of power under Section 482 Cr.P.C - applicant cannot as a matter of right, seek quashing of the proceedings, if there are good reasons on which the High Court could decline to exercise its inherent powers.(Para - 16,18,20)

(B) Constitution of India - Article 215 - high courts to be courts of record - High courts have inherent powers in criminal matters not by virtue of section 482 Cr.P.C but because the power's inherent in high court, as superior court of record by virtue of article 215 of constitution of India as it is a protector of Fundamental Right. (Para - 11)

Applicant along with 24 others prosecuted under Section 2/3 of the U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986 - charge-sheet - cognizance taken in 2000 - Sessions Court framed the charges on 27.08.2002 - prima-facie opinion of learned single judge - after framing of charge without supervening development in the form of judicial order, interference with the proceedings of the Trial under Section 482 Cr.P.C. may not be permissible - because prayer for quashing the entire proceedings initiated on charge-sheet cannot be questioned as the Trial Court has already held by judicial order passed under Section 228 Cr.P.C. - that prima-facie commission of offences is made out - Observation - without questioning the correctness of that order, allowing an application for quashing of proceedings would amount to falsifying the records of the Court where order directing charge to be framed stands unchallenged - there is a legal hurdle by virtue of Section 232 Cr.P.C. which provides a remedy to the applicant, in entertaining this application under Section 482 Cr.P.C. (Para - 4,7,8)

HELD: - We cannot say that, in the eventualities mentioned in the referred order, in no circumstances would an application under Section 482 Cr.P.C. be maintainable i.e. it will not lie. The guiding principle is as to whether in the facts of a case continuance of proceedings amount to abuse of the process of the Court and/or whether interference of the High Court is necessary to secure the ends of justice or not? Based on these two principles the facts of each case are required to be assessed by the High Court when the power and jurisdiction under Section 482 Cr.P.C. is invoked. (Para - 24)

Reference answered. (E-6)

List of Cases cited: -

1. Ahmed Ali Quraishi Vs St. of U.P. & anr., AIR 2020 SCC 788

2. Asian Resurfacing of Road Agency Private Ltd. Vs C.B.I., (2018) 16 SCC 299

3. Prabhu Chawla Vs St. of Raj. & anr., (2016) 16 SCC 30

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard.

2. This is an application under Section 482 Cr.P.C. filed by the applicant challenging the entire proceedings with respect to the applicant/ accused pending before the court of Special Judge, Gangsters Act, Lucknow bearing Sessions Trial No. 199 of 2000 (State of U.P. Versus Mukhtar Ansari) in Case Crime No. 428 of 1999, Police Station Hazratganj, District Lucknow.

3. This case has been placed before this Division Bench in view of a reference made by a learned Single Judge of this Court vide his order dated 12.12.2017 which reads as under:-

"Supplementary affidavit filed on behalf of the applicant is taken on record.

Heard counsel for the parties.

In continuation of Court's order dated 09.05.2017, it is hereby observed that applicant was required to show whether final report submitted by the police against the accused has been accepted by the Court or not. Vide annexure SA-2 there is prima-facie evidence that the final report submitted by the police has been accepted by the Court. Five cases shown to be registered against the present applicant. In four of them he has been acquitted and in one, final report submitted by the police, has been accepted.

Perusal of the order dated 14.06.2000 indicates that cognizance was taken in the year 2000, charge was framed on 27.08.2008 vide annexure 5 out of 19 witnesses 18 have been cross examined. The question is whether at this stage accused/applicant is entitled to move application under Section 482 Cr.P.C. During arguments, learned counsel for the applicant has referred annexure 7 to annexure 12 to show that similar applications under Section 482 Cr.P.C. moved on behalf of co-accused have been allowed by this Court. From annexure 7 to 10, the order have been passed on concession by learned AGA. However, orders annexure 11 and 12 have been passed even though on behalf of the State quashing of charge sheets was vehemently opposed. In both these cases, learned Single Judge has opined that when in all the 4 cases shown in the Gang Chart, the applicant has been acquitted, prosecution of the applicant under Gangster Act should not be continued. Thereafter he has quashed proceedings of Sessions Trial No.199 of 2000, under Section 2/3 UP Gangster Act going on against co-accused Ram Kumar Singh and Akhtar Husain alias Sarju.

In my opinion after framing of charge without supervening development in the form of judicial order, interference with the proceedings of the trial under Section 482 Cr.P.C. may not be permissible because prayer for quashing the entire proceeding initiated on charge sheet cannot be question as the trial court has already held by a judicial order passed under Section 228 Cr.P.C. that primafacie commission of offences is made out. Now without questioning the correctness of that order allowing an application for quashing of proceeding would amount to falsifying the record of that court where order

directing charge to be framed stand unchallenged. In the present case, there is also legal hurdle invoking power under Section 482 Cr.P.C. due to provisions contained in Section 232 Cr.P.C. a remedy available to the applicant under Code of Criminal Procedure. Therefore, he cannot be prayed for invoking inherent jurisdiction of this Court.

Keeping in view the judicial discipline, I think this matter should be heard by a Larger Bench to decide as to whether after framing of charge and where substantial part of prosecution evidence has been adduced, an application under Section 482 Cr.P.C. for quashing entire proceedings of that Session Trial on the behest of the accused specially in Sessions Trial would be maintainable or not.

Office is directed to put up this matter before the Hon'ble Chief Justice/Hon'ble Senior Judge for nomination.

Till the next date of listing, proceedings of aforesaid Session Trial shall remain stayed against the present applicant. "

4. The applicant alongwith 24 others has been prosecuted under Section 2/3 of the U.P. Gangster and Anti Social Activities (Prevention) Act, 1986. A charge-sheet dated 14.06.2005 under the said Act, was filed by the Police, cognizance of which was taken by the court below sometime in 2000. The Sessions Court framed the charges on 27.08.2002. The said proceedings were not challenged initially as according to the Counsel for the applicant the cause did not arise earlier.

5. It is only when in four criminal cases out of the five criminal cases mentioned in the Gang Chart, the applicant was acquitted and a final report which was submitted in respect to Case Crime No. 390 of 1998 was allegedly accepted, that he filed this application under Section 482 Cr.P.C. before the High Court on 06.05.2017.

6. Initially the learned Single Judge expressed a prima-facie opinion that the proceedings relating to the Sessions Trial in question could not be quashed as out of the five cases in one case final report, though it has been submitted, had not been accepted. Thereafter, the matter came up before a Co-ordinate Bench of this Court on 12.12.2017, when the aforesaid reference order was passed. The learned Single Judge referring to Annexure S.A.-2 to the supplementary affidavit which is a Questionnaire and not an order of the court below expressed a prima-facie opinion that there is prima-facie evidence that final report submitted by the police has been accepted by the Court in the 5th criminal case also. The learned Single Judge has noticed that cognizance of the charge-sheet which was filed in Sessions Trial in question was taken in 2000. Charge was framed on 27.08.2008 and 18 out of 19 witnesses had been examined. Then he posed a question as to whether at this stage accused/applicant is entitled to move an application under Section 482 Cr.P.C.? He has then noticed the argument advanced on behalf of the applicant with reference to certain documents on record that similar application under Section 482 Cr.P.C. moved by the co-accused had been allowed by this Court. The learned Single Judge then noticed the opposition on behalf of the State in quashing the charge-sheets in those proceedings.

7. He has then expressed a prima-facie opinion that after framing of charge without supervening development in the

form of judicial order, interference with the proceedings of the Trial under Section 482 Cr.P.C. may not be permissible because prayer for quashing the entire proceedings initiated on charge-sheet cannot be questioned as the Trial Court has already held by judicial order passed under Section 228 Cr.P.C. that prima-facie commission of offences is made out. The learned Single Judge has then observed that without questioning the correctness of that order, allowing an application for quashing of proceedings would amount to falsifying the records of the Court where order directing charge to be framed stands unchallenged.

8. The learned Single Judge has then observed that there is a legal hurdle by virtue of Section 232 Cr.P.C. which provides a remedy to the applicant, in entertaining this application under Section 482 Cr.P.C.

9. He has for all these reasons referred the matter to be considered by a larger Bench.

10. It is against this backdrop that the matter has been placed before us.

11. The High Court has inherent powers in criminal matters not by virtue of Section 482 Cr.P.C. but because the powers inherent in High Court, as a superior Court of record by virtue of Article 215 of the Constitution of India and as it is a protector of fundamental rights of citizens. Section 482 Cr.P.C. merely makes explicit what is otherwise inherent in the High Court. Nevertheless, when we see the provision contained in Section 482 Cr.P.C. it says, *"nothing in this Court shall be deemed to limit or effect the inherent powers of the High Court to make such orders, as may be necessary to give effect to any order under this Court, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice"*. Thus, the said provision merely clarifies that the provisions of Criminal Procedure Code shall not in any way limit or effect the inherent powers of the High Court.

12. Inherent powers of the High Court can be exercised to- (i) make such orders as may be necessary to give effect to any order under this Code, (ii) to prevent abuse of the process of any Court (iii) otherwise to secure the ends of justice.

13. The scope of inherent powers, the circumstances and manner in which they are to be exercised is no longer res-integera as it has been dealt with in a catena of decisions of Hon'ble Supreme Court of India as also this Court. We do not wish to burden our judgment by citing a number of precedents on this issue, suffice it to say that in a recent decision of the Hon'ble Supreme Court of India ***Ahmed Ali Quraishi Versus State of U.P. And Others*** reported in ***AIR 2020 SCC 788*** the law in this regard has been discussed and explained at length. We may fruitfully refer paragraph nos. 10 to 16 of the said report, which are as under:-

"10. Before we enter into facts of the present case and submissions made by the learned counsel for the parties, it is necessary to look into the scope and ambit of inherent jurisdiction which is exercised by the High Court under Section 482 CrPC. This Court had the occasion to consider the scope and jurisdiction of Section 482 CrPC. This Court in State of Haryana v. Bhajan Lal[State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , had elaborately considered the scope and ambit of Section

482 CrPC/Article 226 of the Constitution in the context of quashing the criminal proceedings. In para 102, this Court enumerated seven categories of cases where power can be exercised under Article 226 of the Constitution/Section 482 CrPC by the High Court for quashing the criminal proceedings. Para 102 is as follows:-

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

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

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

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

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

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

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

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

11. This Court in Vineet Kumar v. State of U.P. [Vineet Kumar v. State of U.P., (2017) 13 SCC 369 : (2017) 4 SCC (Cri) 633] , had considered the jurisdiction of the High Court under Section 482 CrPC. In the above case also, the Additional Civil Judicial Magistrate had summoned the accused for offences under Sections 452, 376 and 323 IPC and the criminal revision against the said order was dismissed by the District Judge.

12. This Court time and again has examined the scope of jurisdiction of

the High Court under Section 482 CrPC and laid down several principles which govern the exercise of jurisdiction of the High Court under Section 482 CrPC. A three-Judge Bench of this Court in State of Karnataka v. L. Muniswamy[State of Karnataka v. L. Muniswamy, (1977) 2 SCC 699 : 1977 SCC (Cri) 404] , held that the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court or that the ends of justice require that the proceeding ought to be quashed. In para 7 of the judgment, the following has been stated: (SCC p. 703)

"7. ... In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

13. A three-Judge Bench in State of Karnataka v. M. Devendrappa [State of Karnataka v. M. Devendrappa, (2002) 3 SCC 89 : 2002 SCC (Cri) 539] , had the occasion to consider the ambit of Section 482 CrPC. By analysing the scope of Section 482 CrPC, this Court laid down that 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 further held that 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. The following was laid down in para 6: (SCC p. 94)

"6. ... 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."

14. Further in para 8 the following was stated: (Devendrappa case [State of Karnataka v. M. Devendrappa, (2002) 3 SCC 89 : 2002 SCC (Cri) 539] , SCC p. 95)

"8. ... 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. 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 [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] ."

15. In Sunder Babu v. State of T.N. [Sunder Babu v. State of T.N., (2009) 14 SCC 244 : (2010) 1 SCC (Cri) 1349] , this Court was considering the challenge to the order of the Madras High Court where application was under Section 482 CrPC to quash criminal proceedings under Section 498-A IPC and Section 4 of the Dowry Prohibition Act, 1961. It was contended before this Court that the complaint filed was nothing but an abuse of the process of law and allegations were unfounded. The prosecuting agency contested the petition filed under Section 482 CrPC taking the stand that a bare perusal of the complaint discloses commission of alleged offences and, therefore, it is not a case which needed to be allowed. The High Court accepted the case of the prosecution and dismissed the application. This Court referred to the judgment in Bhajan Lal case [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] and held that the case fell within Category 7. The Supreme Court relying on Category 7 has held that the application under Section 482 deserved to be allowed and it quashed the proceedings.

16. After considering the earlier several judgments of this Court including the case of State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , in Vineet Kumar [Vineet Kumar v. State of U.P., (2017) 13 SCC 369 : (2017) 4 SCC (Cri) 633] , this Court laid down following in para 41: (Vineet Kumar case [Vineet Kumar v.State of U.P., (2017) 13 SCC 369 : (2017) 4 SCC (Cri) 633] , SCC p. 387)

"41. Inherent power given to the High Court under Section 482 CrPC is with the purpose and object of advancement of justice. In case solemn process of Court is sought to be abused by a person with some oblique motive, the Court has to thwart the attempt at the very threshold. The Court cannot permit a prosecution to go on if the case falls in one of the categories as illustratively enumerated by this Court in State of Haryana v.Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] . Judicial process is a solemn proceeding which cannot be allowed to be converted into an instrument of operation or harassment. When there are materials to indicate that a criminal proceeding is manifestly attended with mala fide and proceeding is maliciously instituted with an ulterior motive, the High Court will not hesitate in exercise of its jurisdiction under Section 482 CrPC to quash the proceeding under Category 7 as enumerated in State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , which is to the following effect: (SCC p. 379, para 102)

"102. ... (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.'

Above Category 7 is clearly attracted in the facts of the present case. Although, the High Court [Vineet Kumar v. State of U.P., 2016 SCC OnLine All 1445] has noted the judgment of State of Haryana v.Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , but did not advert to the relevant facts of the present case, materials on which final report was submitted by the IO. We, thus, are fully satisfied that the present is a fit case where the High Court ought to have exercised its jurisdiction under Section 482 CrPC and quashed the criminal proceedings."

14. The aforesaid exposition of law in our humble opinion, provides sufficient guidance to the exercise of inherent powers by the High Court under Section 482 Cr.P.C..

15. The case of ***Asian Resurfacing of Road Agency Private Ltd. Versus C.B.I.*** reported in ***(2018) 16 SCC 299*** also acts as a guidance to the High Court in exercise of its power under Section 482 Cr.P.C. and helps us in answering the question referred to us by the learned Single Judge. We may in this context refer to paragraphs 27, 28 and 37 of the judgment. The said paragraphs are as under:-

"27. Thus, even though in dealing with different situations, seemingly conflicting observations may have been made while holding that the order framing charge was interlocutory order and was not liable to be interfered with under Section 397(2) or even under Section 482 CrPC, the principle laid down in Madhu Limaye *[Madhu Limaye v. State of Maharashtra*, (1977) 4 SCC 551 : 1978 SCC (Cri) 10] still holds the field. Order framing charge may not be held to be purely an interlocutory order and can in a given situation be interfered with under Section 397(2) CrPC or 482 CrPC or Article 227 of the Constitution which is a constitutional provision but the power of the High Court to interfere with an order framing charge and to grant stay is to be exercised only in an exceptional situation.

28. We have thus no hesitation in concluding that the High Court has

jurisdiction in an appropriate case to consider the challenge against an order framing charge and also to grant stay but how such power is to be exercised and when stay ought to be granted needs to be considered further.....

37. Thus, we declare the law to be that order framing charge is not purely an interlocutory order nor a final order. Jurisdiction of the High Court is not barred irrespective of the label of a petition, be it under Sections 397 or 482 CrPC or Article 227 of the Constitution. However, the said jurisdiction is to be exercised consistent with the legislative policy to ensure expeditious disposal of a trial without the same being in any manner hampered. Thus considered, the challenge to an order of charge should be entertained in a rarest of rare case only to correct a patent error of jurisdiction and not to reappreciate the matter. Even where such challenge is entertained and stay is granted, the matter must be decided on day-to-day basis so that stay does not operate for an unduly long period. Though no mandatory time-limit may be fixed, the decision may not exceed two-three months normally. If it remains pending longer, duration of stay should not exceed six months, unless extension is granted by a specific speaking order, as already indicated.

16. It has been categorically held in the aforesaid case that order framing charge may not be held purely interlocutory order and can in a given situation be interfered with under Section 397(2) Cr.P.C. or 482 Cr.P.C. or Article 227 of the Constitution of India, but the power of the High Court to interfere with an order framing charge and to grant stay is to be exercised only in an exceptional situation. Jurisdiction of the High Court is not barred in a challenge to an order framing charge irrespective of the label of a petition be it under Section 397 or 482 Cr.P.C. or Article 227 of Constitution of India. However, the challenge to an order of charge should be entertained in rarest of rare case only to correct the patent error of jurisdiction and not to re-appreciate the matter.

17. As would evident from the concurring judgment of Justice Rohinton Fali Nariman in the said case (Paragraph 54 of the Report) the inherent power of the High Court referred in Section 482 Cr.P.C. is not conferred by the Code of Criminal Procedure. The said provision only saves the already existing inherent powers, which in fact is vested upon the High Court by the Constitution itself, inter-alia under Article 215 of the Constitution of India. Also as, such High Court have the power, nay, the duty to protect fundamental rights of the citizen under Article 226 of Constitution of India, the inherent power to do justice in cases involving the liberty of the citizen would also sound in Article 21 of the Constitution of India. It has been held in the said case that Section 19(3) (c) of the Prevention of Corruption Act, 1988 cannot be read as a ban on maintainability of a petition filed before a High Court under Section 482 Cr.P.C. The non obstante clause in Section 19(3) applies only to the Code of Criminal Procedure, meaning thereby, it does not apply to the inherent powers of the High Court which flow from the Constitution. Paragraph 54 of the judgment reads as under:-

"54. It is thus clear that the inherent power of a court set up by the Constitution is a power that inheres in such court because it is a superior court of record, and not because it is conferred by the Code of Criminal Procedure. This is a power vested by the Constitution itself,

inter alia, under Article 215 as aforestated. Also, as such High Courts have the power, nay, the duty to protect the fundamental rights of citizens under Article 226 of the Constitution, the inherent power to do justice in cases involving the liberty of the citizen would also sound in Article 21 of the Constitution. This being the constitutional position, it is clear that Section 19 (3)(c) cannot be read as a ban on the maintainability of a petition filed before the High Court under Section 482 of the Code of Criminal Procedure, the non-obstante clause in Section 19 (3) applying only to the Code of Criminal Procedure. The judgment of this Court in Satya Narayan Sharma Vs. State of Rajasthan, Paras 14 and 15 does not, therefore, lay down the correct position in law. Equally, in Para 17 of the said judgment, despite the clarification that proceedings can be "adapted" in appropriate cases, the Court went on to hold that there is a blanket ban of stay of trials and that, therefore, Section 482, even as adapted, cannot be used for the aforesaid purpose. This again is contrary to the position in law as laid down hereinabove. This case, therefore, stands overruled."

18. Availability of an alternative remedy under the Cr.P.C. does not put an absolute bar on the exercise of power under Section 482 Cr.P.C., nevertheless while exercising such powers the High Court would be loathe to bypass the remedies available under the Code and exercise its inherent powers unless there is a compelling and exceptional necessity of preventing abuse of process of Court or to secure the ends of justice, that too, sparingly and for good reasons. The legal position in this regard has been recapitulated by the Supreme Court of India in the case of ***Prabhu Chawla Vs. State of Rajasthan and Another*** reported in ***(2016) 16 SCC 30.*** Paragraph 4 to 6 of the said judgment reads as under:-

"4. Mr. P.K. Goswami, learned Senior Advocate for the appellants supported the view taken by this Court in Dhariwal Tobacco Products Ltd. He pointed out that in para 6 of this judgment S.B. Sinha, J. took note of several earlier judgments of this Court including that in R.P. Kapur Vs. State of Punjab and Som Mittal Vs. State of Karnataka for coming to the conclusion that :

"6. ...<u>. Only because a revision petition is maintainable, the same by itself.... would not constitute a bar for entertaining an application under Section 482 of the Code."</u>

5. *Mr Goswami also placed strong reliance upon the judgment of Krishna Iyer, J. in a Division Bench in Raj Kapoor V. State Relying upon the judgment of a Bench of three judges in Madhu Limaye Vs. State of Maharashtra and quoting therefrom, Krishna Iyer, J. in his inimitable style made the law crystal clear in para 10 which runs as follows:*

"10. <u>The first question is as to whether the inherent power of the High Court under Section 482 stands repelled when the revisional power under Section 397 overlaps. The opening words of Section 482 contradict this contention because nothing of the Code, not even Section 397, affect the amplitude of the inherent power preserved in so many terms by the language of Section 482. Even so, a general principle pervades this branch of law when a specific provision is made: easy resort to inherent power is not right except under compelling circumstances. Not that there is absence of jurisdiction but that inherent power should not invade areas set apart for specific power under the same</u>

Code. in Madhu Limaye Vs. State of Maharashtra this Court has exhaustively and if I may say so with great respect, correctly discussed and delineated the law beyond mistake. While it is true that Section 482 is pervasive it should not subvert legal interdicts written into the same Code, such, for instance, in Section 397(2). Apparent conflict may arise in some situations between the two provisions and a happy solution. '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 desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction'.

In short, there is not total ban on the exercise of inherent power where abuse of the process of the court or other extraordinary situation excites the Court's jurisdiction. The limitation is self-restraint, nothing more The policy of the law is clear that interlocutory orders, pure and simple, should not be taken up to the High Court resulting in unnecessary litigation and delay. At the other extreme, final orders are clearly capable of being considered in exercise of inherent power, if glaring justice stares the court in the face. In between is a tertium quid, as Untwalia, J. has pointed out as for example, where it is more than a purely interlocutory order and less than a final disposal. The present case falls under that category where the accused complain of harassment through the Court's process. Can we state that in this third category the inherent power can be exercised? In the words of Untawalia, J.:

'10. ... 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 any 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.'

I am, therefore clear in my mind that the inherent power is not rebuffed in the case situation before us. Counsel on both sides, sensitively responding to our allergy for legalistics, rightly agreed that the fanatical insistence on the formal filing of a copy of the order under cessation need not take up this Court's time. Our conclusion concurs with the concession of counsel on both sides that merely because a copy of the order has not been produced, despite its presence in the records in the

court, it is not possible for me to hold that the entire revisory power stands frustrated and the inherent power stultified."

6. In our considered view any attempt to explain the law further as regards the issue relating to inherent power of the High Court under Section 482 CrPC is unwarranted. We would simply reiterate that Section 482 begins with a non obstante clause to state:

*"**482. Saving of inherent powers of High Court.-** 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 this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice."*

A fortiori, there can be no total ban on the exercise of such wholsesome jurisdiction where, in the words of Krishna Iyer, J.

"abuse of the process of the court or other extraordinary situation excites the Court's jurisdiction. The limitation is self-restraint, nothing more".

We venture to add a further reason in support. Since Section 397 CrPC is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 CrPC only to petty interlocutory orders! A situation wholly unwarranted and undesirable"

19. The exercise of inherent powers is hedged by certain self imposed restrictions as has been noticed in the decisions of the Hon'ble Supreme Court quoted hereinabove. Whether in the facts of a particular case such power is to be exercised or not is a discretion to be exercised by the High Court in the light of the law discussed hereinabove.

20. The applicant cannot as a matter of right, seek quashing of the proceedings, if there are good reasons on which the High Court could decline to exercise its inherent powers. In the given facts of a case where the High Court finds that the application under Section 482 Cr.P.C. has itself been moved to abuse the process of the Court and delay the trial or there are otherwise malafides on the part of the applicant, or considering his conduct or that he had an occasion to approach the Court earlier but had been sitting over the matter, then these aspects can be looked into based on the particular facts of a case and appropriate decision can be taken accordingly, as per law.

21. Even after framing of charge under Section 228 by the Sessions Court, an application under Section 482 can lie in the facts of a case if there is a cause which has arisen and it is not possible to hold as a general preposition that no such application under Section 482 will lie after framing of charge. It all depends upon facts of the case and whether the parameters required in Section 482 are attracted or not. Likewise it cannot be said that in no circumstances such an application under Section 482 will lie if substantial evidence has been adduced by the prosecution, in view of Section 232.

22. Section 232 Cr.P.C. provides that if, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal. No doubt at the stage of Section 232 Cr.P.C. the court would have an opportunity to acquit the accused but only after the evidence has been taken for the prosecution, but this provision would not

give opportunity to the accused to seek quashing of the proceedings prior to the eventualities mentioned in Section 232 being satisfied i.e. prior to the evidence having been led by the prosecution etc. What if, prior to the said stage, may be immediately prior to it, a case is made out by the accused that given the facts and evidence, continuance of proceedings any further would lead to unnecessary harassment and abuse of the process of the Court or that the facts of the case require interference at that stage to prevent injustice? It will all depend on the assessment of facts of a case to be undertaken by the Court exercising powers under Section 482.

23. No such general proposition of law can be laid down ousting the jurisdiction of this Court from exercising inherent power under Section 482 Cr.P.C. merely because the charge had been framed under Section 228 or because of Section 232 Cr.P.C. Each case is to be dealt with on its own facts based on the parameters of Section 482 Cr.P.C.

24. One needs to understand the distinction between the proceedings 'being not maintainable' and 'not liable to be entertained'. Not being maintainable would mean it will not lie in the first place. Whereas not liable to be entertained would mean, the application, though it can lie, is not liable to be entertained in the facts of the case. The distinction may seem fine and at times blurred but nevertheless it does exist and has to be understood and kept in mind. Of course it can be also said that an application is not maintainable hence not liable to be entertained but that would be the same as the first proportion about non-maintainablity. The distinction with the second proportion remains. We can not say that, in the eventualities mentioned in the referred order, in no circumstances would an application under Section 482 Cr.P.C. be maintainable i.e. it will not lie. Whether such an application is to be entertained or not is a question to be considered and answered in the facts of each case and no general proposition or straight jacket formula can be laid down/provided in this regard. The guiding principle is as to whether in the facts of a case continuance of proceedings amount to abuse of the process of the Court and/or whether interference of the High Court is necessary to secure the ends of justice or not? Based on these two principles the facts of each case are required to be assessed by the High Court when the power and jurisdiction under Section 482 Cr.P.C. is invoked.

25. We answer the reference accordingly and direct that the case be placed before the learned Single Judge who has been assigned applications under Section 482 Cr.P.C. for admission and disposal, as the case may be.

26. Before parting we would like to mention that we had asked the learned Counsel for the applicant to show the order by which a final report allegedly submitted by the Police on 30.06.1999 in one of the 5 cases i.e. Crime Case no. 390 of 1998 under Section 392 IPC has been accepted by the Court below. The learned Counsel could not show any such order, instead he referred to a questionnaire submitted by the applicant and answers by the office of the Court concerned and stated that as the file was not traceable, therefore, the order was not available.

27. List this case before the learned Single Judge on **09.03.2021** amongst first five cases of the day.

28. We request the learned Single Judge to dispose of the proceedings at the earliest, if possible, within one month of its listing as aforesaid.

(2021)03ILR A105
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.03.2021

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Application U/S 482/378/407 No. 4253 of 2012
& other related cases

M/S Fertico Marketing & Investment Pvt. Ltd. & Ors. ...Applicants
Versus
C.B.I., Anti Corruption Branch, Lucknow & Anr. ...Opposite Parties

Counsel for the Applicants:
Gaurav Gupta, Himanshu Hemant Gupta, Nandit K Srivastava, Yasovardhan Swaroop

Counsel for the Opposite Parties:
Birshwar Nath, Anurag Kumar Singh, S.B. Pandey

(A) Criminal Law - Indian Penal Code, 1860 - Sections 120 -B, 415,418,420, 467, 468 and 471 - Prevention of Corruption Act, 1988 - Sections 13(2) read with 13(1)(d) - remitted back by supreme court - Mere failure in complying with the promise would not amount to cheating - criminal proceedings are based on public policy, while civil proceedings are intended to determine the rights between the parties - The allegations and the findings of the CBI in the charge-sheet would indicate commission of economic offences against the financial and economic well-being of the State as well as the public in general.(Para - 42, 63)

Petitioners had taken coal on the basis of FSAs (Fuel Supply Agreements) on notified price for manufacturing special smokeless fuel to be supplied for domestic use - but instead of using the coal taken on notified price, they had unauthorizedly diverted the same in the open/black market - had obtained pecuniary gains and, corresponding caused loss to the coal company/public in general - CBI had carried out intensive investigation and, filed a detailed charge-sheet against the petitioners.(Para - 60)

HELD: - The offences committed by the accused cannot be said to be overwhelmingly and predominantly of civil nature. The conduct of the accused has both civil and criminal consequences. The NCL is entitled to proceed against the accused under the FSA, but for the criminal offences committed by them, the competent Court has to proceed against the accused for their crimes. There is no parity in a closure report filed by the CBI in the case against the petitioners herein, the CBI has collected sufficient evidence, which would clearly disclose that prima facie, offences have been committed by the accused-petitioners in the present case. CBI has not found involvement of the officials of the NCL in commission of the offence with the petitioners. The offence of criminal conspiracy under Section 120-B IPC is against the petitioners and DIC officials, who issued forged and fabricated certificates regarding status of the factory requirement of coal by the petitioners. (Para - 63,73)

Application u/s 482 Cr.P.C. dismissed. (E-6)

List of Cases cited: -

1. Ashoka Smokeless Coal India (P) Ltd. & ors. Vs U.O.I. & ors., (2007) 2 SCC 640

2. Anil Mahajan Vs Bhor Industries Ltd. & anr. , (2005) 10 SCC 228

3. Gorige Pentaiah Vs St. of Andh. P. & ors., (2008) 12 SCC 53

4. V.Y. Jose & anr. Vs St. of Guj. & anr. , (2009) 3 SCC 78

5. V.P. Shrivastava Vs Indian Explosives Ltd. & ors., (2010) 10 SCC 361

6. Sushil Sethi & anr. Vs The St. Of Arun.P. & anr. , (2020) 3 SCC 240

7. Babloo Kumar Vs St. of Jharkhand & ors., 2006 (3) JCR 144

8. Ajmer Singh Vs St. of Har., (2010) 3 SCC 746, paras 23 to 29

9. Yogesh @ Sachin Jagdish Joshi Vs St. of Mah., (2008) 10 SCC 394

10. St. of M.P. Vs Sheetla Sahai & ors., (2009) 8 SCC 617

11. Rajesh Bajaj Vs State of NCTE Delhi & ors., (1999) 3 SCC 259

12. Tulsi Ram Vs St. of U.P., 1963 Supp. (1) SCR 382

13. Hridaya Ranjan Prasad Verma & ors. Vs St. Bihar & anr., (2000) 4 SCC 168

14. Tulsi Ram Vs St. of U.P., 1963 Supp. (1) SCR 382

15. Pratibha Rani Vs Suraj Kumar & anr., (1985) 2 SCC 370

16. Medchl Chemicals & Pharma (P) Ltd. Vs Biological E. Ltd. & anr., (2000) 3 SCC 269

17. Rajiv Thapar & ors. Vs Madan Lal Kapoor, (2013) 3 SCC 330

(Delivered by Hon'ble Dinesh Kumar Singh, J.)

1. This is second round before this Court after theses cases have been remitted back by the Supreme Court vide judgment and order dated 17th November, 2020 passed in Criminal Appeal Nos. 760-764 of 2020 and, other connected criminal appeals, for decision by this Court on three questions, which were framed vide order dated 24.02.2015, but not dealt with by this Court in its final judgment and order dated 14th August, 2019 passed in these cases, which was challenged before the Supreme Court in the afore-mentioned criminal appeals.

2. This Court did not deal with the three questions in its judgment dated 14.08.2019 as the learned counsels, appearing for the petitioners herein, at the time of final arguments pressed only first question. Be that as it may, since the Supreme Court has remitted back the matters to this Court for decision on Question Nos. 2, 3 and 4, this Court has proceeded to hear the arguments of the learned counsels, representing the petitioners as well as the learned counsel, representing the Central Bureau of Investigation.

3. Vide order dated 24th February, 2015 Hon'ble Vishnu Chandra Gupta (since retired) had framed the following four questions for determination:-

"Q.No.1. Whether the investigation conducted by the CBI in these bunch of cases are illegal and without jurisdiction for non-compliance of section 6 of DSPE Act? If so, its effect?

Q.No. 2. Whether the cases are overwhelmingly and predominantingly of civil nature as purely based on breach of contract (FSA) and the criminal prosecutions are liable to be quashed?

Q. No. 3. Whether CBI did not follow doctrine of parity in filing the criminal prosecutions against the petitioners? If so, its effect?

Q. No. 4. Whether in absence of Officer/official of NCL, charge of Criminal conspiracy under section 120-B IPC could be made out?"

4. Hon'ble Judge was not in agreement with the view taken by another Single Bench in its judgment in the case of

Sriniwas Dwivedi Versus The State of U.P. through S.P., CBI/ACB, Lucknow in a petition under Section 482 CrPC, being Petition No.3830 of 2013, decided on 9th September, 2013 on the issue of consent by the State Government, permitting the investigation under the Delhi Special Police Establishment Act, 1946 (for short 'DSPEA') and, therefore, referred the following two questions for decision by the Division Bench:-

"1. Whether investigation of such cases having involvement of Public servant under control of State Government of U.P. as well as private individuals for offences punishable under the Prevention of Corruption Act, 1988 (49 of 1988), and attempts, abetments and conspiracies in relation to all or any of the offence or offences mentioned above and any other offence or offences committed in the course of the transaction and arising out of the same facts under the G.O. of State Government Dated 15.6.1989 can be investigated by CBI assuming suo moto jurisdiction under section 6 of DSPE Act without the previous permission or consent of State Government?

2. Whether total non compliance / absence of previous consent of State Government under section 6 of DSPE Act could be cured by grant of prosecution sanction under section 197 Cr.P.C. of under section 19 of P.C. Act by State Government or competent authority?"

5. The Division Bench vide its judgment and order dated 6th July, 2015 answered the reference in following manner:-

"Our answer therefore to question no.1 is that since the question as framed proceeds on an erroneous premise of facts available in the case, the same is answered by holding that the Government Order dated 15.6.l989 permits investigation and it was not a case of assuming suo motu jurisdiction by the CBI to investigate on the facts of the present case.

The second question framed by the learned Single Judge is returned unanswered in view of the fact that the affidavit of the State Government had not been invited by the learned Single Judge before proceeding to raise a doubt and frame the second question to be answered in this reference as observed above.

With the aforesaid answers to the two questions framed, let the papers be placed before the concerned court for proceeding in the matter in accordance with law."

6. After the case was remitted back by the Division Bench, this Court vide its final judgment and order dated 14th August, 2019 concluded the issue of sanction by the State Government as under:-

"36. From perusal of the affidavit of the Principal Secretary, Department of Home, Government of Uttar Pradesh, it is evident that the Government has granted the post facto consent vide notification dated 7.9.2018 against the two public servants of the State Government whose names have figured during the course of investigation. The consent given by the State Government vide order dated 7.9.2018 would deem to be sufficient for investigation by the C.B.I. of offences against the two public servants of the State Government whose names find place in the charge sheet, but were not named in the F.I.R. In cases where the name of a public servant is not in the F.I.R., but his name comes to light during the course of

investigation and, charge sheet is filed against such a public servant of the State Government, the consent given after completion of investigation would be a valid consent under Section 6 of the DSPE Act. It is also relevant to mention here that cognizance has been taken by the competent court of law. The question of valid consent can be raised by the public servants, who have been named in the First Information Report, and not by the private individuals who have come before this Curt."

This Court dismissed the petitions with following observations:

"41. This Court has failed to appreciate that how the petitioners are prejudiced even if there is no consent in respect of the public servants whose names have figured during the course of investigation and against whom charge sheets have been filed and, after sanction under Section 19 of the Prevention of Corruption Act, the cognizance has been taken against them along with private entities/individuals. The public servants who have been named in the charge sheet, have not come forward to this Court challenging the investigation or charge sheets, but the private individuals have come before this Court on the ground that the substance of charge is only under Section 120-B read with Section 13(2)/13(1)(c) of the Prevention of Corruption Act and, if the prosecution fails in case of the public servants, the prosecution will also fail against them. However, the aforesaid contention has been rejected in the previous paragraphs. There is no prejudice caused to the petitioners even if it is assumed that there was no proper consent of the State Government under Section 6 of the DPSE Act."

7. The aforesaid judgment and order dated 14th August, 2019 came to be challenged before the Supreme Court. The Supreme Court vide final judgment and order dated 17th November, 2020 had upheld the judgment and order dated 14th August, 2019 passed by this Court and, remitted back the matter for decision on Question Nos. 2, 3 and 4 by observing as under:-

"21. In the result, we find no reason to interfere with the finding of the High Court with regard to not obtaining prior consent of the State Government under Section 6 of the DSPE Act.

22. However, it could be noticed that the learned Single Judge while referring two questions to the Division Bench, had observed that the question Nos. 2, 3 and 4 can be decided only after the question No. 1 was answered. After the matter was returned to the learned Single Judge by the Division Bench, the learned Single Judge was bound to answer question Nos. 2, 3 and 4. The learned Single Judge, in the impugned order, has not at all dealt with question Nos. 2, 3 and 4.

23. We, therefore, remit the matter to the learned Single Judge for deciding the question Nos. 2, 3 and 4 on its own merits. We clarify, that we have not considered the merits of the matter and all questions available to both the parties are kept open."

8. Some of the facts, though they may appear to be repetitive, but are imporatnt to be narrated for decision on Question Nos. 2, 3 and 4, referred to above. In ***'Ashoka Smokeless Coal India (P) Ltd. and others VERSUS Union of India and others (2007) 2 SCC 640,*** the validity/legality of the Scheme framed by the Coal India Limited for sale of coal by e-Auction to the non-core sectors and traders came to be challenged. The Supreme Court set-aside

the policy of e-Auction of coal and, issued directions to frame a New Coal Distribution Policy (for short 'NCDP'). The Supreme Court concluded the judgment in Ashoka Smokeless Coal India (P) Ltd. and others VERSUS Union of India and others (supra) as under:-

"188. Coal being a scarce commodity, its utility for the purpose for which it is needed is essential. Although, technically, in view of the fact that no price is fixed for coal, there may not be any black marketing in the technical sense of the terms; but this Court cannot also encourage black marketing in general sense. Nobody should be allowed to take undue advantage while dealing with a scarce commodity. The very fact that despite best efforts of the Central Government, the coal companies failed to curb the menace of a section of people and to deal in coal excluding other general people therefrom or the linked consumers misusing their position of obtaining allotment of coal either wholly or in part, it is absolutely necessary that some mechanism should be found out for plugging the loopholes. The Union of India or the coal companies appear to have lost confidence in the State Governments. They had carried out joint inspection and in that process they must have arrived at a satisfaction about the genuineness of the claims of industrial units for which the linkage system was meant for.

189. Before us most of the consumers, with a view to obtain supply of coal had filed documents to prove their genuineness. The said documents must be scrutinised by the authorities of the coal companies. In the event, they have any suspicion, inspection should be carried out by officers appointed by the Chairman-cum-Managing Director of the company concerned within whose jurisdiction the unit is situated.

190. With a view to evolve a viable policy, a committee should be constituted by the Union of India with the Secretary of Coal being the Chairman. In such a committee, a technical expert in coal should also be associated as most of the projects involve consumers of coal, particularly manufacturers of hard coke and smokeless fuel. In our opinion, it may not be difficult to find out, having regard to the technologies used therein as regards the ratio of the input vis-à-vis the output, with a balance and 10% margin. On the basis of such finding alone, apart from the requirements of five years, supply should form the basis of MPQ. We may, however, hasten to add that the Central Government in collaboration with the coal companies would be at liberty to evolve a policy which would meet the requirements of public interest vis-à-vis the interest of consumers of coal. They would be entitled to lay down such norms as may be found fit and proper. They would be entitled to fix appropriate norms therefor. In the event, any industrial unit is found to violate the norms, it should be stringently dealt with.

191. Hard coke plants are also coal mines within the meaning of the Colliery Control Order, 2000. Hard coke is coal within the meaning of the provisions thereof. The Central Government, therefore, may think it fit to widen the definition of coal so as to include the smokeless coal in exercise of its power under the Essential Commodities Act. We may notice in ONGC [1990 Supp SCC 397] that this Court has held that slurries are a part of coal and is governed by the provisions of the Mines and Minerals (Regulation and Development) Act. Such being the wider definition of coal, we fail to see any reason as to why proper measure

cannot be taken by the Union of India to have a complete control thereover. Any strict mechanism to find out the genuine consumers would go a long way in taking preventive measures and dealing with coal by unscrupulous persons for unauthorised purposes. Those who do so, should be dealt with stringently but the same would not mean that the genuine consumers should suffer for want of coal.

192. We, in the peculiar facts and circumstances of this case, are of the opinion that it may not be difficult to find out as to who the genuine consumers are. So far as owners of the hard coke ovens are concerned, they are members of the association and their identity can easily be verified.

193. However, discussions made hereinbefore should not be taken to lay down a law that the Central Government and for that matter the coal companies cannot change their policy decision. They evidently can; but therefor there should be a public interest as contradistinguished from a mere profit motive. Any change in the policy decision for cogent and valid reasons is acceptable in law; but such a change must take place only when it is necessary, and upon undertaking of an exercise of separating the genuine consumers of coal from the rest. If the coal companies intend to take any measure they may be free to do so. But the same must satisfy the requirements of constitutional as also the statutory schemes; even in relation to an existing scheme e.g. Open Sales Schemes, indisputably the coal companies would be at liberty to formulate the new policy which would meet the changed situation. E-advertisement or e-tender would be welcome but then therefor a greater transparency should be maintained."

9. The Coal India Limited framed a new policy, which was introduced with effect from 18th October, 2007. According to the new policy, Fuel Supply Agreements (for short 'FSA') were to be entered into between the Coal Companies and, the purchasers of the coal. The price of the coal was fixed and, notified by the Coal India Limited. Before entering into the FSA, the verification, whether the unit was in operation/working condition, its requirement of raw-material etc. were to be ascertained by the Coal Companies. Once the FSA was entered into, the coal was to be supplied on fixed price, in terms of the NCDP.

10. In respect of the leading case, which is of M/s Fertico, the FSA was entered into between the petitioners and the coal company (NCL) on 30th April, 2008. The FSA was a commercial arrangement for supply of coal on a fixed price. When the FSA was in existence, the Central Bureau of Investigation (for short 'CBI') conducted made a joint surprise check of the factory premises of the petitioners and, noticed large-scale diversion of coal allotted under the NCDP on notified rates in pursuance of the FSA in the black-market in active connivance with the government officials. By diverting the coal in the black-market, these companies made exorbitant profits by wrongful gains, which caused a substantial loss to the Central Government/Coal Company to the tune of Rs.36.28 Crores.

11. Similar raids were conducted in the factory premises of other petitioners and FIRs were registered against them by the CBI.

12. The petitioners-M/s Fertico Marketing & Investment Pvt. Ltd. situated at B-20, Industrial Area, Ram Nagar, District Chandauli (for short 'petitioner-

Fertico Investment') is registered with U.P. State Industries Department as Small-Scale- Industry (for short 'SSI') for manufacturing Special Smokeless Fuel (SSF) from the raw-material i.e. coal obtained from the coal mine projects of Northern Coal Fields Limited (NCL) to be supplied under the NCDP on notified/subsidized rates. However, the CBI unearthed that the petitioner-Fertico Investment in active connivance with unknown officers/officials of District Industries Center (DIC), Chandauli; unknown officers/officials of NCL, Singrauli and others did not actually process the coal; instead the coal, so received, was sold in black market at a high premium.

13. The petitioner-Fertico Investment during the year 2010-11 lifted 30,569.86 metric-tonnes coal from NCL at an average price of Rs.1700/- per metric-tonne (notified/subsidized rate) and, sold the same at the rate of Rs.4,200/- per metric-tonne in black market. This notified/subsidized rate is the rate on which coal was supplied to Thermal Power Units of the Government of India.

14. The CBI, in the joint surprise check conducted on 25th March, 2011, noticed that the factory of the petitioner-Fertico Investment was in non-operational condition. An electric generator of 125 KVA was found installed in the factory. No power connection for the purpose of manufacturing SSF was found in the factory. The quality of coal, found available in the factory premises of the petitioner-Fertico Investment, did not match with the quality of coal being received by the petitioner-Fertico Investment from NCL. Samples of the coal from the factory premises of the petitioner-Fertico Investment were sent for testing the grade/quality. The Mechanical Examiner of coal, in his report, had stated that the quality of coal available in the factory premises of the petitioner-Fertico Investment was Grade-D, while the coal supplied to the petitioner-Fertico Investment by NCL was of Grade-B and Grade-C only. It was clear that coal available in the factory premises was kept for the namesake and, just to display the functional status of the factory to any inspection team.

15. Against the declaration of 18 labourers in the factory, only 04 were available. The conveyor system, bunker and retort of the coal handling plant were found in a dusty, non-lubricated and rusted condition and, it seemed that the plant was not in a functional condition for the last several months. The SSF, available in the factory premises of the petitioner-Fertico Investment, was tallied with their quantities shown in the books of the firm and, huge shortage was noticed.

16. The concept of SSF was developed by Central Mine Planning & Design Institute Limited (CMPDI) for large-scale production of domestic coke for meeting the progressive rise in demand of that type of fuel and, to minimize air pollution. As per technical specification, for a 100 tonnes per day SSF plant, the steam coal requirement would be 167 tonnes. The power supply to the plant should be 440 watt. The connected load was expected to be about 135 KW (including the power for standby equipment), the daily consumption of power would be about 1560 KW and, for a plant of 100 tonnes per day SSF, about 99 persons were required to be employed.

17. From the physical and technical inspection of the factory premises of the petitioner-Fertico Investment, it became

very clear that the factory was not in operation for the last couple of years. However, the petitioner-Fertico Investment continued to take supply under the notified/subsidized rate from NCL and, would sell the same in the black-market at a high premium. During the period 2010-11, the petitioner-Fertico Investment lifted quantity of steam coal Grade-B (LF) 22618.67 metric-tonnes and Grade-C (LF) 8690.20 metric-tonnes, total steam coal 31303.94 metric-tonnes from NCL at notified/ subsidized rates through road by trucks. The total load for faring the coal would be 1899 trucks. However, the coal was lifted by 284 trucks in several trips.

18. The CBI examined most of the owners of the trucks, which brought the coal form NCL and, allegedly unloaded in the factory premises of the petitioner-Fertico Investment. Three truck owners, covering 49 trucks' load and 748.66 metric-tonnes of coal confirmed in their statements that the coal loaded in their trucks from the projects of NCL was unloaded in the Chandasi Coal Market, Chandauli, instead of the factory premises of the petitioner-Fertico Investment. The distance between Chandasi Coal Market and Chandauli Industrial Area is around 15 kilometers.

19. The CBI also concluded that the diversion of coal taken from NCL on notified/subsidized rates in pursuance of the FSA in the black-market got corroborated from the fact that the Mobile Squad of the Commercial Tax, Varanasi, intercepted 4 trucks loaded with the coal from NCL for the factory premises of the petitioner-Fertico Investment going to Chandasi Coal Market. The instances of 4 trucks with their registration numbers have been given in the charge-sheet.

20. It is further recorded in the charge-sheet that on the notified/subsidized rates of B-Grade and C-Grade coal, the petitioner-Fertico Investment had purchased coal from NCL under the FSA and, the e-Auction rate of B-Grade and C-Grade of coal during 2010-11 was fixed to 1368/- per metric-tonn in case of B-Grade coal and Rs.2,421/- per metric-tonne in case of C-Grade coal. This e-Auction would be at-least at the market rate of B-Grade and C-Grade coal. It is also alleged that to camouflage the diversion of coal in the black-market, bogus sale of SSF was shown by the petitioner-Fertico Investment in its books. As per the record of the petitioner-Fertico Investment, the company had shown a sale of 18633.05 metric-tonnes of SSF and 7940.60 metric-tonnes undersized coal to different private parties through 880 trucks in the year 2010-11. Out of said 880 trucks, 181 vehicles were found other than trucks (motorcycle, tractor and bus etc.) and/or having unallocated registration numbers by the ARTOs of different districts. The owners/drivers of 47 vehicles, on their examination, stated that their trucks never loaded any coal or coal product from the factory premises of the petitioner-Fertico Investment. However, invoice of each sale had been prepared by the petitioner-Fertico Investment, mentioning therein date, type of commodity, weight, vehicle number and amount etc. In addition, sale of 4094.03 metric-tonnes SSF and 1461.74 metric tonnes undersized coal made through 227 vehicles had been established to be false and fabricated.

21. The CBI, in its investigation, has found that during the year 2010-11, to show the bogus sale of SSF/undersized coal, the petitioner-Fertico Investment forged the purchase and sale documents

and, used them as genuine to NCL and Department of Commercial Tax. These sales have been fraudulently and dishonestly shown by accused, Anil Kumar Agrawal and Arun Kumar Agrawal, Directors of the petitioner-Fertico Investment and/or their close relatives. One of the Directors, accused Anil Kumar Agrawal was also the proprietor of firm M/s Anil Traders, Chandasi, Chandauli. Accused, Anil Kumar Tiwari, an employee of Munna Industries (Proprietor accused, Anil Kumar Agrawal) was the Proprietor of M/s Baba Enterprises, Chandauli. Similarly, accused Chandrama Yadav, working as labourer in the petitioner-Fertico Investment was Proprietor of M/s Yadav Traders, Chandauli and Mritunjay Kumar, a domestic help of accused Anil Kumar Agrawal was the proprietor of M/s Om Enterprises, Chandauli. Accused Anil Kumar Agrawal, with fraudulent and mala-fide intention constituted these firms viz. M/s Baba Enterprises, M/s Yadav Traders and M/s Om Enterprise and, got them registered with Commercial Tax Department, Varanasi for doing the business of coal in the name of his employees for re-routing coal as SSF. All the said four firms have been found indulging in bogus purchase of SSF/undersized coal by the petitioner-Fertico Investment.

22. The CBI further found that accused Jay Narayan Agrawal is brother-in-law of accused, Anil Kumar Agrawal, Director of the petitioner-Fertico Investment. He was the Director of M/s Ananda Coal Movers and, proprietors of two firms; M/s Shivam Coal Movers, Chandasi, Chandauli and M/s Trishul Industries, Chandauli. All these firms were found indulging in bogus purchase of SSF/undersized coal by the petitioner-Fertico Investment. Accused, Arun Kumar Agrawal, one of the Directors of the petitioner-Fertico Investment and, his brother, accused, Anil Kumar Agrawal were also Proprietors of M/s Surya Industries, Chandauli. This firm had been found indulging in bogus purchase of SSF/undersized coal by the petitioner-Fertico Investment.

23. According to the CBI, the petitioner-Fertico Investment criminally conspired with 11 different firms i.e. M/s Ananda Coal Movers, Pvt. Ltd. (owned by accused Jay Narayan Agrawal), M/s Om Enterprises (owned by accused Anil Kumar Agrawal), M/s Purnagiri Holding Pvt. Ltd., (owned by accused Subhash Chand Tulsyan and accused Muksh Kumar Tulsyan), M/s Anil Traders (owned by accused Anil Agrawal), M/s Baba Enterprises (owned by accused Anil Agarwal), M/s Shivam Coal Movers (owned by accused Jay Narayan Agarwal) M/s Shubhangi Traders (owned by accused Anand Shukla) M/s Surya Industries (owned by accused Arun Kumar Agrawal), M/s Trishul Industries (owned by accused Jay Narayan Agrawal), M/s Yadav Traders (owned by accused Anil Agrawal) and M/s Tulsyan Coal Syndicate (owned by accused Subhash Chand Tulsiyan) and in furtherance of the said criminal conspiracy, M/s Shree Ram Fuel Pvt. Ltd fraudulently and dishonestly prepared bogus sale invoices in favour of the said firms and the said firms dishonestly/fraudulently reflected the said fake/bogus purchases as genuine in their records.

24. The CBI, in its charge-sheet, has detailed that how-much coal received from the NCL under FSA on notified/subsidized rate was diverted through these firms which was shown to have been purchased by these

firms as SSF/undersized coal from the petitioner-Fertico Investment and, the CBI concluded that in the year 2010-11 itself a substantial amount of wrongful gain of seven crores rupees was made by the petitioner-Fertico Investment from diverting the coal received under the notified/subsidized rate in the black market.

25. The investigation by the CBI has also revealed that the coal supply to the petitioner/Fertico Investment was made after taking certification of the operational status from the State Industries Department i.e. District Industries Center (DIC). After allotment of coal by the concerned coal companies, the coal companies used to write to the units directly for verification and, send a copy of the letter to the DICs and the Directorate of Industries. On receipt of such letters from the coal companies, the DICs used to verify and send their report directly to the concerned coal companies. Sometimes, the coal companies used to write to the Directorate of Industries also for the same. It was further disclosed that on request of CIL in December, 2010, the Directorate of Industries, Kanpur forwarded formats I and II to all DICs for compliance.

26. The CBI, in its investigation, had further found that accused, Anil Kumar Agrawal had entered into a criminal conspiracy with accused Ramji Singh, General Manager, DIC, Chandauli and, in furtherance of the said criminal conspiracy, fraudulently and dishonestly sent false status reports regarding the working condition of the petitioner-Fertico Investment during the period June, 2010 to November, 2010 under his signature. Accused Ramji Singh, General Manager, DIC, Chandauli deliberately and, dishonestly concealed the real fact that the factory of the petitioners was not in operation. During this period, he sent month-wise false status reports to the Directorate of Industries, Kanpur for onward transmission to the NCL, Singrauli. On the basis of the month-wise status report duly signed by accused, Ramji Singh, the NCL supplied coal at a notified price to the petitioner-Fertico Investment. Further, from December, 2010 to February, 2011, the information regarding the end use and operational status of the petitioner-Fertico Investment was fraudulently and dishonestly submitted in Format No. I & II by accused, Anil Kumar Agrawal, Director of the petitioner-Fertico Investment along with affidavit and, in furtherance of the said criminal conspiracy, the same was fraudulently and dishonestly certified by accused, Ramji Singh, the then General Manager and accused, Yogendra Nath Pandey, Assistant Manager, DIC, Chandauli. These reports were sent by accused, Ramji Singh to the Directorate of Industries, Kanpur, who further sent the same to the General Manager, Sales, NCL, Singrauli. On the basis of the said false certificate regarding existence of the unit, its operational status and, end use of the coal, further supplies of coal were made to the petitioner-Fertico Investment by NCL and, thereby the accused obtained pecuniary advantage for themselves and, for other co-accused by corrupt and illegal means.

27. It has been further said that during the course of investigation role of the officers/officials of NCL and Coal India Limited was examined. As per the provisions of NCDP, CIL was to undertake verification of such consumers of erstwhile non-core sector in a time-bound manner, either directly or through an agency, so as to check the veracity of their claim of being

bona fide consumers of coal for allocating coal to such consumers on notified rates. However, there were no clear-cut guidelines/methods regarding the verification of non-core sector and, Small Scale Industrial Units. As per the provisions of the FSA, the NCL was bound to supply the coal to the petitioner-Fertico Investment on the notified price. In absence of any clear-cut guidelines, no physical verification of the factory premises of the petitioner-Fertico Investment could take place. However, on the basis of the bogus/false verification certificate issued by DIC, NCL kept on supplying coal to the petitioner-Fertico Investment.

28. It is important to note here that the CBI could not find any incriminating evidence against the officers/officials of the NCL/CIL.

29. Heard Mr. Sri Ajit Kumar Sinha, learned Senior Advocate assisted by Mr. Himanshu H. Gupta, Mr. Yasovardhan Swaroop, Mr. Alok Kumar Singh and Mr. Aishwarya Sinha for the petitioners and Mr. Anurag Kumar Singh for the CBI and Mr. Rao Narednra Singh, learned AGA for the State.

30. After setting out the facts and findings of the CBI in its charge-sheet dated 13.04.2011 in brief, I would now deal with three questions, on which the Supreme Court, has remitted the matter back for decision by this Court .

"Q.No. 2. Whether the cases are overwhelmingly and predominantly of civil nature as purely based on breach of contract (FSA) and the criminal prosecutions are liable to be quashed?"

31. After the judgment of the Supreme Court in *Ashoka Smokeless Coal India (P) Ltd. and others VERSUS Union of India and others* (supra), the Government of India, Ministry of Coal, formulated 'New Coal Distribution Policy' and, published the same on 18th October, 2007 in supersession of existing coal distribution policy for core and non-core sectors and, other instructions issued in this regard from time to time.

32. Classification of consumers into core and non-core sectors was reviewed on the basis of new policy and, it was decided to dispense with the same. Instead, each sector/consumers was treated on merit, keeping in view, inter alia, the regulatory provisions applicable thereto and other relevant factors. Requirement of Defence Sector and Railways was to be met in full at notified price. For power utilities, including independent power producers/captive power plants and, fertilizer sector, under the new policy, 100 per cent quantity as per the normative requirement of the consumers was to be made through 'Fuel Supply Agreement' (for short 'the FSA') by CIL at fixed prices to be declared/notified by CIL. In respect of other consumers, it was provided that under the NCDP, 75% of the quantity as per the normative requirement of the consumers/actual users should be considered for supply of coal through FSA by CIL at notified prices to be fixed and declared by CIL and, balance 25% of coal requirement of the units was to be sourced by them through e-auction/import of coal etc, as per their preference.

33. All the existing linkage holders of erstwhile core and non-core sectors and, not having FSAs were required to be entered into FSAs with coal companies. It was further provided that distribution of coal to units where requirement was upto 4200 tonnes per annum, the distribution was to be done through agencies nominated by the State Government; in units, where

requirement was more than 4200 tonnes per annum, coal was to be supplied directly from CIL/Subsidiary companies through FSAs. So far as the linked consumers of erstwhile non-core sector, whose annual requirement was less than 4200 tonnes, were concerned, they were given option to either enter into FSA with the coal company or they could opt out FSA regime and access their coal requirement through agencies nominated by State Governments. In respect of supply of coal to steal plants, it was provided that the same would be based on FSA. In respect of supply of coal to consumers in small and medium sector, it was provided that the State Governments would be requested to work out genuine requirement of such units in small and medium sector like smokeless fuel, brick kiln, coke oven units etc in a transparent and scientific basis and distribute coal to them accordingly. It was further provided that all the existing valid linked consumers, whose linkage/MPQ, during the year 2006-2007, was 4200 tonnes or more were to enter into FSAs with coal companies within six months from the date to be notified by CIL. The other valid linked consumers were given option to opt out of FSA regime or enter into FSA within six months. On opting out, such consumers could access their coal requirement through various channels i.e., e-caution, distribution network of State nominated agencies etc. Failure, to enter into FSA would result in discontinuation of supplies at fixed prices.

34. It was further provided that around 10% of the estimated annual production of CIL would be initially offered through e-auction and, the quantity to be offered under e-auction would be reviewed from time to time by the Ministry of Coal. It was for the CIL to undertake verification of erstwhile consumers/non-core sector consumer in a time bound manner, either directly or through an agency, so as to check the veracity of their claim of being *banafide* consumers of coal and, thereafter, act accordingly.

35. The NCL on 19th March, 2008, intimated to the petitioners herein that under the New Coal Distribution Policy (for short 'NCDP') all the existing valid linked consumers, whose linkage/MPQ was 4200 tonnes or more, they were required to enter into FSAs with coal companies. Other valid linked consumers were having option to opt out of FSA regime or enter into FSA. On opting out, such consumers could access their coal requirement through various other channels, like e-auction, distribution net work of State nominated agencies etc. Failure to enter into FSA with the supplying coal company would result in discontinuation of supply at fixed price.

36. Pursuant to the aforesaid letter dated 19th March, 2008 written by the the Northern Coalfields Limited (for short 'the NCL') to the petitioners herein, a Fuel Supply Agreement dated 30th April, 2008 was entered into between NCL and the petitioners. The life of FSA was for five years. Clause 4.4 of the FSA specifically provided that the purchaser should not sell/divert and/or transfer the coal for any other purpose whatsoever and, the same shall be treated as material breach of agreement. In case of material breach, the NCL would terminate the agreement forthwith without any liability or damage whatsoever, payable to the purchaser. The NCL had right to verify including the right to inspect/call for any document from the purchaser and physically verify the ends-use of coal and satisfy itself to its authenticity.

37. Clause-14 provided dispute settlement mechanism.

38. Clause-15 provided that in the event the purchaser re-sells/diverts the coal pursuant to the agreement, the seller would have the right to terminate agreement forthwith and, the NCL would be entitled to forfeit the security deposit of the purchaser in addition to rights vested with the seller (NCL) upon such termination.

39. In pursuance of the aforesaid FSA, the petitioners furnished bank guarantee in favour of the NCL to the tune of Rs. 33,12,913/, which stood fortified.

40. After the first information report was registered by the CBI in the present case, the NCL on 23rd May, 2011 issued notice whereby supply of coal to the petitioners was kept in abeyance in the light of the FIR lodged by the CBI against the petitioners.

41. The learned counsel for the petitioners has submitted that the FSA is a bilateral commercial arrangement which provides mechanism for settlement of dispute and remedies available to the parties in case of a breach. In sum and substance, allegation against the petitioners is that they had breached the terms of the agreement inasmuch as they had allegedly diverted the coal, taken under FSA from NCL at notified price, in the black market at a high premium and for such a breach remedy is envisaged in the FSA itself. Further, it has been submitted that the NCL has already taken action under the FSA and, had forfeited the security deposit of Rs.33,12,913/-. Further it has been submitted that for violating the terms of the commercial contract, remedy lies in civil action and, no criminality can be attached to it. It is also submitted that the FSA provides mechanism to handle the situation in case buyer diverts the coal procured under FSA in the open market. Offence under Section 420 IPC is not attracted against the petitioners.

42. It is also submitted that it is well settled that a person to be held guilty of cheating, as defined under Section 415 IPC, it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise with an intention to retain the property. Mere failure in complying with the promise would not amount to cheating. Allegation that the petitioners made false representation to enter into FSA for supply of coal by NCL at notified rates and, thereafter sold the coal in open market at high premium of Rs.2,500/- per metric tonnes was completely false. It is submitted that the CIL, in its reply dated 11.02.2010, under the Right to Information Act, had specifically (Annexure-14) informed that there was no subsidy/financial support from the Central Government to CIL and to its subsidiary coal companies for sale of coal under the FSA. The price derived through a process of e-auction could not have been the basis for drawing a conclusion that the coal taken under the FSA by the petitioners from NCL was diverted at a premium of Rs.2,500/- per metric tonne in the open market. Only 10 per cent of the total production of the CIL could have been sold through e-auction and, rest of the coal was to be supplied through FSA at a notified rate.

43. The learned counsel has also submitted that no offence under Sections 467, 468 and 471 IPC could be said to have been committed by the petitioners as there had been no fraudulent inducement prior to entering into the FSA nor any document or electronic document was forged for entering into the FSA. Even ingredients of

Section 471 IPC are totally absent as there had been no allegation or evidence of using as genuine a forged document or electronic record. He has also submitted that offences under Sections 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act are not attracted against the petitioners as the same would be attracted when there is a criminal misconduct by a public servant. In support of submission that the present dispute is predominantly contractual in nature and arose from breach of commercial contract, he has placed reliance upon the following judgments:

i.) Anil Mahajan Vs. Bhor Industries Ltd. and another, (2005) 10 SCC 228;

ii.) Gorige Pentaiah Vs. State of Andhra Pradesh and others, (2008) 12 SCC 531;

iii.) V.Y. Jose and another Vs. State of Gujarat and another (2009) 3 SCC 78:

iv.) V.P. Shrivastava Vs. Indian Explosives Limited and others, (2010) 10 SCC 361

v.) Sushil Sethi and another Vs. The State Of Arunachal Pradesh and another, (2020) 3 SCC 240:

44. In respect of Q.No. 3. "Whether CBI did not follow doctrine of parity in filing the criminal prosecutions against the petitioners? If so, its effect?", on behalf of the petitioners it has been submitted that the CBI in identical matter, involving the allegations of diversion of coal and re-sell of coal in open market, had filed closer report before the Special Judge, CBI, Dhandbad and, the same had been accepted by the Special Judge and final format of closure had been submitted. It was specifically recorded that no criminality could be pin-pointed and, the action could be taken under the Income Tax Act. Coal companies were asked to look into the lapses and, take required action for systematic improvement. The closure report has been placed on record with the supplementary affidavit filed on behalf of the petitioners dated 04.12.2013, which was accepted by the learned Special Judge, CBI. It is submitted that in case of ***Babloo Kumar Vs. State of Jharkhand and others, 2006 (3) JCR 144,*** the Jharkhand High Court quashed the FIR registered by the State police and, further proceedings on identical allegations of diverting the coal in the black-market on the ground that the police found allotment of coal and transport of the goods on valid documents and, nothing remained for further investigation by the police. He has said that the Special Leave Petition filed against the aforesaid order was dismissed by the Supreme Court vide order dated 01.12.2006, which has been annexed as Annexure-17. The learned counsel has also placed reliance in the case of ***Ajmer Singh Vs. State of Haryana (2010) 3 SCC 746, paras 23 to 29*** of which read as under:-

"23. The principle of parity in criminal case is that, where the case of the accused is similar in all respects as that of the co-accused then the benefit extended to one accused should be extended to the co-accused. With regard to this principle, it is important to mention the observation of this Court in Harbans Singh v. State of U.P. [(1982) 2 SCC 101 : 1982 SCC (Cri) 361] In that case it was held, that, in view of commutation of death sentence of one of the accused, who was similarly placed as that of the appellant, award of death sentence to the appellant was unjustified and hence, the death sentence of the appellant was stayed till the decision of the President on commutation of sentence.

24. An important observation of this Court on the point need to be noticed at this stage: (Harbans Singh case [(1982) 2 SCC 101 : 1982 SCC (Cri) 361] , SCC p. 107, para 18)

"18. ... it will be a sheer travesty of justice and the course of justice will be perverted, if for the very same offence, the petitioner has to swing and pay the extreme penalty of death whereas the death sentence imposed on his co-accused for the very same offence is commuted to one of life imprisonment and the life of the co-accused is shared (sic spared)."

25. In Akhil Ali Jehangir Ali Sayyed v. State of Maharashtra [(2003) 2 SCC 708 : 2003 SCC (Cri) 685] , this Court maintained that as the second accused was placed on the same situation as the appellant, Article 21 of the Constitution would not permit this Court to deny the same benefit to the second accused.

26. The Court of Appeal, Alberta, Canada in R. v. Christie [2004 ABCA 287 : 2004 Carswell Alta 1224 (CA)] discussed the meaning of the principle in connection with sentencing in criminal cases. The Court of Appeal stated:

"40. Parity is a principle which must be taken into account in any sentence, and particularly where the offence was a joint venture. There will, of course, be cases where the circumstances of the co-accused are sufficiently different to warrant significantly different sentences, such as where one co-accused has a lengthy related criminal record or played a much greater role in the commission of the offence."

Thus, expressing its view on "parity in sentencing" the Court observed:

"43. What we must strive for is an approach to sentencing whereby sentences for similar offences committed by similar offenders in similar circumstances are understandable when viewed together, particularly in cases involving joint ventures."

27. Also the observation of the Court of Appeal, Alberta in Wahby v. R. [2004 WASCA 308 : 2004 WL 3061688] , whereby, the Court quoted the explanation given in Goddard v. R. [(1999) 21 WAR 541] , is relevant for the discussion in the present case:

"In considering the application of the principle, all the circumstances of the case are to be taken into account; those concerned with the commission of the offence and those which are personal to the offender before the court and the co-offender. Where there are differences, as almost inevitably there will be, true parity will be produced by different sentences, each proportionate to the criminal culpability of each offender, bearing in mind, as is often said but is worth repeating, that sentencing is not and should not be a process involving a search for mathematical precision, but is an act of discretion informed by the proper application of sentencing principles to the particular case. Inevitably there will be a range of appropriately proportionate sentences which may be passed for the offence before the court."

28. The Court of Appeal of the Supreme Court of Victoria, Australia in R. v. Hildebrandt [187 A Crim R 42 : 2008 WL 3856330 : 2008 VSCA 142] observed:

"Judicial expositions of the meaning of the parity principle are not entirely uniform. The term "the parity principle' is used in at least two senses in the relevant authorities. First, to express the recognition that like cases should be treated alike (itself an emanation of equal justice). Secondly, the phrase is used to describe the requirement to consider the "appropriate comparability' of co-offenders, and in that

sense, comprehends the mirror propositions that like should be treated alike, and that disparate culpability or circumstances may mandate a different disposition."

29. In Postiglione v. R. [(1997) 189 CLR 295 : 94 A Crim R 397] Dawson and Gaudron, JJ. stated:

"The parity principle upon which the argument in this Court was mainly based is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them. In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. If so, the notion of equal justice is not violated.... Discrepancy or disparity is not simply a question of the imposition of different sentences for the same offence. Rather, it is a question of due proportion between those sentences, that being a matter to be determined having regard to the different circumstances of the co-offenders in question and their different degrees of criminality."

The Court, therefore, concluded the principle to mean:

"... the concept simply is that, when two or more co-offenders are to be sentenced, any significant disparity in their sentences should be capable of a rational explanation."

What can be inferred from the above decision is, that for applying the principle of parity both the accused must be involved in same crime and must be convicted in single trial, and consequently, a co-accused is one who is awarded punishment along with the other accused in the same proceedings."

45. With regard to Question No. 4 'Whether in absence of Officer/official of NCL, charge of Criminal conspiracy under section 120-B IPC could be made out, it is submitted that the prior meeting of minds of two or more persons is *sine-qua-non* for offence of criminal conspiracy. It is further submitted that an agreement must relate to doing or causing to be done either an illegal act or an act, which is not illegal itself, but it is done by illegal means. In the present case, the CBI did not find any criminality by the officers of the NCL/CIL. If the officers of NCL and CIL were not involved, it negates the possibility of criminal conspiracy of the petitioners and the officers of the NCL inasmuch as for criminal conspiracy, the criminality of officers of NCL/CIL was to be established, but the CBI had not found any thing against the officers of the NCL/CIL. The learned counsel for the petitioners has placed reliance upon two judgments of the Supreme Court; (i) ***Yogesh alias Sachin Jagdish Joshi Vs. State of Maharashtra, (2008) 10 SCC 394,*** paragraphs 18, 19 and 20 are extracted herein below:

"18. Section 120-A IPC defines criminal conspiracy. The section reads as under:

"120-A. Definition of criminal conspiracy.--When two or more persons agree to do, or cause to be done,--

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.--It is immaterial whether the ille*gal act is the ultimate object of such agreement, or is merely incidental to that object."*

19. Section 120-B IPC provides for punishment for an offence of criminal conspiracy.

20. The basic ingredients of the offence of criminal conspiracy are: (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. It is, therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy. Yet, as observed by this Court in Shivnarayan Laxminarayan Joshi v. State of Maharashtra [(1980) 2 SCC 465 : 1980 SCC (Cri) 493] a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the common intention of the conspirators. Therefore, the meeting of minds of the conspirators can be inferred from the circumstances proved by the prosecution, if such inference is possible."

and; (ii) ***State of Madhya Pradesh Vs. Sheetla Sahai and others, (2009) 8 SCC 617,*** paragraphs 36 to 38 of which are extracted hereunder:-

"36. Criminal conspiracy has been defined in Section 120-A of the Penal Code, 1860 to mean:

"120-A. Definition of criminal conspiracy.--When two or more persons agree to do, or cause to be done,--

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.--It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

Section 120-B of the Penal Code provides for punishment for criminal conspiracy.

37. Criminal conspiracy is an independent offence. It is punishable separately. Prosecution, therefore, for the purpose of bringing the charge of criminal conspiracy read with the aforementioned provisions of the Prevention of Corruption Act was required to establish the offence by applying the same legal principles which are otherwise applicable for the purpose of bringing a criminal misconduct on the part of an accused.

38. A criminal conspiracy must be put to action inasmuch as so long a crime is generated in the mind of an accused, it does not become punishable. What is necessary is not thoughts, which may even be criminal in character, often involuntary, but offence would be said to have been committed thereunder only when that take concrete shape of an agreement to do or cause to be done an illegal act or an act which although not illegal by illegal means and then if nothing further is done the agreement would give rise to a criminal conspiracy. Its ingredients are:

(i) an agreement between two or more persons;

(ii) an agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means."

46. In view of aforesaid, the learned counsel has lastly submitted that the proceedings impugned, in pursuance of the charge-sheet, would result in abuse of process of the Court and, not serve the ends of justice and, therefore, are liable to be

quashed by this Court in exercise of its inherent power under Section 482 CrPC.

47. On the other hand, Mr. Anurag Kumar Singh, learned counsel for the CBI, has submitted that there was no compulsion or pressure on the petitioners to enter into the FSA and, it was purely a discretion of the linkage holders to enter or not to enter the FSA. In case, they would have chosen not to enter into the FSA, they could have accessed their coal requirement through agencies nominated by the State Government or other channels like e-auction. The price charged to such consumers entering into the FSA was a notified price on which coal was also made available to the Defence Establishments and the Railways. Such agencies, entering into the FSA, were entitled to charge actual price and upto 5 per cent margin as service charge over and above the basic price charged by the coal company. The State Governments and the Central Government Departments having administrative control over such agencies were held responsible to ensure that coal allotted to the targeted consumers was distributed in a fair and transparent manner and, they were responsible for taking appropriate action to prevent its misuse.

48. The coal was supplied to the targeted consumers on notified price for the welfare of general public. He has further submitted that the Supreme Court in ***Ashoka Smokeless Coal India (P) Ltd. and others Versus Union of India and others*** (supra) had held that "The coal companies would have a duty to fix the price of an essential commodity in such a manner so as to sub-serve the common good." In paragraphs-111, it was held that "..... the object of price fixation is to see that the ultimate consumers obtain the essential commodity at a fair price and for achieving the said purpose, the profit margin of the manufacturer/producers may be kept at a bare minimum." It is for this reason, the coal was supplied to the petitioners under the FSA on the notified price.

49. The purpose, for which the petitioners were given supply of coal under the FSA on notified price, was that the consumers should get special smokeless fuel (coke), which is a domestic fuel, suitable for cooking at a very reasonable price. He has further submitted that during the course of investigation, the sufficient evidence had been collected against the petitioners that they had sold the coal supplied to them under the FSA on notified price at an average price of Rs. 1700/- per metric tonne in the black market at the rate of Rs.4200/- per metric tonne. This act had not only caused wrongful gain to the petitioners but also dented the entire coal distribution mechanism created for welfare of the common man.

50. The CIL is a public sector undertaking and, it was enjoying monopoly in coal mining in the country. This monopoly was created in favour of the people of the country with the sole purpose of ensuring that the public/consumers get the commodity at a fair price and for this purpose complex mechanism of distribution of coal was created. The coal linkages of the petitioners was existing prior to coming into force the NCDP for the purpose of production of SSF. The petitioners had applied in pursuance of the advertisement issued by the CIL. The SSF was promoted as the same was pollution free domestic fuel and, therefore, public at large was beneficiary. The petitioners, being linkage holders, were given an option to enter into the FSA for supply of coal at a

notified price in order to supply smokeless fuel for the common households and small kitchens, canteens/hotels with the sole purpose that smokeless fuel reaches to consumers at a very reasonable price. The petitioners, instead of producing SSF, had diverted the coal, taken on notified price, in the black market as is evident from the charge-sheet. They entered into the FSA, misrepresenting and deceiving the NCL in believing that they would use coal for the purpose of producing SSF. Diversion of coal and non-fulfillment of the conditions of the FSA would also entitle the seller to cancel the agreement. In the present case, since the act of the petitioners was deliberate continuous act done over a period of time as they were diverting the coal for the purpose of earning illegal profit against the expressed terms and conditions of the FSA, their act amounts to cheating and forgery etc. for which the CBI had collected sufficient evidence against them and, therefore, they were to be prosecuted for committing criminal offences, besides civil consequence. The petitioners had deceived the NCL, dishonestly induced the coal company to deliver coal to them at notified price under the assurance that they would utilize the coal supplied for the production of SSF only and nothing else.

51. Wrongful loss is not a precondition for the offence of cheating. Offence under Sections 467, 468 and 471 IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act are clearly made out against the petitioners, as the petitioners made false documents in connivance with the officials of the District Industries Center, Chandauli and other co-accused persons as bogus certificates regarding the end-use of coal received by the petitioners, the operational status of the production unit of the petitioners as well as the sale invoices in favour of private firms showing the sale of coal to them, showing transportation of coal by vehicles which were later on found to be motorcycles and scooters etc.

52. The learned counsel for the CBI has further submitted that the facts of the case in the case of *Babloo Kumar Vs. State of Jharkhand and others* (supra) cited by the petitioners were different and, the judgment rendered by the Jharkhand High Court had no bearing to the facts of the present case. The learned counsel for the CBI has further submitted that in the present case, not only the NCL had suffered loss because of not being able to supply the same quantity of coal by e-auction, but the general public, for whom the coal was intended, had also suffered a loss by the sale of said quantity at a higher price by the petitioners. The learned counsel for the CBI has placed reliance in the judgment of the Supreme Court in the case of ***Rajesh Bajaj Vs. State of NCTE Delhi and others, (1999) 3 SCC 259*** and ***Tulsi Ram Vs. State of U.P., 1963 Supp. (1) SCR 382.***

53. In respect of Question No. 2, the learned counsel for the CBI has submitted that the cases are not purely based on breach of contract and not predominantly of civil nature. The petitioners had committed criminal offences, as mentioned in the charge-sheet. There are sufficient evidence available on the record for their prosecution. The petitioners had caused dent to the programme of the Government aimed at providing domestic coal to the general public at a reasonable price and, they had hugely received wrongful gain in the process. The learned counsel for the CBI has further submitted that in the case of *Babloo Kumar Vs. State of Jharkhand*

and others (supra), the CBI did not find sufficient evidence, but here in the present case, more than sufficient evidence are available against the petitioners. Here, in the present case for offence of criminal conspiracy and involvement of the petitioners in diverting the coal supplied to them under the SFA on notified price in black-market in active connivance of the government officials and co-accused, the CBI had collected sufficient evidence against them. There can be no claim of parity to desire any benefit against the law. It is further submitted that the charge of criminal conspiracy under Section 120-B IPC was clearly made out in absence of officers of the NCL inasmuch in the present case, the coal was being supplied under the FSA merely on the basis of certificates issued by the District Industries Center, certifying the operational status and production of the Units. The offence has been purportedly committed by the petitioners and, the government officials of District Industries Center without any involvement of NCL officials. The basis of offence is misrepresentation by the petitioners before the NCL and forging of documents etc. There is no complicity of the NCL officials and, therefore, offence under Section 13(2) read with 13(1)(d) of the Prevention of Corruption Act is only against the petitioners, and the officials of the District Industries Center, Chandauli is clearly established. It has been further submitted that since the charge-sheet and the evidence collected by the CBI clearly disclose the commission of offence by the accused-petitioners, these petitions are nothing but an abuse of process of the Court and, are liable to be dismissed.

54. I have considered the submissions carefully and, perused the charge-sheet and other documents placed with pleadings.

55. The coal is a raw-material for several industries e.g. power, steal and oil, which were considered to be core-sectors, vital for the economy of the country. The Coal had been a controlled commodity, specially regulated one. It is an essential commodity. Coking coal mines and coal mines were nationalized by The Coking Coal Mines (Nationalization) Act, 1972 and Coking and Non-Coking Coal Mines (Nationalization) Act, 1973. After nationalization, coal consumers were categorized into two main sectors, namely, core-sector and non-core sector. Core Sector's consumers included sectors vital for infrastructural developments e.g. power, steal, cement, defence, fertilizers, railways, paper aluminium, export, central public sector undertakings etc. and, for other remaining sectors/consumers were categorized as non-core sectors. 94.61% of coal produced in India used to be consumed by core-sector, whereas non-core sector used to consume 5.39% of total production of coal. Linkage of coal to be supplied to the consumers was based on: (i) availability of coal; (ii) requirements thereto in respect of each industries, as certified by the State and; (iii) the capacity of Railways to transport coal.

56. There was always a mismatch between demand of coal in respect of non-core sector and coal availability in the subsidiary companies of the Coal India Limited. After 2001, new linkages could not be granted for non-core sector consumers and, these consumers were constrained to purchase coal from black-market at a higher price/premium. Even the consumers, having linkages, had to depend on secondary market and, they wanted enhancement in supply of quantity of coal.

57. The existence of high premium price in secondary market tempted the linked non-core sector consumers to

divert/sell the coal taken on notified price from the nationalized coal companies in open/black market.

58. With effect from 1st January, 2000, the coal became a non-regulated commodity i.e. its price could not be controlled by the Central Government and, henceforth it was the Coal India Limited which became entitled to determine its price. On 06.06.2001, the Coal India Limited authorized its each subsidiary company to decide its own policies for sale of coal to non-core sectors, including the price to be charged.

59. It was well-known that the supply could not meet the demand which was to a great extent artificial and man-made. To prevent black-marketing of coal by procuring in excess of their requirements and/or units being non-existence, a new scheme as e-auction was made to meet the liberalization of policy of Central Government in regard to import of coal on earning of profit to the coal mines and, to provide transparent system of distribution of coal. This policy of e-auction came to be challenged before the Supreme Court in the case of *'Ashoka Smokeless Coal India (P) Ltd. and others VERSUS Union of India and others'* (supra). The Supreme Court quashed the said policy and, directed to evolve a new vital policy for which a direction was given to constitute a committee by the Central Government with the Secretary of Coal, being the Chairman, which should meet the requirements of public interest viz-a-viz the interest of consumers of coal.

59. As mentioned above, in compliance of the judgment in the case of *'Ashoka Smokeless Coal India (P) Ltd. and others* VERSUS Union of India and others (supra) and direction given therein, NCDP was formulated by Government of India, Ministry of Coal. The Supreme Court itself has taken a judicial notice of the fact of diversion of coal taken by the non-core consumers on notified price in black/open market at a high premium.

60. The allegations and findings against the petitioners are that they had taken coal on the basis of FSAs on notified price for manufacturing special smokeless fuel to be supplied for domestic use, but instead of using the coal taken on notified price, they had unauthorizedly diverted the same in the open/black market and, thus, had obtained pecuniary gains and, corresponding caused loss to the coal company/public in general. The CBI had carried out intensive investigation and, filed a detailed charge-sheet against the petitioners.

61. The CBI in its charge-sheet has mentioned following material/ evidence in respect of the allegation/charge against the petitioners; (i) the factory premises of the petitioners was found in a non-functional condition; only electric generator of 125 KVA was found installed and no power connection for the purpose of manufacturing SSF was found in the factory premises of the petitioners; (ii) the quality of coal found available in the factory premises did not match with the quality of coal having been received by the petitioners, which was evident from the report of Chemical Examiner of the coal available in the factory premises of the petitioners, which was Grade-D, while coal supplied to the petitioners was Grade-B and Grade-C only; (iii) against the declaration of 18 labourers in the factory premises, only 4 labourers were available. The conveyor system, bunker and retort of the

coal handling plant were found non-lubricated and dusted condition, which would indicate that the plant was not in running condition for the last several months. However, for the smooth functioning of the plant of capacity of 100 metric tonnes per day, about 99 persons would be required to be employed; (iv) The truck owners, in their statements, had confirmed that the coal loaded in their trucks from the produce of NCL was unloaded in the Chandasi Coal Market, Chandauli District, instead of factory premises of the petitioners. The mobile squad of Commercial Tax Department, Varanasi had intercepted on 4 occasions trucks loaded with coal from NCL supposed to be going to the factory premises of the petitioners, while coming to Chandasi Coal Market instead of factory premises.(v) Sale of 18633.05 metric-tonnes of SSF and 7940.60 metric-tonnes undersized coal to different private parties, as shown in the record through 880 trucks in the year 2010-11 was found false inasmuch as out of said 880 trucks, 181 vehicles were found other than trucks (motorcycle, tractor and bus etc.) or having un-allotted registration numbers by the ARTOs of different districts. Owners/drivers of 47 trucks, in their statements, had stated that they had never loaded any coal or coal product from the factory premises of the petitioners. (vi) Fake invoices were prepared by the petitioners, mentioning therein different type of commodity, weight, vehicle number and amount etc. The sale of 4094.03 metric tonnes SSF and 1461.74 metric tonnes undersized coal made through 227 vehicles had been established to be false and fabricated. (vii) To show bogus sale of SSF/different undersized coal, the petitioners had forged purchase and sale documents and used the same as genuine to NCL and the Department of Commercial Tax and, the most of these sales were to their own companies i.e. accused, Anil Kumar Agarwal and Arun Kumar Agarwal of the petitioners. (viii) Anil Kumar Agarwal and Arun Kumar Agarwal in furtherance of criminal conspiracy with the accused Ramjit Singh, General Manager, DIC, Chandauli used to send false status report regarding working condition of the factory premises of the petitioners and, on that basis the coal, on notified price, continued to be supplied to the petitioners, which were diverted unauthorizedly in the black market at a high premium. Thus, there is, *prima facie,* sufficient evidence available in the charge-sheet against the accused for the offences punishable under Sections 120-B, 420, 467, 468 and 471 IPC and Sections 13(2) read with 13(1)(d) of the Prevention of Corruption Act.

62. The FSA is a commercial arrangement between the petitioners and coal company for supply of coal on notified price for the purpose of manufacturing special smokeless fuel. The breach of the FSA provides consequences and remedies. Since the coal on notified price was supplied to the petitioners under a commercial agreement, it would not absolve the petitioners, if the offences, as mentioned in the charge-sheet, were committed by them, in the course of commercial transaction. From the evidence and allegations mentioned in the charge-sheet, it can hardly be said that acts of commission and omission by the petitioners are predominantly of civil nature and/or purely based on breach of contract.

63. The criminal proceedings are based on public policy, while civil proceedings are intended to determine the rights between the parties. The allegations

and the findings of the CBI in the charge-sheet would indicate commission of economic offences against the financial and economic well-being of the State as well as the public in general. The offences committed by the accused cannot be said to be overwhelmingly and predominantly of civil nature. The conduct of the accused has both civil and criminal consequences. The NCL is entitled to proceed against the accused under the FSA, but for the criminal offences committed by them, the competent Court has to proceed against the accused for their crimes.

64. The learned counsel for the petitioners has submitted that there has been no criminal conspiracy. For committing the offence, alleged to have been committed by the petitioners-accused, the learned counsel has submitted that the CBI has not found any evidence for involvement of the officials of the NCL in commission of alleged offence and, therefore, the charge of criminal conspiracy against the petitioners is not falsified. He has placed reliance in the case of Yogesh alias Sachin Jagdish Joshi Vs. State of Maharashtra (supra), particularly on paragraphs 20 and 25 which read as under:-

20. The basic ingredients of the offence of criminal conspiracy are: (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. It is, therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy. Yet, as observed by this Court in Shivnarayan Laxminarayan Joshi v. State of Maharashtra [(1980) 2 SCC 465 : 1980 SCC (Cri) 493] a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the common intention of the conspirators. Therefore, the meeting of minds of the conspirators can be inferred from the circumstances proved by the prosecution, if such inference is possible.

25. Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is sine qua non of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. It is well settled that an offence of conspiracy is a substantive offence and renders the mere agreement to commit an offence punishable even if an offence does not take place pursuant to the illegal agreement.

65. The learned counsel has also submitted that to constitute an offence of cheating, as defined under Section 415 IPC, deception by fraudulent or dishonest inducement has to be from the very beginning of the transaction. In the present case, the CBI has not recorded that when the FSA was entered into between the parties, the accused had entered into the FSA with fraudulent intention to deceive the NCL. The learned counsel has also submitted that there is no such finding recorded in the charge-sheet. In support of the said submission, the learned counsel has placed reliance on the judgment of the Supreme Court in the case of ***Hridaya Ranjan Prasad Verma and others*** **Vs.**

State of Bihar and another, (2000) 4 SCC 168. Paragraphs 13, 14 and to 15 of Hridaya Ranjan Prasad Verma and others Vs. State of Bihar and another (supra) read as under:-

"13. Cheating is defined in Section 415 of the Code as:

"415. Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat'.

Explanation.--A dishonest concealment of facts is a deception within the meaning of this section."

The section requires--

(1) deception of any person;

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

(i) to deliver any property to any person, or

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

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property

14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.

66. In the present cases, the allegations against the accused-petitioners are that they in connivance with the DIC officials, submitted forged certificate regarding the requirement of coal and status of running condition of the factory premises of the petitioners for supply of coal by the NCL under FSA on notified price, which they, instead of using it to manufacture SSF, diverted in the open/black market at a high premium.

67. Every time if the coal is diverted in an open/black market, it would constitute

an offence and, therefore, to say that since there is nothing on record to show that the petitioners had an intention from the very beginning to deceive the NCL dishonestly and fraudulently has no substance. The Supreme Court in the case of *Rajesh Bajaj Vs. State of NCTE Delhi and others* (supra) has held that if, in the course of commercial transaction, offence of cheating is committed, then criminal proceedings cannot be quashed on the ground that the transaction has also a civil consequence. Paragraphs 9, 10 and 11 of the said judgment are extracted hereunder:-

"9. It is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Nor is it necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent. Splitting up of the definition into different components of the offence to make a meticulous scrutiny, whether all the ingredients have been precisely spelled out in the complaint, is not the need at this stage. If factual foundation for the offence has been laid in the complaint the court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one or two ingredients have not been stated with details. For quashing an FIR (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence. In State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] this Court laid down the premise on which the FIR can be quashed in rare cases. The following observations made in the afores"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."aid decisions are a sound reminder: (SCC p. 379, para 103)

10. It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions. One of the illustrations set out under Section 415 of the Penal Code, 1860 [Illustration f] is worthy of notice now:

"(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats."

11. The crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence or not. The complainant has stated in the body of the complaint that he was induced to believe that the respondent would honour payment on receipt of invoices, and that the complainant realised later that the intentions of the respondent were not clear. He also mentioned that the respondent after receiving the goods had sold them to others and still he did not pay the money.

Such averments would prima facie make out a case for investigation by the authorities."

68. The Supreme Court in the case of ***Tulsi Ram Vs. State of U.P., 1963 Supp. (1) SCR 382***, in paragraphs-15 and 16 has held as under:-

"15. No doubt, Mr Mulla contended that because the firms were able to obtain temporary credits on the basis of their hundis, it cannot be said that they have made any wrongful gain to themselves. His contention is that the firms had good credit in the market and for obtaining credit in the transaction in question they have good equivalents in the shape of hundis. He also pointed out that out of the 180 odd hundis drawn by the firms only a very few were dishonoured and that this happened only in the month of December 1949. It was not shown, he proceeded, that Murarka Brothers on whom the hundis were drawn were not throughout the period of nine months when the transactions were entered into, in a position to meet the hundis. Out of hundis worth Rs 80 lakhs those worth Rs 74 lakhs were in fact honoured and even the remaining hundis would have been honoured but for the fact that there was slump in the market and cotton bales worth Rs 12 lakhs belonging to the appellants were lying pledged in the godowns of the Central Bank of India for securing an amount of Rs 9 lakhs. Had these bales been sold in the normal course there would have been no crisis in December of the kind which occurred and led to the dishonourment of certain hundis, in which the Bank of Bikaner and Matadin Bhagwandas were payees. Bearing in mind all these facts, learned counsel wants us to draw the inference that the obtaining of credit was not on the security of forged railway receipts but on the security of hundis themselves which were drawn by parties who had credit in the market and drawn on a party which has not been shown not to be possessed of adequate funds to meet the hundis throughout the period covered by the transaction. We do not think that the argument of learned counsel has much force. B.N. Kaul, (PW 32), the Manager of the Kanpur branch of the Bank of Bihar has said that he purchased hundis because the railway receipts showed that the consignments were large and their value was commensurate with the amount for which the bills had been drawn. He added that he would not have purchased these hundis if the consignments were for very small quantities, apparently meaning thereby that if the value of the consignments was not commensurate with the amount to be advanced he would not have purchased the hundis. Apart from the evidence of Kaul there is also other evidence to show that the real basis of discounting bills was not merely the credit of the appellant or the security afforded by these bills. This evidence is in consonance with the normal banking practice of discounting hundis only when they are supported by railway receipts of consignments despatched by the drawer to outside parties. No doubt, bills or hundis are themselves securities and taking into consideration the credit of the drawer of a hundi a bank may conceivably discount such hundis but where the hundis are themselves supported by railway receipts it would be futile to say that the railway receipts were not intended by the parties to be regarded as further security for discounting the bills. Where a consignor of goods draws a hundi for the price of the consignment on some firm and supports that hundi with the railway receipt

obtained by him in respect of the consignment, the party in fact pledges the consignment to the bank discounting the hundi and, therefore, in such a transaction the railway receipt cannot be regarded as anything else than a security for that transaction. If that security turns out to be worthless or practically worthless because the value of the consignment is only a fraction of what it was represented to be, the discounting of the hundi by the party drawing it must necessarily be regarded as unlawful. It would thus follow that the firm in question made a gain by obtaining credits and that these credits were obtained by them by restoring to unlawful means. The gain they made was, therefore, unlawful. Mr Mulla contended that for an act to be regarded as dishonest it is not enough to show that one person deceived another and thereby made a wrongful gain but it is further necessary to show that as a result of the deception the other person sustained wrongful loss. In support of his contention he has relied upon the decision in Sanjiv Ratanappa Ronad v. Emperor [ILR (LVI Bom 488)] . That was a case where the first accused who was a Police Sub-Inspector was found to have made a false document by altering a certain entry made by him in his diary with a view to create evidence. It was argued before the court that in order to constitute an offence of forgery under Sections 463 and 464 the document must be made dishonestly or fraudulently and those words must be read in the sense in which they are defined in the Penal Code, 1860 and that it was not enough to show that the deception was intended to secure an advantage to the deceiver. Dealing with this argument Baker, J., who was one of the Judges constituting the Bench observed at p. 493.

"The definition of ''dishonestly' in Section 24 of the Penal Code, 1860 applies only to wrongful gain or wrongful loss and although there are conflicting rulings on the question of the definition of the word ''fraudulently' the consensus of opinion of this Court has been that there must be some advantage on the one side with a corresponding loss on the other."

Section 463, which defines forgery, runs thus:

"Whoever makes any false document or part of a document with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery."

16. The intention to cause damage or injury to the public or to any person is thus an element which has to be established before a fabricated document can be held to be a false document or a forgery. In view of the term of Section 463 what the learned Judge has observed is understandable and may be right. Here, however, we are concerned with the offence under Section 420 IPC which speaks of dishonest inducement as a necessary ingredient. As Baker, J., has rightly pointed out:

"As dishonesty involves a wrongful gain or wrongful loss, obviously it does not apply to the present case where no pecuniary question arises."

69. For an offence of cheating, guilty intent, at the time of making the promise, is an essential ingredient. However, failure to fulfill the promise subsequently may not attract the provisions of Section 418 IPC or 420 IPC. The illustration "g' of Section 415 IPC would indicate that mere failure to deliver in breach of an agreement would not amount to cheating but liable to a civil

action for breach of contract. If a party, during the course of execution of the contract, develops guilty intent to deceive the other party and, induces the other party to deliver any property, it would attract the offence under Sections 418 and 420 IPC, as the case may be. In the present case, initially, the petitioners might not have *mens rea* to deceive the NCL at the time of entering into the FSA, but while subsequently taking delivery of coal on notified rates, as per the allegations, they submitted forged and fabricated documents in respect of status of the factory and its requirement as is evident from the charge-sheet and diverted the coal in black market.

70. In view of the aforesaid facts, as stated above, the illustration "g' to Section 415 IPC is not attracted in the present case. From the reading of the charge-sheet, it cannot be said that it does not disclose commission of an offence or ingredients of offence under Sections 415, 418 and 420 IPC are absent. It is also well settled that if there is civil remedy provided for breach of contract, that itself will not absolve any party from criminal action, if the offence has been committed in the course of execution of the contract. The criminal prosecution as well as civil remedy/action are to be pursued where the offence has been committed in breach of contract and it also discloses commission of an offence. The Supreme Court in the case of ***Pratibha Rani Vs. Suraj Kumar and another (1985) 2 SCC 370*** in paragraph-21 has held as under:

"21. After all how could any reasonable person expect a newly married woman living in the same house and under the same roof to keep her personal property or belongings like jewellery, clothing etc., under her own lock and key, thus showing a spirit of distrust to the husband at the very behest. We are surprised how could the High Court permit the husband to cast his covetous eyes on the absolute and personal property of his wife merely because it is kept in his custody, thereby reducing the custody to a legal farce. On the other hand, it seems to us that even if the personal property of the wife is jointly kept, it would be deemed to be expressly or impliedly kept in the custody of the husband and if he dishonestly misappropriates or refuses to return the same, he is certainly guilty of criminal breach of trust, and there can be no escape from this legal consequence. The observations of the High Court at other places regarding the inapplicability of Section 406 do not appeal to us and are in fact not in consonance with the spirit and trend of the criminal law. There are a large number of cases where criminal law and civil law can run side by side. The two remedies are not mutually exclusive but clearly coextensive and essentially differ in their content and consequence. The object of the criminal law is to punish an offender who commits an offence against a person, property or the State for which the accused, on proof of the offence, is deprived of his liberty and in some cases even his life. This does not, however, affect the civil remedies at all for suing the wrongdoer in cases like arson, accidents etc. It is an anathema to suppose that when a civil remedy is available, a criminal prosecution is completely barred. The two types of actions are quite different in content, scope and import. It is not at all intelligible to us to take the stand that if the husband dishonestly misappropriates the stridhan property of his wife, though kept in his custody, that would bar prosecution under Section 406 IPC or render the ingredients of Section 405 IPC nugatory or abortive. To say that because the stridhan of a

married woman is kept in the custody of her husband, no action against him can be taken as no offence is committed is to override and distort the real intent of the law.

71. The Supreme Court in the case of ***Medchl Chemicals & Pharma (P) Ltd. Vs. Biological E. Ltd. and another, (2000) 3 SCC 269*** has held that agreement for referring the dispute to arbitration cannot be an affective substitute for criminal prosecution when the act of a party to the agreement constitutes an offence. The Supreme Court has also held that while exercising the inherent power under Section 482 CrPC, the High Court is only required to see that without continuation of proceedings would be totally an abuse of the process of the Court or not. If the allegations in the complainant/charge-sheet disclose commission of offence, the High Court has to keep its hands off and, allow the machinery of the Criminal Procedure Code to take its course. Paragraphs-14, 15, 16 and 17 of the aforesaid judgment read as under:-

"14. Needless to record however and it being a settled principle of law that to exercise powers under Section 482 of the Code, the complaint in its entirety shall have to be examined on the basis of the allegation made in the complaint and the High Court at that stage has no authority or jurisdiction to go into the matter or examine its correctness. Whatever appears on the face of the complaint shall be taken into consideration without any critical examination of the same. But the offence ought to appear ex facie on the complaint. The observations in Nagawwa v. Veeranna Shivalingappa Konjalgi [(1976) 3 SCC 736 : 1976 SCC (Cri) 507] lend support to the above statement of law: (SCC p. 741, para 5)

"(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings."

15. In the matter under consideration, if we try to analyse the guidelines as specified in Shivalingappa case [(1976) 3 SCC 736 : 1976 SCC (Cri) 507] can it be said that the allegations in the complaint do not make out any case against the accused nor do they disclose the ingredients of an offence alleged against the accused or the allegations are patently absurd and inherently improbable so that no prudent person can ever reach to such a conclusion that there is sufficient ground for proceeding against the accused? In the present case, the complaint as noticed above does not, however, lend credence to the questions posed. It is now well settled and one need not dilate on this

score, neither do we intend to do so presently that the allegations in the complaint will have to be accepted on the face of it and the truth or falsity of which would not be gone into by the Court at this earliest stage as noticed above: whether or not the allegations in the complaint were true is to be decided on the basis of the evidence led at the trial and the observations on this score in the case of Nagpur Steel & Alloys (P) Ltd. v. P. Radhakrishna [1997 SCC (Cri) 1073] ought to be noticed. In para 3 of the Report this Court observed: [SCC (Cri) p. 1074, para 3)]

"3. We have perused the complaint carefully. In our opinion it cannot be said that the complaint did not disclose the commission of an offence. Merely because the offence was committed during the course of a commercial transaction, would not be sufficient to hold that the complaint did not warrant a trial. Whether or not the allegations in the complaint were true was to be decided on the basis of evidence to be led at the trial in the complaint case. It certainly was not a case in which the criminal trial should have been cut short. The quashing of the complaint has resulted in grave miscarriage of justice. We, therefore, without expressing any opinion on the merits of the case, allow this appeal and set aside the impugned order of the High Court and restore the complaint. The learned trial Magistrate shall proceed with the complaint and dispose of it in accordance with law expeditiously."

16. Be it noted that in the matter of exercise of the High Court's inherent power, the only requirement is to see whether continuance of the proceeding would be a total abuse of the process of court. The Criminal Procedure Code contains a detailed procedure for investigation, charge and trial, and in the event, the High Court is desirous of putting a stop to the known procedure of law, the High Court must use a proper circumspection and as noticed above, very great care and caution to quash the complaint in exercise of its inherent jurisdiction. Recently, this Court in Trisuns Chemical Industry v. Rajesh Agarwal [(1999) 8 SCC 686 : 2000 SCC (Cri) 47 : (1999) 5 Scale 609] observed: (SCC pp. 689-90, paras 5-9)

"5. The respondent's counsel in the High Court put forward mainly two contentions. The first was that the dispute is purely of a civil nature and hence no prosecution should have been permitted, and the second was that the Judicial Magistrate of the First Class, Gandhidham has no jurisdiction to entertain the complaint. Learned Single Judge has approved both the contentions and quashed the complaint and the order passed by the Magistrate thereon.

6. On the first count learned Single Judge pointed out that there was a specific clause in the memorandum of understanding arrived at between the parties that disputes, if any, arising between them in respect of any transaction can be resolved through arbitration. The High Court made the following observations:

"Besides supplies of processed soyabean were received by the complainant Company without any objection and the same have been exported by the complainant Company. The question whether the complainant Company did suffer the loss as alleged by it are matters to be adjudicated by the civil court and cannot be the subject-matter of criminal prosecution.'

7. Time and again this Court has been pointing out that quashing of FIR or a

complaint in exercise of the inherent powers of the High Court should be limited to very extreme exceptions (vide State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] and Rajesh Bajaj v. State NCT of Delhi [(1999) 3 SCC 259 : 1999 SCC (Cri) 401]).

8. In the last referred case this Court also pointed out that merely because an act has a civil profile is not sufficient to denude it of its criminal outfit. We quote the following observations: (SCC p. 263, para 10)

"10. It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions.'

9. We are unable to appreciate the reasoning that the provision incorporated in the agreement for referring the disputes to arbitration is an effective substitute for a criminal prosecution when the disputed act is an offence. Arbitration is a remedy for affording reliefs to the party affected by breach of the agreement but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act may be connected with the discharge of any function under the agreement. Hence, those are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Pre-emption of such investigation would be justified only in very extreme cases as indicated in State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] ."

17. On a careful reading of the complaint, in our view, it cannot be said that the complaint does not disclose the commission of an offence. The ingredients of the offences under Sections 415, 418 and 420 cannot be said to be totally absent on the basis of the allegations in the complaint. We, however, hasten to add that whether or not the allegations in the complaint are otherwise correct has to be decided on the basis of the evidence to be led at the trial in the complaint case but simply because of the fact that there is a remedy provided for breach of contract, that does not by itself clothe the court to come to a conclusion that civil remedy is the only remedy available to the appellant herein. Both criminal law and civil law remedy can be pursued in diverse situations. As a matter of fact they

"are not mutually exclusive but clearly coextensive and essentially differ in their content and consequence. The object of criminal law is to punish an offender who commits an offence against a person, property or the State for which the accused, on proof of the offence, is deprived of his liberty and in some cases even his life. This does not, however, affect the civil remedies at all for suing the wrongdoer in cases like arson, accidents, etc. It is an anathema to suppose that when a civil remedy is available, a criminal prosecution is completely barred. The two types of actions are quite different in content, scope and import". (vide Pratibha Rani v. Suraj Kumar [(1985) 2 SCC 370 : 1985 SCC (Cri) 180]) (SCC p. 383, para 21)"

72. While exercising inherent jurisdiction under Section 482 CrPC, the High Court has to determine whether continuation of the proceedings would be an abuse of process of the Court or the order passed by it would be to secure the

ends of justice. At the stage of exercising the jurisdiction under Section 482 CrPC, High Court is not required to evaluate the correctness or otherwise of the allegation leveled against the accused in the complaint/charge-sheet. The prosecution cannot be quashed by the High Court, even if the accused is able to raise some suspicion or doubt regarding truthfulness of the allegations. The Supreme Court in the case of ***Rajiv Thapar and others Vs. Madan Lal Kapoor (2013) 3 SCC 330*** has laid down the steps which if found in affirmative that would be justified for quashing the criminal proceedings in exercise of the powers vested under Section 482 CrPC. Paragraphs 28, 29 and 30 of the aforesaid judgment read as under:-

"28. The High Court, in exercise of its jurisdiction under Section 482 CrPC, must make a just and rightful choice. This is not a stage of evaluating the truthfulness or otherwise of the allegations levelled by the prosecution/complainant against the accused. Likewise, it is not a stage for determining how weighty the defences raised on behalf of the accused are. Even if the accused is successful in showing some suspicion or doubt, in the allegations levelled by the prosecution/complainant, it would be impermissible to discharge the accused before trial. This is so because it would result in giving finality to the accusations levelled by the prosecution/complainant, without allowing the prosecution or the complainant to adduce evidence to substantiate the same. The converse is, however, not true, because even if trial is proceeded with, the accused is not subjected to any irreparable consequences. The accused would still be in a position to succeed by establishing his defences by producing evidence in accordance with law. There is an endless list of judgments rendered by this Court declaring the legal position that in a case where the prosecution/complainant has levelled allegations bringing out all ingredients of the charge(s) levelled, and have placed material before the Court, prima facie evidencing the truthfulness of the allegations levelled, trial must be held.

29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 CrPC, if it chooses to quash the initiation of the prosecution against an accused at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 CrPC, at the stages referred to hereinabove, would have far-reaching consequences inasmuch as it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 CrPC the High Court has to be fully satisfied that the material produced by the accused is such that would lead to the conclusion that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the

necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 CrPC to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:

30.1. Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

30.2. Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?

30.3. Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?

30.4. Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5. If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."

73. So far as Question No. 3 is concerned, there is no parity in a closure report filed by the CBI in respect of some cases in Jharkhand and, in the case against the petitioners herein, the CBI has collected sufficient evidence, which would clearly disclose that prima facie, offences have been committed by the accused-petitioners in the present case. In Jharkhand, the CBI did not find sufficient evidence for committing an offence by the accused. In view thereof, the Question No. 3 has no relevance as the facts are different. The evidence collected by the CBI regarding accused in Jharkhand was not sufficient whereas, as discussed above, there is sufficient evidence available against the accused-petitioners, which would clearly constitute *prima facie,* offences committed by them. So far as the Question No. 4 is concerned, the CBI has not found involvement of the officials of the NCL in commission of the offence with the petitioners. The offence of criminal conspiracy under Section 120-B IPC is against the petitioners and DIC officials, who issued forged and fabricated

certificates regarding status of the factory requirement of coal by the petitioners. Therefore, there is no substance in the submission of the counsel for the petitioners that offence of criminal conspiracy between the petitioners and officials of the NCL is not made out.

74. In view of the aforesaid discussions, I do not find any merit and substance in these petitions filed under Section 482 CrPC and, therefore, they are **dismissed.** Interim order, if any, stands vacated. The learned trial Court concerned is directed to proceed with the trial and, conclude the same expeditiously, preferably within one year from today.

75. Let a copy of this order be transmitted to the learned trial Court concerned forthwith for compliance.

(2021)03ILR A138
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.03.2021

BEFORE

THE HON'BLE ALOK MATHUR, J.

Application U/S 482/378/407 No. 6561 of 2019

Shubh Karan Pandey ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Diwakar Pratap Pandey

Counsel for the Opposite Parties:
Govt. Advocate, Rakesh Kumar Singh

(A) Criminal Law - Indian Penal Code, 1860 - Sections 419 - punishment for cheating by personation, Sections 420 - Cheating and dishonestly inducing delivery of property, Sections 467 - forgery of valuable security, will, etc. , Sections 468 -forgery for purpose of cheating, Code of criminal procedure, 1973 - Section 24 - Public Prosecutor , Section 190(1)b - Cognizance of offences by magistrates ,upon a police report of such facts , Section 301 - Appearance by Public Prosecutors , Section 302 - permission to conduct prosecution - if middle some interloper or officious intervener were permitted without any interest or concern, then, it will be not only the waste of time of the Court but also increase the pendency of vexatious litigations causing annoyance, frustration and worry among the genuine litigants. (Para - 25)

Petitioner, who had purchased the land for due consideration from the seller - subsequently got the mutation done in his favour - mistake if any, was duly rectified by the revenue authorities - opposite party no. 2, who is an absolute stranger to the proceedings - firstly lodged a first information report against the petitioner - subsequently when no materials was found during investigation moved a protest petition seeking continuance of the prosecution of the petitioner - even contested the matter before the revisional Court as well as this Court.(Para - 24 ,27)

HELD: - No criminal act having been committed during the entire process. The application moved by opposite party no. 2, does not reveal any commission of offence by the petitioner and no material has been placed so as to indicate that the petitioner has committed any forgery or has played fraud. Permitting any proceedings to continue against the petitioner would be nothing but an abuse of the process of law and accordingly the impugned orders, are hereby quashed, and no proceedings deserve to be continued on the basis of the final report filed by the Police. (Para -27,28)

Application u/s 482 Cr.P.C. allowed. (E-6)

List of Cases cited: -

1. Thakur Ram Vs St. of Bih., AIR 1966 SC 911

2. Kuldip Singh Vs St. of Har., 1979 SCC Online (P&H) 212

3. Praveen Malhotra Vs St., 1990 SCC Online (Del) 51

4. Arunachalam Vs P.S.R. Sadhanantham, (1979) 2 SCC 297

5. P. Vs Narashimharao Vs St., 1997 SCC Online (Del) 485

6. All India Democratic Women's Assn. Vs St., 1997 SCC Online (Mad) 1040

7. Janta Dal Vs. H.S. Chowdhary & ors., AIR 1993 SC 892

8. BALCO Employees Union Vs U.O.I. & ors., AIR 2002 SC 350, at para 84

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

1. Heard Sri Diwakar Pratap Pandey, learned counsel for the applicant as well as learned Additional Government Advocate for the State of U.P. and Sri Rakesh Kumar Singh, learned counsel appearing on behalf of opposite party no. 2.

2. By means of present application u/s 482 Cr.P.C. the applicant has assailed the order dated 16.11.2018, passed by the Additional Chief Judicial Magistrate, Ambedkar Nagar in Crime No. 218 of 2013, under Sections 419, 420, 467, 468 I.P.C., Police Station - Bhiti, District - Ambedkar Nagar as well as order dated 03.09.2019, passed by the Sessions Judge, Ambedkar Nagar in Criminal Revision No. 95 of 2019 - Subhkaran Vs. State of U.P. and Another.

3. Brief facts of the case are that the applicant purchased 1/2 share of Gata No. 805, area 0.686 hectares, situated at Village - Chandapur, Tehsil - Bhiti, District - Ambedkar Nagar from one Ram Piyare S/o Ramkaran, resident of the applicant's village on 2nd July, 2003. Subsequent to the purchase of the said land, the applicant moved an application for mutation. On his application for mutation, the Revenue Authorities mutated the entire area of Gata No. 805 in favour of the applicant. In the meanwhile, earstwhile owner of the property - Ram Piyare, expired, leaving his son Vipin Kumar, who moved an application for rectification of the mistake and his application was allowed and the revenue authorities duly corrected the mistake committed earlier. Subsequently, it has also been stated that Vipin Kumar executed a sale deed of the remaining 1/2 area of Gata No. 805 in the name of applicant's sons namely Chintamani Pandey and Sheshmani Pandey. In the present case opposite party no. 2 is the complainant who lodged the first information report against the applicant on 09.09.2013, stating that the applicant had committed fraud in collusion with the revenue authorities and thereby the entire area of Gata No. 805 was mutated in favour of applicant. The complainant has stated that correct facts were deliberately concealed from the revenue authorities and therefore, first information report dated 09/10.09.2013, under Sections 419, 420, 467, 468 I.P.C., Police Station - Bhiti, District - Ambedkar Nagar was lodged. The Police investigated the matter wherein statements of the revenue authorities were also recorded alongwith the statement of the applicant as well as Sri Vipin Kumar - complainant (son of original owner of the land). The Police after investigation was of the opinion that no case is made out and submitted final report before the Court of Magistrate on 15th September, 2013. On 03.12.2014, an application was moved by Vipin Kumar before the Magistrate requesting to accept the report submitted by the Police while opposite party no. 2 moved a protest application on 22.06.2016.

4. By means of order dated 16.01.2018, the Additional Chief Judicial Magistrate, Ambedkar Nagar rejected the final report and took cognizance of the case under Section 190(1)b of Cr.P.C. and treating the application of opposite party no. 2 as complainant case issued summons to the applicant.

5. Aggrieved by the order dated 16.01.2018, the applicant filed revision before the Sessions Judge, Ambedkar Nagar, who also upheld the order passed by the Additional Chief Judicial Magistrate and dismissed the revision preferred by the applicant by means of order dated 03.09.2019, which has been impugned in the present application.

6. Learned counsel for the applicant has placed great reliance on the fact that there is no dispute among the seller, purchaser and the revenue authorities. He submits that it is not the case that there was any fraud factual or otherwise or manipulation in the records by either of the parties. He further submits that the applicant has purchased 1/2 share of Gata No. 805 and when the applicant moved an application for mutation, due to some mistake, the revenue authorities mutated the entire area of Gata No. 805 in favour of the applicant and on coming to know about the said mistake, it was duly corrected.

7. It is next submitted by learned counsel for the applicant that subsequently in the light of the fact that about Rs.2,00,000/- were given to the owner of the land, the remaining portion of Gata No. 805 was also mutated in favour of the sons of the applicant. It is also submitted that the opposite party no. 2 has no interest or any locus in the matter and criminal proceedings are being proceeded only at his behest and insistence of the complainant. It is further submitted that opposite party no. 2 is not a victim or aggrieved person so as to pursue the criminal case against the applicant.

8. Learned counsel for the applicant has laid great emphasis of the fact that the entire matter was investigated by the Police wherein statements of the concerned persons were recorded and after examination of the statements and especially the statement of the owner of the property, who specifically stated that he had no grievance nor he supported the version of the complainant that there is any forgery. The revenue authorities also appeared during the investigation and their statements were also recorded under Section 161 Cr.P.C., where also any sort of manipulation or forgery in the records was denied. Counsel for the applicant lastly submits that in absence of any material to support the contention of opposite party no. 2, present criminal proceedings have been initiated.

9. Perusal of impugned orders passed by the Civil Judge (Senior Division)/Additional Chief Judicial Magistrate as well as the revisional Court dated 03.09.2019 passed by the Sessions Judge, it is worth considering that both the Courts below have merely relied upon the facts stated in the protest petition whereas, it is alleged that the applicant is guilty of forging and manipulating the records in collusion with the Revenue Authorities. In both the orders there is not an iota of mention as to whether some wrong fact was pleaded in the application for mutation moved pursuant to the sale deed or any fact was deliberately, intentionally or wrongfully stated so as to mislead the Revenue Authorities to mutate the entire

land in favour of the applicant or what was the nature of the forgery or the details of the fraud done by the applicant, while moving the application for mutation. In absence of aforesaid considerations or any averment in this regard, it is clearly borne out that both the Court below have not applied their mind to verify the allegations made by opposite party no. 2, who is the author of the present controversy, before proceeding to accept his application.

10. The gravamen of the contention of learned counsel for the applicant is that the criminal proceedings are to be prosecuted by the State and a stranger to the dispute who is not a victim nor aggrieved person does not have any locus to participate in the criminal proceedings as per provisions of the Code. Learned counsel for the applicant has made serious allegations against opposite party no. 2 to the effect that he wants to grab the remaining area of Gata No. 805 and only for this purpose he has lodged the first information report in question.

11. Learned counsel appearing on behalf of opposite party no. 2, to whom notices were issued appeared before this Court and vehemently contested the matter. He could not even attempt to answer as to what is his interest in the present proceedings or particularly how he would be benefited in case the applicant is prosecuted and what is his interest in the said dispute.

12. Just because the complainant lodged the first information report and consequently when the Police had filed final report, he appeared before the Court of Additional Chief Judicial Magistrate, and filed protest petition, and subsequently when notices were issued by this Court he submitted that it was his duty to appear and contest the matter.

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

14. Looking into the facts as submitted above, the main question which arise is to ascertain the locus of opposite party no. 2 to interfere in the present proceedings.

15. Learned counsel for the applicant has vehemently submitted that it is well settled that a third party who is neither a victim nor has any interest, has no locus standi in the criminal proceedings.

16. Much reliance was placed on Section 24 Cr.P.C. Section 24 of the Code of Criminal Procedure, 1973 C.rP.C. which lays down that a Public Prosecutor shall be appointed for conducting prosecution, appeal or other proceeding on behalf of the Government, as the case may be. Section 301 Cr.P.C. states that the Public Prosecutor or the Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any court in which that case is under inquiry, trial or appeal. It further states that if in any such case any private person instructs a pleader to prosecute any person in any court, the pleader so instructed shall act under the directions of the Public Prosecutor or the Assistant Public Prosecutor and may with the permission of the court, submit written arguments after the evidence is closed in the case. Section 302 Cr.P.C. empowers the Magistrate inquiring into or trying a case to permit the prosecution to be conducted by any person other than a police officer below the rank of inspector. It further states that no person other than the Advocate General or

Government Advocate or a Public Prosecutor or Assistant Public Prosecutor shall be entitled to do so without such permission. Any person conducting the prosecution may do so personally or through his pleader.

17. Reliance has also been placed on Section 301 Cr.P.C. Section 301 came to be interpreted in a number of cases. In **Thakur Ram v. State of Bihar, AIR 1966 SC 911** the Supreme Court ruled that in a case which has proceeded on a police report, a private party has no locus standi. It further ruled that, barring a few exceptions, in criminal matters, the aggrieved party is the State, which is the custodian of the social interests of the community at large, and so it is necessary for the State to take all steps necessary for bringing the person who has acted against the social interests of the community, to book.

18. In **Kuldip Singh v. State of Haryana, 1979 SCC Online (P&H) 212** the Punjab and Haryana High Court held that, the Court has no role to play as regards a person engaging her own pleader, since the pleader's role is confined to briefing the Public Prosecutor. The Court further held that it only has a say in the matter, if the pleader so engaged by the party, wishes to make a written submission.

19. In **Praveen Malhotra v. State, 1990 SCC Online (Del) 51** a third party sought to intervene in the matter and present oral arguments against a petition for bail filed by the accused. The petitioners relied on the judgment of the Supreme Court in **Arunachalam v. P.S.R. Sadhanantham, (1979) 2 SCC 297** where the Supreme Court had ruled that under Article 136, it can entertain appeals against judgments of acquittal by the High Court at the instance of private parties also, as Article 136 does not inhibit anyone from invoking the Court's jurisdiction. The Court, in the present case, distinguished this case and said that the ruling made by the Supreme Court in the context of Article 136 cannot be relied upon in the context of a third party seeking to intervene in a bail application filed by the accused under Section 439 Cr.P.C., exercising powers under Section 482.

20. In the case of **P.V. Narashimharao v. State, 1997 SCC Online (Del) 485** the petitioner sought to intervene in an appeal filed by the accused against the order of the trial court. The Delhi High Court ruled that there was no provision in Cr.P.C. analogous to Order 1 Rule 10 of the Civil Procedure Code. It further stated that a reading of the section shows that a private party has no role in a proceeding instituted by the State. Hence, the application of the petitioner to intervene was rejected. In **All India Democratic Women's Assn. v. State, 1997 SCC Online (Mad) 1040** wherein the High Court of Madras stated that Section 301(2) Cr.P.C. gives a third party only a right to assist the prosecution. The prosecution of the criminal proceedings, the Court held, is primary responsibility of the State, and **if third parties are allowed to intervene, then there will be a number of associations to represent one party or the other in criminal proceedings, and this would give rise to confusion and chaos.**

21. Considering the aforesaid decisions it is clear that the opposite party no. 2, is a stranger to the entire proceedings, has actively participated in the same in furtherance of his object to see that the petitioner is duly prosecuted in

pursuance of the first information report lodged by him. He has not disclosed anywhere in the proceedings below, or before this court, as to what is his interest in the matter. Devoid of any interest in the disputed property, the opposite party no. 2, is neither an aggrieved person not has any sort of interest in the said dispute, and is therefore, clearly a stranger who is persuing the case for his personal objects which are not clear and therefore he does not have any locus standi to participate in the proceedings for prosecution of the petitioner. It has further been alleged that opposite party no. 2 himself is trying to usurp the property, and therefore he is pursuing the prosecution against the petitioner.

22. This Court has also gone into the merits of the matter, including the applications moved by opposite party no. 2, as well as the first information report. The opposite party no. 2 has not placed any material before the Court by means of his protest petition, which may indicate the culpability of the petitioner or the revenue authorities. The buyer and seller also unanimously agree that there was neither any illegality in the transaction, nor, in the mutation proceedings, but the entire prosecution is being sponsored and promoted by opposite party no. 2, without there being any material to support the contention raised by him. It has not been disclosed by him as to in what manner the petitioner has committed forgery or played fraud, but surprisingly, was able to convince the Courts below to proceed against the petitioner, without there being any material to support his contention.

23. The statement of Baijnath Prasad, Naib Thesildar has also been filed, according to whom on an application for mutation preferred by the petitioner, and by means of order dated 13.5.2013, he had mutated Gata No.805, area 0.686 hectares in favour of petitioner, after obtaining reports form the concerned Lekhpal and Kangoo. Subsequently, on 07.06.2013, an application for correction was moved by the petitioner, on which the Naib Thesildar cancelled his earlier order dated 13.05.2013, but on 18.06.2013, Vipin, the seller himself appeared before the authority and confirmed the sale and therefore he restored his earlier order dated 13.05.2013. He has stated that there was no fraud or forgery, and the entire exercise has been done in accordance with law.

24. This Court in exercise of powers vested under Section 482 of the Cr.P.C. would readily step in, to prevent any abuse of the process of law. In the present case the facts as stated above clearly make out a case for interference by this Court. The opposite party no. 2, who is an absolute stranger to the proceedings, firstly lodged a first information report against the petitioner and subsequently when no materials was found during investigation moved a protest petition seeking continuance of the prosecution of the petitioner and even contested the matter before the revisional Court as well as this Court.

25. It is thus clear that if middlesome interloper or officious intervener were permitted without any interest or concern, then, it will be not only the waste of time of the Court but also increase the pendency of vexatious litigations causing annoyance, frustration and worry among the genuine litigants. The Hon'ble Apex Court in **Janta Dal Vs. H.S. Chowdhary and Others, AIR 1993 SC 892,** observed in this regard as under :

"109. It is thus clear that only a person acting bona fide and having sufficient interest in the proceeding of PIL will alone have a locus standi and can approach the court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not a person for personal gain or private profit or political motive or any oblique consideration. Similarly, a vexatious petition under the colour of PIL brought before the court for vindicating any personal grievances, deserves rejection at the threshold."

26. If such litigants who act with oblique motive are permitted to approach the Courts, then the *busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either for themselves or as proxy of others or for any other extraneous motivation or for glare of publicity break the queue muffling their faces by wearing the mask of public interest litigation, and get into the courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the courts and as a result of which the queue standing outside the doors of the Court never moves which piquant situation creates a frustration in the minds of the genuine litigants and resultantly they lose faith in the administration of our judicial system.* (***BALCO Employees Union Vs. Union of India and Others, AIR 2002 SC 350,*** at para 84).

27. The petitioner, who had purchased the land for due consideration from the seller, and that subsequently got the mutation done in his favour, and the mistake if any, was duly rectified by the revenue authorities. I do not find any criminal act having been committed during the entire process. The only person who could have been aggrieved was the seller, who's statement was recorded before the Police authorities during investigation, and he also clearly stated that he had no grievance against the purchaser. Even the statement of the revenue authorities were recorded by the Police who did not find commission of any offence and therefore a final report was filed before the Magistrate. The application moved by opposite party no. 2, also does not reveal any commission of offence by the petitioner and no material has been placed so as to indicate that the petitioner has committed any forgery or has played fraud.

28. In such circumstances permitting any proceedings to continue against the petitioner would be nothing but an abuse of the process of law, and accordingly the impugned orders dated 16.11.2018, passed by the Additional Chief Judicial Magistrate, Ambedkar Nagar in Case Crime No. 218 of 2013, under Sections 419, 420, 467, 468 I.P.C., Police Station - Bhiti, District - Ambedkar Nagar as well as order dated 03.09.2019, passed by the Sessions Judge, Ambedkar Nagar in Criminal Revision No. 95 of 2019 - Subhkaran Vs. State of U.P. and Another, are hereby quashed, and no proceedings deserve to be continued on the basis of the final report filed by the Police in Case Crime No. 218 of 2013, under Sections 419, 420, 467, 468 I.P.C., Police Station - Bhiti, District - Ambedkar Nagar.

29. The application is accordingly **allowed.**

(2021)03ILR A145
ORIGINAL JURISDICTION
CIVIL SIDE
DATED:LUCKNOW 15.03.2021

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Service Single No. 331 of 2012

Ram Prakash Bajpai ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Prem Shankar Pandey

Counsel for the Respondent:
C.S.C.

A. Constitution of India – Article 226 – Writ – Res Judicata –Applicability– Second writ petition –Maintainability–Earlier writ petition was not decided on merits– Acquittal in criminal case subsequently – Effect–Principle of *res judicata* is applicable to the writ proceedings in India. But, the same should not be applied on mere technical consideration of form, but by a matter of substance within the limits allowed by law –Held, from the order passed by this Court in the first writ petition it cannot be inferred in any manner that the challenge of the petitioner to his dismissal was decided by this court on merits or that the petitioner had abandoned his challenge to the same in any manner whatsoever–Since the earlier writ petition was not decided on merits the principle of *res judicata* cannot be applied. (Para 8)

B. Service law–Departmental enquiry–No witness to proof document against the employee/petitioner – Enquiry not as per the procedure established by law – Effect –Held, Punishment order passed against the petitioner on the basis of an defective and illegal enquiry cannot stand. (Para 10 and 12)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Sarguja Transport Service Vs St. Transport Appellate Tribunal, M.P., Gwalior, & ors., (1987) 1 SCC 5

2. Sheoparsan Singh & ors. Vs Ramnandan Singh & ors. 1916 ILR 43P.C. 694

3. Canara Bank Vs N.G. Subbaraya Setty & ors. (2018) 16 SCC 228

4. Subhas Chandra Sharma Vs Managing Director & anr. 2001 (1) UPLBEC 541

5. Subhas Chandra Sharma Vs U.P. Co-operative Spinning Mills & ors. 2001 (2) UPLBEC 1475

6. St. of Uttar Pradesh Vs Saroj Kumar Sinha (2010) 2 SCC 772

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard learned counsel for the petitioner and Sri H.P. Srivastava, learned Additional Chief Standing Counsel for respondents.

2. Petitioner was working on the post of the driver when he was sent from Lucknow to Bangaluru by truck along with Sri V.K. Saxena, Junior Aircraft Mechanic, and Sri Harish Chandra @ Munna, Cleaner to bring spare parts of a helicopter. The allegations are that on 06.06.1994, they illegally loaded the truck with some teak wood, for which they were arrested in District Adilabad, State of Andhra Pradesh. A criminal case was lodged against them before the Court of Munsif Magistrate, Boath, District Adilabad, State of Andhra Pradesh. On 18.06.1994, the petitioner along with the junior aircraft mechanic and the cleaner was suspended. All three persons were charge-sheeted in a departmental enquiry and they also

submitted their reply. The enquiry officer called all the three delinquent employees in person and they again submitted their written explanations. The enquiry officer submitted his report on 14.11.1994. On 04.08.1995 the petitioner was dismissed from service. Thus petitioner filed a writ petition No.4527 (S/S) of 1995 against his dismissal order dated 04.08.1995. During the pendency of the said writ petition, by order dated 12.02.1996, the suspension of both the junior aircraft mechanic and the cleaner were withdrawn and they were permitted to join duties. However, the order conditioned, that, in case they were found guilty in the criminal case they would be dismissed. The trial court by its judgment-dated 04.07.1996 acquitted both the junior aircraft mechanic and the cleaner but convicted the petitioner. As a consequence, both, the junior aircraft mechanic and the cleaner were permitted to continue in their services with all benefits. The petitioner preferred an appeal against the judgment of the trial court. By its judgment dated 30.04.1998, the Sessions Judge, Adilabad allowed the appeal of the petitioner and acquitted him also in the criminal case. The Writ Petition No.4527 (S/S) of 1995 filed by the petitioner against his dismissal was still pending. On 19.09.2011, the same was taken up and the High Court after hearing all the parties concerned, taking into consideration the fact that as a consequence of their acquittal in the criminal case the other two delinquent employees involved along with the petitioner were exonerated in the disciplinary proceedings, permitted the petitioner also to approach the opposite party No.2, Director, Civil Aviation, U.P. for similar relief, as he also now stood acquitted in the said criminal case. The petitioner moved such a representation on 26.09.2011, which was rejected by the Director, Civil Aviation (Maintenance, Security and General Administration Unit), Lucknow Airport, by his order-dated 30.12.2011. Hence, present writ petition is filed by the petitioner challenging, both, the order dated 30.12.2011 whereby his representation is rejected as well as his earlier dismissal order dated 04.08.1995.

3. Learned counsel for petitioner raises two submissions before the Court. The first, that, since the other two persons also involved in the incident were reinstated in service on their acquittal in the criminal case, hence petitioner is also entitled to the same relief on parity. Second, on merits, the petitioner submits that the departmental enquiry conducted by the enquiry officer is illegal as no witness was called or appeared for the department to prove any of the allegations and/or documents against the petitioner. The procedure prescribed for the departmental enquiry was not followed. Only an explanation was taken from the petitioner based on which the enquiry officer submitted his report and the punishment order was passed. In his explanation, the petitioner had denied any wrongdoing on his part and, therefore, the report submitted by the enquiry officer, bereft of any evidence on part of the department, cannot stand.

4. On the other hand, Mr. H.P. Srivastava, learned Additional Chief Standing Counsel objected that the present writ petition is a second petition and, therefore, the same is barred by the principle of *res judicata*, which is equally applicable to the writ proceedings. Before coming to the merits of the case, it would be appropriate to consider the objection of *res judicata* raised by the State.

5. The law about the applicability of the principle of *res judicata* to the writ proceedings is upheld and elaborated in a

large number of judgments including in ***Sarguja Transport Service vs. State Transport Appellate Tribunal, M.P., Gwalior, and others1***. In Paragraph 9, the Supreme Court held that even withdrawal of the writ petition without leave of the court would amount to abandoning of his claim by the petitioner and thus a second writ petition would not be maintainable on his behalf. The relevant paragraph 9 of ***Sarguja Transport Service[1]*** reads:

"9. The point for consideration is whether a petitioner after withdrawing a writ petition filed by him in the High Court under Article 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that Article. On this point the decision in Daryao vs. State of U.P., (1962) 1 SCR 574 is of no assistance. But we are of the view that the principle underlying Rule 1 of Order XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in a High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission. In the instant case the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ petition had been withdrawn without permission to file a fresh petition. We, however. make it clear that whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental right guaranteed under Article 21 of the Constitution since such a case stands on a different footing altogether. We however leave this question open. "

6. The Privy Council, in ***Sheoparsan Singh and Ors. vs. Ramnandan Singh and Ors2,*** while interpreting the principle of *res judicata* in the context of the Indian law, in paragraph 15 states:

"15. There has been much discussion at the Bar as to the application of the plea of res judicata as a bar to this suit. In the view their Lordships take the case has not reached the stage at which an examination of this plea and this discussion would become relevant. But in view of the arguments addressed to them their Lordships desire to emphasize that the rule of res judicata, while founded on ancient precedent, is dictated by a wisdom which is for all time. " It had been well said," declared Lord Coke, " interest reipublicae ut sit finis litium, otherwise great oppression might be done under colour and pretence of law ": 6 Coke, 9a. Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators.

Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who describes the plea thus: " If a person though defeated at law sue again he should be answered, 'You were defeated formerly.' This is called the plea of former judgment." (See the Mitakshara (Vyavahara), bk. II., ch. i., edited by J.R. Gharpure, p. 14, and the Mayuka, ch. i., Section 1, p. 11 of Mandlik's edition.) And so ***the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law."*** *(emphasis added)*

7. The said law settled by the Privy Council is again considered and applied by the Supreme Court in the case of ***Canara Bank vs. N.G. Subbaraya Setty and Ors3.*** After elaborating the applicability and scope of the said principle in number of judgments, the Supreme Court in ***Canara Bank[3]*** in paragraph 5 held:

"5. Res judicata is, thus, a doctrine of fundamental importance in our legal system, though it is stated to belong to the realm of procedural law, being statutorily embodied in Section 11 of the Code of Civil Procedure, 1908. However, it is not a mere technical doctrine, but it is fundamental in our legal system that there be an end to all litigation, this being the public policy of Indian law. The obverse side of this doctrine is that, when applicable, if it is not given full effect to, an abuse of process of the Court takes place. However, there are certain notable exceptions to the application of the doctrine."

8. The above judgments make it clear that the principle of *res judicata* is applicable to the writ proceedings in India. But, the same should not be applied on mere technical consideration of form, but by a matter of substance within the limits allowed by law. Therefore this court is required to inspect the facts and circumstances of the case to decide if the objection of the state has any substance. A perusal of the order-dated 19.09.2011, passed by this Court in the first writ petition, demonstrates that this Court did not consider the submissions of the petitioner challenging his termination order on merits. Since the petitioner raised a fresh ground, that his case was at par with the other two delinquent employees who were discharged in the disciplinary proceedings only because they were acquitted in the criminal case, hence now on his acquittal he should also be discharged, the High Court, noting the said submission, permitted the petitioner to raise the same also before the Director, Civil Aviation, Lucknow, and required the Director to consider the same. From the order dated 19.09.2011 of this Court in the first writ petition it cannot be inferred in any manner that the challenge of the petitioner to his dismissal was decided by this court on merits or that the petitioner had abandoned his challenge to the same in any manner whatsoever. Learned Additional Chief Standing Counsel could not show any such facts or circumstance from which this Court can infer that the petitioner ever abandoned any of his rights or claims. Therefore, since the earlier writ petition was not decided on merits the principle of *res judicata* cannot be applied and since the petitioner has not surrendered challenge to his dismissal even the principle settled in case of ***Sarguja Transport Service (supra)*** is not applicable. It would not be appropriate for this Court to take a hyper-technical view

and debar the petitioner from submitting his case on merits, which till now is never considered on merits. Thus, the objection of the learned Additional Standing Counsel is rejected. In view thereof, this Court is bound to consider the case of the petitioner on merits.

9. On perusal of the order dated 30.12.2012, whereby the representation of the petitioner is rejected, it is found that in the entire order, the Director, Civil Aviation, U.P., Lucknow has nowhere considered the claim of parity raised by the petitioner with the other two persons similarly placed. The Director has only repeated the averments and thereafter rejected the representation of the petitioner on the ground that since the petitioner was in-charge of the vehicle, therefore, it was his duty to ensure that the same was not misused. The junior aircraft mechanic in the vehicle was a person much superior to the petitioner. Once a superior person was present and the entire alleged incident took place in his presence, and further, the said superior person is discharged from departmental proceedings on his acquittal in the criminal case, there is no reason not to give such a benefit to the petitioner also. Similarly, even the cleaner, a person junior to the petitioner, is also discharged from the departmental proceedings on his acquittal from the criminal case. Therefore, the petitioner is also entitled to be treated at par with them and is entitled to a similar discharge from the departmental proceedings on his acquittal in the criminal case.

10. So far as the second submission of the petitioner is concerned, a perusal of the record of departmental proceedings shows that no witness appeared in the departmental enquiry or proved any document against the petitioner. The law in this regard is well settled.

11. (A) This Court in ***Subhas Chandra Sharma vs. Managing Director and another4,*** said:-

"In our opinion after the petitioner replied to the charge-sheet a date should have been fixed for the enquiry and the petitioner should have been intimated the date, time and place of the enquiry and on that date the oral and documentary evidence against the petitioner should have been led in his presence and he should have been given an opportunity to cross-examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence. If the petitioner in response to this intimation had failed to appear for the enquiry then an ex parte enquiry should have been held but the petitioner's service should have not been terminated without holding an enquiry. In the present case it appears that no regular enquiry was held at all. All that was done that after receipt of the petitioner's reply to the charge-sheet he was given a show-cause notice and thereafter the dismissal order was passed. In our opinion this was not the correct legal procedure and there was violation of the rules of natural justice. Since no date for enquiry was fixed nor any enquiry held in which evidence was led in our opinion the impugned order is clearly violative of natural justice."

(B) The above judgment was followed by another Division Bench in ***Subhas Chandra Sharma vs. U.P. Co-operative Spinning Mills and others5*** where Court held:

"In cases where a major punishment proposed to be imposed an oral enquiry is a must, whether the employee

request, for it or not. For this it is necessary to issue a notice to the employee concerned intimating him date, time and place of the enquiry as held by the Division Bench of this Court in Subhash Chandra Sharma v. Managing Director, (2000) 1 UPLBEC 541, against which SLP has been dismissed by the Supreme Court on 16-8-2000." (emphasis added)

(C) In ***State of Uttar Pradesh vs. Saroj Kumar Sinha*****6**, the Supreme Court said:

"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.

When a departmental enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service."

12. From the above facts, it is found that the enquiry held against the petitioner is not held as per the procedure established by law. Thus the punishment order passed against the petitioner on the basis of such an defective and illegal enquiry cannot stand.

13. Given the aforesaid, the writ petition is ***allowed***. Both the order of dismissal dated 04.08.1995 as well as the order dated 30.12.2011 rejecting the representation of the petitioner are set aside. Petitioner would be entitled to all benefits of service as are granted to other two delinquent employees i.e. Sri V.K. Saxena, Junior Aircraft Mechanic and Sri Harish Chandra @ Munna, Cleaner.

(2021)03ILR A150
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.03.2021

BEFORE

THE HON'BLE CHANDRA DHARI SINGH, J.

Service Single No. 3597 of 2020
and
Service Single No. 11886 of 2020

Mohit Kumar & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Badrish Kumar Tripathi

Counsel for the Respondents:
C.S.C., Gaurav Mehrotra, Jogendra Nath Verma

A. Service law–Post of Cane Supervisor–Qualification–CCC certificate issued by DOEACC Society – Nature – Course on Computer Concepts (CCC) is designed to fulfill the beginner level computer literacy and that can be undertaken by a person at his own also – Its objective is to enable a student to acquire the knowledge pertaining to fundamental of information technology – Held, qualification of CCC as an expertise in the computer application

which, as matter of fact, is nothing but a most preliminary knowledge in the field concerned – It can be said that requirement of the employer was to have the persons at least with minimum knowledge of computer concepts. (Para 24, 25 and 36)

B. Service law – Post of Cane Supervisor – Qualification – Possession of equivalent qualification in place of CCC certificate issued by DOEACC Society – Consideration – Intention of the legislature/employer in providing requirement of 'CCC' Certificate is to recruit the candidates suitable to work efficiently in the changing work environment of Government Offices which aims to make government services available to citizens electronically – It also aims to empower the country digitally in the domain of technology – Held, Candidates who can provide conclusive evidence that they have education or experience at least equal to what is required by the minimum qualifications deserve careful consideration. (Para 36 and 37)

C. Interpretation of Statute – Statute – Declaratory or clarificatory or explanatory in nature – Operation– Retrospective Effect–Ordinarily a subordinate legislation cannot be given retrospective effect but a clarification/notification can be given retrospective effect – A declaratory, clarificatory or explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act – Held, Government Order dated 05.07.2018 is clarificatory in nature and, therefore, it can be given retrospective effect. (Para 32 and 33)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Commissioner of Income Tax Vs Vatika Township Pvt. Ltd.; (2015) 1 SCC 1

2. S.B.I. Vs Ramkrishnan & anr.; (2018) 17 SCC 394

3. Zile Singh Vs St. of Har. & ors.; (2004) 8 SCC 1

4. Parvaiz Ahmad Parry Vs St. of J.& K. & ors.; (2015) 17 SCC 709

5. S.B. Bhattacharjee Vs S.D. Majumdar & ors.; (2007) 10 SCC 513

6. Ashok Lanka Vs Rishi Dikshit & ors.; (2006) 9 SCC 90

7. U.O.I. & ors. Vs Martin Lottery Agencies Ltd.; (2009) 12 SCC 209

8. Channan Singh Vs Jai Kaur (Smt.); (1969) 2 SCC 429

9. Punjab Traders Vs St. of Punj.; (1991) 1 SCC 86

10. Mukul Kumar Tyagi Vs The St. of U.P. & ors.; (2020) 4 SCC 86

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. Petitioners of both the writ petitions have approached this Court challenging the order dated 15.01.2020 by which the Commissioner, Sugarcane and Sugar, Lucknow (opposite party no.3) has clarified that the candidates who possess equivalent qualification to 'CCC' Certificate issued by DOEACC Society are not entitled to participate in the interview held for the post of Cane Supervisor in pursuance to the advertisement No.20-Examination/2016.

2. Vide order dated 12.02.2020 passed in Writ Petition No.3597 (SS) of 2020, the Co-ordinate Bench of this Court had directed that if the final result is declared during pendency of the writ petition, the same shall be subject to final outcome of this writ petition.

3. Submission of learned Counsel for the petitioners is that an advertisement was

issued on 05.10.2016 by U.P. Subordinate Service Selection Commission inviting online applications for various posts including the post of Cane Supervisor. The essential qualification for the post of Cane Supervisor is graduation in Agricultural Science or any equivalent qualification along with 'CCC' Certificate issued by DOEACC Society.

4. Learned Counsel for the petitioner has further submitted that earlier the State Government vide order dated 3/6.05.2016 and order dated 23.09.2016 had issued clarification with regard to the recognition of equivalent qualifications with 'CCC' Certificate for appointment on the post of Junior Assistant and the Stenographer and thereafter vide order dated 05.07.2018, it was clarified that the persons who possess Diploma in Computer, Degree in Computer, PGDCA, BCA, MCA and Graduation with B.A., B.Sc, B.Tech. , M.Sc., M.B.A., wherein Computer is one of the subjects or where computer is a course in one semester of the courses shall be deemed to be equivalent qualification to "CCC' Certificate and shall be eligible for selection on the post of Junior Assistant, Stenographer and all other posts of public service of State Government.

5. Learned Counsel for the petitioners has further submitted that the petitioner no.1, 6, 8 and 9 have possessed the qualification of B.Sc. Agricultural Science with Computer subject in VIIIth Semester, petitioners no.2 has possessed the qualification of B.Tech. Agricultural Science with Computer subject in Ist and Vth Semesters, petitioners no.3 and 4 have possessed the qualification of B.Sc. Agricultural Science with Computer subject in VIIIth and VIIth semesters. The petitioner no.5 has possessed the qualification of B.Tech. Agricultural Science with Computer Subject in IInd and Vth Semesters and petitioner no.7 and 10 have also possessed the qualifications of B.Sc. Horticulture with Computer Subject in VIIIth Semester whereas the petitioner of connected Writ Petition No.11886 (SS) of 2020 is B.Sc. Agricultural Science and having post graduate one year diploma in computer applications.

6. It has again been submitted by learned Counsel for the petitioners that all the petitioners being eligible candidates have submitted online applications for the post of Cane Supervisor and after qualifying in written examination, they were called for interview in the office of U.P. Subordinate Service Selection Commission, Gomti Nagar, Lucknow but they were refused to participate in the interview on the ground that they do not have requisite qualification. Being aggrieved, the petitioners filed a Writ Petition No.1970 (SS) of 2020, which was disposed of vide order dated 22.01.2020 with direction to submit representation before the competent authorities and the same shall be decided in accordance with law. Thereafter, a review application against the order dated 22.01.2020 was filed by the petitioner, which was rejected by this Court vide order dated 29.01.2020.

7. Learned Counsel for the petitioners has contended that the opposite party no.3 being subordinate legislature is not competent to clarify or elaborate the Government Orders dated 3/6.05.2016, 23.09.2016 and 05.07.2018 issued by the opposite party no.2 and, therefore, the impugned order dated 15.01.2020 is illegal, arbitrary and without jurisdiction and the same is liable to be quashed. He has further contended that the candidate with higher

qualification is deemed to fulfill the lower qualification prescribed for a post provided that such higher qualification must be in the same channel with the lower qualification. In the instant case, the advertisement was issued on 05.10.2016 for the post of Cane Supervisor for which the requisite qualification is 'CCC' Certificate from DOEACC Society but vide Government Order dated 05.07.2018, the State Government had clarified/ explained the earlier Government Orders dated 3/6.05.2016 and 23.05.2016 by which the petitioners are eligible to participate in the interview but opposite parties have not permitted them to participate in the interview though the petitioners participated in the written examination and qualified the same.

8. It has again been contended by learned Counsel for the petitioners that the Government Orders issued by the State are in the nature of clarification and, therefore, a clarificatory/ explanatory amendments will have retrospective effect. Hence, the respondents have committed an error while denying the claim of the petitioners to participate in the interview. In support of his submissions, learned Counsel for the petitioners has placed reliance to para 32 of ***Commissioner of Income Tax Vs. Vatika Township Pvt. Ltd.; (2015) 1 SCC 1***, which reads as under:

"32. Let us sharpen the discussion a little more. We may note that under certain circumstances, a particular amendment can be treated as clarificatory or declaratory in nature. Such statutory provisions are labelled as "declaratory statutes". The circumstances under which provisions can be termed as "declaratory statutes" are explained by Justice G.P. Singh [Principles of Statutory Interpretation, (13th Edn., Lexis Nexis Butterworths Wadhwa, Nagpur, 2012)] in the following manner:

"Declaratory statutes

The presumption against retrospective operation is not applicable to declaratory statutes. As stated in Craies [W.F. Craies, Craies on Statute Law (7th Edn., Sweet and Maxwell Ltd., 1971)] and approved by the Supreme Court ***[Ed.****: The reference is to Central Bank of India v. Workmen, AIR 1960 SC 12, para 29] : "For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a Preamble, and also the word "declared" as well as the word "enacted".' But the use of the words "it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduced new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is "to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language "shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence*

of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law which the Constitution came into force, the amending Act also will be part of the existing law."

The above summing up is factually based on the judgments of this Court as well as English decisions."

9. Learned Counsel has also invited attention to para 33 of the ***State Bank of India Vs. Ramkrishnan and another; (2018) 17 SCC 394.*** Para 33 quoted below:

"33. The Report of the said Committee makes it clear that the object of the amendment was to clarify and set at rest what the Committee thought was an overbroad interpretation of Section 14. That such clarificatory amendment is retrospective in nature, would be clear from the following judgments:

33.1.CIT v. Shelly Products [CIT v. Shelly Products, (2003) 5 SCC 461] : (SCC p. 478, para 38)

"38. It was submitted that after 1-4-1989, in case the assessment is annulled the assessee is entitled to refund only of the amount, if any, of the tax paid in excess of the tax chargeable on the total income returned by the assessee. But before the amendment came into effect the position in law was quite different and that is why the legislature thought it proper to amend the section and insert the proviso. On the other hand the learned counsel for the Revenue submitted that the proviso is merely declaratory and does not change the legal position as it existed before the amendment. It was submitted that this Court in CIT v. Chittor Electric Supply Corpn. [CIT v. Chittor Electric Supply Corpn., (1995) 2 SCC 430] has held that proviso (a) to Section 240 is declaratory and, therefore, proviso (b) should also be held to be declaratory. In our view that is not the correct position in law. Where the proviso consists of two parts, one part may be declaratory but the other part may not be so. Therefore, merely because one part of the proviso has been held to be declaratory it does not follow that the second part of the proviso is also declaratory. However, the view that we have taken supports the stand of the Revenue that proviso (b) to Section 240 is also declaratory. We have held that even under the unamended Section 240 of the Act, the assessee was only entitled to the refund of tax paid in excess of the tax chargeable on the total income returned by the assessee. We have held so without taking the aid of the amended provision. It, therefore, follows that proviso (b) to Section 240 is also declaratory. It seeks to clarify the law so as to remove doubts leading to the courts giving conflicting decisions, and in several cases directing the Revenue to refund the entire amount of income tax paid by the assessee where the Revenue was not in a position to frame a fresh assessment. Being clarificatory in nature it must be held to be retrospective, in the facts and circumstances of the case. It is well settled that the legislature may pass a declaratory Act to set aside what the legislature deems to have been a judicial error in the interpretation of statute. It only seeks to clear the meaning of a provision of the principal Act and make explicit that which was already implicit."

...
..."

10. Again learned Counsel has placed reliance to para 14 of ***Zile Singh Vs. State***

of Hariyana and others; (2004) 8 SCC 1. Para 14 is extracted below:

"14. The presumption against retrospective operation is not applicable to declaratory statutes.... In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is "to explain" an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended.... An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (ibid., pp. 468-69)."

11. Learned Counsel for the petitioners has next contended that in similar circumstances petitioners having one subject of computer in Writ-A No.10518 of 2018 and Writ-A No.11412 of 2018, which were disposed of vide orders dated 04.07.2018 and 08.05.2018 repetitively, were allowed by the respondents to participate in the interview but the petitioners of instant writ petitions have been denied. Such action of the respondent authority is arbitrary and illegal and is not sustainable in the eyes of law.

12. Per contra, learned Counsel appearing on behalf of the State has submitted that the selection/ appointment for the post of Cane Supervisor, only 'CCC' Certificate issued by the DOEACC Society is mandatory and compulsory requirement. The other certificate issued by other agency equivalent to the 'CCC' Certificate is not acceptable. The petitioners have not possessed 'CCC' Certificate issued by the DOEACC Society and, therefore, they could not be allowed to participate in the interview of the cane supervisor.

13. Learned Counsel appearing on behalf of the State has further submitted that the orders dated 08.05.2018 and 04.07.2018 passed in Writ-A No.11412 of 2018 and Writ-A No.10518 of 2018 respectively relates to an Advertisement No.03-Examination/ 2016 of Village Development Officer whereas the petitioners are applied for Cane Supervisor, therefore, the petitioners cannot claim the benefits of the said orders. At the time of sending requisition, the Government Order dated 06.05.2016 was in force which was issued for the selection of the Junior Assistant and Stenographer whereas the present matter relates to the selection of the Cane Supervisors and, therefore, the same is not applicable in the case of the petitioners.

14. It has next been submitted learned Counsel appearing on behalf of the State that Rule 9 of the U.P. Cane Supervisor (Category-III) Service (Second Amendment) Rules, 2015 provides that for the post of Cane Supervisor, only 'CCC' Certificate issued by DOEACC Society is mandatory and, therefore, the authority has rightly denied the petitioners to participate in the interview as the petitioners have not possessed 'CCC' Certificate issued by DOEACC Society. The State Government has issued the Government Order dated 05.07.2018 in respect of selection of the Junior Assistant and Stenographer in which the guidelines have been provided with regards to equivalency of 'CCC' Certificate issued by DOEACC Society with other

certificates and courses whereas in the instant case, no such guidelines have been issued. Hence, the impugned order dated 15.01.2020 has rightly been passed by the Commissioner, Sugar Cane and Sugar, Lucknow. The writ petition is devoid by merit and is liable to be dismissed.

15. I have considered the submissions of learned Counsel for the parties and perused the record.

16. Before coming to the merits of the case, it would be appropriate to bring in box some of necessary facts in chronological order.

17. On 05.10.2016, an advertisement was issued by U.P. Subordinate Service Selection Commission for filling up the post of 437 Cane Supervisor. For the post of Cane Supervisor, the candidates were required to possess the qualification of graduation in Agricultural Science or any equivalent qualification along with 'CCC' Certificate issued by DOEACC Society. For ready reference, paras 8 and 9 of the advertisement is extracted below:

*"**8.** <u>अनिवार्य अर्हता (शैक्षिक) :–</u>*

उपर्युक्त सारणी–1 में उल्लिखित गन्ना पर्यवेक्षक पद पर भर्ती हेतु विहित अनिवार्य शैक्षिक अर्हता निम्नलिखित सारणी–3 में दी गयी है, आवेदन की अंतिम तिथि तक इच्छुक अभ्यर्थी जो उक्त अनिवार्य अर्हता धारित करते हो, वे ऑनलाइन आवेदन कर सकते है:–

सारणी–3

पद क्रमांक पद नाम अनिवार्य अर्हता/अधिमानी अर्हता

1–गन्ना पर्यवेक्षक 1. भारत में विधि द्वारा स्थापित किसी विश्वविद्यालय से कृषि विज्ञान में स्नातक उपाधि अथवा सरकार द्वारा मान्यता प्राप्त उसके समकक्ष कोई अर्हता।

2–कम्प्यूटर संचालन में डी0ओ0ई0ए0सी0सी0 (डोएक) सोसाइटी द्वारा प्रदान किया गया "सी0सी0सी0" प्रमाणपत्र

*9. **अधिमानी अर्हता** :– उपर्युक्त पदों के लिए अन्य बातों के समान होने पर ऐसे अभ्यर्थी को अधिमान दिया जाएगा*

1– प्रादेशिक सेना में न्यूनतम दो वर्ष की अवधि तक की सेवा की हो, या

2– राष्ट्रीय कैडेट कोर का 'बी' प्रमाण–पत्र प्राप्त किया हो।"

18. Before issuance of the advertisement, vide Government Order dated 3/6.05.2016, the State Government had recognised the qualifications equivalent to 'CCC' Certificate for the post of Junior Assistant and Stenographer. The Government Order dated 3/6.05.2016 reads as under:

" प्रेषक,

किशन सिंह अटोरिया,
प्रमुख सचिव,
उत्तर प्रदेश शासन।

सेवा में,

समस्त प्रमुख सचिव/सचिव,
उत्तर प्रदेश शासन।

कार्मिक अनुभाग–2 लखनऊ, दिनांक 06 मई, 2016

विषय :– डी.ओ.ई.ए.सी.सी. (डोएक) सोसाइटी द्वारा प्रदत्त सी.सी.सी. प्रमाण–पत्र की समकक्षता निर्धारित करने के सम्बन्ध में।

महोदय,

कनिष्ठ सहायक एवं आशुलिपिक के पदों पर चयन हेतु डी.ओ.ई.ए.सी.सी. (डोएक)

सोसाइटी द्वारा द्वारा प्रदत्त सी.सी.सी. प्रमाण–पत्र की समकक्षता के सम्बन्ध में शासन द्वारा

निम्नवत् निर्णय लिया गया है :–

(1) माध्यमिक शिक्षा परिषद, उत्तर प्रदेश के साथ–साथ केन्द्र अथवा किसी राज्य सरकार द्वारा स्थापित किसी संस्था/शिक्षा बोर्ड/परिषद द्वारा संचालित हाईस्कूल अथवा इण्टरमीडिएट परीक्षा में पृथक विषय के रुप में कम्प्यूटर साइन्स विषय को लिया गया हो।

(2) यदि किसी अभ्यर्थी द्वारा कम्प्यूटर साइन्स में डिप्लोमा अथवा डिग्री प्राप्त की गई हो तो वह भी कनिष्ठ सहायक/आशुलिपिक के पदों पर भर्ती हेतु पात्र होगा।

2– इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि कनिष्ठ सहायक एवं आशुलिपिक के पदों पर चयन हेतु उपर्युक्तानुसार कार्यवाही सुनिश्चित कराने का कष्ट करें। मान्यता प्राप्त

शिक्षा बोर्डो/परिषदों की सूची संलग्न है, साथ ही ऐसी संस्थाए, जो माध्यमिक शिक्षा परिषद, उ0प्र0 इलाहाबाद द्वारा मान्य नहीं है, की सूची भी संलग्न है।

संलग्नक– यथोक्त।
भवदीय,
ह0 अपठनीय
(किशन सिंह अटोरिया)
प्रमुख सचिव।"

19. Again on 23.09.2016, the State Government had issued another Government Order for the purpose of recognising the equivalency of 'CCC' Certificate and modified the earlier Government Order dated 3/6.05.2016 to the extent of that clause (1) of the Government Order dated 3/6.05.2016 shall be applicable for all the public services/ posts of the State Government which require 'CCC' Certificate issued by DOEACC Society (Now known as 'NIELIT'). The Government Order dated 23.09.2016 is quoted below:

" प्रेषक,
किशन सिंह अटोरिया,
प्रमुख सचिव,
उत्तर प्रदेश शासन।
सेवा में,
समस्त प्रमुख सचिव/सचिव,
उत्तर प्रदेश शासन।
कार्मिक अनुभाग–2 लखनऊ, दिनांक 23 सितम्बर, 2016
विषय :– डी.ओ.ई.ए.सी.सी. (डोयक) सोसाइटी द्वारा प्रदत्त सी.सी.सी. प्रमाण–पत्र की समकक्षता निर्धारित करने के सम्बन्ध में।
महोदय,
उपर्युक्त विषयक समसंख्यक शासनादेश दिनांक 03/06 मई, 2016 का कृपया संदर्भ ग्रहण करें, जिसके माध्यम से कनिष्ठ सहायक एवं आशुलिपिक के पदों पर चयन हेतु डी.ओ.ई.ए.सी. सी. (डोयक) सोसाइटी द्वारा प्रदत्त सी.सी.सी. प्रमाण–पत्र की समकक्षता के सम्बन्ध में शासन द्वारा निम्नवत् निर्णय लिया गया था :–
(1) माध्यमिक शिक्षा परिषद, उत्तर प्रदेश के साथ–साथ केन्द्र अथवा किसी राज्य सरकार द्वारा स्थापित किसी संस्था/शिक्षा बोर्ड/परिषद द्वारा संचालित हाईस्कूल अथवा इण्टरमीडिएट परीक्षा में पृथक विषय के रुप में कम्प्यूटर साइन्स विषय को लिया गया हो।
(2) यदि किसी अभ्यर्थी द्वारा कम्प्यूटर साइन्स में डिप्लोमा अथवा डिग्री प्राप्त की गई हो तो वह भी कनिष्ठ सहायक/आशुलिपिक के पदों पर भर्ती हेतु पात्र होगा।
2– इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि ***ऐसी समस्त राज्याधीन लोक सेवाओं और पदों, जिन पर, डी.ओ.ई.ए.सी.सी. (डोयक) सोसाइटी (परिवर्तित नाम NIELIT - National Institute of Electronics and Information Technology) द्वारा प्रदत्त सी.सी.सी. प्रमाण–पत्र अपेक्षित है, के संदर्भ में भी उपर्युक्त प्रस्तर–1 में उल्लिखित व्यवस्था प्रभावी होगी।*** तत्क्रम में मान्यता प्राप्त शिक्षा बोर्डो/परिषदों की सूची पुनः संलग्न की जा रही है, साथ ही ऐसी संस्थाएँ, जो माध्यमिक शिक्षा परिषद, उ0प्र0, इलाहाबाद द्वारा मान्य नहीं है, की सूची भी संलग्न की जा रही है।

?संलग्नक– यथोक्त।
भवदीय,
ह0 अपठनीय
(किशन सिंह अटोरिया)
प्रमुख सचिव।"

20. It is relevant to note that after issuance of the Advertisement No.20 - Examination/ 2016, the State Government again on 05.07.2018 issued another Government Order and modified/ clarified the earlier Government Orders dated 3/6.05.2016 and 23.09.2016 to the extent that those persons who are having qualifications in computer i.e. Diploma in Computer, Degree in Computer, PGDCA, BCA, MCA and Graduation (B.A., B.Sc., B.Tech., M.Sc., M.B.A.) wherein Computer is one of the subjects or where the computer is course in one semester of the courses shall be deemed to possess equivalent qualifications to "CCC' Certificate and shall be eligible for selection. The Government Order dated 05.07.2018 is quoted below for ready reference:

"प्रेषक,

मुकुल सिंहल

अपर मुख्य सचिव,

उत्तर प्रदेश शासन।

सेवा में,

समस्त अपर मुख्य सचिव/प्रमुख सचिव/सचिव,

उत्तर प्रदेश शासन।

कार्मिक अनुभाग–2 लखनऊ, दिनांक 05 जुलाई, 2018

विषयः– डी0ओ0ई0ए0सी0सी0(डोयक) सोसाइटी द्वारा प्रदत्त सी0सी0सी0 प्रमाण पत्र की समकक्षता के सम्बन्ध में।

महोदय,

कनिष्ठ सहायक, आशुलिपिक एवं ऐसी समस्त राज्याधीन लोक सेवाओं और पदो, जिन पर (Electronics and information Technology) द्वारा प्रदत्त सी0सी0सी प्रमाण पत्र अपेक्षित है, की समकक्षता के सम्बन्ध में समसंख्यक शासनादेश दिनांक 03/06 मई 2016 एवं 23 सितम्बर, 2016 निर्गत किये गये है।

2. समकक्षता के सम्बन्ध में हो रही व्यावहारिक कठिनाईयों के दृष्टिगत सी0सी0सी प्रमाण पत्र एवं उसकी समकक्ष अर्हता को और स्पष्ट करने हेतु सम्यक विचारोपरान्त शासन द्वारा यह निर्णय लिया गया है कि कम्प्यूटर में उच्च योग्यता धारी यथा कम्प्यूटर में डिप्लोमा, डिग्री, पी. जी.डी.सी.ए., बी0सी0ए0, एम0सी0ए0 तथा ग्रेजुऐशन अथवा उच्च डिग्री (बी0ए0, बी0एस0सी0, बीटेक, एम.एस.सी. एम0बी0ए) में कम्प्यूटर एक विषय के रूप अथवा एक सेमेस्टर में कम्प्यूटर कोर्स धारित करने वाले अभ्यर्थियों को भी प्रश्नगत पदों के चयन हेतु अर्ह माना जायेगा।

3. इस सम्बन्ध में मुझे यह कहने का निर्देश हुआ है कि शासन द्वारा लिए गए उक्त निर्णय का अनुपाल सुनिश्चित किया जाय।

भवदीय

मुकुल सिंहल

अपर मुख्य सचिव।"

21. Petitioners of the present writ petitions have applied for the post of Cane Supervisor. They appeared in written examination and after declaring successful, they were directed to appear in interview but they have been denied to appear before the Interview Board on the ground that they have not possessed the requisite qualification as required by the advertisement.

22. A deep consideration of the facts and circumstances of the case and the discussions including the submissions advanced by learned Counsel for the parties, the crux of the matter is *whether the petitioners are entitled for the retrospective benefit of equivalence of 'CCC' Certificate as provided in the Government Order dated 05.07.2018 issued for all the public services/ posts of the State Government read with Government Orders dated 3/6.05.2016 and 23.09.2016 issued for the posts of Junior Assistant and Stenographer?*

23. While keeping in mind the fact stated above, I deem it appropriate to understand nature of 'CCC' conducted by DOEACC. As per the details available available on the official website of the NIELIT, the details of the Course on Computer Concepts (CCC) is as follows:

*"**Introduction:** This course is designed to aim at imparting a basic level IT Literacy programme for the common man. This programme has essentially been conceived with an idea of giving an opportunity to the common man to attain computer literacy thereby contributing to increased and speedy PC penetration in different walks of life. After completing the course the incumbent should be able to the use the computer for basic purposes of preparing his personnel/business letters, viewing information on internet (the web), receiving and sending mails, preparing his business presentations, preparing small databases etc. This helps the small business communities, housewives, etc. to maintain their small accounts using the computers*

and enjoy in the world of Information Technology. This course is, therefore, designed to be more practical oriented.

Eligibility: *The candidates can appear in the NIELIT CCC Examination through following three modes and the eligibility criteria for each mode are indicated against each:*

2.1 Candidates sponsored by NIELIT approved Institutes permitted to conduct CCC Course - irrespective of any educational qualifications;

2.2 Candidates sponsored by Government recognized Schools/ Colleges having obtained an Unique Identity number from NIELIT for conducting CCC - irrespective of any educational qualifications; and

2.3 Direct Applicants (without essentially undergoing the Accredited Course or without being sponsored by a Govt. recognised School/ College) - irrespective of any educational qualification;

Duration: The total duration of the course is 80 hours, consisting of

i) Theory 25 hours

ii) Tutorials 5 hours

iii) Practicals 50 hours

The course could ideally be a two weeks intensive course."

24. The introduction quoted above indicates that the Course on Computer Concepts (CCC) is designed to fulfill the beginner level computer literacy and that can be undertaken by a person at his own also. The only requirement is that he must get the same verified by NIELIT (formerly known as "DOEACC Society").

25. The qualification of CCC as an expertise in the computer application which, as matter of fact, is nothing but a most preliminary knowledge in the field concerned. In other words, it can be said that requirement of the employer was to have the persons at least with minimum knowledge of computer concepts and the person applying must be computer literate. In present days, computer literacy is just equivalent to letter literacy in earlier days.

26. In the case of ***Parvaiz Ahmad Parry vs State of Jammu and Kashmir and others; (2015) 17 SCC 709***, Hon'ble Supreme Court in paras 13, 14 and 15 held as under:

"13. As would be clear from the undisputed facts mentioned above, the minimum qualification prescribed for applying to the post of Jammu and Kashmir Forest Service Range Officers Grade I was "BSc (Forestry) or equivalent from any university recognised by ICAR". It is not disputed that the appellant had to his credit a qualification of BSc with Forestry as one of the major subjects and Masters in Forestry i.e. MSc (Forestry), on the date when he applied for the post in question, which satisfied the eligibility criteria so far as the qualification was concerned.

14. We do not agree with the reasoning of the High Court that in order to be an eligible candidate, the appellant should have done BSc in Forestry and since he had not done so, he was not considered as an eligible candidate. This reasoning, in our view, does not stand to any logic and is, therefore, not acceptable insofar as the facts of this case are concerned.

15. In our considered view, firstly, if there was any ambiguity or vagueness noticed in prescribing the qualification in the advertisement, then it should have been clarified by the authority concerned in the advertisement itself. Secondly, if it was not clarified, then benefit should have been

given to the candidate rather than to the respondents. Thirdly, even assuming that there was no ambiguity or/and any vagueness yet we find that the appellant was admittedly having BSc degree with Forestry as one of the major subjects in his graduation and further he was also having Master's degree in Forestry i.e. MSc (Forestry). In the light of these facts, we are of the view that the appellant was possessed of the prescribed qualification to apply for the post in question and his application could not have been rejected treating him to be an ineligible candidate for not possessing prescribed qualification."

27. In the present case, the petitioners have been denied to participate in the interview only on the ground that even the petitioners have possessed equivalent qualification of 'CCC' Certificate, they are not entitled to participate in the interview as they did not have possessed 'CCC' Certificate issued by DOEACC Society. During the course of the argument, learned Counsel appearing on behalf of the State has vehemently contended that the clarificatory Government Order dated 05.07.2018 will not have retrospective effect in the case of petitioners as the same was not issued for the post of Cane Supervisor.

28. In the case of ***S.B. Bhattacharjee vs S.D. Majumdar and others; (2007) 10 SCC 513,*** Hon'ble Supreme Court has held that calrificatory or explanatory order have retrospective effect. In paras 32, 33, 35 and 36 of the said judgment reads as under:

"32. The clarification issued by the State is not in the teeth of the illustration given in Clause (g) of Para 3.4 of the office memorandum. The clarification having been issued, the same should be taken into consideration by this Court irrespective of the fact as to whether it was available to the Public Service Commission on 16-3-2004 when the DPC held its meeting which, in our opinion, was not of much significance.

33. The clarification being explanatory and/or clarificatory, in our opinion, will have a retrospective effect.

34. In S.S. Grewal v. State of Punjab [1993 Supp (3) SCC 234 : 1993 SCC (L&S) 1098 : (1993) 25 ATC 579] this Court stated the law thus: (SCC pp. 240-41, para 9)

"9. ... In this context it may be stated that according to the principles of statutory construction a statute which is explanatory or clarificatory of the earlier enactment is usually held to be retrospective. (See Craies on Statute Law, 7th Edn., p. 58.) It must, therefore, be held that all appointments against vacancies reserved for Scheduled Castes made after May 5, 1975 (after May 14, 1977 insofar as the service is concerned), have to be made in accordance with the instructions as contained in the letter dated May 5, 1975 as clarified by letter dated April 8, 1980."

35. Yet again in CIT v. Podar Cement (P) Ltd. [(1997) 5 SCC 482] this Court referring to a large number of authorities including that of G.P. Singh's Principles of Statutory Interpretation, observed: (SCC p. 506, para 51)

"51. ... "... An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the Constitution came into force, the amending Act also will be part of the existing law.' "

36. This Court in Allied Motors (P) Ltd. v. CIT [(1997) 3 SCC 472] observed: (SCC pp. 479-80, para 13)

"13. Therefore, in the well-known words of Judge Learned Hand, one cannot make a fortress out of the dictionary; and should remember that statutes have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. In R.B. Jodha Mal Kuthiala v. CIT [(1971) 3 SCC 369] this Court said that one should apply the rule of reasonable interpretation. A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole."

29. In the case of ***Ashok Lanka vs Rishi Dikshit and others; (2006) 9 SCC 90,*** the Apex Court in para 67, 68 and 69 held as under:

"67. Ordinarily, a subordinate legislation cannot be given a retrospective effect. The notification dated 5-7-2005, however, is said to be clarificatory in nature. A clarificatory notification can be given retrospective effect. Such a clarification, according to the State, was necessary to be issued as there was an apparent conflict between the Hindi version and the English version of the notification.

68. It may be true that before the High Court such a contention has not been raised but we are satisfied about the bona fide of the State in this behalf. In that view of the matter, it was not necessary for the District-Level Committee or the State to verify the criminal background of the family members of the applicants.

69. Presumably, character certificates were required to be issued by the respective Superintendents of Police in respect of the candidates concerned. Of course, if they had been residing at different places at different points of time, such character certificates were required to be issued by the Superintendent of Police of each such place. But the same would not mean that character certificates were required to be produced by the candidates in respect of their family members also particularly when it was not certain as to who would come within the purview of the said term. It was in that sense the notification dated 5-7-2005 was a clarificatory one, and, therefore, could be given a retrospective effect."

30. In the case of ***Union of India and others vs Martin Lottery Agencies Limited; (2009) 12 SCC 209,*** in paras 43, 44 and 49, the Hon'ble Supreme Court has held as under:

"43. The question as to whether a subordinate legislation or a parliamentary statute would be held to be clarificatory or declaratory or not would indisputably depend upon the nature thereof as also the object it seeks to achieve. What we intend to say is that if two views are not possible, resort to clarification and/or declaration may not be permissible.

44. This aspect of the matter has been considered by this Court in Virtual Soft Systems Ltd. v. CIT [(2007) 9 SCC 665] , holding: (SCC pp. 687-88, paras 50-51)

"50. It may be noted that the amendment made to Section 271 by the Finance Act, 2002 only stated that the amended provision would come into force

with effect from 1-4-2003. The statute nowhere stated that the said amendment was either clarificatory or declaratory. On the contrary, the statute stated that the said amendment would come into effect on 1-4-2003 and therefore, would apply only to future periods and not to any period prior to 1-4-2003 or to any assessment year prior to Assessment Year 2004-2005. It is the well-settled legal position that an amendment can be considered to be declaratory and clarificatory only if the statute itself expressly and unequivocally states that it is a declaratory and clarificatory provision. If there is no such clear statement in the statute itself, the amendment will not be considered to be merely declaratory or clarificatory.

51. Even if the statute does contain a statement to the effect that the amendment is declaratory or clarificatory, that is not the end of the matter. The Court will not regard itself as being bound by the said statement made in the statute but will proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is an amendment which is intended to change the law and which applies to future periods."

49. Reverting to the decision of a Kerala High Court in CIT v. S.R. Patton [(1992) 193 ITR 49 (Ker)] wherein the Gujarat High Court's judgment was followed, this Court noticed that the Explanation was not held to be a declaratory one but thereby the scope of Section 9(1)(ii) of the Act was widened. The law in the aforementioned premise was laid down as under: (Sedco case [(2005) 12 SCC 717] , SCC pp. 724-25, paras 17-19)

"17. As was affirmed by this Court in Goslino Mario [CIT v. Goslino Mario, (2000) 10 SCC 165] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139 : 1980 SCC (Tax) 67] .) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section. (See Sonia Bhatia v. State of U.P. [(1981) 2 SCC 585] , SCC at p. 598.) If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force. [See Shyam Sunder v. Ram Kumar [(2001) 8 SCC 24] (SCC para 44); Brij Mohan Das Laxman Das v. CIT [(1997) 1 SCC 352] (SCC at p. 354) and CIT v. Podar Cement [(1997) 5 SCC 482] (SCC at p. 506).] But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared' or "for the removal of doubts'.

18. There was and is no ambiguity in the main provision of Section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word "earned' had been judicially defined in S.G. Pgnatale [(1980) 124 ITR 391 (Guj)] by the High Court of Gujarat, in our view, correctly, to mean as income "arising or accruing in India'. The amendment to the section by way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, "income payable for service rendered in India'.

19. When the Explanation seeks to give an artificial meaning to "earned in India' and bring about a change effectively in the existing law and in addition is stated to come into force with effect from a future

date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively."

31. In ***Channan Singh vs Jai Kaur (Smt.); (1969) 2 SCC 429***, it was held that it is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. ***In Punjab Traders v. State of Punjab; (1991) 1 SCC 86,*** it was observed that an amendment Act may be purely clarificatory when it clears a meaning of the provisions of the principal Act which was already implicit therein.

32. In determining the nature of the Act, regard must be had to the substance rather than to the form of amendment. A declaratory, clarificatory or explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act.

33. As per the judgments rendered by Hon'ble Supreme Court, it is substantially clear that ordinarily a subordinate legislation cannot be given retrospective effect but a clarification/ notification can be given retrospective effect. The Government Order dated 05.07.2018 is clarificatory in nature and, therefore, it can be given retrospective effect. In the present case, The petitioners are the persons who possessed equivalent certificate of 'CCC' issued by other recognized institution wherein basic knowledge of computer operation is warranted, but that has not been taken into consideration.

34. If a new Government Order/ Office Order/ Memorandum/ Act/ Rule is 'to explain' an earlier Government Order/ Office Order/ Memorandum/ Act/ Rule, it would be without object unless construed retrospective. An explanatory/ clarificatory Government Order is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Government Order. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Government Order is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Government Order may be purely clarificatory to clear a meaning of a provision of the principal Government Order which was already implicit. A clarificatory amendment of this nature will have retrospective effect.

35. Hon'ble Apex Court in the case of ***Mukul Kumar Tyagi vs The State of Uttar Pradesh and others; (2020) 4 SCC 86*** has held that the candidates who were covered under the guidelines dated 03.05.2016 were also treated as equivalent to 'CCC' Certificate. In this case, while issuing clarificatory Government Order dated 05.07.2018 in pursuance to the Government Orders dated 3/6.05.2016 and 23.09.2016, the State Government had clarified that the candidates who applied for all the public services/ posts shall be entitled for the benefit of equivalence to 'CCC' certificate. In paras 71 and 72 of Mukul Kumar Tyagi's case (supra), the Apex Court has held as under:

"71. The above direction indicates that select list insofar as the candidates, who had certificates from Nielit/Doeacc was not quashed, their position in the select list was not disturbed

and select list was partly quashed only with regard to those candidates, who did not have CCC or Nielit certificate. The object or purpose of the direction was to scrutinise the qualifications of those candidates, who have claimed equivalent certificate. The above direction of the learned Single Judge was only for the purpose to scrutinise the qualification of those candidates, who are found possessing equivalent computer qualification so as to retain their names in the select list. After the judgment of the learned Single Judge dated 7-10-2017 [Prashant Kumar Jaiswal v. State of U.P. Writ A No. 41750 of 2015, order dated 7-10-2017 (All)] , the Commission in revising the merit list accepted the guidelines given under the Government Order dated 3-5-2016. The guidelines prescribed under the Government Order dated 3-5-2016 are as follows:

"(a) The qualification of High School or intermediate examination with an independent subject or Computer Science from Madhyamik Shiksha Parishad, Uttar Pradesh or from any Institution/Education Board/Council established by the Central or any State Government.

(b) If any candidate has obtained diploma or degree in Computer Science then he shall also be eligible to be recruited as Junior Assistant/Stenographer."

72. Thus, in the revised select list apart from candidates, who had CCC certificates from DOEACC/NIELIT, the candidates who were covered under guidelines dated 3-5-2016 were also treated as equivalent to CCC and were given place in the merit list subject to marks secured by them in the written test and interview."

36. The intention of the legislature/ employer in providing requirement of 'CCC' Certificate for the said post is to recruit the candidates suitable to work efficiently in the changing work environment of Government Offices which aims to make government services available to citizens electronically. It also aims to empower the country digitally in the domain of technology. The objective of the 'CCC' Course is to enable a student to acquire the knowledge pertaining to fundamental of information technology. In the present case, admittedly, the petitioners does not have possessed the 'CCC' Certificate but they have possessed the equivalent qualifications issued by other recognized institutions which makes them suitable to fulfill the requirements of employer for the posts in question.

37. The candidates who can provide conclusive evidence that they have education or experience at least equal to what is required by the minimum qualifications deserve careful consideration, even if their degrees have titles different from those recognized in the disciplines list or if they acquired their qualifications by a route other than a conventional one, if equivalency were not an option, some fully qualified candidates would not receive consideration. The authority to determine equivalent qualifications is not a license for a State or Employer to waive or lower standards and accept less than qualified individuals. The fact that a particular candidate is the best does not change the requirement and he/ she possess qualifications at least equal to the published minimum qualifications.

38. For the discussions made hereinabove, a writ of certiorari is issued quashing the impugned order dated 15.01.2020 passed by the Commissioner, Sugarcane and Sugar, U.P., Lucknow.

39. The respondents are directed to allow the petitioners to participate in the interview to be held in pursuance of the Advertisement No.20-Examination/2016 and consider the candidature of the petitioners on merit in accordance with law.

40. Accordingly, the writ petitions are ***allowed.*** No order as to costs.

(2021)03ILR A165
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.01.2021

BEFORE

THE HON'BLE IRSHAD ALI, J.

Service Single No. 7777 of 2010

C/M Sarswati Laghu Madhyamik Vidyalaya ...Petitioner

Versus

State of U.P. ...Respondent

Counsel for the Petitioner:
G.C. Verma

Counsel for the Respondent:
C.S.C., A.M. Tripathi, Avnish Kumar Singh, P.K. Singh Bisen, Pankaj Pathak

A. Civil Law - UP Basic Education Act, 1972 – UP Basic Schools (Junior High School) (Recruitment and Conditions of Services of Teachers) Rules, 1978 – Rules 15 – Disciplinary proceeding against Head Master – No approval by District Basic Education Officer – Director's order to the committee of management for payment of salary – Validity – Held, the Director of Education (Basic), in absence of any order passed by the District Basic Education Officer, has no jurisdiction to usurp the power of the District Basic Education Officer, but as a matter of fact, the disciplinary proceeding initiated against the Head Master/respondent and proposal made to the District Basic Education Officer is subject to approval required under Rule 15 – In absence of such approval, the disciplinary proceeding against the Head Master/respondent has not attained finality in the eyes of law. (Para 14 and 17)

B. Service law – Disciplinary proceeding – Its continuance even after retirement – Validity – In absence of provision, no disciplinary proceeding can continue after the retirement and the employee is entitled for all consequential benefit permissible to the post – Held, once this Court has come to the conclusion that the Head Master/respondent has retired and disciplinary proceeding has not been finalized by granting approval to the proposal of the Committee of Management, the cause of action of the petition has rendered infructuous – Head Master/Respondent, held, entitled for the payment of salary applicable to the post of Headmaster of the institution inasmuch as the arrears of salary. (Para 16, 18 and 19)

Writ Petition disposed of. (E-1)

Cases relied on :-

1. Bhagirathi Jena Vs Board of Directors O.S.F.G. & ors.; AIR 1999 SC 1841

2. Writ Petition No.16905 of 2000; Ravindra Singh Rathore Vs District Inspector of Schools & ors. decided by the Allahabad High Court on 26.9.2003

(Delivered by Hon'ble Irshad Ali, J.)

1: Heard Sri G.C. Verma, learned counsel for the petitioner, learned Standing Counsel for respondent Nos.1 and 2, Sri P.K. Singh Bisen, learned counsel for respondent Nos.3 and 4 and Sri Avnish Kumar Singh, learned counsel for respondent No.5.

2: By means of the present writ petition, the petitioner is challenging an order passed by the Director of Education (Basic), whereby certain benefits have been granted to the respondent No.5 of the post of Headmaster of an institution run and managed by the private Management receiving aid from the State Government.

3: Brief fact of the case is that the respondent No.5 was granted appointment on the post of Headmaster and while holding the post, disciplinary proceeding was initiated against him and he was suspended vide order dated 9.8.2005, which was challenged by way of Writ Petition No.5489 (S/S) of 2005, wherein this Court granted interim order and in pursuance thereof, the respondent No.5 was reinstated in service and continued to discharge his duties. The interim order granted by this Court was modified on 25.1.2006 with the permission to conclude the disciplinary proceeding, if any, against respondent No.5. In pursuance thereof, the disciplinary proceeding was initiated and after its conclusion, papers were submitted before the District Basic Education Officer for grant of prior approval as required under Rule 15 of the Rules of 1978. The District Basic Education Officer, after hearing the parties, disapproved the proposal of the prior approval of the disciplinary proceeding of the respondent No.5 on the ground that while concluding the disciplinary proceeding proper opportunity of hearing was not provided to the respondent No.5.

4: After the order passed by the District Basic Education Officer, the Committee of Management resolved to initiate proceeding by giving full fledged opportunity of hearing to the respondent No.5. It is the case of the Committed of Management that after giving opportunity of hearing to the respondent No.5, disciplinary proceeding was concluded and papers were submitted before the District Basic Education Officer for grant of prior approval on 23.11.2007. The District Basic Education Officer issued notice to the respondent No.5 and thereafter, the respondent No.5 sought one month time to file reply to the same.

5: Writ Petition No.6419 (S/S) of 2008 was filed before this Court, challenging the notice issued by the District Basic Education Officer as well as against the resolution passed by the Committee of Management proposed to dismiss the respondent No.5 with the prayer to pay all consequential benefits of service. The said writ petition was decided vide order dated 1.10.2008, whereby direction was issued to decide the claim setup by the respondent No.5 before the Director of Education (Basic).

6: The judgment and order passed by this Court was subject matter of challenge in Special Appeal No.661 of 2008, whereby the order passed by the learned Single Judge was set aside and the Division Bench of this Court held that the Director of Education (Basic) has no jurisdiction to decide the issue of grant of prior approval, as required under Rule 15 of the Rules and under the Rules, Basic Education Officer is the competent authority to exercise this power. After the judgment, the District Basic Education Officer again issued notice on the matter of grant of prior approval. It is the case of the petitioner that concealing the fact of pendency of earlier writ petition, he moved an application for recall of the judgment. After the judgment passed by the Division Bench of this Court, the District Basic Education Officer issued notice

under Rule 15. The notice was challenged before this Court by the respondent No.5, which was finally decided, whereby direction was issued that the competent authority shall decide the matter expeditiously, within a period of four months.

7: Thereafter, the respondent No.5 approached the Director of Education (Basic) and requested that in absence of any order of suspension, termination or dismissal, the salary and other consequential benefits have been stopped, thus, direction be issued to the Committee of Management and other education authorities to release the benefits available to him. The Director of Education (Basic) issued notice to the parties including the Committee of Management and passed an order, whereby benefit was granted to the respondent No.5 to ensure payment as prayed by the respondent No.5.

8: The order passed by the Director of Education (Basic) dated 31.8.2010 is the subject matter of challenge in the present writ petition to the extent that the benefits have been provided to the respondent No.5. It is also relevant to record that in the meantime, the respondent No.5 retired from service on 30.6.2002.

9: Submission of learned counsel for the petitioner is that the Director of Education (Basic) is having no jurisdiction to try and decide the dispute in regard to the termination or dismissal of Teacher appointed in an institution by a private Committee receiving aid from the State Government. Next submission is that under Rule 15, the District Basic Education Officer is empowered to exercise his power for the grant of approval or disapproval and the order passed therein is appealable before the Director of Education (Basic), thus, the submission is that without any order, the Director of Education (Basic) cannot assume jurisdiction of the appellate court.

10: His next submission is that the Director was not having jurisdiction to issue direction to the Committee of Management or the other educational authorities to release the salary and other consequential benefits on the ground that the matter in regard to the grant of prior approval was pending before the District Basic Education Officer. His further submission is that the claim setup by the Committee of Management before the Director of Education was not taken into consideration and ignoring the same, the impugned order has been passed.

11: In submission on the point of jurisdiction, learned counsel for the petitioner placed reliance upon a judgment which was passed during the course of present dispute in Special Appeal No.661 of 2008 (Committee of Management Vs. State of U.P. & Others). In support of his submission, he further placed reliance upon a judgment passed in Writ Petition No.5996 (S/S) of 2010 (Jagdish Yadav Vs. State of U.P.), wherein several judgments of the Hon'ble Apex Court were taken into consideration that the authority who has been empowered to assume jurisdiction of appellate court cannot usurp power without any order passed by his subordinate officer.

12: On the other hand, learned counsel for the respondents submitted that it is a matter of Basic Education department recognized under the provisions of U.P. Basic Education Act, 1972 inasmuch as the provisions of U.P. Junior High Schools (Payment of Salaries of Teachers and other

Employees) Act, 1978 are also applicable. It has further been submitted that during the pendency of the disciplinary proceeding, the petitioner retired from service on 30.6.2002, pending approval of the proposal of the Committee of Management to grant approval. In the Basic Education Act, 1972 and Act of 1978, there is no provision to continue the disciplinary proceeding, therefore, his submission is that in absence of any provision under the Act to continue the disciplinary proceeding after the retirement, no proceeding can be continued against the petitioner, thus, he is entitled for all benefits available to the post of Headmaster.

13: I have considered the submission advanced by learned counsel for the parties and perused the material on record.

14: On perusal of the record, it is evident that the Director of Education (Basic) has directed the Committee of Management to make payment of salary as well as arrears to the respondent No.5. The Director of Education (Basic) in absence of any order passed by the District Basic Education Officer, has no jurisdiction to usurp the power of the District Basic Education Officer, but as a matter of fact, the disciplinary proceeding initiated against the respondent No.5 and proposal made to the District Basic Education Officer is subject to approval required under Rule 15 of the Rules of 1978. The provision contained under Rule 15 of The U.P. Recognised Basic Schools (Junior High Schools) (Recruitment And Conditions Of Service Of Teachers) Rules, 1978 is quoted below :-

*"**15. Termination of service.** - No Headmaster or Assistant Teacher of a recognised school may be discharged or removed or dismissed from service or reduced in rank or subjected to any diminution in emoluments or served with notice of termination of service except with the prior approval in writing of the District Basic Education Officer :*

Provided that in the case of the Headmaster or an Assistant Teacher of a minority institution the approval of the District Basic Education Officer shall not be necessary."

15: The controversy in regard to the continuation of disciplinary proceeding and payment of salary after retirement came for consideration before the Hon'ble Supreme Court in the case of **Bhagirathi Jena Vs. Board of Directors O.S.F.G. & others [AIR 1999 SC 1841],** wherein the Hon'ble Supreme Court while considering the disciplinary proceeding after retirement, has held as under :-

"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 departmental enquiry after superannuation, 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 30.6.95. there was no authority vested in the Corporation or 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 authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement.

Learned senior counsel for the respondent placed reliance on the judgment of this Court in T.S. Mankad v. State of Gujarat reported in, [1989] Suppl. 2 SCC 110. It is true that that was a case of imposing a reduction in the pension and gratuity on account of unsatisfactory service of the employee as determined in an enquiry which was extended beyond the date of superannuation. But the above decision cannot help the respondent inasmuch as in that case there was a specific rule namely Rule 241-A of the Junagadh State Pension and Parwashi Allowance Rules, 1932 which enabled the imposition of a reduction in the pension or gratuity of a person after retirement. Further, there were rules in that case which enabled the continuance of departmental enquiry even after superannuation for the purpose of finding out whether any misconduct was established which could be taken into account for the purpose of Rule 241-A. In the absence of a similar provision with Regulations of the respondent Corporation, the above judgment of Mankad's case cannot help the respondent.

The question has also been raised in the appeal in regard to the payment of arrears of salary and other allowances payable to the appellant during the period he was kept under suspension and upto the date of superannuation. Inasmuch as the enquiry had lapsed, it is, in our opinion, obvious that the appellant would have to get the balance of the emoluments payable to him after deducting the suspension allowance that was paid to him during the abovesaid period.

The appeal is therefore allowed directing the respondent to pay arrears of salary and allowances payable to him during the period of suspension upto the date of superannuation after deducting the suspension allowance paid to him for the said period and also to pay the appellant, all the retiral benefits otherwise payable to him in accordance with the rules and regulations applicable, as if there had been no disciplinary enquiry or order passed there in."

In the circumstances the judgment and order of the High Court is set aside. The writ petition of the appellant is allowed in terms of the directions given above. No order as to costs."

16: This Court in the case of **Ravindra Singh Rathore Vs. District Inspector of Schools and Others** decided by the Allahabad High Court in Writ Petition No.16905 of 2000 vide judgment and order dated 26.9.2003 has held that in absence of provision, no disciplinary proceeding can continue after the retirement and the employee is entitled for all consequential benefit permissible to the post. The relevant paragraphs 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32 are being quoted below :-

"23. As noticed hereinbefore there is no specific provision which empowers the continuance of a disciplinary proceedings against an employee, teacher and Principal of an aided educational institution in the State of U.P. Rules 30 and 32 of the 1964 Rules also do not empower for continuance of departmental enquiry once the person has retired. Thus, the disciplinary proceedings could not have continued and it lapsed.

24. In the case of State Bank of India v. A.N. Gupta and Ors., (1997) 8 SCC

60, the Hon'ble Supreme Court was considering the question as to whether a departmental enquiry can be continued after the retirement in case of an employee of the State Bank of India. The Apex Court considered the judgment of the Andhra Pradesh High Court in T. Narasiah v. State Bank of India, (1978) 2 LLJ 173. In paragraph 14 of the judgment, the Hon'ble Supreme Court has held as follows :

"14. In the case before the Andhra Pradesh High Court (T. Narasiah) the petitioner was an officer in the State Bank. Disciplinary proceedings were initiated against him but before these could be completed the officer was informed by the Bank through its letter dated 5.5.1976, that it was not possible for the Bank to complete the enquiry well in time before the officer attained the age of 60 years which was the date of his superannuation. He was told he would therefore cease to be in the Bank's service on the date of his superannuation and he would not be paid any subsistence allowance with effect from that date. The officer was treated as having retired and ceasing to be in the employment of the Bank with effect from 10.5.1976. The Officer claimed his provident fund and pension and on the Banks' refusal to pay the same, a writ petition was filed. During the course of the hearing of the writ petition it was submitted by the Bank that it had since decided to pay the provident fund in full to the officer and the Bank had also no objection to pay his contribution to the pension and that as far as the payment of the Bank's share in the pension fund was concerned, the officer was not entitled thereto unless and until the Bank granted the same in accordance with Rule 11 of the Pension Rules. It was contended before the Andhra Pradesh High Court by the officer that Rule 11 had no application in his case and on attaining the age of superannuation he automatically went out of the service of the Bank. The Bank, however, relied on Rule 11 to withhold the Bank's contribution to the pension fund. The Court was of the view that Rule 11 had to be read in its context and consistent with the object behind the said Rule. It held that the Rule applied not only in the case of the retirement contemplated by Rule 19 but also to cases of retirement of employees on attaining the age of superannuation. The Court observed that it might happen that the irregularities of misfeasance of an employee could not be detected well before his retirement so as to initiate and complete disciplinary enquiry in the matter and again there might be a case where disciplinary enquiry was initiated but could not be completed before the delinquent employee attained the age of superannuation. The Court noted that there was no provision in the Service Rules of the Bank providing for extension of service of an employee to enable the authorities to complete the disciplinary enquiry against him which power was available under the Government Service Rules. The Court said even if an enquiry was pending against an employee there was nothing to stop him from retiring on his attaining the age of superannuation. The enquiry could not continue after his retirement. The Court was therefore, of the opinion that it was for that reason that the bank had reserved to itself the power to sanction the pensionary benefit under Rule 11 and if there was nothing wrong with the service of an employee throughout, the Bank would naturally sanction the pension, but if there was sufficient material disclosing grave irregularities on the part of the employee, the Bank might be well within its power in refusing to sanction the pensionary benefits, or in sanctioning them only partly. The learned single Judge of the Andhra

Pradesh High Court then went on to hold as under :

"Of course, such decision has to be arrived at fairly, which necessarily means after holding an enquiry, giving a fair opportunity to the concerned officer to defend himself against the accusation. Such an enquiry would not be a 'disciplinary enquiry' within the ordinary meaning of the term, but an enquiry confined to the purposes of the Rules, viz., whether the employee should be granted any pensionary benefits ; and if so, to what extent? Such an enquiry can also be made after the retirement (of an employee ; and particularly in cases of retirement) on attaining the age of superannuation, probably, such enquiry will have to be conducted only after retirement."

The Court, therefore, gave direction as to how the enquiry was to be conducted against the officer so as to entitle him to the pensionary benefits if he was exonerated. We are afraid that this view of the Andhra Pradesh High Court does not commend to us. By giving such an interpretation to Rule 11 the Andhra Pradesh High Court has, in effect, lend validity to disciplinary proceeding against an employee even after his superannuation for which no provision existed either in Pension Rules or in the Service Rules and when the High Court had himself observed that an enquiry even if initiated during the service period of the employee could not be continued after his retirement on superannuation."

Thus, the Hon'ble Supreme Court has held that no disciplinary proceedings against an employee even after his superannuation for which no provision existed either in the Pension Rules or in the Service Rules, can be continued.

25. Recently, the Hon'ble Supreme Court in the case of Chandra Singh v. State of Rajasthan and Anr., JT 2003 (6) SC 20, has held as follows :

"37. .....A departmental proceeding can continue so long as the employee is in service. In the event, a disciplinary proceeding is kept pending by the employer the employee cannot be made to retire. There must exist specific provision in the pension rules in terms whereof, whole or a part of the pension can be withheld or withdrawn wherefor a proceeding has to be initiated. Furthermore, no rule has also been brought to our notice providing for continuation of such proceeding despite permitting the employee concerned to retire. In absence of such a proceeding, the High Court or the State cannot contend that the departmental proceedings against the appellant Mata Deen Garg could continue."

26. Applying the principle laid down in Chandra Singh (supra) and Bhagirathi Jena (supra) to the facts of the present case, in the absence of any specific provision in the 1964 Rules, the proceedings for continuation of enquiry after the retirement of the employee lapsed.

27. The disciplinary proceedings can also not be saved in the present case on the ground that the committee of management had passed a resolution dismissing Sri Ravindra Singh Rathore from the post of Principal in the college and only the proposed punishment was required to be approved by the Board under Section 21 of the Act of 1982. Section 21 of the Act of 1982 reads as follows :

"21. Restriction on dismissal etc. of teachers.--The Management shall not, except with the prior approval of the Board, dismiss any teacher or remove him from service, or serve on him any notice of removal from service, or reduce him in rank or reduce his emoluments or withhold his increment for any period (whether

temporarily or permanently) and any such thing done without such prior approval shall be void."

28. The statement of objects and reason for enacting the Act of 1982, inter alia, provided as follows ;

".....Under Section 16G (3) of the Intermediate Education Act, 1921, managements were authorised to impose punishment with the approval of the District Inspectors of Schools in matters pertaining to disciplinary action. This provision was found to be inadequate in cases where the management proposed to impose the punishment of dismissal, removal or reduction in rank and so it was considered necessary that this power should be exercised subject to the prior approval of the Commission or the Selection Boards, as the case may be, which could function as an independent and impartial body."

29. The Hon'ble Supreme Court in the case of Committee of Management, St. John Inter College v. Girdhari Singh and Ors., (2001) 4 SCC 296, has, after taking into consideration the statement of objects and reasons of the Act of 1982, held that it unequivocally indicates that earlier provisions continued under Section 16G (3) (a) of the Education Act were found to be inadequate where the management proposed to impose the punishment of dismissal, removal or reduction in rank. In other words, the Legislature thought that the power of approval/disapproval to an order of punishment imposed by the management should not be vested with a lower educational authority, like the District Inspector of Schools, but should be vested with an independent Commission or Board which would function as an independent and impartial body.

30. Under Section 21 of the Act of 1982 the Board has to examine the merits of the case and apply its mind independently to the question whether the evidence on record justify the removal or not. The Hon'ble Supreme Court in the case of Committee of Management Bishambhar Sharan Vaidic Inter College, Jaspur, Nainital and Anr. v. U.P. Secondary Education Service Commission and others, 1995 (Supp) 3 SCC 244, in paragraph 4 of the judgment, has held as follows :

"..... We have also noticed Section 21 of the Act to which our attention was particularly drawn. We are of the view that the High Court has fallen in error in holding that the enquiry was vitiated because the charge-sheet was not framed by the enquiry committee but by the committee of management. The High Court has also committed an error in holding that the Commission could not have gone into the merits of the case. According to us, in view of the provisions of the said Section 21, the Commission while deciding whether or not to grant approval of the removal of a teacher, has necessarily to go into the merits of the case and apply its mind independently to the question whether the evidence on record justify the removal. It must be remembered that thecommission appointed under the Act is a high-powered body and as a body entrusted with the important function of supervising the actions taken by the Management against the teachers, it has to discharge its responsibility circumspectively. It cannot exercise its function effectively unless it scrutinizes the material and applies its mind carefully to the facts on record....."

31. In the case of Punjab National Bank and Ors. v. Kunj Behari Misra, (1998) 7 SCC 84, the Hon'ble Supreme Court has held that the disciplinary proceedings breaks into two

stages. The first stage commences when the disciplinary authority arrives at its conclusion on the basis of the evidence, the enquiry officer's report and the delinquent employee replied to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusion. Since under Section 21 of the Act of 1982, it has been provided that if the management dismisses any teacher or removes him from service or serves on him any notice of removal from service or reduces him in rank or reduces his emoluments or withholds his increments for any period, whether temporarily or permanently, except the prior approval of the Board, such thing done without such prior approval shall be void.

32. Thus, it can safely be said that till such time the Board after considering the relevant material and going into the merits of the charges either approves or disapproves the proposed order of punishment, the disciplinary proceedings are continuing. Since Sri Ravindra Singh Rathore has retired before the Board had considered the matter for according approval, as required under Section 21 of the Act of 1982, the disciplinary proceedings cannot be continued."

17: In view of the above, the cause of action in challenging the order of Director on the ground of jurisdiction is not required to be decided at present. It is admitted case of the parties that the District Basic Education Officer has yet not granted approval, as required under Rule 15, therefore, it cannot be termed that the disciplinary proceeding against the respondent No.5 has attained finality in the eyes of law. Under Rule 15, the District Basic Education Officer can approve the proposal of the Committee of Management and also can disapprove the same with the direction to conclude the disciplinary proceeding in the light of the observation made therein. The respondent No.5 on attaining the age of superannuation, has retired from service on 30.6.2002, therefore, challenge to the order of Director has rendered infructuous.

18: In case the order of the Director is set aside on the ground that he was having no jurisdiction to pass the order for payment of salary and other benefits to the respondent No.5, at best, after setting aside the order, the matter would be remanded to the District Basic Education Officer for consideration of claim of the respondent No.5 in regard to his entitlement of salary. Once this Court has come to the conclusion that the respondent No.5 has retired and disciplinary proceeding has not been finalized by granting approval to the proposal of the Committee of Management, the cause of action of the petition has rendered infructuous.

19: The respondent No.5, accordingly, is entitled for the payment of salary applicable to the post of Headmaster of the institution inasmuch as the arrears of salary w.e.f. the date found due. Therefore, the District Basic Education Officer is directed to ensure entire payment to the respondent No.5 within a period of three months from the date of production of certified copy of this order.

20: With the aforesaid observation and direction, the writ petition is finally **disposed of.**

(2021)03ILR A174
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.01.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 8368 of 2020

Roshanee Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Onkar Singh

Counsel for the Respondent:
C.S.C., Ajay

A. Civil Law - UP Basic Education (Teacher) Service Rules, 1981 – Clause 2(V) – Word 'Shiksha Mitra' – Definition – Absence from duty – Weightage of past service – Benefit, when can be given – Held, definition of Shiksha Mitra under Clause 2 (V) of the Rules, 1981 is very clear and purpose thereof is laudable as only those Shiksha Mitras can be given weightage of past services, who are working as Shiksha Mitra after being reverted as Shiksha Mitra from the post of Assistant Teacher in compliance of the dictum of Hon'ble Apex Court in re; Anand Kumar Yadav's case – Such benefit cannot be provided to those Shiksha Mitras, who are not Shiksha Mitra for substantial period at the time when such benefit was to be provided. (Para 12)

Writ Petition dismissed. (E-1)

Cases relied on :-

1. Civil Appeal No. 9529 of 2017; St. of U.P. & anr. Vs Anand Kumar Yadav & ors. decided by Supreme Court on 25.07.2017

2. Vijay S. Sathaye Vs Indian Airlines Limited & ors.; (2013) 10 SCC 253

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Onkar Singh, learned counsel for the petitioner and Sri Ran Vijay Singh, learned counsel for the opposite parties.

2. By means of this petition, the petitioner has prayed following reliefs:-

(I) Issue a writ, order or direction in the nature of Certiorari for quashing the definition of "Shiksha Mitra" as provided in Clause 2 (V) of the Uttar Pradesh Basic Education (Teacher) Service Rules, 1981, to the extent which says that the "Shiksha Mitra" means "working Shiksha Mitra" Annexure No.1.

(II) Issue a writ, order or direction in the nature of Certiorari for quashing and set aside all the consequential Government Orders, to the extent which treats "Shiksha Mitra" as "Working Shiksha Mitra".

(III) Issue a writ, order or direction in the nature of mandamus commanding to the opposite parties to give all the benefits i.e. weightage of Shiksha Mitra, as per her Shiksha Mitra experience, to the petitioner ignoring the condition of "Working Shiksha Mitra".

(IV) Issue a writ, order or direction in the nature of mandamus commanding to the opposite parties, to permit the petitioner to rejoin on the post of Shiksha Mitra, in Primary School Badiyan Kheda, Block Sikandarpur Karna, District Unnao.

(V) Issue any other writ, order or direction that this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and allow this writ petition with cost."

3. By means of order dated 13.1.2021, this Court while considering the request of

the learned counsel for the petitioner to file amendment application granted him time to file such application to explain the term 'working Shiksha Mitra' as indicated in Appendix-I of the Uttar Pradesh Basic Education (Teachers) Service (Twentieth Amendment) Rules, 2017.

4. Today, learned counsel for the petitioner has submitted that he shall not file any amendment application as it is not required in this case.

5. As per learned counsel for the petitioner, the petitioner was initially appointed as Shiksha Mitra in Primary School Badiyan Kheda, Block Sikandarpur Karna, District Unnao on 14.11.2008 pursuant to the Government Order dated 26.5.1999. Thereafter, she was absorbed/ appointed on the post of Assistant Teacher on 1.7.2015 as per Government Order dated 19.6.2013.

6. Batch of writ petitions were filed before this Court by the persons, who claimed to be eligible for appointment and whose chances were affected by filling up vacancies of Assistant Teachers by regularizing the Shiksha Mitras against such vacancies. Those writ petitions were opposed by the State Government and Shiksha Mitras by stating that the scheme of Shiksha Mitras was to meet a situation where sufficient trained Teachers were not available while constitutional mandate of imparting elementary education was to be fulfilled. The issue referred to the Full Bench of this Court to adjudicate as to whether appointment of Shiksha Mitras in pursuance of Government Order dated 26.5.1999 was of the statutory character. Some more issues were raised before the Full Bench but for deciding this writ petition, there would be no fruitful purpose to deal with those issues. The Full Bench was of the view that the nature of appointment of Shiksha Mitras could not authorize them to be treated as Teacher in terms of Uttar Pradesh Basic Education (Teachers) Service Rules, 1981 (for brevity "Rules, 1981"). Further, they did not have the qualifications prescribed under the said Rules inasmuch as on the date of appointment, they did not have Bachelor Degree nor they had Basic Teachers Certificate as prescribed under the Rules, 1981. The Full Bench further held that the reservation policy had not been followed. No doubt they may have served the need of the hour, their regular appointment in violation of requisite statutory qualification was illegal. The matter went in appeal before the Hon'ble Apex Court in re; **State of U.P. and Another Vs. Anand Kumar Yadav and Others, Civil Appeal No.9529 of 2017.** The Hon'ble Apex Court was pleased to uphold the view of the High Court with certain observations to the extent that it may be permissible to give some weightage to the experience ofShiksha Mitras or some age relaxation may be possible, mandatory qualifications cannot be dispensed with. Regularization of Shiksha Mitras as Teacher was not permissible. The Hon'ble Apex Court has held that the Shiksha Mitras have got no legal right to get any relief or preference but in a peculiar situation, they ought to be given opportunity to be considered for recruitment if they have acquired or they now acquire the requisite qualification in terms of advertisements for recruitment for next two consecutive recruitments. They may also be given suitable age relaxation and some weightage for their experience as may be decided by the concerned authority. Till they avail this opportunity, the State is at liberty to continue them as Shiksha Mitras on the same terms and conditions on

which they were working prior to their absorption, if the State so decides.

7. As per learned counsel for the petitioner, the aforesaid judgment of the Hon'ble Apex Court came on 25.7.2017 and the petitioner was permitted to revert back on the post of Shiksha Mitra in same institution till 10.8.2017. Further, the petitioner went on leave on 11.8.2017 on account of illness of her child and after her child recovered from illness on 8.5.2018, she requested to submit her joining at the institution but Head Master of the institution refused to permit her joining. In the counter affidavit, vide para-13, it has been categorically indicated that after the judgment of the Hon'ble Apex Court on 25.7.2017, the petitioner worked only for 16 days and from 11.8.2017, she never turned up to discharge her duties nor submitted any application for leave. In para-14 of the counter affidavit, it has been indicated that the post of Shiksha Mitra is based on honourarium, therefore, it was not permissible under the law to allow the petitioner to join on the post of Shiksha Mitra after such a long gap without there being any sanctioned leave or permission from the competent authority. Further, there was no provision for leave without pay in respect of Shiksha Mitras. The petitioner could not deny the aforesaid submissions of counter affidavit by filing rejoinder affidavit and reply to paras-13 & 14 of the counter affidavit has been given in paras-14 & 15 of the rejoinder affidavit. The petitioner could not cite any provision of law even during the course of argument to the effect that Shiksha Mitras could have been given leave without pay. Therefore, the petitioner could have not been treated "Working Shiksha Mitra" at the time of providing her benefit of weightage in terms of the judgment of Hon'ble Apex Court in re; **Anand Kumar Yadav** (supra). Learned counsel for the petitioner has contended that the petitioner was qualified for the post of Assistant Teacher as she got 100 marks out of 150 marks in Assistant Teachers Recruitment Examination, 2019 and declared passed. She was having B.T.C. certificate. Since the petitioner was not given weightage of her past services, therefore, she could not finally get through. The reason for not providing weightage is that the weightage has been given to only those Shiksha Mitras, who were working Shiksha Mitras but the petitioner was not working Shiksha Mitra as she was absconding from job without any leave, therefore, such weightage could have not been provided to her. Learned counsel for the petitioner has drawn attention of this Court towards the definition of "Shiksha Mitra", which is as under:-

""Shiksha Mitras" means a person working as such in junior basic schools run by Basic Shiksha Parishad under the Government Orders prior to the commencement of Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011.

Or a person who has been a Shiksha Mitra and appointed as an Assistant Teacher in Junior Basic Schools run by Basic Shiksha Parishad and reverted to work as Shiksha Mitra in pursuance of the judgement of the Apex Court in SLP No.32599 of 2015, State of U.P. and Others Vs. ***Anand Kumar Yadav*** *and Others."*

8. On the strength of aforesaid definition, learned counsel for the petitioner has submitted that the petitioner is fully covered with the aforesaid definition as she has been a Shiksha Mitra and appointed as Assistant Teacher in an

institution in question and reverted to work as Shiksha Mitra pursuant to the judgment of the Hon'ble Apex Court in re; **Anand Kumar Yadav (supra)**. Therefore, her absence from service w.e.f. 11.8.2017 may not disentitle her to be treated as Shiksha Mitra.

9. Sri Ran Vijay Singh, learned Addl. Chief Standing Counsel has submitted with vehemence that since the petitioner had abandoned her job without getting the leave sanctioned from the competent authority, therefore, she may not be treated as Shiksha Mitra. Undoubtedly, she has been Shiksha Mitra and was appointed as Assistant Teacher in an institution in question, thereafter reverted to as Shiksha Mitra pursuant to the judgment of the Hon'ble Apex Court in re; **Anand Kumar Yadav** (supra) but after serving 16 days as Shiksha Mitra, she abandoned her job, therefore she cannot claim, legally to be provided weightage of past services. At least she should be serving Shiksha Mitra. He has cited the judgment of the Hon'ble Supreme Court in re; **Vijay S. Sathaye v. Indian Airlines Limited and Others, (2013) 10 SCC 253,** referring paras 12, 14 & 16, which are as under:-

"12. It is a settled law that an employee cannot be termed as a slave, he has a right to abandon the service any time voluntarily by submitting his resignation and alternatively, not joining the duty and remaining absent for long. Absence from duty in the beginning may be a misconduct but when absence is for a very long period, it may amount to voluntarily abandonment of service and in that eventuality, the bonds of service come to an end automatically without requiring any order to be passed by the employer. (emphasis supplied)

14. For the purpose of termination, there has to be positive action on the part of the employer while abandonment of service is a consequence of unilateral action on behalf of the employee and the employer has no role in it. Such an act cannot be termed as 'retrenchment' from service. (See: State of Haryana v. Om Prakash, (1998) 8 SCC 733) (emphasis supplied)

16. In Syndicate bank v. Staff Assn., (2000) 5 SCC 65 and Aligarh Muslim University v. Mansoor Ali Khan, (2000) 7 SCC 529, this Court ruled that if a person is absent beyond the prescribed period for which leave of any kind can be granted, he should be treated to have resigned and ceases to be in service. In such a case, there is no need to hold an enquiry or to give any notice as it would amount to useless formalities. A similar view has been reiterated in Banaras Hindu University v. Shrikant, (2006) 11 SCC 42, Chief Engineer (Construction) v. Keshava Rao, (2005) 11 SCC 229 and Bank of Baroda v. Anita Nandrajog, (2009) 9 SCC 462." (emphasis supplied)

10. On the strength of aforesaid judgment of the Hon'ble Apex Court, Sri Ran Vijay Singh has submitted that the petitioner was absent without getting leave, therefore she should be treated to have resigned and ceased to be in service. When she was no more in service at the time when the weightage of past services was to be awarded, there was no question of awarding such weightage to the petitioner. Sri Ran Vijay Singh has also submitted that the definition of Shiksha Mitra under Clause 2 (V) of the Rules, 1981 (as amended) rightly indicates only those Shiksha Mitras would be given weightage if they are working as Shiksha Mitra after being reverted on such post pursuant to the direction of the Hon'ble Apex Court in re; **Anand Kumar Yadav** (supra). The

Shiksha Mitras, who are not functioning as Shiksha Mitra at particular point of time when such weightage was to be awarded, how can it be presumed that such person is willing to take benefit of the direction of the Hon'ble Apex Court in re; **Anand Kumar Yadav** (supra).

11. He has further submitted that had it been a short period, it could have been understood but the petitioner was absconding from duties of Shiksha Mitra from 11.8.2017 and weightage of past services was to be awarded in the month of May, 2020 when the petitioner was not Shiksha Mitra for the last about three years. Therefore, the present petitioner may not be given any relief as prayed in the writ petition and the writ petition may be dismissed with costs.

12. Having heard learned counsel for the parties and having perused the material available on record and the dictum of the Hon'ble Apex Court in re; **Vijay S. Sathaye** (supra), I am of the considered opinion that the definition of Shiksha Mitra under Clause 2 (V) of the Rules, 1981 (as amended) is very clear and purpose thereof is laudable as only those Shiksha Mitras can be given weightage of past services, who are working as Shiksha Mitra after being reverted as Shiksha Mitra from the post of Assistant Teacher in compliance of the dictum of Hon'ble Apex Court in re; **Anand Kumar Yadav** (supra). Such benefit cannot be provided to those Shiksha Mitras, who are not Shiksha Mitra for substantial period at the time when such benefit was to be provided. In the present case, it is admission on the part of the petitioner that she has not discharged the duties of Shiksha Mitra since 11.8.2017. She was not on valid leave. Shiksha Mitras are paid honourarium. No provision of law has been cited or shown by the learned counsel for the petitioner to the effect that Shiksha Mitras can be granted leave without pay for substantially long period.

13. Therefore, I do not find any infirmity or illegality in not providing weightage of past services to the petitioner in terms of Clause 2 (V) of the Rules, 1981, which has been amended in compliance of the dictum of Hon'ble Apex Court in re; **Anand Kumar Yadav** (supra). Accordingly, the writ petition is **dismissed** being devoid of merits.

(2021)03ILR A178
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.03.2021

BEFORE

THE HON'BLE CHANDRA DHARI SINGH, J.

Service Single No. 15506 of 2019

Constable 2199 (PNO 162806090) Sandeep Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Meenakshi Singh Parihar, A.P. Singh

Counsel for the Respondents:
C.S.C.

A. Constitution of India – Article 311 (2) (b) – UP Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 – Rules 8 (2) (b) and 17 – Post of Constable – Dismissal order – Criminal proceeding u/s 302 IPC – No departmental inquiry – Absence of record of reason of inquiry being impracticable – Effect – Before proceedings to impose any major penalty, the departmental inquiry is a must and is a condition precedent – However, in certain contingency said

rigour of the rule can be dispensed with and one such contingency provided for is that in case it is not reasonably practicable to hold inquiry and for this reasons will have to be recorded in writing – Held, there must be some material for satisfaction of the disciplinary authority that departmental inquiry is not reasonably practicable. The decision to dispense with the departmental enquiry cannot be rested solely on the *ipse dixit* of the concerned authority – Not recording the finding that it is not reasonably practicable to hold inquiry is contrary to the requirement of the provisions of Rule 8 (2) (b) of Rules, 1991. (Para 13, 14, 15 and 19)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Jaswant Singh Vs St. of Punj. & ors.; AIR 1991 SC 385

2. U.O.I. & anr. Vs Tulsiram Patel; (1985) 3 SCC 398

3. Sudesh Kumar Vs St. of Har. & ors.; (2005) 11 SCC 525

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. The petitioner has approached this Court challenging the impugned order dated 29.09.2018 by which the Senior Superintendent of Police, Lucknow has dismissed the petitioner from service and the order dated 20.05.2019 by which the representation/ appeal of the petitioner has also been dismissed by the Inspector General of Police (Establishment), Lucknow.

2. Brief facts of the case are that the petitioner was appointed on 02.11.2016 as Constable. When the petitioner was posted as Constable at Police Station Gomti Nagar, Lucknow, an FIR with Case Crime No.1132 of 2018, under Section 302 IPC was lodged on 29.09.2018 at 4:57 hours by one Ms. Sana alleging therein that when she was going to her home along with her colleague Vivek Tiwari in the night, their car was parked near City Montessori School, Gomti Nagar Extension. Two policemen came in front of the car. They tried to go away from there, the police personnel tried to stop the car and thereafter, one shot was fired. However, Vivek Tiwari drove the car but after sometime, it collided with the wall at underpass and then the complainant witnessed that Vivek Tiwari was profusely bleeding from his head. Police came there and Vivek Tiwari was taken to the hospital where he died. On the date of occurrence, the petitioner was arrested and sent to jail and vide Office Order dated 29.09.2018, the petitioner was placed under suspension. The inquiry was assigned to the Circle Officer, Alambagh, Lucknow and on the basis of his report dated 29.09.2018, the petitioner has been dismissed from service on the same day exercising powers conferred under Rule 8(2)(b) of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 read with Article 311 (2)(b) of the Constitution of India. Against the order of suspension, the petitioner filed a Writ Petition No.12911 (SS) of 2019, which was dismissed as not pressed vide order dated 22.05.2019. Vide order dated 03.01.2019, the petitioner was released on bail.

3. On 30.09.2019 at about 18:57 hours another FIR in Case Crime No.1140 of 2018, under Section 302 IPC was lodged at Police Station Gomti Nagar, Lucknow by Smt. Kalpana Tiwari wife of late Vivek Tiwari against the petitioner and co-accused Prashant Chaudhary alleging therein that the co-accused Prashant

Chaudhary has murdered her husband Vivek Tiwari who was working as Area Sales Manager in Apple Company. The said FIR of Case Crime No.1140 of 2018 was clubbed with Case Crime No.1132 of 2018.

4. After conducting the investigation, the Investigating Officer has submitted charge-sheet against the petitioner under Section 323 IPC in Case Crime No.1132 of 2018. Vide order dated 24.12.2018, the learned Chief Judicial Magistrate has taken cognizance under Section 323 IPC against the petitioner and under Section 302 IPC against the co-accused Prashant Chaudhary. Vide order dated 07.03.2019 passed in ST No.49 of 2019, the petitioner was summoned for framing charges under Section 323 IPC and on 22.03.2019, the learned Additional Sessions Judge-I, Lucknow had framed charges under Sections 323 and 302 IPC read with Section 114 IPC. The petitioner was taken into custody and sent to jail. Vide order dated 16.04.2019 passed in Criminal Misc. Case No.3881 (B) of 2019, the petitioner was released on bail by this Court. Thereafter, the petitioner filed a Criminal Misc. Case No.2068 of 2019 under Section 482 of Cr.P.C. challenging the charges framed by the court below, which is still pending.

5. Learned Counsel for the petitioner has submitted that vide order dated 29.09.2018, the petitioner was placed under suspension and the Circle Officer, Alambagh was appointed as Enquiry Officer to inquire the incident which was taken on 29.09.2018. Thereafter, on the basis of the report submitted on the same day, the petitioner was dismissed from service vide impugned order dated 29.09.2018 which is in contravention of the provisions of Rule 17 of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (in short '1991 Rules'). The impugned order itself shows that before passing the order of dismissal, no inquiry was at all conducted against the petitioner nor any opportunity of hearing has been provided to him which is in violation of Articles 14 and 16 of the Constitution of India. In the order of suspension dated 29.09.2018, it was categorically mentioned that the petitioner is being suspended in contemplation of disciplinary inquiry as such it was incumbent upon the departmental authorities to have conducted proper inquiry in accordance with the Rules but without conducting any inquiry in a very illegal manner, the petitioner has been dismissed from service on the same day i.e. 29.09.2018 which is against the provisions of Rule 8(2)(b) of 1991 Rules read with Article 311 (2)(b) of the Constitution of India.

6. Learned Counsel for the petitioner has further submitted that while passing the impugned order, the disciplinary authority has also not recorded any reason for not holding proper inquiry against the petitioner, which is against the provisions of sub-rule (b) of Rule 17 of 1991 Rules. While passing the dismissal order, it has been recorded that the impugned order has been passed in public as well as State interest and also in the interest of police department. The aforesaid reasons arrived at against the provisions of 1991 Rules as there is no such provisions which confers such power to the disciplinary authority to punish a police officer without conducting proper inquiry in accordance with the Rules. In these circumstances, the impugned order is liable to be set aside as the same has been passed illegally, arbitrarily and unreasonably without proper application of mind.

7. *Per contra*, learned Counsel appearing on behalf of the State has vehemently opposed the submissions of learned Counsel for the petitioner and submitted that the disciplinary authority after examining the findings recorded by the Enquiry Officer and on the basis of the evidences available on record, and also on finding that it is not practicable to conduct a detailed inquiry and that the offence committed by the petitioner is a grave misconduct and heinous in nature has passed the impugned order exercising powers conferred under Rule 8(2)(b) of 1991 Rules.

8. Learned Counsel appearing on behalf of the State has further submitted that against the dismissal order dated 29.09.2018, the petitioner filed an appeal before the appellant authority which has also been duly considered and rejected the same in accordance with law. Against the dismissal order, the petitioner has an alternative remedy for filing a revision under Rule 23 of 1991 Rules and thereafter, before the learned State Public Service Tribunal but instead of avail such alternatives remedies, the petitioner has filed the instant writ petition and, therefore, the same is liable to be dismissed on the ground of availability of alternate remedy.

9. I have considered the submissions of learned Counsel for the parties and perused the record.

10. Before adjudicating the grievance of the petitioner on merit, it would be appropriate to reproduce the relevant portion of the impugned dismissal order dated 29.09.2018 and the order dated 20.05.2019 passed by the Appellate Authority dismissing the appeal of the petitioner which reads as under respectively:

"29-09-2018

अतः मैं कलानिधि नैथानी, आई0पी0एस0, वरिष्ठ पुलिस अधीक्षक, लखनऊ का उक्तांकित कारणों के आधार पर यह समाधान हो गया है कि निलम्बित आरक्षी 2199 ना0पु0 / पीएनओ–162806090 संदीप कुमार पुत्र श्री सतेन्द्र सिंह, निवासी–कालोनी न्यू रामनगर बड़ौत, थाना बड़ौत, जनपद बागपत एवं निलम्बित आरक्षी 5948 ना0पु0/पीएनओ–162153936 प्रशान्त कुमार पुत्र श्री रविन्द्र सिंह, निवासी–ग्राम जटपुरा, थाना अहार, जनपद बुलन्दशहर को सेवा में बनाये रखना पुलिस विभाग के अनुशासन एवं कार्य क्षमता की दृष्टि से लोकहित/राज्यहित/पुलिस विभाग के हित में नहीं है। अतएव सक्षम नियुक्ति प्राधिकारी होने के कारण उ0प्र0 अधीनस्थ श्रेणी के पुलिस अधिकारियों की (दण्ड एवं अपील) नियमावली–1991 के प्रस्तर–8(2)(ख) सपठित भारत के संविधान के अनुच्छेद 311(2)(ठ) में, प्रदत्त अधिकारों के अन्तर्गत अपने अर्न्तनिहित शक्तियों का प्रयोग करते हुए निलम्बित आरक्षी 2199 ना0पु0/पीएनओ–162806090 संदीप कुमार पुत्र श्री सतेन्द्र सिंह, निवासी–कालोनी न्यू रामनगर बड़ौत, थाना बड़ौत, जनपद बागपत एवं निलम्बित आरक्षी 5948 ना0पु0/पीएनओ–162153936 प्रशान्त कुमार पुत्र श्री रविन्द्र सिंह, निवासी–ग्राम जटपुरा, थाना अहार, जनपद बुलन्दशहर को पुलिस विभाग की सेवा से पदच्युत किये जाने का आदेश पारित करता हूँ।"

"20.05.2019

अपीलकर्ता द्वारा प्रस्तुत अपील के आलोक में पत्रावली पर उपलब्ध साक्ष्यों का परिशीलन किया गया, जिससे यह स्पष्ट है कि दिनांक 28.09.2018 को आरक्षी 2199 ना0पु0 पीएनओ–162806090 संदीप कुमार एवं एक अन्य आरक्षी 5984 ना0पु0/162153936 प्रशांत कुमार थाना गोमतीनगररजट संख्या–79 समय 21.28 बजे रात्रि 9.00 बजे से दिनांक 29.09.2018 की प्रातः 9.00 बजे तक चीता मोबाइल गश्त क्षेत्र मकदूमपुर हेतु रवानाशुदा ड्यूटीरत थे। मृतक विवेक तिवारी अपनी सहकर्मी सना के साथ अपनी कार में मौजूद था। ड्यूटीरत उक्त दोनों आरक्षियों द्वारा मृतक

विवेक तिवारी व उसकी सहकर्मी से पूछताछ किये जाने के दौरान कहा–सुनी होने पर विवेक तिवारी की गोली मारकर हत्या कर दी गयी, जिससे विवेक तिवारी की मृत्यु हो गयी। वादिनी सना की तरफ से थाना गोमतीनगर पर मु0अ0सं0–1132/2018 धारा 302 पंजीकृत किया गया। विवेचना के दौरान आरक्षी 2199 ना0पु0 पीएनओ–162806090 संदीप कुमार एवं आरक्षी 5984 ना0पु/162153936 प्रशांत कुमार, थाना गोमतीनगर, लखनऊ प्रकाश में आये, जिन्हे गिरफ्तार कर जेल भेजा गया। प्रकरण की जांचोपरान्त इन्हें दोषी पाया गया है। अपीलार्थी ने अपने अपील में उल्लिखित तथ्यों में कोई ऐसा विशिष्ट तथ्य अंकित नहीं किया है, जिसके आधार पर प्रश्नगत दण्डादेश निरस्त किया जाना विधिपूर्ण हो। प्रश्नगत दण्डादेश में किसी प्रकार की प्रकियात्मक त्रुटि अथवा असंवैधानिकता प्रतीत नहीं हो रही है। इस प्रकार प्रकरण में पारित आदेश औचित्यपूर्ण एवं विधि सम्मत है।

उपरोक्त विश्लेषण से मैं इस निष्कर्ष पर पहुॅचा हूॅ कि प्रत्यावेदक का अपीलीय प्रत्यावेदन बलहीन व निराधार है, जो निरस्त किये जाने योग्य है।

अतः उपरोक्त प्रकरण में वरिष्ठ पुलिस अधीक्षक, लखनऊ के आदेश संख्या–स–1132/2018 दिनाँक 29–9–2018, जिसके माध्यम से उ0प्र0 अधीनस्थ श्रेणी के पुलिस अधिकारियों की (दण्ड एवं अपील) नियमावली–1991 के नियम–8(2) (ख) के अन्तर्गत पदच्युति के दण्ड से दण्डित किये जाने का आदेश पारित किया गया है, जो नियमाकूल है, तथा जिसमें किसी प्रकार के हस्तक्षेप की आवश्यकता नहीं है। एतद्द्वारा अपीलकर्ता आरक्षी 2199 ना0पु0 पीएनओ–162806090 संदीप कुमार की अपील अस्वीकार की जाती है।"

11. It is not disputed that the Competent Authority can very well exercise the powers as have been provided under Rule 8(2)(b) of 1991 Rules while dispensing with the service of a subordinate officials and record the reasons as to why the power is being exercised under Rule 8(2)(b) of 1991 Rules. The argument of the petitioner is that the impugned order dated 29.09.2018 does not indicate any reason as to why it is not reasonably practicable to hold inquiry against the petitioner. The said order was under challenged in the appeal but the Appellate Authority dismissed the appeal on the ground that the appeal has no force and there are no illegality in the order dated 29.09.2018 passed by the Senior Superintendent of Police, Lucknow.

12. In order to appreciate the respective arguments which has been advanced relevant Rule 8 of U.P. Police Officers of the Subordinate Rank (Punishment and Appeal) Rules 1991 is being quoted below:

*"**8. Dismissal and removal.** (1) No Police Officer shall be dismissed or removed from service by an authority subordinate to the appointing authority.*

(2) No Police Officer shall be dismissed, removed or reduced in rank except after proper inquiry and disciplinary proceedings as contemplated by these rules:

Provided that this rule shall not apply

(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 enquiry; or

(c) Where the Government is satisfied that in the interest of the security of the State it is not expedient to hold such enquiry.

(3) All orders of dismissal and removal of Head Constables or Constables shall be passed by the Superintendent of Police. Cases in which the Superintendent

of Police recommends dismissal or removal of a Sub-Inspector or an Inspector shall be forwarded to the Deputy Inspector General concerned for orders.

(4) (a) The punishment for intentionally or negligently allowing a person in police custody or judicial custody to escane shall be dismissal unless the punishing authority for reasons to be recorded in writing awards a lessor punishment.

(b) Every officer convicted by the Court for an offence involving moral turpitude shall be dismissed unless the punishing authority for reasons to be recorded in writing considers it otherwise."

13. Bare perusal of the aforesaid rules would go to show that holding of inquiry is a rule and dispensing with the enquiry is an exception. Before proceedings to impose any one of the major penalty of dismissal, removal or reduction in rank the departmental inquiry is a must and is a condition precedent. However in certain contingency said rigour of the rule can be dispensed with and one such contingency provided for is that in case it is not reasonably practicable to hold inquiry and for this reasons will have to be recorded in writing. The said authority is to be exercised in exceptional circumstances and that to by recording finding to the effect as to why it is not reasonably practical to hold an inquiry. Thus, recording of finding that it is not reasonably practicable to hold inquiry before proceeding to exercise aforesaid authority of dispensation of service under Rule 8 (2)(b) of 1991 Rules is *sine quo non.*

14. The words "reasons to be recorded in writing that it is not reasonably practicable to hold enquiry" means that there must be some material for satisfaction of the disciplinary authority that it is not reasonably practicable. The decision to dispense with the departmental enquiry cannot be rested solely on the ipse dixit of the concerned authority. The Apex Court in the case of ***Jaswant Singh vs. State of Punjab and others; AIR 1991 SC 385*** has observed as under:

"It was incumbent on the respondents to disclose to the Court the material in existence at the date of the passing of the impugned order in support of the subjective satisfaction recorded by respondent no.3 in the impugned order. 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."

" ... When the satisfaction 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."

15. Clause (b) of the second proviso to clause (2) of Article 311 provides that where an authority empowered to dismiss or remove a person or to reduce him in rank, is satisfied that for some reason to be recorded by the authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause against the proposed punishment, the provisions of clause (2) of Article 311 of the Constitution shall not apply. Article 311(2) of the Constitution of India is quoted below for ready reference:

"311. Dismissal, removal or reduction in rank of persons employed in

civil capacities under the Union or a State. *- (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.*

[(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges

[Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed: Provided further that this clause shall not apply]

(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; or

(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.

[(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.]"

16. A disciplinary authority is not expected to dispense with the disciplinary inquiry in exercise of the power under clause (b) of Article 311 lightly or arbitrarily or out of ulterior motives or merely in order to avoid holding of a disciplinary inquiry or because the department's case against the government servant is weak and likely to fail. The finality given to the decision of the disciplinary authority by Article 311(3) does not preclude judicial review. In such cases the court will strike down the order dispensing with the inquiry as also the order-imposing penalty. If the court finds that the dispensing with the inquiry has been done without any basis, without recording reasons or recording reasons, which have no nexus to the dispensing of the inquiry or if the decision is made on collateral basis, the order is liable to be set aside by the court. The scope of Clause (b) of the second proviso to Article 311(2) and of Article 311 (3) came up for consideration before a Constitution Bench of Hon'ble Supreme Court in the case of ***Union of India and another vs. Tulsiram Patel; (1985) 3 SCC 398.*** In para 130, Hon'ble Supreme Court has held as under:

*"**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 intimidates witnesses who are going to give 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 others threatens, intimidates and terrorizes the officer who is the disciplinary authority or members 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. The finality given to the decision of the disciplinary authority by Article 311(3) is not binding upon the court so far as its power of judicial review is concerned and in such a case the court will strike down the order dispensing with the inquiry as also the order imposing penalty. The case of Arjun Chaubey v. Union of India [(1984) 2 SCC 578 : 1984 SCC (L&S) 290 : (1984) 3 SCR 302] is an instance in point. In that case, the appellant was working as a senior clerk in the office of the Chief Commercial Superintendent, Northern Railway, Varanasi. The Senior Commercial Officer wrote a letter to the appellant calling upon him to submit his explanation with regard to twelve charges of gross indiscipline mostly relating to the Deputy Chief Commercial Superintendent. The appellant submitted his explanation and on the very next day the Deputy Chief Commercial Superintendent served a second notice on the appellant saying that his explanation was not convincing and that another chance was being given to him to offer his explanation with respect to those charges. The appellant submitted his further explanation but on the very next day the

Deputy Chief Commercial Superintendent passed an order dismissing him on the ground that he was not fit to be retained in service. This Court struck down the order holding that seven out of twelve charges related to the conduct of the appellant with the Deputy Chief Commercial Superintendent who was the disciplinary authority and that if an inquiry were to be held, the principal witness for the Department would have been the Deputy Chief Commercial Superintendent himself, resulting in the same person being the main accuser, the chief witness and also the judge of the matter."

17. In ***Sudesh Kumar vs. State of Haryana and others; (2005) 11 SCC 525***, the Supreme Court observed as follows:

"5. It is now established principle of law that an inquiry under Article 311(2) is a rule and dispensing with the inquiry is an exception. The authority dispensing with the inquiry under Article 311(2)(b) must satisfy for reasons to be recorded that it is not reasonably practicable to hold an inquiry. A reading of the termination order by invoking Article 311(2)(b), as extracted above, would clearly show that no reasons whatsoever have been assigned as to why it is not reasonably practicable to hold an inquiry. The reasons disclosed in the termination order are that the complainant refused to name the accused out of fear of harassment; the complainant, being a foreign national, is likely to leave the country and once he left the country, it may not be reasonably practicable to bring him to the inquiry. This is no ground for dispensing with the inquiry. On the other hand, it is not disputed that, by order dated 23-12-1999, the visa of the complainant was extended up to 22-12-2000. Therefore, there was no difficulty in securing the presence of Mr Kenichi Tanaka in the inquiry.

6. A reasonable opportunity of hearing enshrined in Article 311(2) of the Constitution would include an opportunity to defend himself and establish his innocence by cross-examining the prosecution witnesses produced against him and by examining the defence witnesses in his favour, if any. This he can do only if inquiry is held where he has been informed of the charges levelled against him. In the instant case, the mandate of Article 311(2) of the Constitution has been violated depriving reasonable opportunity of being heard to the appellant."

18. On the parameter of the aforesaid provisions and law laid down by Hon'ble Supreme Court, I have examine the instant case. In the present case, it is accepted position that first information report was lodged as Case Crime No.1132 of 2018, under Section 302 IPC and second first information report was as Case Crime No.1140 of 2018, under Section 302 IPC. Later on, second FIR was clubbed with Case Crime No.1132 of 2018. The learned Additional Sessions Judge-I, Lucknow had framed charges under Sections 323 and 302 IPC read with Section 114 IPC against the petitioner, vide order dated 22.03.2019. The authority concerned in his wisdom has proceeded to pass order of dismissal on account of the fact that it is not reasonably practicable to hold inquiry.

19. In the impugned order, it has been stated that looking into the nature of alleged offence and seriousness of the charges, it is not feasible to hold departmental inquiry against the petitioner but fact of the matter is that nothing has been disclosed, as to why it is not reasonably practicable to hold inquiry. It is

true that petitioner has been implicated in a murder case during the course of duty and it is not specified that in what way and manner seriousness of alleged offence has got connected with not reasonable and practicable to hold inquiry. Thus, non recording of finding that it is not reasonably practicable to hold inquiry is contrary to the requirement of the provisions of Rule 8(2)(b) of 1991 Rules.

20. It is emerging from the factual scenario that no regular departmental inquiry has been held and no exercise has been undertaken which would substantiate that said inquiry was not reasonably practicable then in this background order of dismissal on this score is liable to be set aside. While dismissing the appeal by the Appellate Authority has also not taken into consideration that the disciplinary authority has not recorded any reason as to why it is not reasonable practicable to hold inquiry. The dismissal order nowhere discloses that disciplinary authority has ever arrived at a conclusion that holding of an inquiry as per Rule 8(2)(b) of 1991 Rules was not reasonably practicable. The reasons assigned in the impugned order are not at all sustainable in the eyes of law.

21. So far as the argument of learned Counsel appearing on behalf of the State that the petitioner has an alternative remedy of filing revision under Rule 23 of 1991 Rules before the revisional authority is concerned, the issue of said alternative remedy has already been settled by the co-ordinate Bench vide order dated 29.05.2019. The relevant portion of the order dated 29.05.2019 passed in this case is quoted below:

"6. The words of Rule 23 of the aforesaid Rule 1991 clearly indicate an entitlement upon the officer whose appeal has been rejected to prefer a Revision to the superior authority. The Revision in entertainable only upon specific conditions being met. The revising authority has also been granted discretion to call for and examine the records of any order passed in appeal against which no Revision has been preferred.

7. The aforesaid words of Rule 23 of the Rules of 1991 clearly indicate that the provisions of Revision are not mandatory in nature and are clearly at the discretion of the Officer whose appeal has been rejected. In view of the aforesaid, the preliminary objection raised against the maintainability of the writ petition is rejection."

22. In view of the aforesaid, I am of the view that the order of dismissal passed against the petitioner does not fulfill the requirements of Rule 8(2)(b) of 1991 Rules read with Article-311(2) Proviso Clause (b) of the Constitution of India and therefore, cannot be sustained.

23. Accordingly, the order dated 29.09.2018 passed by the Senior Superintendent of Police, Lucknow and the order dated 20.05.2019 passed by the Inspector General of Police (Establishment), Lucknow are set aside. The writ petition is ***allowed.***

24. The ts are directed to reinstate the petitioner in service with all consequential benefits, if there is no other legal impediment leaving it open to the respondents to proceed with the departmental inquiry, in accordance with law, if they so advised. It is also made clear that the reinstatement of the petitioner is subject to outcome of the trial proceedings.

(2021)03ILR A188
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.03.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 18754 of 2019

Prof. Devi Singh ...Petitioner
Versus
I.I.M. Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Shireesh Kumar

Counsel for the Respondents:
A.S.G., C.S.C.

A. Constitution of India – Article 14 – Pension – Payment stopped – Principle of natural justice – Applicability – Request of retirement approved with payment of regular pension – After three years, payment of pension provisionally stopped – No opportunity of hearing afforded – Effect – Held, staying the pension provisionally after more than three years since the petitioner was getting regular pension, without having any colour of authority to that effect and even without affording an opportunity of hearing to the petitioner is patently illegal, arbitrary and uncalled for. (Para 41 and 43)

B. Civil Law - Central Civil Services (Pension) Rules, 1972 – Rule 27 and 28 – Worked both on post of Professor and Director at IIM – Counting of service tenure for pension – Pre-interrupted service – Interruption between the two spells of civil service – Its counting as qualifying service – Held, in the absence of indication to the contrary in the service record, interruption between the two spells of service shall be treated as automatically condoned and pre-interrupted services to be treated as qualifying service – Two spells of service of the petitioner shall be counted for the pension – *Madhukar's case* of the Supreme Court followed. (Para 46)

C. Interpretation of Statute – Beneficial legislation – Liberal interpretation – Since the pension Rules are the beneficial legislation, therefore, the interpretation of such rules should be made liberally, if two interpretations of said rules are possible. (Para 47)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Madhukar Vs St. of Mah., (2014) 15 SCC 565

2. DTC Vs Balvan Singh, AIR 2017, SC 396

3. U.O.I. & ors. Vs Vijay Kumar No. 3989606 P.Ex. Naik reported in (2015) 10 SCC 460

4. P. Venugopal Vs U.O.I. (2008) 5 SCC 1

5. Frome United Breweries Company Ltd. & anr. Vs Keepers of the Peace and Justice for Country Borough to Bath; 1926 AC 586

6. St. of Orissa Vs Dr. (Miss) Binapani Dei & ors. reported in AIR 1967 SC 1269

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Shireesh Kumar, learned counsel for the petitioner, Sri J.N. Mathur, learned Senior Advocate assisted by Sri Anant Tewari, learned counsel for the Indian Institute of Management, Lucknow (hereinafter referred to as IIM, Lucknow) and Sri Sudhanshu Chauhan, learned counsel for the Union of India.

2. Under challenge is order dated 25.6.2019 passed by the Board of Governors of IIM, Lucknow as contained in Annexure no. 19 to this writ petition whereby the payment of pension of the petitioner has been

stopped holding him disqualified for the pension and its arrears.

3. The brief facts of the case are that IIM, Lucknow invited applications for appointment to the post of Director, IIM, Lucknow and after the search by the competent authorities and with detailed selection procedure the petitioner was found suitable for the appointment to the post of Director, IIM, Lucknow and accordingly a High Level Committee recommended his name for such appointment with approval from the cabinet committee of the appointments. Accordingly, the appointment letter was issued on 28.7.2003 appointing the petitioner as Director, IIM, Lucknow for the period of five years. The petitioner submitted his joining on 25.8.2003.

4. Learned counsel for the petitioner has submitted that IIM, Lucknow is an autonomous body which is a registered society under Societies Registration Act, 1960 and such society has its own Memorandum of Association and Bye Laws.

5. On 03.09.2003, the petitioner submitted an application (Annexure no. 5 to the writ petition) before the Board of Governors to consider his candidature for simultaneous appointment as Professor in the Indian Institute of Management, in line with the practice prevailing in other institutes of management. Vide order dated 22.10.2003 (Annexure no. 6 to the writ petition) Board of Governors of Indian Institute of Management, Lucknow approved simultaneous appointment of the petitioner as Professor IIM, Lucknow.

6. On 24.8.2008, the petitioner completed the tenure of five years as Director, IIM, Lucknow and on 31.8.2008 submitted an application (Annexure no. 7 to the writ petition) to the Board of Governors seeking it's concurrence for his posting as Professor in IIM, Lucknow, Noida Campus, as already approved by the Board of Governors. The petitioner also exercised his option for Government of India pension prevailing in IIM at the time of his joining the institute on 25.8.2003. On 14.10.2003 (Annexure no. 8 to the writ petition), petitioner was conveyed the approval of the Board of Governors acknowledging the fact that after relinquishing the charge of Director, IIM, Lucknow, the petitioner has assumed the charge of the Professor.

7. On 22.9.2008, petitioner resumed the charge as Professor in the pay scale of Rs. 18400-500-22400/- at IIM, Lucknow Noida Campus, Noida. Notably, the order dated 14.10.2008 also stated that prior to resuming the charge, the matter was referred to the Chairman, Board of Governors and approval was accorded by him to the petitioner to resume charge as Professor at IIM, Lucknow, Noida Campus, Noida. The order dated 14.10.2008, also stated that the basic pay of the petitioner as Professor may be fixed as Rs. 22400/- per month with effect from 25.8.2008 and the period from the day he relinquished the charge as Director and until he resumed charge as Professor at IIM, Lucknow, Noida Campus i.e. 25.8.2008 to 21.9.2008 may be treated as grant of earned leave as per the requisition made by the petitioner vide his letter dated 22.9.2008 as at the time of relinquishing the charge as Director, 150 days earned leave was due at his credit. No dues certificate obtained from different departments on relinquishing charge as Director IIM, Lucknow was also enclosed.

8. Sri Shireesh Kumar has, therefore, submitted that in view of the aforesaid developments the petitioner continued in the service of IIM, Lucknow as Professor in continuation to his initial appointment as Director w.e.f. 25.8.2003.

9. Further, while the petitioner was continuing as Professor at IIM, Lucknow, vide order dated 5.3.2009 (Annexure no. 9 to the writ petition) he was again appointed as Director, IIM, Lucknow for a further tenure of five years, as per the approval granted by the Government of India and in compliance of the order dated 5.3.2009, the petitioner resumed the charge of the post of Director on 9.3.2009.

10. As per Sri Shireesh Kumar before completion of second term as Director, IIM, Lucknow on 18.2.2014, the petitioner submitted an application (Annexure no. CA-2 of the counter affidavit) to the Chairman, Board of Governors, IIM, Lucknow stating that he had already attained the age of 61.5 years and as per the government rules on superannuation he was eligible to seek retirement from the service with pensionary benefits on expiry of his present tenure. The petitioner, therefore, requested for seeking retirement on superannuation effective from the date on the relinquishing the charge of the office of Director.

11. On the application dated 18.2.2014, approval was granted by the Board of Director and on relinquishing the charge of the post of Director, IIM, Lucknow on 15.9.2014, petitioner was allowed to retire as Professor, IIM, Lucknow as well, accordingly the petitioner had completed 11 years and 15 days of service in the IIM, Lucknow commutatively, as Director as well as Professor.

12. Sri Shireesh Kumar has further submitted with vehemence that minimum qualifying service for pension was 10 years and since the petitioner had completed 11 years and 15 days as such he was regularly being paid the monthly pension since his completion of the term / superannuation with effect from 16.9.2014.

13. Further, on 3.10.2017 (Annexure no. 10 to the writ petition), the opposite party no. 1 passed an order whereby the pension of the petitioner was provisionally stayed for the reason that an ongoing AG Audit had made some adverse observations on the "process of grant of pension" to the petitioner. The order dated 3.10.2017 had been passed without opportunity of hearing to the petitioner as well as without approval by the Board of Governors, moreover, on 3.10.2017, there was no report of the audit team, as the only report of audit team relied upon by the opposite party no. 1 against the petitioner is dated 18.12.2017 (Annexure no. 13 to the writ petition).

14. Sri Shireesh Kumar has submitted that opposite party no. 1 and 2 in para-4 of the counter affidavit have admitted that IIM, Lucknow has not framed any Rules of its own and adopted the Government of India Rules. The Central Civil Services (Pension) Rules, 1972 (hereinafter referred to as CCS Rules, 1972) do not contain any provision for provisionally stoppage of pension.

15. Further, against the order dated 3.10.2017, the petitioner submitted a representation on 11.10.2017 (Annexure no. 12 to the writ petition). When no decision on the representation was communicated to the petitioner then he instituted a Writ Petition No. 27361(SS) of 2017, in this Court which was disposed of by this Court vide order dated 9.1.2019 (Annexure no. 15 to the writ petition) with a direction to the opposite party no. 2 to

take a decision on the representation in the meeting of the Board of Governors scheduled on 16.01.2019 and communicate the decision to the petitioner forthwith.

16. On 28.3.2019 (Annexure no. 17 to the writ petition), the opposite party no. 1 passed an order whereby the representation submitted by the petitioner was rejected. Against the orders dated 03.10.2017 and 28.3.2019, the petitioner instituted another writ petition no. 12595(SS) of 2019 and vide order dated 2.5.2019 (Annexure no. 17 to the writ petition), the writ petition no. 12595(SS) of 2019 was disposed off and the orders dated 3.10.2017 and 28.3.2019 were set aside.

17. Through the order dated 2.5.2019, this Hon'ble Court had directed the respondents to pass orders with regard to grant of pensionary benefits and arrears thereof in the light of the CCS Rules, 1972. The petitioner immediately communicated the order dated 2.5.2019 upon the opposite parties no. 1 and 2 but instead of taking a decision as per the CCS Rules, 1972, on 25.6.2019 (Annexure no. 19 to the writ petition), an order was passed reiterating the earlier decision dated 3.10.2017 and 28.3.2019 and pension along with its arrears was denied to the petitioner.

18. Sri Shireesh Kumar has strenuously submitted that the order dated 25.6.2019 was based upon a letter dated 22.5.2019 issued by the Government of India addressed to the opposite party no. 1. The order dated 25.6.2019 was passed without application of mind by the Board of Governors of IIM, Lucknow and pension along with its arrears was denied to the petitioner, holding that there was a break of 28 days in the two spell of tenures of the petitioner as Director. Whereas in absence of specific indication to the contrary in the service book of the petitioner, any interruption cannot be allowed in the service of the petitioner.

19. Sri Shireesh Kumar has submitted that the impugned order dated 25.6.2019 has been passed in violation of principles of natural justice inasmuch as no opportunity of hearing of any kind whatsoever has been afforded to the petitioner before passing the order dated 25.6.2019. Besides, the impugned order has been passed in violation of Rule 27 and 28 of the CCS Rules, 1972. He has also submitted that the impugned order has been passed violating the directions being issued by this Court on 2.5.2019. The impugned order is absolutely non-speaking and unreasoned order. By means of impugned order the extraneous material has been taken into account without application of mind by the competent authority of IIM, Lucknow. Further, the impugned order is nothing but communication of earlier order dated 3.10.2017 and 28.3.2019 which had already been set aside by this Court vide order dated 2.5.2019. At last, the impugned order has been passed despite the fact that CCS Rules, 1972 do not provide provisional stoppage of pension.

20. In support of his contention that the impugned order dated 25.6.2019 has been passed ignoring Rule 27 and 28 of CCS Rules, 1972 Sri Shireesh Kumar has submitted with vehemence that Rule 27 of the CCS Rules, 1972 provides for effect of interruption in service and Rule 27(a) provides that an interruption in the service of a government servant entails forfeiture of his past services, except in case of authorized leave of absence. Further, since vide order dated 14.10.2003 the period of service of the petitioner from 25.8.2008 to

21.9.2008 was regularized, treating this period to have been spent on leave and this period was adjusted from 150 days of earned leave available in the account of the petitioner as such there was no interruption in the continued service of the petitioner.

21. Rule 28 of the Rules of 1972 provides for continuation of interruption in service and Rule 28(a) provides that in absence of a specific indication to the contrary in the service book an interruption between two spells of civil service rendered by a government servant under Government shall be treated as automatically condoned and the pre-interruption service be treated as qualifying service. Rule 28(b) provides nothing in clause (a) shall apply to interruption caused by the resignation, dismissal or removal from service or for participation in strike (not applicable in the case of the petitioner). Rule 28(c) provides that the period of interruption referred to in clause (a) shall not count as qualifying service meaning thereby that the period of 28 days from 25.08.2008 to 21.9.2008 would not have been counted as qualifying service for the petitioner but on a reading of Rule 28(c) with Rule 27(1)(a) shows that on sanction of leave for this period even this period of 28 days was to be counted as qualifying service for the petitioner.

22. As per Sri Shireesh Kumar even if it is presumed that there is an interruption of 28 days between two spells of the services of the petitioner still the petitioner has a service of 10 years 11 months and 18 days which is more than 10 years, therefore, he is qualified for pension. This statutory provision is not considered in the order dated 25.6.2019.

23. The period from 25.8.2008 to 21.9.2008 is being treated interruption in service by the opposite parties despite the fact that there is no specific indication to the contrary in the service book of the petitioner as such as per the law laid down by the Hon'ble Supreme Court in the case of ***Madhukar vs. State of Maharashtra, 2014(15) SCC 565*** and ***DTC vs. Balvan Singh, AIR 2017, SC 396,*** this period should be treated as automatically condoned and the pre-interruption service to be treated as qualifying service. Para 11 to 15 of the aforesaid judgment is as under :

*11. **Rule 46 of the Rules, 1982** relates to forfeiture of service on resignation. Under Rule 46(1) "resignation from a service or a post entails forfeiture of past services". Sub rule (4) of Rule 46 deals with the cases where the resignation shall not entail forfeiture of past services. But the said Rule 46 is not applicable to the appellant as he neither claimed the benefit of pension under the said Rules nor he was paid pension in terms of the said Rules.*

12. As per paragraph 3 of Resolution dated 11.03.1992 the benefit of previous service by condoning break in service can be granted only if there is compliance of conditions contained in Rule 48(1) of the Rules, 1982, which reads as follows:-

"48. Condonation of interruption in service.-(1)The appointing authority may, by order, condone interruptions in the service of a Government servant:

Provided that-

a) -

b) the interruptions have been caused by reasons beyond the control of the Government servant;

c) the total service pensionary benefit in respect of which will be lost, is not less than five years duration, excluding one or two interruptions, if any; and

d) the interruption including two or more interruptions, if any, does not exceed one year.

(2) The period of interruption condoned under sub-rule (1) shall not count as qualifying service.

(3) In the absence of a specific indication to the contrary in the service record, an interruption between two spells of civil service rendered by a Government servant under Government, shall be treated as automatically condoned and the pre-interruption service treated as qualifying service.

(4) Nothing in sub-rule (3) shall apply to interruption caused by resignation, dismissal or removal from service or for participation in a strike.

(5) The period of interruption referred to in sub-rule (3) shall not count as qualifying service."

As per Rule 48 (3) in the absence of a specific indication to the contrary in the service record, an interruption between two spells of civil service rendered by a Government servant under Government, shall be treated as automatically condoned and the pre-interruption services to be treated as qualifying service.

13. In the case of the appellant, there is notional break in service. He resigned from the Government service on 18.07.1960 and joined the post of Lecturer in Hislop College, Nagpur on the same day i.e. 18.07.1960. Further, higher authorities have recommended to add the earlier period of service for determination of pensionary benefit. Being so, in absence of a specific direction to the contrary in the service record, the interruption between two spells of service rendered by the appellant under the Government shall be treated as automatically condoned; the earlier service rendered by appellant is to be counted towards qualifying service.

14. In view of the provisions of Rule 48 read with Government Resolution dated 11.3.1992, we hold that the appellant is entitled for counting the service earlier rendered between 21.06.1950 to 17.07.1960 for determination of pension. The High Court failed to notice the relevant provisions and wrongly held that the appellant is not entitled to get the benefits of his past services in view of Rule 46(1) of the Rules, 1982, which is not applicable in the case of the appellant. The High Court also erred in rejecting the claim on the ground of delay and failed to notice that the cause of action for grant of pension arises every month. In the present case what we find is that the appellant made representation at an appropriate stage and such request was accepted by respondent No.4, the Administrative Officer, Higher Education, Nagpur who recommended respondent No.5, the Senior Accounts Officer, Accountant General-II, Maharashtra to count the period and to take into consideration the fact that the appellant has rendered more than 33 years of service. Even the Joint Director by his letter dated 30.12.2005 recommended to respondent No.2, Director, Higher and Technical Education, Pune to count the period from 21.06.1950 to 18.07.1960. Thereby, the appellant also explained the delay in moving the High Court.

15. For the reasons aforesaid, we set aside the impugned judgment and order dated 23.04.2012 passed by the Division Bench of High Court of Judicature at Bombay, Nagpur Bench, Nagpur and direct the respondents to count the period of service rendered by the appellant from 21.06.1950 to 18.07.1960 for the purpose of computation of pension and pay the consequential benefits including arrears of pension within three months from the date of this judgment. On failure, the respondents shall be liable to pay interest @ of 8% from the date of filing of the writ petition till the amount is paid."

[Emphasis Supplied]

24. As per Sri Shireesh Kumar similar provisions have been dealt with by the Hon'ble Apex Court in re: ***Madhukar (supra)***, therefore, the controversy in question may be decided in terms of the aforesaid dictum of Hon'ble Apex Court.

25. In support of his further contention to the effect that the impugned order has been passed in violation of principles of natural justice as no opportunity of defense has been provided to the petitioner, Sri Shireesh Kumar has cited the dictum of Hon'ble Supreme Court in re: ***DTC vs. Balvan Singh, AIR 2017, SC 396*** referring para 5 thereof as under :

"5. Prima facie, we are of the view that no adverse effect can be permitted upon the right of the employee to receive pension unless he was given notice by appropriate entry in the service book or through other notice that his absence will be treated as unauthorised absence and will not be counted towards qualifying service for pension. In absence of such notice, after the respondent-employee has taken voluntary retirement under VRS and that too on the ground that he has completed ten years of service, it may be unjust and very harsh to inflict him with such adverse consequences. No doubt in sub-rule (2) of Rule 28 of the Pension Rules which relates to condonation of interruption of service, an opportunity of representation is required to be given to the employee before making entry in service book regarding forfeiture of past service only, but there appears to be some substance in the submission that Rules of Natural Justice may be attracted even in other similar situation where the entry is regarding unauthorised absence, if it is to have the effect of break in service adversely affecting the length of qualifying service for pension." ***[Emphasis Supplied]***

26. Sri Shireesh Kumar has further submitted that this Court on 2.5.2019 disposed off the Writ Petition no. 12595 (SS) of 2019 setting aside the order dated 3.10.2007 and 28.3.2019 and directed the Board of Governors of IIM, Lucknow to reconsider the matter of the petitioner and to pass order with regard to grant of pensionary benefits and arrears thereof in the light of the CCS Rules, 1972 but the order dated 25.6.2019 has not been passed for grant of pension and its arrears to the petitioner as the CCS Rules have been totally ignored accordingly the order dated 25.6.2019 is not legally sustainable.

27. Sri Shireesh Kumar has submitted with vehemence that since the CCS (Pension) Rules, 1972 are beneficial legislation, therefore, those have to be interpreted liberally in view of the dictum of Hon'ble Apex Court in re : ***Union of India and others vs. Vijay Kumar No. 3989606 P.Ex. Naik reported in (2015) 10 Supreme Court Cases 460.*** Para 14 of the judgment is referred herein below:

"14. The Entitlement Rules for Casualty Pensionary Awards, 1982 are beneficial in nature and ought to be liberally construed. In terms of Rule 12, the disability sustained during the course of an accident which occurs when the personnel of the armed forces is not strictly on duty may also be attributable to service on fulfilling of certain conditions enumerated therein. But there has to be a reasonable casual connection between the injuries resulting in disability and the military service."

[Emphasis Supplied]

28. Per contra, Sri J.N. Mathur, learned Senior Advocate appearing for IIM,

Lucknow orally raised preliminary objection against the maintainability of the writ petition by submitting that the order dated 22.5.2019 issued by the Government of India as contained in Annexure no. 2 to the writ petition has not been challenged whereas the order dated 25.6.2019 which has been passed pursuant to the aforesaid order of Government of India dated 22.5.2019.

29. However, Sri Shireesh Kumar has disputed this oral preliminary objection and submitted that the letter dated 22.5.2019 is not an order but an internal correspondence between the Government of India and the Directors, IIM, Lucknow and the copy thereof has not been endorsed to the petitioner. Even such letter dated 22.5.2019 itself indicates that it is a 'letter'. He has further submitted that every material or document which was part of the decision making process of the order dated 25.6.2019 got merged in the ultimate order dated 25.6.2019, therefore, the correspondence letter dated 22.5.2019 which is not even an order, need not to be challenged, hence, the preliminary objection deserves to be summarily rejected.

30. Sri Mathur has submitted that petitioner had two separate tenures as Director. First tenure was from 25.8.2003 to 24.08.2008 (five years). During the first tenure as Director the petitioner made an application on 3.9.2003 for simultaneous appointment as Professor. Petitioner's appointment as Professor while remaining Director was co-terminus. Upon completion of his first tenure as Director the petitioner submitted an application to join at IIM Noida Campus on 31.8.2008. There was a gap of 28 days upon completion of first tenure as Director and taking up the assignment to teach as Professor in IIM Noida with effect from 22.9.2008. The petitioner taught at IIM, Noida Campus for five months 16 days. Second tenure as Director was from 9.3.2009-8.3.2014 (five years). Six months' extension was granted by the Central Government from 9.3.2014-8.9.2014 (six months). There was a gap of six months and 15 days between the two tenures. A month before expiry of his second tenure the petitioner on 18.2.2014 (Annexure no. 2 to counter affidavit) applied for voluntary retirement which was allowed on 15.3.2014 by the Board.

31. The present case is not of withholding or withdrawal of pension, but is one where issue involved is the admissibility of pension. Pension was inadmissible to the petitioner as he was not eligible or entitled to receive the same. Thus, Rule 9 of the CCS (Pension) Rules, 1972 has no application in the instant case.

32. Rule 49(2) of the CCS Rules, 1972 provides for ten years of qualifying service for grant of pension in an establishment. There was a 28 day break in service in the case of the petitioner upon completion of first tenure as Director and taking up the assignment of teaching in IIM, Noida with effect from 22.9.2008. There was gap of 6 months and 15 days between the petitioner's two tenures as Director. Rule 27 of the CCS Rules, 1972 provides that an interruption in the service of a Government servant entails forfeiture of his past service. In the instant case the break in service was not caused due to any penalty or disciplinary proceedings but was due to a tenure appointment coming to an end. The petitioner thus did not have 10 years of minimum qualifying service for retirement pension.

33. The 28 days break in service between 24.8.2008 to 22.9.2008 (28 days) was sought to be made good by seeking post facto sanction of Earned Leave which was irregularly allowed since the petitioner ceased to be in service after 24.8.2008 and was hence not entitled for availing earned leave in any manner other than encashment. A perusal of the CCS Rules, 1972 reveals that the procedure adopted in the case of petitioner for granting him earned leave post facto even when he was not in employment is alien and no such provision exists in the CCS Rules. Earned leave accumulated at the end of service can only be encashed. The earned leave standing to the petitioner's credit at the end of his first tenure as Director could only have been encashed. It is reiterated that earned leave cannot be granted to a person who is not on the rolls of IIM. Person has to be in service to be eligible for leave.

34. Sri Mathur has further submitted that Rule 28 of the CCS Rules, 1972 provide for condonation of interruption in service. It has been argued on behalf of the petitioner that the 28 day break in service stood automatically condoned in terms of Rule 28(a). This argument is fallacious and misconceived. The interruption in the petitioner's case was caused due to two distinct and separate and fresh orders of tenure appointment. The petitioner was permitted to take up his assignment to teach in IIM, Noida with effect from 22.9.2008. This is not a situation where a Professor of the Institute was appointed as Director and he had two spells of service, one as Director and the other as Professor and he rejoined his post as Professor upon competition of the tenure. In the instant case upon completion of the tenure the service of the petitioner as Director came to an end. The petitioner sought to join in IIM, Noida to teach as Professor and was permitted to do so with effect from 22.9.2008 and not from 25.8.2008. The fresh tenure of the petitioner was after a fresh selection for the post was made by the Central Government. The petitioner was appointed afresh as Director on 5.3.2009 and his second fresh term as Director was not in continuation with his earlier term. The gap cannot be automatically condoned as the gap was not as a result of some artificial break like suspension, or punishment which was later set aside. Importantly Rule 28(c) of the CCS Rules, 1972 clearly provides that the period of interruption referred to in clause (a) shall not count as qualifying service.

35. The petitioner could not have been given voluntary retirement. The qualifying service for voluntary retirement is 20 years as pewr Rule 48A of the CCS Rules, 1972. The petitioner did not have twenty years of service to enable him to retire voluntarily. Importantly, the petitioner was given a tenure appointment and even the Memorandum of Association & Rules of the IIM society do not visualize superannuation for the Director. The petitioner has been given pension for the post of Director which in his case was patently erroneous. The service conditions of the petitioner did not visualize the prospect of superannuation. The principle of superannuation does not apply to a tenure post. This has been held by the Apex Court in the case of **P. Venugopal V. Union of India (2008) 5 SCC 1**. The relevant portion is being quoted herein under :

"32. From the above quotation, as made in para 16 of the said decision of this Court, it is evident that this has laid down that the term of 5 years for a Director of AIIMS is a permanent term. Service

conditions make the post of Director a tenure post and as such the question of superannuating or prematurely retiring the incumbent of the said post and as such the question of superannuating or prematurely retiring the incumbent of the said post does not arise at all. Even an outsider (not an existing employee of AIIMS) can be selected and appointed to the post of Director. The appointment is for a tenure to which principle of superannuation does not apply. "Tenure" means a term during which the office is held. It is a condition of holding the office. Once a person is appointed to a tenure post, his appointment to the said post begins when he joins and it comes to an end on the completion of tenure unless curtailed on justifiable grounds. Such a person does not superannuate, he only goes out of the office on completion of his tenure."

[Emphasis Supplied]

36. As per Sri Mathur, petitioner's appointment on the post of Professor was coterminous and it ended with the end of tenure as Director. Petitioner's appointment on the post of Professor was not on a substantive post. The procedure prescribed for appointment of Regular Faculty was never followed. There was no advertisement, no selection, no interview. Post of Regular faculty cannot be filled without advertisement, interview and selection by a selection committee.

37. In the instant case the Board while reconsidering the petitioner's case with regard to pensionary benefits had his representation dated 11.10.2017 before them. Thus, full opportunity of hearing has been given by considering his representation. As such it cannot be argued that no opportunity of hearing was granted to the petitioner. The Board was deciding admissibility of pensionary benefits to the petitioner. The order dated 3.10.2017 having been set aside the Board reconsidered the entire matter and considered each and every aspect raised by the petitioner in his representation.

38. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that the present writ petition is maintainable inasmuch as the contents of letter dated 22.5.2019 issued by the Government of India which is part of decision making process of the impugned order dated 25.6.2019 got merged in the said order. Besides, the letter dated 22.5.2019 is a correspondence letter between the Government of India and IIM, Lucknow, even the copy thereof has not been endorsed to the petitioner, therefore, not challenging letter dated 22.5.2019 would not be fatal for the petitioner for maintaining this writ petition challenging the order dated 25.6.2019.

39. Further, no proper opportunity to submit the defense has been provided to the petitioner before passing the impugned order dated 25.6.2019. Hon'ble Apex Court in re: ***D.T.C. vs. Balwan Singh (supra)*** while interpreting Rule 27 and 28 of CCS Rules, 1972 has categorically held that an opportunity of representation would be required to be given to the employee before making entry in service book regarding forfeiture of past services and if it is not provided, the said inaction would be violative of principles of natural justice. In the present case vide impugned order dated 25.6.2019 all 29 paras of aforesaid impugned order are narration of facts relating to the petitioner and his grievances and no explanation or show cause notice has been issued against the petitioner

before passing the impugned order which has civil consequences. This letter only says that the matter of the petitioner was placed in the Board of Governors, IIM, Lucknow meeting held on 14.6.2019 and Board has extensively deliberated the matter and found that pension and arrears thereof are not admissible to the petitioner as per CCS Rules, 1972, therefore, this order has been passed in utter violation of principles of natural justice.

40. The impugned order dated 25.6.2019 has been passed in continuation of earlier order dated 3.10.2017 and 28.3.2019 whereas those orders have been set aside by this Court vide order dated 2.5.2019 in Writ Service Single No. 12595 of 2019. The IIM has not assailed the order dated 2.5.2019 and said order has attained finality. Therefore, the concerning opposite party should have not taken recourse of the order dated 3.10.2017 and 28.3.2019 and even if those orders were to be relied on, an opportunity of hearing must have been provided to the petitioner apprising that those orders are being relied on and specific explanation to that effect should be called from the petitioner but no opportunity of hearing was provided to the petitioner. The manner under which the impugned order dated 25.6.2019 has been passed may not be appreciated and since the impugned order involves the civil consequences as it is causing serious prejudice to the petitioner, therefore, the principles of fairness should be followed strictly. The law is settled from the very beginning as at the House of Lords in re: ***Frome United Breweries Company Ltd. and another vs. Keepers of the Peace and Justice for Country Borough to Bath*** reported in 1926 AC 586 as observed as under :

"...This rule has been asserted, not only in the case of Courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called Courts, have to act as judges of the rights of others..."

Further, the Hon'ble Apex Court in re: ***State of Orissa vs. Dr. (Miss) Binapani Dei and others reported in AIR 1967 SC 1269*** has held as under :

"... It is true that the order is administrative in character, but even an administrative order which involves civil consequences, as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence. No such steps were admittedly taken, the High Court was, in our judgment, right in setting aside the order of the State."

41. I have also noted that vide first order dated 3.10.2017 (Annexure no. 10 to the writ petition) passed by the Director, IIM the pension of the petitioner was provisionally stayed without affording an opportunity of hearing. However, there was no statutory prescription to that effect under CCS Pension Rules, 1972. Such stay of pension of the petitioner provisionally was based on ongoing A.G. Audit whereas such audit report is dated 18.12.2017 (Annexure no. 17 to the writ petition), therefore, it is beyond any comprehension as to how the subsequent report has been taken into account staying the pension of the petitioner provisionally.

42. It has also been noted that the request of the petitioner regarding his simultaneous appointment as Professor provisionally in the IIM, Lucknow besides Director has been approved by the Board of

Governors / Directors,as the case may be. Further, his request seeking concurrence for his posting as Professor, IIM at Noida Campus was also approved by the Board of Governors / Directors. Further, the Board of Governors / Directors has approved that the period from the date the petitioner would relinquish the charge as Director and until he would resume charge as Professor at IIM, Lucknow Noida Campus from 25.8.2008 to 21.9.2008 shall be treated as grant of earned leave. All requisite formalities, e.g. No Dues Certificate etc. obtained from different departments were also adheared to. The further appointment of the petitioner as Director, IIM, Lucknow for five years was approved by the Board of Governors / Directors and also by the Government of India. Not only the above the application of the petitioner dated 18.2.2014 whereby he sought retirement from service with pensionary benefits was duly approved by the Board of Governors / Directors and on relinquishing charge of the post of Director, IIM, Lucknow on 15.9.2014 the petitioner was allowed to retire as Professor of IIM, Lucknow as well. Admittedly, the petitioner was getting monthly pension w.e.f. 16.9.2004.

43. The aforesaid developments convince the Court that since the appropriate orders, as above referred, have been passed by the competent authority time to time and such orders have been executed after getting due approval from the Board of Governors / Directors, as the case may be, of the IIM and Government of India, therefore, taking U-turn in the present issue staying the pension of the petitioner provisionally on 3.10.2017, i.e. after more than three years since the petitioner was getting regular pension, without having any colour of authority to that effect and even without affording an opportunity of hearing to the petitioner is patently illegal, arbitrary and uncalled for.

44. Therefore, the submissions of Sri J.N. Mathur regarding not following the procedure by the competent authority granting the benefits to the petitioner would not sustain as no protest of any kind whatsoever has been ever lodged against the orders passed by the Board of Governors / Director, as the case may be, in favour of the petitioner from the very beginning, say from 22.10.2003 (Annexure no. 6) onwards till 15.9.2014 when, after due approval, the petitioner was allowed to retire. This is not a petition filed by the IIM, Lucknow challenging the aforesaid approvals. Whereas, the petitioner was getting pension regularly since his retirement after getting due approval from the competent authority i.e. Board of Governors / Directors, as the case may be.

45. Further, despite this Court vide order dated 2.5.2019 having set aside the order dated 3.10.2017 whereby the pension of the petitioner was stayed provisionally and the order dated 28.3.2019 which was passed by the opposite party no. 1 in compliance of the order of this Court dated 9.1.2019, passing impugned order dated 25.6.2019 on the basis of orders dated 3.10.2017 and 28.3.2019 is an illegal inaction on the part of opposite party no. 1 inasmuch as nonest orders i.e. order dated 3.10.2017 and 28.3.2019 could not have been taken into account while passing impugned order dated 25.6.2019, more so in violation of principles of natural justice.

46. Rule 27 of CCS Rules, 1972 provides effect of interruption in service. Clause (a) of the Rule 27(1) provides that an interruption in service of government servants entails forfeiture of his past

service except authorised leave of absence. Rule 28 thereof provides the mechanism for condonation of interruption in service. It clearly mandates that in the absence of specific indication to the contrary in the service book an interruption between the two spells of civil service rendered by a government servant under the government shall be treated as automatically condoned and the pre-interruption service treated as qualifying service. The protection so given under Rule 28(a) has an exception under sub-rule (b) by saying that nothing in clause (a) shall apply to interruption caused by resignation, dismissal or removal from service for participation in a strike. Undoubtedly, no condition of clause (b) is applicable in the present case. Sub-clause (c) of Rule 28 appears to have interruption contrary to Rule 28(a) inasmuch as Rule 28(a) says an interruption between the two spells of civil service rendered by the government servant shall be treated as automatically condoned and pre-interruption service treated as qualifying service whereas sub-clause (c) of Rule 28 provides that the period of interruption referred to in clause (a) shall not be counted as qualifying service. However, if Rule 28(c) is read with Rule 27(1)(a) the inference may be drawn to the effect that the period of 28 days of interruption of service of the petitioner w.e.f. 25.8.2008 to 21.9.2008 would be counted as qualifying service. The Hon'ble Apex Court in re: ***Madhukar (supra)*** has held, while interpreting similar provisions of law to the effect that in the absence of indication to the contrary in the service record, interruption between the two spells of service shall be treated as automatically condoned and pre-interrupted services to be treated as qualifying service, therefore, in view of the dictum of the Hon'ble Apex Court in re: ***Madhukar (supra)*** there may not be any confusion on the interpretation of Rule 28 of CCS Rules, 1972 and, therefore, the two spells of service of the petitioner shall be counted for the pension.

47. There is no dispute that the petitioner was getting pension after retirement from IIM, Lucknow and vide very first order dated 3.10.2017 (Annexure no. 10 to the writ petition) the pension of the petitioner was abruptly stayed on the basis of one audit objection and finally vide impugned order dated 25.6.2019 not only the payment of pension of the petitioner has been denied but the arrears thereof has been denied holding that since there was break in service of 28 days in the two spells of service of petitioner as Director, therefore, he shall not be paid pension in view of the Rule 27 and 28 of the CCS Rules, 1972. Since the pension Rules are the beneficial legislation, therefore, the interpretation of such rules should be made liberally, if two interpretations of said rules are possible in view of dictum of Hon'ble Apex Court in re: ***Union of India vs. Vijay Kumar (supra).***

48. Therefore, in view of what has been considered and observed above, I hereby ***allow*** the present writ petition.

49. A writ in the nature of certiorari is issued ***quashing*** the order dated 25.6.2019 passed by the Board of Governors, IIM, Lucknow as contained in Annexure no. 19 to the writ petition.

50. A writ in the nature of mandamus is issued commanding the opposite parties to forthwith restore the pension of the petitioner. Petitioner shall be paid the arrears of pension with promptness preferably within a period of two months with interest @ 6% per annum from the

date it accrued up to the date of its actual payment. The petitioner shall be paid regular pension as and when the same falls due.

51. It is further directed that if this order is not complied with within stipulated time, the petitioner shall be entitled for the interest @ 12% on the aforesaid dues.

52. No order as to costs.

(2021)03ILR A201
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.03.2021

BEFORE

THE HON'BLE CHANDRA DHARI SINGH, J.

Service Single No. 20385 of 2019
connected with
Service Single No. 20505 of 2020
and
Service Single No. 24584 of 2019
and
Service Single No. 20251 of 2019

Aakash Verma & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Laltaprasad Misra, Prafulla Tiwari

Counsel for the Respondents:
C.S.C, Himanshu Raghave

A. Service law – Police recruitment – Assistant Sub-Inspector – Qualification – Certificate of 'O' level issued by DOEACC Society – Non-possession thereof – Rejection of candidature – Validity – Classification between certificate issued by DOEACC society and issued by other university – Reasonableness – 'O' level certificate issued by DOEACC/NIELIT is a foundation course in Computer – Held, insistence on allowing only such candidates to be appointed who have obtained training from a particular institute give rise to the institutional exclusivity having no reasonable basis for classification between the certificates issued by DOEACC/NIELIT and other St. established universities – Candidature of a person cannot be rejected solely on the ground that he or she does not possess 'O' level certificate issued by DOEACC/NIELIT. (Para 37 and 39)

B. Service law – Police recruitment – Qualification – B.Tech (C.S.), B.Sc.(C.S.), B.C.A. include the foundational course in Computer as well – It's syllabus also cover the syllabus of 'O' level certificate – Same line of progression – Held, if a candidate possesses a basic qualification/ degree like B.Tech (C.S.), B.Sc.(C.S.), B.C.A., which includes the foundational course in Computer, such graduation degrees/diplomas of the candidates, being a 3 or 4 year degree/diploma courses, shall presuppose the acquisition of one year 'O' Level Course – It can be said that candidates possessing such a nature of basic educational qualification degree are well versed with the syllabus of 'O' level course. (Para 44, 45 and 46)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Abha Tripathi & ors. Vs St. of U.P. & ors.; (2016) 6 ALL LJ 66

2. Anand Yadav & ors. Vs St. of U.P. & ors.; 2020 SCC Online SC 823

3. St. of Uttrak. & ors. Vs Deep Chandra Tiwari & ors.; 2013 SCC Online SC 1141

4. Writ – A No. 24273 of 2018; Deepak Singh & ors. Vs St. of U.P. & ors. decided on 23.07.2019

5. Zahoor Ahmed Rather & ors. Vs Shekh Imtiaz Ahmed & ors.; (2019) 2 SCC 404,

6. Ganesh Kuwarbi & ors. Vs St. of Uttarak. & anr.; 2014 SCC OnLine Utt 1917

7. B.L. Asawa Vs St. of Raj. & ors.; (1982) 2 SCC 55

8. Sadhna Singh Vs St. of U.P. & ors.; 2011 (5) ADJ 54

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. Since common questions are involved in all the above-mentioned writ petitions, they are being decided together.

2. Mainly, the following two prayers have been made in all the writ petitions :-

(i) To issue a writ, order or direction in the nature of mandamus directing Uttar Pradesh Service Recruitment and Promotion Board to do the document verification of the petitioners by treating them as qualified and eligible and the petitioners be also subjected to further process of recruitment as contemplated under Rule 17 of Uttar Pradesh Police Ministerial, Accounts, Confidential Assistant Cadres Service (First Amendment) Rules, 2016.

(ii) To issue a writ, order or direction in the nature of mandamus directing the respondents to consider candidature of the petitioners for appointment on the post of ASI, while treating the degrees possessed by the petitioner as equivalent to the 'O' level certificate issued by DOEACC/NIELIT.

3. Vide order dated 23.09.2019 passed in Writ Petition No.20385 (SS) of 2019, Writ Petition No.20251 (SS) of 2019 & Writ Petition No.24584 (SS) of 2019, the Co-ordinate Bench of this Court had directed that if any appointment is made during pendency of the writ petitions, the same shall be subject to final outcome of writ petitions and this fact shall be mentioned in every appointment letter, if issued, during pendency of the writ petitions.

4. For proper adjudication, facts of Writ Petition No.20385 (SS) of 2019 are being taken up.

5. Brief facts of the case are as follows :

(i) The respondent no.2/U.P. Police Recruitment and Promotion Board issued an Advertisement dated 26.12.2016 inviting applications from the male candidates for making recruitment on the 136 posts of Sub-Inspector (Confidential), 303 posts of Assistant Sub-Inspector (Ministerial) and 170 posts of Assistant Sub-Inspector (Accounts) i.e. total 609 posts. As per advertisement, date of online registration for filling up the aforesaid posts was from 12.01.2017 to 11.02.2017. Last date of depositing the application fee was 14.02.2017 and last date of final submission of application form was 18.02.2017. The petitioners submitted their online application for consideration of their candidature for appointment on the aforesaid posts as per the advertisement.

(ii) As per the advertisement, the following were essential educational qualification:

"(i) Assistant Sub-Inspector of Police (Ministerial):

(a) Bachelor Degree from a University established by law in India or equivalent qualification recognised by the Government.

(b) Hindi typing with speed of at least 25 words per minute and English Typing with speed of at least 30 words per minute (Uni-code based using in-script-key

board or as prescribed by the Head of Department).

(c)Certificate of 'O' level in Computer from DOEACC/NIELIT Society.

(ii) Assistant Sub-Inspector of Police (Accounts):

(a) Bachelor Degree in Commerce or Post-Graduate Diploma in Accountancy from an University established by law in India or equivalent qualification recognised by the Government.

(b) Hindi Typing (Uni-code based using in-script-key board or as prescribed by the Head of Department) with speed of at least 15 words per minute.

(c) Certificate of 'O' level in Computer from DOEACC/NIELIT Society.

(iii) Sub-Inspector of Police (Confidential):

(a) Bachelor Degree from a University established by law in India or equivalent qualification recognised by the Government.

(b) Hindi Typing with speed of at least 25 words per minute and English Typing with speed of at least 30 words per minute (Uni-code based using in-script-key board or as prescribed by the Head of Department).

(c) Hindi shorthand dictation with a speed of minimum 80 words per minute.

(d) Certificate of 'O' level in Computer from DOEACC/NIELIT Society."

(iii) As per the advertisement, preferential qualifications for applying the aforesaid posts were: (a) Higher certification from DOEACC/NIELIT (b) Graduation in law from any institute or college or university recognised by University Grants Commission (UGC) (c) has served in the Territorial Army for at least two years (d) possess 'B' Certificate of National Cadet Corps.

(iv) Clause 4 of Advertisement dated 26.12.2016 provides that recruitment on the aforesaid posts shall be made under U.P. Police Ministerial, Accounts, Confidential Assistant Cadre Service (First Amendment) Rules, 2016 (hereinafter referred as 'Rules of 2016').

(v) The online written examination was held on 22.12.2018 and thereafter, the answer key was issued, which was available on the official website of respondent no.2 w.e.f. 03.01.2019 to 06.01.2019. Result of the said examination was declared by respondent no.2 on 08.03.2019 and all the petitioners herein were declared successful in the said examination.

(vi) The respondent no.2 issued admit card to the petitioners for appearing in the next stage of selection process i.e. for verification/scrutiny of documents and physical standard test as per notice dated 03.07.2019 under Rule 17 of 2016 Rules. The petitioners herein presented themselves alongwith relevant documents for verification of documents and for physical standard test as per schedule but they were orally informed that their candidature is being rejected on the ground that they do not possess the 'O' level certificate issued by DOEACC/NIELIT and the signatures of the petitioners were taken on the application form wherein an endorsement was made by respondent no.2 that their candidature is being cancelled due to non-submission of 'O' level certificate issued by DOEACC/NIELIT. The scrutiny held w.e.f. 11.07.2019 to 14.07.2019.

(vii) The respondent no.2 declared the date of holding the Computer Tying Test and Stenography examination vide notice dated 22.07.2019 and 29.07.2019 but the petitioners were not invited for the said tests.

(viii) There is no dispute with regard to possessing the qualification of Bachelor Degree from an University established by law in India or equivalent qualification recognised by the Government. The dispute in the instant writ petitions is only confined to the certificate of 'O' level issued by DOEACC/NIELIT because of which the petitioners have been non-suited on the ground that they do not possess certificate of 'O' level issued by DOEACC/NIELIT.

6. Dr. L.P. Mishra, learned counsel for the petitioners has submitted that crux of the matter in the present writ petitions is that the petitioners have been non-suited on the ground that they do not possess 'O' level certificate issued by DOEACC/NIELIT, whereas the petitioners were having higher degree or diploma in computer course issued by institutes duly recognized and affiliated by the Board of Technical Education/University/UGC/AICTE or IGNOU. It is further submitted that the course of 'O' level certificate mentioned in the advertisement is one year duration course and is a foundational course, whereas the duration of courses done by the petitioners vary from one year to four year and the syllabus of 'O' level course is included in the syllabus of courses done by the petitioners, therefore, the petitioners also possess 'O' level certificate.

7. In support of the aforesaid argument, Dr. Mishra, has invited attention of the Court towards the syllabus of 'O' level course and the syllabus of M.C.A., B.Tech (C.S.), B.Sc. (C.S.) which are possessed by the petitioners and submitted that in the courses done by the petitioners, 'O' level course is included, therefore, the petitioners possess the requisite qualification for being selected and appointed on the post for which they had applied.

8. Dr. Mishra has submitted that respondent no.2 also issued an advertisement in the year 2013 for recruitment on the post of Computer Operator Grade - A and the following was the essential educational qualification as mentioned in the advertisement :-

"(i) Must have passed the Intermediate Examination with Physics and Mathematics as subjects from recognised Board.

And

Must have passed 'O' level examination in Computer from DOEACC of the Government of India or a qualification recognised by the Government as equivalent thereto.

(ii) Must have obtained a Diploma in Computer Engineering, Information Technology or Electronics Engineering from the Board of Technical Education, Uttar Pradesh or a qualification recognised by the Government as equivalent thereto."

9. In the aforesaid advertisement, a dispute was raised by the candidates possessing higher degrees who were not allowed to appear in the document verification and on the controversy, respondent no.2 constituted a Committee comprising Sri D.C. Yadav, Pro. Vice Chancellor/Pro. Computer Science, U.P.T.U., Lucknow; Dr. Raghuraj Singh, Prof. and Head of Department of Computer Science, H.B.T.I., Kanpur, U.P.; and Shri Asraf Ali, Principal Government Polytechnic Aadampur, Gonda for considering the equivalence of technical qualification with respect to the qualification acquired by a candidate. The

committee submitted its report dated 03.03.2014 and 04.09.2013, wherein the higher degrees and diplomas as possessed by the petitioners were declared as equivalent and above to 'O' level certificate issued by DOEACC/NIELIT.

10. Learned counsel has submitted that the degrees and diplomas required by the petitioners are covered under the Committee reports dated 03.03.2014 and 04.09.2013 under Serial Nos.12 and 17, as such, they are legally entitled for getting their documents verified and also to appear in the Physical Standard Test and other process of selection as contemplated under Rule 17 of 2016 Rules. It is submitted that, therefore, the educational qualification as mentioned in the advertisement i.e. 'O' level certificate is a part of syllabus of degrees and diplomas possessed by the petitioners, thus, the petitioners are also eligible as per advertisement dated 26.12.2016.

11. Learned counsel for the petitioners has submitted that rejection of candidature of the petitioners on the ground that they do not possess 'O' level certificate issued by DOEACC/NIELIT cannot be a ground for their rejection.

12. Learned counsel for the petitioner has relied upon a judgment in the case of ***Abha Tripathi and Ors. v. State of U.P. & Ors. - (2016) 6 ALL LJ 66*** and submitted that the candidates who possess the degree issued by the University shall be eligible for appointment wherein the equivalent Degree in Computers has been asked for.

13. Learned counsel has also relied upon a judgment rendered by Hon'ble Supreme Court in the case of ***Anand Yadav and Ors. v. State of U.P. & Ors. - 2020 SCC Online SC 823*** and submitted that if two degrees are identical, there is no question of equivalence.

14. Learned counsel appearing on behalf of the petitioners relied upon the judgment rendered by Hon'ble Supreme Court in the case of ***State of Uttrakhand & Ors. v. Deep Chandra Tiwari & Ors - 2013 SCC Online SC 1141*** wherein the Hon'ble Supreme Court has held as follows:-

"11. We are conscious of the principle that when particular qualifications are prescribed for a post, the candidature of a candidate possessing higher qualification cannot be rejected on that basis. No doubt, normal rule would be that candidate with higher qualification is deemed to fulfill the lower qualification prescribed for a post. But that higher qualification has to be in the same channel. Further, this rule will be subject to an exception. Where the prescription of a particular qualification is found to be relevant for discharging the functions of that post and at the same time, the Government is able to demonstrate that for want of the said qualification a candidate may not be suitable for the post, even if he possesses a "better" qualification but that "better" qualification has no relevance with the functions attached with the post."

15. It is submitted that denying opportunity to the petitioners to participate in the selection process for appointment on the aforesaid posts amounts to unreasonable classification, adoption of dual standards and arbitrariness as similarly situated candidates holding computer certificates equivalent to 'O' level certificate were earlier allowed to

participate in selection for similar posts under the department.

16. Dr. Mishra has vehemently submitted that in the case of ***Deepak Singh and Ors. v. State of U.P. & Ors. (Writ - A No.24273 of 2018 decided on 23.07.2019)***, it has been established that the curriculum of the Diploma in Engineering and the Graduation Degree in Engineering are essentially different. Whereas, in the instant matter, the petitioners have studied the same curriculum from a State established University for the same duration of one year, as is taught by DOEACC/NIELIT. Mr. Mishra has further submitted hence the facts of the matter are substantially different in the present case and that the judgment of the Larger Bench in *Deepak Singh's case (supra)* is clearly distinguishable and not applicable on the facts of the instant case.

17. It is submitted that a person seeking recruitment cannot be deprived of being recruited if the person seeking recruitment meets the requisite criteria of qualification(s).

18. Dr. Mishra has lastly submitted that vide Uttar Pradesh Police Ministerial, Accounts and Confidential Assistants Cadres Service (Third Amendment) Rules, 2020, the minimum educational qualification required for appointment on the post of ASI contained in Rule 10(1) has been amended to include any qualification equivalent to the 'O' level certificate of NIELIT/ DOEACC recognized by the Government. He has further submitted that in pursuance of the aforesaid Amendment and decision taken, the Additional Secretary (Recruitment), U.P. Police Recruitment and Promotion Board has issued Notification dated 09.07.2020, whereby it has been clearly laid down that a certificate issued by a Board/ University/ UGC/AICTE/IGNOU/NIELIT(DOEACC) established or recognized by the State/Central Government shall be treated as equivalent to the 'O' level certificate issued by DOEACC Society, as long as the course upon whose completion such certificate has been issued, was for a duration of one year or more. Therefore, there is no reason to oust the petitioners from the selection process at hand as the petitioners possess the degree equivalent to the 'O' level certificate issued by DOEACC Society and are fully eligible for appointment on the post of ASI.

19. *Per Contra*, Dr. Uday Veer Singh, learned Additional Chief Standing Counsel appearing for the State has vehemently opposed the submissions made by petitioner's counsel and submitted that Point No.3.2 of advertisement dated 26.12.2016/Rule 10 of 2016 Rules provides for essential qualification for direct recruitment of the advertised posts.

20. Learned counsel has submitted that after declaration of result, according to Clause - C of Rule 17 of 2016 Rules, the candidates had to appear for scrutiny of the documents and Physical Standard Test. The successful candidates from 11.07.2019 to 14.07.2019 had appeared for verification of the documents and physical standard test. It is submitted that the candidates whose documents were not in accordance to the required documents as per advertisement dated 26.12.2016 were not allowed for the next stage.

21. It is submitted that the writ petitioners had qualified the written examination and at the time of scrutiny of the documents they were rejected on the

ground that they do not possess 'O' level certificated issued by DOEACC/NIELIT. It is submitted by learned counsel for the State that in Point No.3.2 of Advertisement dated 26.12.2016 and in Rule 10 of 2016 Rules, it is specifically provided that only 'O' level certificate issued by DOEACC/NIELIT is necessary.

22. Learned counsel for the State has submitted that one of the required qualifications for vacant posts is 'O' level certificate issued by DOEACC/NIELIT. There is no optional clause in the advertisement or in the 2016 Rules, hence it is imperative for the candidates to possess statutory qualification prescribed for appointment to the concerned post. Possession of higher qualification certificate as against prescribed qualification is inconsequential.

23. Learned counsel has submitted that it is settled law that the recruitment process must be completed as per terms and conditions given in the advertisement and as per rules existing when the recruitment process began. Equivalent or higher qualification can only be seen if the recruitment rules provide for the same and if such advertisement inviting applications does not indicate that equivalent or higher qualification holders are eligible to apply then higher or equivalent qualifications should not be considered.

24. Learned counsel for the State has submitted that rules of a game cannot be changed after the game starts. In the present selection process, the requisite qualification was prescribed as "a candidate having the 'O' level certificate from a certain society i.e. DOEACC/NIELIT is eligible" and the said qualification is required in view of Rule 10 of the Rules of 2016. Thus, it is clear that the petitioners have been rightly denied the candidature during scrutiny/verification of documents.

25. Learned counsel for the State has relied upon a judgment of the Hon'ble Supreme Court in the case of ***Zahoor Ahmed Rather and Ors. v. Shekh Imtiaz Ahmed and Ors. - (2019) 2 SCC 404,*** in which the following has been held in Para - 26:

"26. We are in respectful agreement with the interpretation which has been placed on the judgment in Jyoti K.K. [Jyoti K.K. v. Kerala Public Service Commission, (2010) 15 SCC 596 : (2013) 3 SCC (L&S) 664] in the subsequent decision in Anita [State of Punjab v. Anita, (2015) 2 SCC 170 : (2015) 1 SCC (L&S) 329]. The decision in Jyoti K.K. [Jyoti K.K. v. Kerala Public Service Commission, (2010) 15 SCC 596 : (2013) 3 SCC (L&S) 664] turned on the provisions of Rule 10(a)(ii). Absent such a rule, it would not be permissible to draw an inference that a higher qualification necessarily presupposes the acquisition of another, albeit lower, qualification. The prescription of qualifications for a post is a matter of recruitment policy. The State as the employer is entitled to prescribe the qualifications as a condition of eligibility. It is no part of the role or function of judicial review to expand upon the ambit of the prescribed qualifications. Similarly, equivalence of a qualification is not a matter which can be determined in exercise of the power of judicial review. Whether a particular qualification should or should not be regarded as equivalent is a matter for the State, as the recruiting authority, to determine. The decision in Jyoti K.K. [Jyoti K.K. v. Kerala Public Service Commission, (2010) 15 SCC 596 : (2013) 3 SCC (L&S)

664] turned on a specific statutory rule under which the holding of a higher qualification could presuppose the acquisition of a lower qualification. The absence of such a rule in the present case makes a crucial difference to the ultimate outcome. In this view of the matter, the Division Bench [Imtiyaz Ahmad v. Zahoor Ahmad Rather, LPA (SW) No. 135 of 2017, decided on 12-10-2017 (J&K)] of the High Court was justified in reversing the judgment [Zahoor Ahmad Rather v. State of J&K, 2017 SCC OnLine J&K 936] of the learned Single Judge and in coming to the conclusion that the appellants did not meet the prescribed qualifications. We find no error in the decision [Imtiyaz Ahmad v. Zahoor Ahmad Rather, LPA (SW) No. 135 of 2017, decided on 12-10-2017 (J&K)] of the Division Bench."

26. Learned counsel has also relied upon a judgment rendered by a Larger Bench of this Court in the case of ***Deepak Singh and Ors. v. State of U.P. & Ors. rendered in Writ - A No.24273 of 2018 decided on 23.07.2019*** wherein it has been observed that the State Government while prescribing the essential qualifications or desirable qualifications are best suited to decide requirements for selecting a candidate for nature of work required by the State Government and the Courts are precluded from laying down the conditions of eligibility. The Court further observed that the 'O' level Diploma granted by NIELIT is not equivalent to Post Graduate Diploma in Computer Application.

27. It is submitted that the recruitment process of the vacant posts under reference had been completed and the successful candidates had joined the said posts. It is further submitted that Uttar Pradesh Police Ministerial, Accounts and Confidential Assistants Cadres Service (Third Amendment) Rules, 2020, as relied by the petitioners' counsel, can not be given retrospective effect in the advertisements in question.

28. Learned counsel for the State has submitted that in view of the above facts and circumstances and law settled, the instant writ petitioners are devoid of merit and be dismissed as such.

29. I have heard Dr. L.P. Mishra, learned counsel for the petitioners; Dr. Uday Veer Singh, learned Additional Chief Standing Counsel and perused the records as well as written submissions filed by the parties as also the judgments cited above.

30. Before I proceed to consider the submissions of learned counsel for the parties, I need to consider the relevant clauses of advertisement (Clause 3.2 & 3.3) and relevant rules (Rules 10 & 17), which are reproduced hereinunder:-

"3.2 - शैक्षिक अर्हता:

1) - पुलिस उप निरीक्षक (गोपनीय) पद के लिए

(क) - भारत में विधि द्वारा स्थापित विश्वविद्यालय से स्नातक उपाधि या सरकार द्वारा मान्यता प्राप्त समकक्ष अर्हता,

(ख) - कम से कम 25 शब्द प्रति मिनट की गति से हिन्दी टंकण (इन्स्क्रिप्ट की-बोर्ड पर यूनीकोड में) तथा कम से कम 30 शब्द प्रति मिनट की गति से अंग्रेजी टंकण,

(ग) - न्यूनतम 80 शब्द प्रति मिनट की गति से हिन्दी आशुलिपि श्रुतिलेख.

(घ) - डोएक/नाइलिट सोसायटी से कम्प्यूटर में 'ओ' स्तर का प्रमाण पत्र।

(2) - पुलिस सहायक उप निरीक्षक (लिपिक)पद के लिए

(क) - भारत में विधि द्वारा स्थापित विश्वविद्यालय से स्नातक उपाधि या सरकार द्वारा मान्यता प्राप्त समकक्ष अर्हता

(ख) - कम से कम 25 शब्द प्रति मिनट की गति से हिन्दी टंकण (इन्स्क्रिप्ट की बोर्ड पर यूनीकोड में) तथा कम से कम 30 शब्द प्रति मिनट की गति से अंग्रेजी टंकण,

(ग)- डोएक/नाइलिट सोसायटी से कम्प्यूटर में 'ओ' स्तर का प्रमाण

(3) - पुलिस सहायक उप निरीक्षक (लेखा) पद के लिए पत्र।

(क) - भारत में विधि द्वारा स्थापित विश्वविद्यालय से वाणिज्य में स्नातक उपाधि या लेखा शास्त्र परास्नातक डिप्लोमा या सरकार द्वारा मान्यता प्राप्त समकक्ष अर्हता,

(ख) - कम से कम 15 शब्द प्रति मिनट की गति से हिन्दी टंकण इन्स्क्रिप्ट

की बोर्ड पर यूनीकोड में)

(ग) - डोएक/नाइलिट सोसायटी से कम्प्यूटर में 'ओ' स्तर का प्रमाण पत्र।

टिप्पणी

(1) पंजीकरण की अन्तिम तिथि तक अभ्यर्थी को अपेक्षित शैक्षिक अर्हता अवश्य धारित करनी चाहिए तथा उसकी अंकतालिका अथवा प्रमाण- पत्र उसके पास उपलब्ध होने चाहियें। अपेक्षित शैक्षिक अर्हता हेतु परीक्षा में सम्मिलित हुए (appeared) अथवा सम्मिलित होने वाले (appearing) अभ्यर्थी पात्र न होंगे।

(2) आवेदन पत्र में उल्लिखित शैक्षिक अर्हता की यथार्थता, शुद्धता एवं समकक्षता को सिद्ध करने के लिए अभिलेखीय साक्ष्य प्रस्तुत करने का दायित्व अभ्यर्थी का होगा। इस सम्बन्ध में बोर्ड का निर्णय अंतिम होगा।

3.3 - अधिमानी अर्हतायें:

अन्य बातों के समान होने पर ऐसे अभ्यर्थी को अधिमान दिया जायेगा जिसने:

(1) - डोएक (DOEACC) नाइलिट (NIELIT) सोसायटी से उच्च प्रमाणीकरण या सरकार द्वारा मान्यता प्राप्त कम्प्यूटर अपलीकेशना/ प्रौद्योगिकी में स्नातक उपाधि या उससे उच्च अर्हता प्राप्त किया हो,

(2) - विश्वविद्यालय अनुदान आयोग से मान्यता प्राप्त किसी संस्थान या महाविद्यालय या विश्वविद्यालय से विधि में स्नातक किया हो,

(3) - प्रादेशिक सेना में कम से कम दो वर्ष की सेवा की हो,

(4)- राष्ट्रीय कैडेट कोर का 'बी' प्रमाण-पत्र प्राप्त किया हो।"

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Rule 10:

Essential qualification for direct recruitment:

"(i) Assistant Sub-Inspector of Police (Ministerial):

(a) Bachelor's Degree from a University established by law in India or equivalent qualification recognised by the Government.

(b) Hindi typing with speed of at least 25 words per minute and English Typing with speed of at least 30 words per minute (Uni-code based using in-script-key board or as prescribed by the Head of Department).

(c)Certificate of 'O' level in Computer from DOEACC/NIELIT Society.

(ii) Assistant Sub-Inspector of Police (Accounts):

(a) Bachelor's Degree in Commerce or Post-Graduate Diploma in Accountancy from an University established by law in India or equivalent qualification recognised by the Government.

(b) Hindi Typing (Uni-code based using in-script-key board or as prescribed by the Head of Department) with speed of at least 15 words per minute.

(c) Certificate of 'O' level in Computer from DOEACC/NIELIT Society.

(iii) Sub-Inspector of Police (Confidential):

(a) Bachelor's Degree from a University established by law in India or equivalent qualification recognised by the Government.

(b) Hindi Typing with speed of at least 25 words per minute and English Typing with speed of at least 30 words per minute (Uni-code based using in-script-key board or as prescribed by the Head of Department).

(c) Hindi shorthand dictation with a speed of minimum 80 words per minute.

(d) Certificate of 'O' level in Computer from DOEACC/NIELIT Society."

Rule 17:

Procedure for Direct recruitment

(A) Application Form and Call Letter:-

A candidate shall fill only one application Form. The Board will accept, only online applications. The Head of the Department, in consultation with the Board, shall fix an application fee for a recruitment. Detailed procedure for filling the Application Form and issuance of call letter shall be determined by the Board and shall be displayed on its website or be published in the notification.

The Government may change the number of vacancies for any recruitment at any time before the first examination and may also cancel any recruitment at any time or stage of recruitment without assigning any reason therefor.

(B) Written Examination:

Candidates whose applications are found correct, shall be required to appear for written test or 100 marks. In this written examination the Board will keep one objective type question paper of four following subjects:

Subjects	***Maximum Marks***
1. General Hindi/Computer Knowledge	*100 Marks (Objective Type)*
2. General Knowledge/Current Affiars	*100 Marks (Objective Type)*
3. Numerical and Mental Ability Test	*100 Marks (Objective Type)*
4. Mental Aptitude Test/I.Q. Test/Reasoning	*100 Marks (Objective Type)*

Candidates failing to obtain 50% marks in each of the above subjects shall not be eligible for recruitment. The Board will decide on its own level to conduct written examination on one date in a single shift or in more than one shift or on more than one date in different shifts with different question paper. Detailed procedure and syllabus for written examination shall be determined by the Board and will be displayed on its website or shall be published in the notification.

(C) Scrutiny of Documents and Physical Standard Test

Candidates found successful in written examination under clause (B) shall be required to appear in Scrutiny of Documents and Physical Standard Test. Keeping in view the total number of. vacancies, the Board shall decide at its own level, the number of candidates on the basis of merit to be called for this test. Physical Standards for candidates are as follows:

1. Minimum Physical Standards for male candidates are as follows:

(a) Height:

(i) for General/Other Backward classes and Scheduled Castes male

candidates height should be 163 minimum centimetres

(ii) for Scheduled Tribes male candidates minimum height should be 156 cemtimeters

(b) Chest:

For the candidates belonging to General Other Backward classes and Scheduled Castes minimum chest measurement should be 77 centimetres without expansion and at least 82 centimetres with expansion; and for the candidates belonging to the Scheduled Tribes 75 centimetres without expansion and not less than 80 centimetres on expansion.

Note: Minimum 5 centimete chest expansion is essential

2. Minimum physical Standards for female candidates are as follows:

(a) Height:

(i) for General or Other Backward classes and Scheduled Castes female candidates minimum height should be 150 centimetres.

(ii) for Scheduled Tribes female candidates minimum height should be 145 centimetres

(b) Weight: Minimum 40 Kg. for female candidates.

For conducting this examination a committee will be constituted by the Board in which a Deputy Collector nominated by the District Magistrate will the Chairman and the Deputy Superintendent of Police nominated by the District Superintendent of Police will be the member. The other members of the committee shall be nominated by the District Magistrate or the Superintendent of Police if requested by the board.

Detailed procedure for this examination shall be determined by the Board and will be displayed on its website or shall be published in the notification.

If any candidate is not satisfied with his Physical Standard Test, he may file an objection on the same day after the test.

For clearing all such objection: the Board nominate one Additional Superintendent of Police at every place and Physical Standard Test of all such candidates will be conducted again by the committee in the presence of the said nominated Additional Superintendent of Police. All those candidates who are again found unsuccessful in the Physical Standard Test will be declared unfit for recruitment and no further appeal will be entertained in this regard.

D) Computer Typing and Stenography Examination

Candidates found successful in Scrutiny of Documents and Medical Examination as per part (C) shall be required to appear in the computer typing test of qualifying nature. The qualifying typing speed shall be as per the post which has been applied for by the candidate. Only those candidates who have applied for the post of Sub Inspector of Police (Confidential) and qualify the required typing test as above, shall have to appear in stenography test which shall be of qualifying nature. The procedure for the examination shall be decided by the Board and will be displayed on its website or shall be published in the notification.

(E) Selection and Final Merit List

From amongst candidates who have qualified in computer typing and from amongst those candidates who have applied for the post of Sub Inspector of Police (Confidential) and have qualified the stenography test also, the Board shall prepare a select list of candidates of each post separately as per vacancies, on the basis of aggregate marks obtained by them in Written examination, keeping in view the

reservation policy, and send it with recommendation to the Head of the Department, subject to Medical test/character verification. No waiting list shall be prepared by the Board. List of all such candidates with marks obtained by each candidate shall be uploaded on its website by the Board. The Head of the Department shall after his approval forward the list sent by the Board to the Appointing Authority for further action.

Note:- If two or more than two candidates obtain equal marks then their seniority shall be decided by the procedure laid down in the following order:

(1) If two or more candidates obtain equal marks then such candidate will be given preference who possesses preferential qualification, if any in the same order as stated in rule (11). Candidate having more than one preferential qualification shall get the benefit of any one preferential qualification

(2) Even then if two or more candidates have equal marks then candidate older in age shall be given preference.

(3) If despite the aforementioned more than one candidates are equal, then preference to such candidate shall be determined according to the order in English Alphabets of their names mentioned in High School Certificate.

(F) Medical Test:

The candidates whose names are in the select list as per clause (c), will be required to appear for Medical Examination by the Appointing authority. For conducting the medical examination, the Chief Medical Officer of the concerned district shall constitute a Medical Board, which will have 03 doctors, who will conduct Medical Examination asu per Police Recruitment Medical Examination Forms as prescribed and codified by the Head of Department in consultation with the Director General of Medical Health. Any candidate not satisfied by his Medical Examination, may file an appeal on the day of examination itself. Any appeal with regard to Medical Examination will not be considered if the candidate fails to file the appeal on the date of Medical Examination and declaration of its result itself. The Medical Board constituted for appeal shall have expert regarding Medical deficiency of the applicant. The detailed instructions for conducting Medical examination will be issued by the Director General of Police. The candidates found unsuccessful in Medical Examination shall be declared unfit by the Appointing authority and such vacancies shall be carried forward for next selection.

(G) Character Verification:

Character Verification shall be completed under the supervision of appointing authority before issuing of appointment letter and before sending the candidates for training. On adverse fact coming to light during character verification of any candidate, he shall be declared unfit by the appointing authority and such vacancy shall be carried forward for next selection.

31. Para - 26 of the writ petition provides comparative chart of all courses completed by the petitioners with the syllabus of 'O' level course. After comparing the syllabus of 'O' level course of DOEACC/NIELIT with the qualifications which the petitioners are possessing, it is clear that syllabus of 'O' level course is included in the degrees/diplomas possessed by the petitioners.

32. The eligibility criteria for appointment on the post of ASI comprised

of three components i.e. (1) Educational qualification of graduation, (2) Foundational knowledge in computers and (3) competence in typing. The process of selection also consist three stages i.e. (1) written examination, (2) document verification and physical standard test and (3) typing test.

33. In the instant case, all the petitioners herein qualified written examination but they have been denied at second stage i.e. document verification and physical standard test on the ground that they do not possess 'O' level certificate issued by DOEACC/NIELIT, which is a one year foundational course in Computer.

34. Now the first issue for adjudication before this Court is ***whether it is permissible for the respondents to insist on 'O' level certificate issued by DOEACC/NIELIT for appointment on the posts advertised ?***

35. In the case of ***Ganesh Kuwarbi and Ors. v. State of Uttarakhand and Anr. - 2014 SCC OnLine Utt 1917,*** the following has been held in Paras - 6, 7, 9 & 10:-

"6. Since, this Court was not an expert in this field, this Court vide order dated 09.04.2014 had directed the authorities to constitute a Committee to examine the computer operation certificates of the candidates, whether they have equivalent or higher qualification in such field. In compliance of this Court's order, a Committee was constituted and such Committee examined the computer certificates of the petitioners and other candidates and after examination of the certificates, the Committee came to a conclusion that there is a partial similarity in the Course which the petitioners have done with the ''O' Level computer course. The Committee further said that in case the Certificates are recognized by the organizations of the Centre or State Government, their matter be considered sympathetically. This is the report which has been filed before this Court. However, in the aforesaid report, there is absolutely no clarity as to the worth of the computer certificates which each of the petitioners have except that these certificates are either by the University established by law or recognized either by the State or Central Government.

7. The insistence on ''O' Level certificates issued by the DOEACC society in the present case does not appear to be reasonable, as this Court has been informed that there are not sufficient number of institutions in the State of Uttarakhand granting such Certificates. In fact, out of 145 only 59 candidates were having such certificates. By and large, the candidates who reside in hill areas have been ousted from the competition, as they do not have such certificates for the simple reason that the area to which they belong, DOEACC society does not have such institutions.

9. In view thereof, this Court finds that since the intention of the Government was to see whether each candidates has computer knowledge and computer operating skills and if the candidates have undergone such course which gives them this ability and the course is recognized either by the State Government or by the University, then the Public Service Commission shall constitute a Committee which will comprise one representative of the Uttarakhand Public Service Commission and another representative of the Uttarakhand Technical Education Board and one

representative appointed by the Principal Secretary, Technical Education, Government of Uttarakhand who would be an expert in the field of computer science, preferably from the recognized Institute in Uttarakhand such as Indian Institute of Technology.

10. The three members Committee shall examine the computer skill certificates of each of the petitioners and if such certificates are found to be recognized by the University or Government of India body or State Government then for such candidates a computer operation skill test be conducted, and if they are found to be up to the mark in the operation of computer and are judged to be skilled in computer, they be accordingly marked and recommendations made.

36. In the case of ***B.L. Asawa v. State of Rajasthan and Ors. - (1982) 2 SCC 55,*** the following has been held by Hon'ble Supreme Court in Para - 10 :-

"10.....A post-graduate medical degree granted by a University duly established by statute in this country and which has also been recognised by the Indian Medical Council by inclusion in the Schedule to the Medical Council Act has ipso facto to be regarded, accepted and treated as valid throughout our country. In the absence of any express provision to the contrary, such a degree does not require to be specifically recognised by other Universities in any State in India before it can be accepted as a valid qualification for the purpose of appointment to any post in such a State. The Division Bench of the High Court was, in our opinion, manifestly in error in thinking that since the post-graduate degree possessed by the appellant was not one obtained from the University of Rajasthan, it could not be treated as a valid qualification for the purpose of recruitment in question in the absence of any specific order by the University of Rajasthan recognising the said degree or declaring it as an equivalent qualification....."

37. The 'O' level certificate issued by DOEACC/NIELIT is a foundation course in Computer. Insistence on allowing only such candidates to be appointed who have obtained training from a particular institute give rise to the institutional exclusivity having no reasonable basis for classification between the certificates issued by DOEACC/NIELIT and other State established universities.

38. In the case of ***Sadhna Singh v. State of U.P. & Ors. - 2011 (5) ADJ 54,*** it has been categorically held that exclusion of candidates from recruitment process solely because their degrees have been issued by universities situated in the State of Jammu and Kashmir would amount to hostile and invidious discrimination violating the right to equality guaranteed under Article 14 of the Constitution of India, and such candidates cannot be put to fault simply because the institute that issued their certificate is situated in the State of Jammu and Kashmir. The rejection of the candidature of the petitioners on the basis of institutional exclusivity amounts to unreasonable classification having no nexus with the object sought to be achieved.

39. In view of the foregoing reasons and discussions, the first question is answered. Thus, insistence on 'O' level certificate issued by DOEACC/NIELIT is unreasonable and someone's candidature cannot be rejected solely on the ground that he or she does not possess 'O' level certificate issued by DOEACC/NIELIT.

40. The second and principal issue for adjudication before this Court is ***whether holding of basic educational qualification of Graduation can presuppose the acquisition of foundational knowledge in Computer if the syllabus of foundational knowledge of Computer is itself covered under the course of Graduation ?***

41. For adjudicating the aforesaid issue, the intent of legislature is required to be understood first. The intention of the legislature/employer in providing the requirement of 'O' level certificate for the post of Assistant Sub-Inspectors and Sub-Inspectors is to recruit the candidates suitable to work efficiently in the changing work environment of government offices, which aims to make government services available to citizens electronically by online infrastructure. It also aims to empower the country digitally in the domain of technology.

42. The objective of 'O' level certification is to enable a student to acquire the knowledge pertaining to fundamentals of Information Technology (IT Tools and Business Systems, Internet Technology and Web design, Programming and Problem Solving through "C' Language, Application of .NET Technology, Introduction to Multimedia, and Introduction to ICT Resources, a Practical and Project Work). Therefore, it is clearly evident that the motive of State/employer in adding the requirement of "O" level course in addition to qualification of Bachelor Degree is to recruit the candidates with the basic Information Technology skills so that the requirements of government departments in the changing scenario of digitization is met with.

43. After analyzing the intent of the legislature, it is obvious that there can be two categories of candidates in such type of cases applying for the posts mentioned in advertisement i.e. (i) the candidates who possess regular bachelor degrees like B.A, B.Com, B.Sc etc., and (ii) the candidates who possess Bachelor Degree/Diploma in the Computer Science like B.Tech (C.S.), B.Sc.(C.S.), B.C.A. etc.

44. As per the intention of the employer in advertisement, it is mandatory and desirable for the candidates who fall in the first category and possess regular Bachelor Degrees e.g., B.A., B.Sc. B.Com. (without any component of Information Technology syllabus) to pursue a one year "O' level course and possess the certificate of said qualification as on the date of advertisement. If such a candidate does not possess the said qualification then he/she shall without any doubt be not eligible for the selection on posts advertised. However, if a candidate possesses a basic qualification/degree like B.Tech (C.S.), B.Sc.(C.S.), B.C.A. etc., which includes the foundational course in Computer, such graduation degrees/diplomas of the candidates being a 3 or 4 year degree/diploma courses shall presuppose the acquisition of one year "O' Level Course. Thus, it can be said that candidates possessing such a nature of basic educational qualification degree are well versed with the syllabus of 'O' level course.

45. In the instant case there are sufficient material on record to establish that qualifications possessed by the petitioners were in the same line of progression and also that the entire syllabus as is prescribed for grant of 'O' Level Certificate in Computer is also the syllabus

studied by the petitioners in their respective degree/diploma courses.

46. In view of the above, it is clearly evident from comparison of the syllabus of one year "O' level course with the courses of B.Tech., B.Sc., B.C.A. etc., done by the petitioners herein that the syllabus of "O' Level is entirely covered under the syllabus of aforesaid 3 or 4 year degree/diploma courses.

47. The ratio of the judgment as relied by the respondents in ***Zahoor Ahmad's case (supra)*** is reproduced hereinbelow:-

"The decision in Jyoti K.K. [Jyoti K.K. v. Kerala Public Service Commission, (2010) 15 SCC 596 : (2013) 3 SCC (L&S) 664] turned on the provisions of Rule 10(a)(ii). Absent such a rule, it would not be permissible to draw an inference that a higher qualification necessarily presupposes the acquisition of another, albeit lower, qualification. The prescription of qualifications for a post is a matter of recruitment policy. The State as the employer is entitled to prescribe the qualifications as a condition of eligibility. It is no part of the role or function of judicial review to expand upon the ambit of the prescribed qualifications. Similarly, equivalence of a qualification is not a matter which can be determined in exercise of the power of judicial review. Whether a particular qualification should or should not be regarded as equivalent is a matter for the State, as the recruiting authority, to determine. The decision in Jyoti K.K. [Jyoti K.K. v. Kerala Public Service Commission, (2010) 15 SCC 596 : (2013) 3 SCC (L&S) 664] turned on a specific statutory rule under which the holding of a higher qualification could presuppose the acquisition of a lower qualification. The absence of such a rule in the present case makes a crucial difference to the ultimate outcome."

48. In the case of *Zahoor Ahmad (supra)*, the required essential qualification was ITI certificate, as a prime qualification, and the appellants therein were possessing Diploma in Electrical Engineering/Electronics and Communication. The Hon'ble Supreme Court held that in the absence of a specific statutory rule under which holding of higher qualification could presuppose the acquisition of lower qualification, the higher qualification of Diploma in Electrical Engineering/Electronics and Communication cannot be said to presuppose the required qualification of ITI certificate. However, in the case in hand, there are multiple essential qualifications required for the advertised posts. The petitioners' case is not that they are possessing higher degree, instead the only case is that syllabus of 'O' level computer course - which is one of the educational qualifications in the advertisement - is included in their basic education i.e. B.Tech (C.S.), B.Sc (C.S.), B.C.A. etc., being a 3 or 4 year degree/diploma courses, therefore, they are entitled to participate in the vacancy and need not to be in possession of 'O' level course from DOEACC/NIELIT, which is only a one year foundational course. If the same is not done, it would be highly undesirable to ask or require any person who has already completed a 3 or 4 year degree/diploma course in the domain of computer science to pursue and produce a certificate of one year "O' Level Course which is a foundation course in the same domain. However, the requirement of "O' Level Course is proper for candidates whose bachelor degrees like B.A., B.Com etc., are

not in domain of computer science or those who are not entirely covered under the syllabus of 'O' level. In such circumstances, it is clearly evident that the ratio of *Zahoor Ahmad case (supra)* is not applicable in the instant case.

49. So far as ratio of *Deepak Singh's case (supra)* is concerned, the said case is also not applicable in the instant case because in *Deepak Singh's (supra)* there was a specific bar and the candidates holding higher degree were categorically excluded for being considered under the said advertisement, and also there was no material on record to show that qualification possessed by the petitioners therein was in same line of the progression. However, in the instant case there is no such bar and also there is sufficient material on record to establish that the qualification possessed by the petitioners herein covers the syllabus 'O' level Course, which is one of the basic essential qualification.

50. The concept of equality enshrined in Article 14 & 16 of the Constitution of India guarantees equal opportunity to all eligible persons to compete for selection and appointment to a public employment. A person who should be appointed substantively on a particular post under recruitment rules by the State must be most meritorious and suitable person for holding that post for the reason that every appointment made by the State is made in the larger public interest and not for private interest of any person. The right to public employment is a new form of property. It is not only a vast source of patronage for the Government but is also a great source of living and happiness to our unemployed millions. Public employment being property of the nation should not be monopolized.

51. In view of the above discussions and observations, it would be suffice to say that a candidate who can provide conclusive evidence that he/she has educational qualification or experience at least equal to what is required by the minimum qualification deserves careful consideration, even if their degrees have titles different from those recognized in the disciplines list or if they acquired their qualifications by a route other than a conventional one.

52. Consequently, all the above mentioned writ petitions are ***allowed.***

53. Respondents are directed to reconsider the candidature of the petitioners in accordance with law as well as in the light of observations made hereinabove and allow them to participate in the Physical Standard Test and subsequent selection process in pursuance of Advertisement No.PRPB-2-1(9)/2016 dated 26.12.2016 & Advertisement No.PRPB-2-1(9)/2016(Part-1) dated 22.12.2016.

(2021)03ILR A217
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.02.2021

BEFORE

THE HON'BLE CHANDRA DHARI SINGH, J.

Service Single No. 21946 of 2020

Vishal Saini ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Pramod Kumar Yadav

Counsel for the Respondents:

C.S.C.

A. Civil Law - UP Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974 – Compassionate appointment – Nature – Compassionate appointment is in the nature of an exception to the ordinary norm of allowing equality of opportunity to every eligible person to compete for public employment – Reason for the exception as envisaged in the Rules is that the immediacy of the financial hardship that is sustained by a bereaved family by the death of its earning member is sought to be alleviated in a situation in which the Government servant died while in service – *Shiv Kumar Dubey's case* of Supreme Court followed. (Para 10)

B. Constitution of India – Proviso to Article 309 – UP Dying-in-Harness Rules, 1974 – Compassionate appointment – Object and Purpose – Rules have been framed by the St. Government in exercise of the powers conferred by the proviso to Article 309 of the Constitution – It make it abundantly clear that the purpose and object underlying the provision for compassionate appointment is not to reserve a post for a member of the family of a deceased Government servant who has died while in service. The basic object and purpose is to provide a means to alleviate the financial distress of a family caused by the death of its member who was in Government service. (Para 11)

C. Civil Law - UP Dying-in-Harness Rules, 1974 – Rule 5 and its proviso – Compassionate appointment – Time limit of five years – Relaxation –St. government's power to consider for relaxation – Rejection of claim by the authority – Validity – Held, the respondent did not have authority to reject the application of the petitioner on the ground of delay as Rule 5 only empowers the St. Government to do so. The concerned authority only had to refer the matter to the St. Government for consideration of the application of the petitioner for compassionate appointment. (Para 20 and 24)

D. Civil Law - UP Dying-in-Harness Rules, 1974 – Rule 5 and its proviso – Compassionate appointment – Expression 'Undue Hardship' – Applicability – Proviso to Rule 5 empower government to relax the period of five years, if time limit causes undue hardship – Held, on the basis of objective considerations founded on the disclosures made by the petitioner in this case for compassionate appointment and having considered the reasons for the delay, undue hardship within the meaning of the first proviso to Rule 5 of the Rules would be caused to the petitioner. (Para 21)

E. Civil Law - UP Dying-in-Harness Rules, 1974 – Rule 2(c) – Compassionate appointment – Adopted son – Entitlement – Rule 2 (c) provides that the adopted son is entitled for compassionate appointment – Held, adopted son will be treated as son for the purpose of U.P. Rules, 1974 – Argument of the St. that the adopted son is not entitled for compassionate appointment was rejected by the High Court. (Para 23)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Shiv Kumar Dubey & ors. Vs St. of U.P. & ors.; MANU/UP/0189/2014

2. Subhash Yadav Vs St. of U.P. through Secretary Education Department (Basic) & ors.; MANU/UP/2289/2010

3. Umesh Kumar Nagpal Vs St. of Har. & ors.; (1994) 4 SCC 138

4. Director of Education (Secondary) & anr. Vs Pushpendra Kumar & ors.; (1998) 5 SCC 192

5. Sushma Gosain & ors. Vs U.O.I. & ors.; (1989) 4 SCC 468

6. Jagdish Prasad Vs St. of Bihar & anr.; MANU/SC/0996/1996

7. Haryana St. Electricity Board & anr. Vs Hakim Singh; MANU/SC/0964/1997

8. Md. Zamil Ahmed Vs The St. of Bihar & ors.; MANU/SC/0515/2016

9. Sunil Saxena Vs St. of U.P. & ors.; 1994 (68) FLR, 283

10. Singhasan Gupta Vs St. of U.P. & anr.; (1996) 1 UPLBEC 4

11. Ravindra Kumar Dubey Vs St. of U.P. & ors.; 2005 (4) ESC 2706 (All)

12. Shiv Prasad Vs St. of U.P. & ors.; 2009 (3) ESC 1869 (All)

13. Jagat Pal Vs St. of U.P. & ors.; 2011 (2) ADJ 511

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. Heard learned Counsel for the petitioner and learned Counsel appearing on behalf of the State.

2. The petitioner has approached this Court challenging the order dated 11.12.2019 whereby the Director General, Jail Administration and Reforms Services Directorate, Lucknow has rejected the representation of the petitioner for compassionate appointment on the ground of delay. The petitioner, inter alias, has further prayed for a direction to the respondents to appoint the petitioner on compassionate ground according to his qualification.

3. Submission of learned Counsel for the petitioner is that the father of the petitioner, namely, Shiv Prasad Saini who was working as Chaukidar in District Jail, Unnao died on 29.06.2006 during service period and after the death of her father, the mother of the petitioner, namely, Smt. Munni Devi was appointed on compassionate ground on the post of Chaukidar. The mother of the petitioner was also died on 31.01.2012 during service period. The date of birth of the petitioner is 17.04.2001 and at the time of death of her mother, he was 11 years of age. The petitioner is the adopted son of late Munni Devi. The adoption deed was registered on 20.06.2007 in the office of Sub-Registrar, Unnao.

4. Learned Counsel for the petitioner has further submitted that after attaining the age of majority, the petitioner has applied for compassionate appointment on 11.10.2019 but the same has illegally been rejected by the respondent no.2 vide order dated 11.12.2019 on the ground that since the application has been moved after five years, therefore, the application of the petitioner is beyond limitation and he is not entitled for compassionate appointment. While passing the impugned order, the respondent no.2 has not taken into consideration the fact that at the time of death of his mother, the petitioner was minor and the petitioner has applied for compassionate appointment after attaining the age of majority which is within time as prescribed in U.P. Recruitment of Dependants of Government Servants Dying-in-Harness Rules, 1974.

5. Per contra, learned Counsel appearing on behalf of the State has vehemently opposed the submissions of learned Counsel for the petitioner and submitted that the petitioner is the adopted son of the deceased employee and, therefore, he is not entitled for compassionate appointment. The petitioner has also applied for compassionate

appointment beyond the limitation and, therefore, the respondent no.2 has rightly rejected the application of the petitioner.

6. I have considered the submissions of learned Counsel for the parties and perused the record.

7. To appreciate the contentions, it is necessary to first examine the relevant provisions of the U.P. Recruitment of Dependent of the Rules. The expression 'deceased Government servant' is defined by Clause (b) of Rule 2 to mean a Government servant who dies while in service. Rule 2(c) of the Rules defines "family'. Rule 2 (c) of 1974 Rules defines expression "family" of a deceased employee in the following terms:

"2(c) "family" shall include the following relations of the deceased Government servant:

(i) Wife or husband;

(ii) Sons/adopted sons;

(iii) Unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughters-in-law;

(iv) Unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried;

(v) aforementioned relations of such missing Government servant who has been declared as "dead" by the competent Court;

Provided that if a person belonging to any of the above mentioned relations of the deceased Government servant is not available or is found to be physically and mentally unfit and thus ineligible for employment in Government service, then only in such situation the word "family" shall also include the grandsons and the unmarried granddaughters of the deceased Government servant dependent on him."

8. Rule 5 of U.P Recruitment of Dependent of the Rules,1974 provides as follows:

"5. Recruitment of a member of the family of the deceased.--

(1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person-fulfils the educational qualifications prescribed for the post, is otherwise qualified for Government service; and makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

Provided further that for the purpose of the aforesaid proviso, the

person concerned shall explain the reasons and give proper justification in writing regarding the delay caused in making the application for employment after the expiry of the time limit fixed for making the application for employment along with the necessary documents/proof in support of such delay and the Government shall, after taking into consideration all the facts leading to such delay take the appropriate decision.

(2) As far as possible, such an employment should be given in department in which the deceased Government servant was employed prior to his death.

(3) Every appointment made under sub-rule (1) shall be subject to the condition that the person appointed under sub-rule (1) shall maintain other members of the family of deceased Government servant, who were dependent on the deceased Government servant immediately before his death and are unable to maintain themselves.

9. Rule 8 provides as under:

8. ***Relaxation from age and other requirements.--(1)*** *The candidate seeking appointment under these rules must not be less than 18 years at the time of appointment.*

(2) The procedural requirements for selection, such as written test or interview by a selection committee or any other authority shall be dispensed with, but it shall be open to the appointing authority to interview the candidate in order to satisfy itself that the candidate will be able to maintain the minimum standards of work and efficiency expected on the post. An appointment under these rules shall be made against an existing vacancy only."

9. Now, it is in this background, it would be appropriate to mention the principles of the law laid down by this Court and Supreme Court on the subject. In ***Shiv Kumar Dubey and others vs. State of U.P. and others; MANU/UP/0189/2014,*** this Court after elaborately analysing the basic precepts interpreted the provision of the Rules in the light of the principles of law which emerge from the judgment of this court and Supreme Court. This court thus formulated the principles which must govern compassionate appointment in pursuance of Dying in Harness Rules as under:

"(i) A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved;

(ii) There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;

(iii) The object and purpose of providing compassionate appointment is to enable the dependent members of the family of a deceased employee to tide over the immediate financial crisis caused by the death of the bread-earner;

(iv) In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family; its liabilities, the terminal benefits received by the family; the age, dependency and marital status of its

members, together with the income from any other sources of employment;

(v) Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment would cease to exist and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for the grant of compassionate appointment has been made out;

(vi) Rule 5 mandates that ordinarily, an application for compassionate appointment must be made within five years of the date of death of the deceased employee. The power conferred by the first proviso is a discretion to relax the period in a case of undue hardship and for dealing with the case in a just and equitable manner;

(vii) The burden lies on the applicant, where there is a delay in making an application within the period of five years to establish a case on the basis of reasons and a justification supported by documentary and other evidence. It is for the State Government after considering all the facts to take an appropriate decision. The power to relax is in the nature of an exception and is conditioned by the existence of objective considerations to the satisfaction of the Government;

(viii) Provisions for the grant of compassionate appointment do not constitute a reservation of a post in favour of a member of the family of the deceased employee. Hence, there is no general right which can be asserted to the effect that a member of the family who was a minor at the time of death would be entitled to claim compassionate appointment upon attaining majority. Where the rules provide for a period of time within which an application has to be made, the operation of the rule is not suspended during the minority of a member of the family."

10. In ***Shiv Kumar Dubey's case (supra)***, while interpreting the provisions of Rule 5, this Court observed that appointments to public offices have to comply with the requirements of Article 14 and Article 16 of the Constitution. Article 16 provides for equality of opportunity in matters of public employment. Compassionate appointment is in the nature of an exception to the ordinary norm of allowing equality of opportunity to every eligible person to compete for public employment. The reason for the exception as envisaged in the Rules is that the immediacy of the financial hardship that is sustained by a bereaved family by the death of its earning member is sought to be alleviated in a situation in which the Government servant died while in service. Rule 5 of the Rules applies where a Government servant has died in harness after the commencement of the Rules.

11. The Court further observed that Rules have been framed by the State Government in exercise of the powers conferred by the proviso to Article 309 of the Constitution. The Rules make it abundantly clear that the purpose and object underlying the provision for compassionate appointment is not to reserve a post for a member of the family of a deceased Government servant who has died while in service. The basic object and purpose is to provide a means to alleviate the financial distress of a family caused by the death of its member who was in Government service. This is the underlying theme or thread which cuts across almost every provision of the Rules.

12. It was further observed by the Court that the rationale for imposing a limit of five years beyond which an application

cannot be entertained is that the purpose of compassionate appointment is to bridge the immediacy of the loss of an earning member and the financial distress that is sustained in consequence. A lapse of time is regarded by the Rules as leading to a dilution of the immediacy of the requirement. The discretionary power to relax the time limit of five years under first proviso to Rule 5 is in the nature of an exception. It is a power which is vested in the State Government, a circumstance which is indicative of the fact that the subordinate legislation expects it to be exercised with scrupulous care. Ordinarily, the time limit of five years governs. The State Government may relax the norm on a careful evaluation of the circumstances mandated by the second proviso. It is but a matter of first principle that a discretionary power to relax the ordinary requirement should not swallow the main or substantive provision and render the basic purpose and object nugatory.

13. In ***Subhash Yadav vs. State of U.P. through Secretary Education Department (Basic) and others; MANU/UP/2289/2010,*** the Division Bench of this Court dealt with a situation where the father of the appellant had died in harness on 8 August 1994 when the appellant was six years of age. The appellant attained the age of majority on 5 December 2005 and made an application for compassionate appointment. The State Government declined to accord relaxation of the period of five years and the writ petition filed by the appellant was dismissed by a learned Single Judge who held that since the appellant had been able to survive for sixteen years, that was indicative of a lack of immediacy. The Division Bench held that the Government erred in rejecting the application on the ground that there was an inordinate delay and such a blanket reason without considering anything else would not be in conformity with the power which has been conferred on the State, to relax the time period, which has to be exercised reasonably. Hence, the Division Bench held that the authorities cannot reject an application "blindfold" if it had been moved after five years and were required to apply their mind rationally, exercising the discretion in view of other factors relating to the case.

14. In ***Umesh Kumar Nagpal vs. State of Haryana and others; (1994) 4 SCC 138,*** the Supreme Court explained the basic purpose of providing compassionate appointment to the dependent of a deceased employee who has died in harness:

"The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non- manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency.... For these very reasons, the compassionate employment cannot be granted after a lapse of 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."

15. In ***Director of Education (Secondary) and another vs. Pushpendra Kumar and others; (1998) 5 SCC 192,*** the Supreme Court while granting relief of compassionate appointment gave a direction that if no class III post is available in the institution in which the deceased employee was employed or in any other institution in the district, the said respondent would be appointed against a Class IV post in the institution in which the deceased employee was employed and a supernumerary post in class IV be created for that purpose . To quote the relevant extract:

"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. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made for giving gainful appointment to one of the dependents of the deceased who may be eligible for such appointment. Such a provision makes a departure from the general provisions providing for appointment on the post by following a particular procedure. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions. An exception cannot subsume the main provision to which at is an exception and thereby nullify tine main provision by taking away completely the right conferred by the main provision. Care has, therefore, to be taken that a provision for grant of compassionate employment, which is in the nature of an exception to the general provisions, does not unduly interfere with the right of other persons who are eligible for appointment of seek employment against the post which would have been available to them, but for the provision enabling appointment being made on compassionate grounds of the dependent of a deceased employee."

16. In ***Sushma Gosain and others vs. Union of India and others; (1989) 4 SCC 468*** Supreme Court observed thus:

"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."

17. In ***Jagdish Prasad vs. State of Bihar and another; MANU/SC/0996/1996*** Supreme Court observed as under:

"3. It is contended for the appellant that when his father died in harness, the appellant was minor; the compassionate circumstances continue to subsist even till date and that, therefore, the Court is required to examine whether the appointment should be made on

compassionate grounds. We are afraid, we cannot accede to the contention. The very object of appointment of a dependent of the deceased employees who die in harness is to relieve unexpected immediate hardship and distress cause to the family by sudden demise of the earning member of the family. Since the death occurred way back in 1971, in which year the appellant was four years old, it cannot be said that he is entitled to be appointed after he attained majority long thereafter. It other words, if that contention is accepted, it amounts to another mode of recruitment of the dependent of a deceased Government servant which cannot be encouraged de hors the recruitment rules."

18. In ***Haryana State Electricity Board and another vs. Hakim Singh; MANU/SC/0964/1997*** Supreme Court observed as under:

"12. We are of the view that the High Court has erred in over stretching the scope of the compassionate relief provided by the Board in the circulars as above. It appears that High Court would have treated the provision as a lien created by the Board for a dependent of the deceased employee. If the family members of the deceased employee can manage for fourteen years after his death one of his legal heirs cannot put forward claim as though it is a line of succession by virtue of a right of inheritance. The object of the provisions should not be forgotten that it is to give succour to the family to tide over the sudden financial crisis befallen the dependants on account of the untimely demise of its sole earning member."

19. In the leading case of ***Md. Zamil Ahmed vs. The State of Bihar and others; MANU/SC/0515/2016***, the Supreme Court upheld the validity of the compassionate appointment of the brother of the deceased constable who left behind him illiterate wife and four minor children and disapproved the action taken by the state of terminating his service on the ground that the Appellant being the only close relative of the deceased could be given the appointment in the circumstances prevailing in the family. It was observed that the action on the part of welfare state in terminating the appellant service on the ground that he was not dependent of the deceased cant be countenanced. The state was not permitted to terminate the services of the appellant as constable after 15 years of his appointment for the following reasons:

"15. Firstly, the Appellant and wife of the deceased at the time of seeking compassionate appointment did not conceal any fact and nor filed any false or incorrect document/declaration. On the other hand, both of them disclosed their true family relations and conditions prevailing in the deceased family on affidavit.

16. Secondly, the Appellant, who is the brother of the deceased, undertook to maintain the family of the deceased in the event of his securing the compassionate appointment and he accordingly also gave such undertaking to the State.

17. Thirdly, there was no one in the family of the deceased to claim compassionate appointment except the Appellant who, as mentioned above, was the close relative of the deceased, i.e., real younger brother and used to live with the deceased. He was otherwise eligible to claim such appointment being major, educated and only male member in the family.

18. Fourthly, the Appellant after securing the employment throughout maintained the family of the deceased in all respects for the last more than 15 years and he is continuing to do so.

19. In the light of aforementioned reasons, which rightly persuaded the State to grant compassionate appointment to the Appellant, we do not find any justification on the part of the State to dig out the Appellant's case after 15 years of his appointment and terminate his services on the ground that as per the State policy, the Appellant did not fall within the definition of the expression "dependent of deceased" to claim compassionate appointment.

20. The fact that the Appellant was younger brother of the deceased was within the knowledge of the State. Similarly, the State was aware that the brother does not fall within the definition of dependent at the relevant time and still the State authorities obtained the undertaking from the Appellant that he would maintain the family of the deceased once given the appointment.

21. In our considered view, the aforesaid facts would clearly show that it was a conscious decision taken by the State for giving an appointment to the Appellant being the younger brother of deceased constable for the benefit of the family members of the deceased who were facing financial hardship due to sudden demise of their bread earner. In our view, it was a right decision taken by the State as a welfare state to help the family of the deceased at the time of need of the family."

20. In the instant case, the petitioner submitted that when his mother died, he was only 11 years old and after attaining the age of majority, the petitioner has sought for compassionate appointment. The department negatived the representation in this matter taking stand that the application was not made within prescribed period. However, the petitioner's request for compassionate appointment was made soon after petitioner attained majority. Under Rule 5 the time limit within which the dependant of the deceased employee is to be accommodated is fixed as five year. This period can be extended under proviso to Rule 5 where burden of proving the fact that compassionate circumstances continued to exist even till date was on the petitioner himself which he has successfully discharged in this case.

21. On the basis of objective considerations founded on the disclosures made by the petitioner in this case for compassionate appointment and having considered the reasons for the delay, I am of the opinion that undue hardship within the meaning of the first proviso to Rule 5 of the Rules would be caused to the petitioner. The expression 'undue hardship' has not been defined in the Rules. Undue hardship would necessarily postulate a consideration of relevant facts and circumstances of the case.

22. In this case the petitioner was adopted by his mother vide Adoption Deed dated 20.06.2007 and the adoption deed was decreed vide judgment and decree dated 24.07.2012 passed by the Civil Judge (SD), Unnao.

23. In the cases of ***Sunil Saxena vs. State of U.P. and others; 1994 (68) FLR, 283, Singhasan Gupta vs. State of U.P. and another; (1996) 1 UPLBEC 4, Ravindra Kumar Dubey vs. State of U.P. and others; 2005 (4) ESC 2706 (All), Shiv Prasad vs. State of U.P. and others; 2009 (3) ESC 1869 (All) and in the case of Jagat Pal vs. State of U.P. and others;***

2011 (2) ADJ 511, it has been held that adopted son will be treated as son for the purpose of U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974. Rule 2 (c) itself provides that the adopted son is entitled for compassionate appointment. Hence, there is no force in the argument of learned Counsel appearing on behalf of the State that the adopted son is not entitled for compassionate appointment.

24. The impugned order dated 11.12.2019 has been passed by the Director General, Jail Administration and Reforms Services Directorate, Lucknow who did not have authority to reject the application of the petitioner on the ground of delay as Section 5 of 1974 Rules only empowers the State Government to do so. Therefore, the concerned authority only had to refer the matter to the State Government for consideration of the application of the petitioner for compassionate appointment and this having not been done, renders the impugned order itself vitiated.

25. In view of above, the writ petition is ***allowed*** with a direction to the respondents to consider the case of petitioner keeping in view the observations made hereinabove for compassionate appointment within two months from the date on which the certified copy of this order is made available by petitioner along with his representation and decide the same, if there is no other legal impediment.

(2021)03ILR A227
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.02.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 24261 of 2020

Dinesh Kumar Yadav & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Amarendra Nath Tripathi

Counsel for the Respondents:
C.S.C.

A. Service Law – Post of Assistant teacher – Selection and appointment – Approval granted by competent authority – Approval order reviewed/recalled – Payment of salary stopped – No allegation of fraud or misrepresentation – Validity – No statute provide power of review – Held, if the statutes does not provide the provision permitting to review/recall the order, the same cannot be done by the authority – Impugned order should have not been passed by the same authority making review of its earlier order – Impugned order quashed by High Court holding it illegal, unwarranted and without jurisdiction as well suffers from voice of arbitrariness and perversity. (Para 34 and 35)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Naresh Kumar & ors. Vs Government (NCT of Delhi); (2019) 9 SCC 416

2. Dr. (Smt.) Kuntesh Gupta Vs Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) & ors.; AIR 1987 SC 2186)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Amrendra Nath Tripathi, learned counsel for the petitioners and the learned Standing Counsel for the respondents.

2. By means of this writ petition, the petitioners have assailed the order dated 30.06.2020 passed by the District Inspector

of Schools, Lucknow, respondent No.3, (in short D.I.O.S.), by means of which the earlier order of approval of selection/ appointment of the petitioners dated 18.04.2013 has been cancelled.

3. The brief facts of the issue are that two substantiative vacancies occurred in the attached primary section of Sohan Lal Intermediate College, Rajendra Nagar, Lucknow (in short College/ Institution) and therefore, the Manger of the Committee of Management of the College by his letter dated 27.02.2013 sought permission of the D.I.O.S. for filling up the aforesaid two vacancies. The D.I.O.S. vide his order dated 03.03.2013 granted permission for making selection and appointment on the post of Assistant Teacher in attached primary section of the College for making one appointment from amongst the general category candidates and one appointment from amongst the scheduled caste category candidates.

4. Pursuant to the permission granted by the D.I.O.S., an advertisement was published on 04.03.2013 in two leading Newspapers, namely, Indian Express and Swatantra Bharat. The bare perusal of the advertisement dated 04.03.2013, it is crystal clear that in the advertisement it has been categorically stated that the educational qualification and age will be required as prescribed in U.P. Intermediate Education Act, 1921 (here-in-after referred to as the 'Act, 1921') along with the certificate of T.E.T. Thus, it is very much clear that the educational qualifications prescribed in the advertisement is as per the statutory requirement under the law.

5. Both the petitioners are graduates in their respective subjects and had passed B.Ed. Examinations and also possess T.E.T. qualifications for appointment on the post of Assistant Teacher in attached primary section of the College. The petitioners being fully eligible for appointment on the post of Assistant Teacher submitted their application through registered post.

6. All the candidates were sent call letters through registered post to appear in the interview scheduled on 14th April, 2013. The petitioners received the interview call letters and appeared in the interview along with other candidates on the date fixed before the duly constituted Selection Committee and on the basis of the quality point marks, the Selection Committee prepared two separate select lists, one for the candidates of general category and other for the candidates of scheduled caste category for the two separate posts.

7. From the aforementioned select list prepared by the Selection Committee, it clearly born out that against the general category vacancy name of the petitioner No.1 was recommended as a general category candidate and against the vacancy of scheduled caste category name of petitioner No.2 was recommended as a Scheduled Caste Category candidate.

8. After completion of the selection process, the Manager of the Committee of Management of the College forwarded all the papers pertaining to selection to the D.I.O.S. vide his letter dated 15.04.2013 whereby he requested him for granting approval of the selection.

9. The District Inspector of Schools examined all the papers pertaining to the selection and after being satisfied with due selection procedure and the candidates possess the requisite qualifications granted

approval to the selection so made vide his order dated 18.04.2013 whereby the appointment of the petitioners on the post of Assistant Teacher in the attached primary section of the College was approved. The order dated 18.04.2013 has been enclosed as Annexure No.6 to the writ petition.

10. Pursuant to the approval granted by the D.I.O.S., petitioners were issued letters of appointment. The petitioner No.1 was issued letter of appointment on 18.04.2013 and consequently he joined on 20.04.2013 and the petitioner No.2 was issued letter of appointment on 18.04.2013 and consequently he joined on 22.04.2013 on the post of Assistant Teacher in the attached primary section of the College.

11. Both the petitioners pursuant to their appointment submitted their joining in the College which was duly accepted and the petitioners started discharging their duties attached to their post. Both the petitioners continued to discharge their duties in the College and both were paid their due salary from the State Exchequer from the month of April, 2013 till the month of October, 2013.

12. As per learned counsel for the petitioners, all of sudden without there being any order in writing payment of salary of the petitioners was stopped. The petitioners had represented to the D.I.O.S. and requested that their appointment has already been approved by the Competent Authority i.e. D.I.O.S. concerned vide order dated 18.04.2013 and they were being paid their regular salary, therefore, there is no occasion for stopping their salary and ultimately they prayed for payment of their regular salary, but in vain.

13. When the salary of the petitioners was not paid, the petitioner No.1 filed writ petition bearing Writ Petition No.299 (S/S) of 2015 with the prayer for direction to opposite parties for making payment of regular salary and this Court vide order dated 19.02.2015 directed the D.I.O.S. to decide the representation of the petitioner with a speaking and reasoned order.

14. The respondent No.3 while deciding the representation of the petitioner No.1 for payment of salary declared the appointment of both the petitioners as illegal vide order dated 03.07.2015 without affording any opportunity of hearing.

15. As per learned counsel for the petitioners, this Court vide order dated 19.02.2015 passed in Writ Petition No.299 (S/S) of 2015 only directed the respondent No.3 to consider the case of the petitioner No.1 for payment of salary not to review the appointment of the petitioners which was duly approved by the Competent Authority on 18.04.2013. As a matter of fact, the Administrative Authority cannot review its own order.

16. Learned counsel for the petitioners has submitted that on one hand the respondent No.3 has declared the appointment of the petitioners illegal but the order dated 18.04.2013 granting approval of the appointment of the petitioners was neither cancelled nor revoked and the same remained intact.

17. The reason to declare the appointment of the petitioners is illegal vide order dated 03.07.2015 is that the educational qualifications for appointment on the post in question have not been properly disclosed in the advertisement in question.

18. Learned counsel for the petitioners has submitted that the aforesaid

ground is apparently unwarranted inasmuch as the advertisement in question clearly indicates that the educational qualifications for the post of Assistant Teacher would be such as prescribed under the Act, 1921 and the candidate must possess the T.E.T. qualification. Therefore, in that sense the order dated 03.07.2015 is perverse.

19. Both the petitioners have assailed the order dated 03.07.2015 by filing separate writ petition bearing Writ Petition No.4184 (S/S) of 2015 (Petitioner No.1) and Writ Petition No.784 (S/S) of 2016 (Petitioner No.2). During pendency of those writ petitions, the petitioners had represented to the respondent No.3 vide representation dated 06.02.2016 making request that since the petitioners were continuously working on the post of Assistant Teacher, therefore, they be paid their due salary.

20. As per learned counsel for the petitioners, the Regional Joint Director, Secondary Education, Lucknow vide its letter No.(2)/11264/2014-15 dated 26.12.2014 had constituted a three member enquiry Committee to look into the matter. The said three members enquiry Committee had found the selection and appointment of the petitioners valid and legal. The respondent No.3 had forwarded the enquiry report to the respondent No.2 vide its letter No.Ma./11560-61/2015-16 dated 08.03.2016 along with enquiry report. The letter dated 08.03.2016 along with enquiry report has been enclosed by the petitioners as Annexure No.13 to the writ petition.

21. Learned counsel for the petitioners has further submitted that the Finance Controller, Directorate of Education, Allahabad in his audit report had opined that there was no justification in the non-payment of salary of the petitioners and expected to make payment of salary of the petitioners. Such audit report has been enclosed as Annexure No.14 to the writ petition.

22. The respondent No.3, on the basis of enquiry report, the audit report and the fact that the order giving approval of selection/ appointment of the petitioners still remained intact, being the Competent Authority, had passed order dated 28.05.2016 for payment of salary to the petitioners and also the arrears were released. The copy of order dated 28.05.2016 has been enclosed as Annexure No.15 to the writ petition.

23. As per learned counsel for the petitioners, since the respondent No.3 had passed the order dated 28.05.2016, the petitioners left with no grievance, hence, both the petitioners withdrew their writ petitions.

24. Thereafter, pursuant to the order dated 28.05.2015 passed by the respondent No.3, the petitioners were paid regular salary till December, 2019 and no objection of any kind whatsoever was raised from any quarter. However, as per learned counsel for the petitioners, all of sudden the salary of the petitioners was again stopped without any rhyme or reason, in a most illegal and arbitrary manner and without there being any order in writing having been communicated to the petitioners. Feeling aggrieved, the petitioners again represented the respondent No.3 vide separate representation dated 18.03.2020 for payment of salary for the month of January and February, 2020. On the said representation, the respondent No.3 had passed the impugned order dated 30.06.2020, which is contained as

Annexure No.1 to the writ petition, by means of which, the order of grant of approval of selection/ appointment of the petitioners dated 18.04.2013 and the order of release of salary dated 28.05.2016, were recalled holding that no salary is liable to be paid to the petitioners.

25. As per learned counsel for the petitioners, the impugned order dated 30.06.2020 has been passed on the ground that the advertisement was erroneous and incomplete and the procedure of selection was not transparent. All the grounds taken in the impugned order dated 30.06.2020 are perverse and non-tenable and are passed in a most mechanical and arbitrary manner.

26. Learned counsel for the petitioners has reiterated that first of all there was no error in the advertisement as the same specifically states that the educational qualification would be as per the Act, 1921. Thus, whatever prescriptions were given under the Act, 1921 regarding the educational qualification, were the qualifications for the post. There is no prescription of any specific mode or proforma for prescribing the educational qualification in the advertisement under the law.

27. Learned counsel for the petitioners has submitted that as far as the ground taken in the impugned order dated 30.06.2020 regarding alleged forged experience certificate is concerned, the same is also perverse and un-tenable in the eyes of law.

28. Sri Tripathi has contended that the respondent No.3 vide its letter dated 26.05.2020 had sought information from the Manager of the Eram Convent Inter College, Rajajipuram Lucknow regarding experience certificate of the petitioner No.1 and in pursuance thereof the Manager of the said Institution had given the clarification vide letters dated 08.06.2020 and 19.06.2020. In the reply, the Institution had informed the respondent No.3 that the petitioner No.1 was appointed in January, 2006 in its Indira Nagar Branch and had started teaching and subsequently he was transferred to its another branch at Rajajipuram where he worked till May, 2011. Thus, it is evident that the petitioner No.1 had experience of more than 5 years and was duly given weightage of 10 marks as per law. The copies of the aforesaid correspondences have been enclosed as Annexure Nos.18 & 19 with the writ petition.

Further, the respondent No.3 vide its letter No.417 dated 26.05.2020 had sought information from the Manager of the National Public High School, Rajajipuram, Lucknow regarding experience certificate of the petitioner No.2 and in pursuance thereof the Manager of the said Institution had given the clarification vide letter dated 22.06.2020. In the reply, the Institution had informed the respondent No.3 that the petitioner No.2 had worked as Assistant Teacher from 1st July, 2005 to 31st May, 2007 and again from 1st July, 2009 to 31st January, 2013. Thus, it is evident that the petitioner No.2 had experience of more than 5 years (in two trenches) and was duly given weightage of 10 marks as per law. The bare perusal of the impugned order goes to show that the respondent No.3 in its impugned order had not considered the fact that the petitioner No.2 had worked in National Public High School in two trenches.

29. Sri Tripathi has contended with vehemence that the allegation in the

impugned order dated 30.06.2020 regarding appointment of the petitioner No.1 being OBC category candidates against the vacancy of general category is concerned, the said ground is a frivolous one. As a matter of fact, every one including the OBC category candidate is eligible to apply against the unreserved seats (commonly known as general category seats) and, as such, there was no illegality in the said appointment of the petitioner No.1. Thus, it is evident that the impugned order dated 30.06.2020 is baseless, illegal and arbitrary in nature and is passed without having any jurisdiction to review its earlier approval order dated 18.04.2013, thus without jurisdiction.

30. Learned counsel for the petitioners has submitted with vehemence that the Quasi Judicial Authority or the Administrative Authority has got no power to review its earlier order if the statute does not provide so, in view of the dictum of Hon'ble Apex Court in re: ***Naresh Kumar & others vs. Government (NCT of Delhi)*** reported in ***(2019) 9 SCC 416.*** The inference has been drawn towards para-13 of the aforesaid judgment, which is being reproduced here-in-below:-

"13. It is settled law that the power of Review can be exercised only when the statute provides for the same. In the absence of any such provision in the statute concerned, such power of Review cannot be exercised by the authority concerned. This Court in the case of Kalabharati Advertising vs. Hemant Vimalnath Narichania (2010) 9 SCC 437, has held as under: (SCC pp. 445-46, paras 12-14).

".....12. It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In the absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed, is ultra vires, illegal and without jurisdiction. (Vide Patel Chunibhai Dajibha v. Narayanrao Khanderao Jambekar [AIR 1965 SC 1457] and Harbhajan Singh v. Karam Singh [AIR 1966 SC 641] .)

13. In Patel Narshi Thakershi v. Pradyuman Singhji Arjun Singhji [(1971) 3 SCC 844, Major Chandra Bhan Singh v. Latafat Ullah Khan [(1979) 1 SCC 321], Kuntesh Gupta (Dr.) v. Hindu Kanya Mahavidyalaya [(1987) 4 SCC 525 : 1987 SCC (L&S) 491:, State of Orissa v. Commr. of Land Records and Settlement [(1998) 7 SCC 162] and Sunita Jain v. Pawan Kumar Jain [(2008) 2 SCC 705 : (2008) 1 SCC (Cri) 537] this Court held that the power to review is not an inherent power. It must be conferred by law either expressly/specifically or by necessary implication and in the absence of any provision in the Act/Rules, review of an earlier order is impermissible as review is a creation of statute. Jurisdiction of review can be derived only from the statute and thus, any order of review in the absence of any statutory provision for the same is a nullity, being without jurisdiction.

14. Therefore, in view of the above, the law on the point can be summarized to the effect that in the absence of any statutory provision providing for review, entertaining an application for review or under the garb of clarification /modification/ correction is not permissible."

31. Besides, the Hon'ble Apex Court in re: ***Dr. (Smt.) Kuntesh Gupta vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) & others***

reported in ***[AIR 1987 SC 2186)*** has also held that the Administrative Authority or a Quasi Judicial Authority cannot review its own order unless power of review is expressly conferred on it by the statute under which it derives its jurisdiction.

32. Per contra, learned Standing Counsel has submitted that since the specific qualification was not mentioned in the advertisement in question, therefore the impugned order dated 30.06.2020 has been rightly passed. He has also submitted that on account of several complaints being received against the selection/ appointment in question, the enquiry was conducted. So far as enquiry conducted by the three members Committee whereby the appointment of the petitioners was found valid and legal is concerned, the learned Standing Counsel has submitted that the said enquiry was not conducted properly.

33. On being confronted on the point as to whether the Administrative Authority can review/ recall its own order, learned Standing Counsel could not demonstrate any provisions of law permitting the same authority to review/ recall its own order. On being further confronted as to whether there may be other qualification except those qualifications as indicated in the Act, 1921, the learned Standing Counsel has submitted that it is true that there are no other qualifications except such qualification which has been indicated under the Act, 1921 but instead of indicating the qualification as per the Act, 1921, specific qualifications should have been indicated in the advertisement. On being further confronted as to whether the petitioners are not having requisite qualifications, learned Standing Counsel has submitted that the petitioners are having requisite qualifications as prescribed under the law. Further, as to whether the candidate belonging to OBC category candidate may not compete with the candidate of General Category or he may not be selected on the vacancy earmarked for General Category candidate, learned Standing Counsel has submitted that in view of the settled proposition of law of Hon'ble Apex Court, the candidate of the reserved category may compete for the vacancy earmarked for the General Category.

34. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that in view of the dictums' of Hon'ble Apex Court in re: ***Naresh Kumar (supra)*** and ***Dr. (Smt.) Kuntesh Gupta (supra),*** the power of review can be exercise only when the statutes provides for the same and since the statutes does not provide the provision permitting to review/ recall the order, the same cannot be done by the authority concerned.

35. Further, the advertisement in question clearly indicates that the educational qualification and age will be required as prescribed under U.P. Intermediate Education Act, 1921 along with the certificate of T.E.T. and for making selection on the post of Assistant Teacher in the Institution governed under the provisions of the Act, 1921, the qualification prescribed in the advertisement is the correct qualification. There is no allegation of any fraud or misrepresentation on the part of the petitioners in the impugned order and undoubtedly the petitioners are having requisite qualifications prescribed under the law. The District Inspector of Schools, Lucknow had granted approval to the selection of the petitioners vide his order

dated 18.04.2013. Thereafter, on the basis of enquiry report and audit report and considering the factum of approval earlier given for the appointment of the petitioners, the D.I.O.S. passed an order dated 28.05.2016 for payment of salary to the petitioners which was earlier stopped in the month of November, 2013 and even the arrears of salary were also released. On account of these facts, the petitioners have got their writ petitions withdrawn, which were filed assailing the order dated 03.07.2015 passed by the D.I.O.S. holding the appointment of the petitioners erroneous as the advertisement in question was not issued properly. Therefore, when the conscious decision has been taken by the D.I.O.S. on 28.05.2016, the impugned order dated 30.06.2020 should have not been passed by the same authority making review of its earlier order. As a matter of fact, the D.I.O.S. vide impugned order dated 30.06.2020 has not only reviewed the order of approval dated 18.04.2013 but also reviewed the order dated 28.05.2016, therefore, the said order dated 30.06.2020 is without jurisdiction and uncalled for order. The Administrative Authorities must mind their statutory limits and if such limit is crossed without having any colour of authority, the said inaction would be absolutely unacceptable.

36. In view of the facts and circumstances as well as the dictums' of Hon'ble Apex Court in re: ***Naresh Kumar (supra) and Dr. (Smt.) Kuntesh Gupta (supra),*** the order dated 30.06.2020 passed by the respondent No.3, which is contained as Annexure No.1 to the writ petition, is illegal, unwarranted and without jurisdiction, besides, suffers from voice of arbitrariness and perversity, hence, such order is hereby quashed.

37. A writ in the nature of mandamus is issued commanding the opposite parties to allow the petitioners to work on their respective posts and they be paid their regular salary forthwith. The opposite parties are also directed to pay the arrears of salary, which has been withheld, within a period of three months and the petitioners shall be treated continued in service.

38. Accordingly, the writ petition is ***allowed.***

39. No order as to cost.

(2021)03ILR A234
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.03.2021

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Criminal Revision No. 428 of 2020

Satypal Singh ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Kamlesh Singh

Counsel for the Opposite Parties:
G.A., Manoj Kumar Misra

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 397 - calling for records to exercise powers of revision, Section 401- High court's powers of revision, Section 319 - Power to proceed against other persons appearing to be guilty of offence , Indian Penal Code, 1860 - Sections 452, 302, 504, 506 - Unless there is cogent and credible evidence available against a person which may lead to conviction of the person after

conclusion of the trial, he should not be summoned as an additional accused - trial Court has not considered overwhelming evidence collected by the investigating officer during the course of investigation - which would demonstrate that the present revisionist was not present at the time and place of occurrence - impugned order unsustainable and against the law. (Para - 25,28)

Trial Court summoned the revisionist (accused) under Section 319 Cr.P.C. on an application filed by the complainant (respondent No.2) to face trial as an additional accused - (Para - 2)

HELD:- Trial Court is required to look into the material collected by the investigating officer during the course of investigation before forming prima facie opinion for summoning a person as an additional accused. It is the duty of the trial Court to consider the evidence collected by the investigating officer during the course of investigation and power under Section 319 Cr.P.C. should not be exercised merely on statement of the complainant or the witnesses who have reiterated their statements recorded under Section 161 Cr.P.C. during the course of investigation which the investigating officer did not find credible and cogent on the basis of other plethora of evidence collected by him. (Para - 25,27)

Criminal Revision allowed. (E-6)

List of Cases Cited:-

1. Saeeda Khatoon Arshi Vs St.of U.P., (2020) 2 SCC 323

2. Hardeep Singh Vs St. of Punj., (2014) 3 SCC 92

3. Brijendra Singh & ors. Vs St. of Raj. , (2017) 7 SCC 706

4. Periyasami Vs S. Nallasamy, (2019) 4 SCC 342

(Delivered by Hon'ble Dinesh Kumar Singh, J.)

1. Present criminal revision under Section 397/401 Cr.P.C. has been filed impugning the order dated 03.03.2020 passed by the Addl Sessions Judge, Court No.11, Hardoi in S.T. No.111 of 2018: State vs Pawan Singh and Ors. arising out of Crime No.267 of 2017 registered under Sections 452, 302, 504, 506 IPC, Police Station Kachauna, District Hardoi.

2. Learned Trial Court vide impugned order has summoned the revisionist under Section 319 Cr.P.C. on an application filed by the complainant, respondent No.2 to face trial as an additional accused.

3. An FIR was registered at Case Crime No.0267 of 2017 under Sections 147, 148, 149, 452, 302, 504, 506 IPC P.S. Kachauna, Hardoi on a written complaint of respondent No.2 having allegations that on 02.11.2017 at around 9:00 PM. accused Pawan Singh, Satyapal Singh (revisionist), Sonu Singh all sons of Barrister Singh, Harshit @ Jeepu s/o Satyapal Singh, Munna s/o Rajaram came to the house of the complainant and told the uncle of the complainant that he had to leave the land. When uncle of the complainant objected, all these accused entered the house of the complainant. Accused-Pawan, Sonu, Harshit and Munna caught hold of the uncle and present revisionist fired at the uncle of the complainant with illegal weapon. Hearing the sound of gun shot, complainant, his brother, Harisharan and his father Vishnu Narayan came out of the house exhorting the accused, then the accused fled away from the scene of occurrence extending threats. Uncle of the complainant had died on the spot, however, he was taken to the hospital at Kachauna where doctor declared him brought dead. The complainant is a practicing advocate at Hardoi which is evident from the FIR itself.

4. Inquest proceedings were conducted on the same day i.e. 02.11.2017

at 23:05 Hours. Post mortem was conducted on the next day and following injuries were found on the body of the deceased:-

(i) Fire arm entry wound of size 2 x 1.5 cm on interior aspect of left thigh. 7 cm away from root of penis; 13' O clock position margin inflicted; blackening present;

(ii) Fire arm exit wound of 2.5 cm x 2 cm present on back of right thigh on gluteal region;

5. The investigating officer examined as many as 38 witnesses during the course of investigation and filed charge sheet against accused-Pawan Singh, Sonu Singh, two brothers of the revisionist, Harshit @ Jeepu son of the revisionist, Munna Singh s/o Rajaram under Sections 452, 302, 504, 506/34 IPC and absolved the revisionist of the charges as he was not found to be present at the time and place of incident when the alleged incident took place.

6. There is enmity between the complainant who is practicing advocate and the revisionist who happened to be the Village Pradhan. Respondent No.2 had instituted nine cases against the revisionist in which he has either been acquitted or final report has been filed in his favour or complaint cases have been rejected. Details of the cases instituted against the revisionist by the complainant have been given in Annexure-10 of the revision petition.

7. The Investigating Officer found the location of mobile phone of the revisionist at Sandila, 35 kms away from the place of incident i.e. village Tikari on the basis of Call Detail Record. It is also stated that a dispute took place between Pawan, brother of the revisionist and the complainant side in the evening of 02.11.2017 and Pawan Singh called the police by dialing number 100. Police reached the village at around 7:30 PM. Pawan Singh, brother of the revisionist also informed the revisionist about the dispute on his Mob.No.8009185252. Police reached village Tikari and settled the dispute in the evening.

8. It is further stated that respondent No.2 (complainant) after learning about the dispute between the brother of the revisionist and Munna came to the village and bet the brother of the revisionist. However, on intervention of the villagers, Pawan was separated from the complainant. It is also stated that soon thereafter, the complainant himself threatened Ram Sewak, elder brother of his father to grab his property. It is also mentioned that in the year 1998, the complainant and his father had shown Ram Sewak, who did not have any son and had only three married daughters and his wife had died around 30 years back, dead and got recorded his land in their name in the revenue record. When Ram Sewak came to know about this fact, he got annoyed from the complainant and his father and he was not having good relations with them.

9. It is also stated that respondent No.2 was in inebriated condition and he fired at Ram Sewak. He was not taken to the hospital immediately but Ram Sewak was being pressurized to name the revisionist and his family members. However, Ram Sewak did not agree to falsly implicate the revisionist and his other family members. Ram Sewak died due to excessive bleeding.

10. One villager, Bablu called the revisionist at 8:10 PM on 2.11.2017 informing about the incident. Transcript of

conversation between the revisionist and Bablu forms part of the case diary. It is also said that one sepoy of police station Kachauna also called the revisionist at 09:03 PM informing that he was being implicated in the offence. This also forms part of the case diary.

11. In the FIR, it has been said that Ram Sewak was taken to the C.H.C., Kachauna. However, from the statement of the medical Officer of C.H.C., Kachauna, it is clear that he was never brought to C.H.C. Kachauna on 02.11.2017 as alleged in the FIR. The investigating officer on the basis of statement of the witnesses Bhaiya Lal, Ranjana Singh, Uttam Kumar Singh found the presence of the revisionist at Sandila in Gayatri Maha Yagya at the time when the incident allegedly took place. The deceased had received a firearm injury on his leg and he had died due to excessive bleeding as is evident from the post-mortem report.

12. One FIR on the basis of an order on a complaint filed under Section 156(3) Cr.P.C. by Rohit Kumar Singh came to be registered on 17.03.2018 at Police Station Kachauna at FIR No.0098 of 2018 in respect of the same incident under Sections 147, 148, 452, 302, 504, 506 IPC against respondent No.2 and five other persons. The police, however, after investigation of the aforesaid offence filed a final report absolving the named accused. Against final report, protest petition has been filed and same has been treated as complaint.

13. Allegation in FIR No.098 of 2018 is that the deceased's wife had died 30 years before the date of incident. He had no son and had only three daughters. All of them were married. Respondent No.2, his father and brothers had an eye on the property of the deceased. The deceased wanted to get his will registered in favour of his three daughters on the very next day of the incident. When it came to the knowledge of respondent No.2, he fired at the deceased and falsely implicated the revisionist and others. It is also alleged that in past also respondent No.2 and his father had shown the deceased dead and got mutated his land in their names in the revenue record.

14. Heard Mr. Sharad Pathak, learned counsel for the revisionist, Mr. Manoj Kumar Mishra, learned counsel for opposite party no.2 as well as Mr. Umesh Kumar Singh, learned counsel for the State.
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15. Trial Court has summoned the present revisionist on the basis of the statements of respondent No.2-P.W.-1 and P.W.-2 (Basant) who have reiterated the allegations in the FIR. Learned counsel for the revisionist has submitted that investigation carried out by the investigating officer and evidence collected by him is cogent and credible which is not only based on oral testimony of the several witnesses regarding non presence of the revisionist at the time and place of incident but also fully gets established from the scientific and electronic evidence collected by him. He has further submitted that the learned trial Court has ignored the cogent and credible evidence available on record and only on the basis of reiteration of the allegation of the FIR by P.W.-1 and P.W.-2, has summoned the revisionist under Section 319 Cr.P.C. as additional accused to face trial.

16. On the other hand, Mr. Manoj Kumar Mishra, learned counsel for respondent No.2 has submitted that the trial Court has applied the law correctly on the

facts and circumstances of the case inasmuch as during the course of trial, evidence against the revisionist has come regarding his involvement in the commission of offence. He has been assigned role of firing and his presence at the place and time of occurrence is clearly established from the statements of P.W.-1 and P.W.-2 and, therefore, this Court may not interfere with the impugned order in exercise of its powers under Section 397/401 Cr.P.C.

17. Learned counsel for respondent No.2 has placed reliance on the judgment of the Supreme Court in the case of ***Saeeda Khatoon Arshi v. State of U.P.*, (2020) 2 SCC 323** to submit that the Supreme Court after taking survey of the judgments on the power of the Court under Section 319 Cr.P.C. to summon a person as additional accused to face trial has set aside the order of High Court quashing the order of the Sessions Judge summoning a person as an additional accused on the ground that evidence of P.W.-1 and P.W.-2 meet the threshold requirement for summoning the accused under Section 319 Cr.P.C.

18. I have considered the submission of learned counsel for the parties.

19. Section 319 Cr.P.C. reads as under:-

"319. Power to proceed against other persons appearing to be guilty of offence.

"(1)Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub- section (1), then-

(a)the proceedings in respect of such person shall be commenced a fresh, and the witnesses re- heard;

(b)subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

20. Power under Section 319 Cr.P.C. is an extraordinary power conferred on a Court to do real justice. It should be used to that occasion only if compelling reason exists for proceeding against a person against whom action has not been taken. Policy of the code is that the offence can be taken cognizance of once only and not repeatedly upon discovery of further particulars. In a given case, the complainant may not even know the names and other particulars of an offender and it would, therefore, be sufficient for him to make a complaint in respect of persons who are known offenders as accused. When such a trial proceeds against a known accused, if the evidence led in the trial disclose offence committed by other persons who can be tried along with the accused facing trial, then Section 319

Cr.P.C. comes into play. Object of Section 319 Cr.P.C. is to ensure that no one who appears to be guilty escapes trial in relation to the offence.

21. Power under Section 319 Cr.P.C. is not to be exercised in a cavalier and mechanical manner but requires to be invoked when on consideration of material available on record, the Court feels the necessity of implicating some person(s) as accused. Power under Section 319 Cr.P.C. is to be exercised by the Court to do real justice. Provisions of Sub-Section 1 of Section 319 Cr.P.C. provide that "if it appears from the evidence" that any person has committed any offence. The question which Court has to confront itself is that whether when the Investigating Agency/Officer has filed a closure /final report against a named accused, should the Court summon the said person as additional accused only on the statement of the complainant or other witnesses who has/have reiterated the allegation in the FIR. Power under Section 319 Cr.P.C. is to be used primarily to advance the cause of criminal justice but not as a handle at the hands of the complainant to harass a person who is not involved in the commission of the offence/crime.

22. A Constitutional Bench of Supreme Court in the case of **Hardeep Singh vs State of Punjab (2014) 3 SCC 92** has held that power under Section 319 Cr.P.C. which is discretionary and extraordinary power, is to be exercised only when strong and cogent evidence comes against a person before the Court and such power should not be exercised in a casual and cavalier manner.

Para 105 and 106 of the aforesaid judgment is reproduced hereunder:-

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

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words *"for which such person could be tried together with the accused"*. The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused."

23. If the evidence recorded during the trial is nothing more than the statements which are already made under Section 161 Cr.P.C. during the course of investigation and such evidence is against the plethora of evidence collected during the course of

investigation which suggests otherwise, trial Court would not be correct in law for summoning a person as an additional accused on the basis of such evidence.

24. While answering the question that what degree of satisfaction is required for invoking powers under Section 319 Cr.P.C. and in what circumstances powers should be exercised in respect of a person named in the FIR but not charge-sheeted, the Supreme Court in the case of **Brijendra Singh & Ors vs State of Rajasthan : (2017) 7 SCC 706** in paras 13 to 15 has held as under:-

"13. In order to answer the question, some of the principles enunciated in *Hardeep Singh case [Hardeep Singh v. State of Punjab*, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] may be recapitulated: power under Section 319 CrPC can be exercised by the trial court at any stage during the trial i.e. before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some *"evidence"* against such a person on the basis of which evidence it can be gathered that he appears to be guilty of the offence. The *"evidence"* herein means the material that is brought before the court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 CrPC. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the court under Section 319 CrPC and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrant. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom charge-sheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

14. When we translate the aforesaid principles with their application to the facts of this case, we gather an impression that the trial court acted in a casual and cavalier manner in passing the summoning order against the appellants. The appellants were named in the FIR. Investigation was carried out by the police. On the basis of material collected during investigation, which has been referred to by us above, the IO found that these appellants were in Jaipur city when the incident took place in Kanaur, at a distance of 175 km. The complainant and others who supported the version in the FIR regarding alleged presence of the appellants at the place of incident had also made statements under Section 161 CrPC to the same effect. Notwithstanding the same, the police investigation revealed that the statements of these persons regarding the presence of the appellants at the place of occurrence was doubtful and did not inspire confidence, in view of the documentary and other evidence collected during the investigation, which depicted another story and clinchingly showed that the appellants' plea of alibi was correct.

15. This record was before the trial court. Notwithstanding the same, the trial court went by the depositions of the

complainant and some other persons in their examination-in-chief, with no other material to support their so-called verbal/ocular version. Thus, the *"evidence"* recorded during trial was nothing more than the statements which were already there under Section 161 CrPC recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where a plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty-bound to look into the same while forming prima facie opinion and to see as to whether much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record. There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the appellants were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the revision petition filed by the appellants, the High Court too blissfully ignored the said material. Except reproducing the discussion contained in the order of the trial court and expressing the agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny."

25. Thus, trial Court is required to look into the material collected by the investigating officer during the course of investigation before forming prima facie opinion for summoning a person as an additional accused.

26. The Supreme Court in the case of ***Periyasami v. S. Nallasamy,*** **(2019) 4 SCC 342** taking note of the judgment of Hardeep Singh (supra) has held that for summoning a person as an additional accused to face trial in exercise of power under Section 319 of the Code, there has to be more than prima facie case which is otherwise the requirement at the time of framing of the charge. The level of satisfaction for exercising the powers under Section 319 Cr.P.C. is little less than the satisfaction required at the time of conclusion of trial for convicting an accused. Unless there is cogent and credible evidence available against a person which may lead to conviction of the person after conclusion of the trial, he should not be summoned as an additional accused.

Para 10 to 14 of the aforesaid judgment which are relevant are extracted hereunder:-

"10. The learned counsel for the appellants relies upon a Constitution Bench judgment of this Court in *Hardeep Singh v. State of Punjab* [*Hardeep Singh v. State of Punjab*, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] to contend that satisfaction required to invoke the power under Section 319 of the Code to arraign an accused is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is only where strong and cogent evidence occurs against a person from the evidence laid before the court, such power should be exercised and not in a casual and cavalier manner. The Court held as under: (SCC p. 138, paras 105-06)

"105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a

person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence' is clear from the words *"for which such person could be tried together with the accused'*. The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused."

(emphasis in original)

11. The learned counsel for the appellants also refers to a recent order of this Court in *Labhuji Amratji Thakor v. State of Gujarat [Labhuji Amratji Thakor v. State of Gujarat*, (2019) 12 SCC 644 : 2018 SCC OnLine SC 2547] , where, the order of summoning the additional accused on the basis of the statements of some of the witnesses in the witness box was set aside for the reason that there is not even suggestion of any act done by the appellants amounting to an offence under Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012. It was held as under: (SCC OnLine SC para 12)

"12. ... The Court has to consider substance of the evidence, which has come before it and as laid down by the Constitution Bench in *Hardeep Singh [Hardeep Singh v. State of Punjab*, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] has to apply the test i.e. "more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction.'…"

12. We have heard the learned counsel for the parties and find that the order passed by the High Court is not sustainable in law. The present case is basically a matrimonial dispute wherein, the husband who is the complainant has levelled allegations against the wife and her other family members. Though in the FIR, the complainant has mentioned that 15 women and 35 men came by vehicles but the names of 11 persons alone were disclosed in the first information report.

13. In the statements recorded under Section 161 of the Code during the course of investigation, the complainant and his witnesses have not disclosed any other name except the 11 persons named in the FIR. Thus, the complainant has sought to cast net wide so as to include numerous other persons while moving an application under Section 319 of the Code without there being primary evidence about their role in house trespass or of threatening the complainant. Large number of people will not come to the house of the complainant and would return without causing any injury as they were said to be armed with weapons like crowbar, knife and ripper, etc.

14. In the first information report or in the statements recorded under Section 161 of the Code, the names of the appellants or any other description has not been given so as to identify them. The allegations in the FIR are vague and can be

used any time to include any person in the absence of description in the first information report to identify such person. There is no assertion in respect of the villages to which the additional accused belong. Therefore, there is no strong or cogent evidence to make the appellants stand the trial for the offences under Sections 147, 448, 294(b) and 506 IPC in view of the judgment in *Hardeep Singh case [Hardeep Singh v. State of Punjab*, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] . The additional accused cannot be summoned under Section 319 of the Code in casual and cavalier manner in the absence of strong and cogent evidence. Under Section 319 of the Code additional accused can be summoned only if there is more than prima facie case as is required at the time of framing of charge but which is less than the satisfaction required at the time of conclusion of the trial convicting the accused."

27. To arrive at deserved satisfaction for summoning a person as an additional accused under Section 319 Cr.P.C., it depends on the quality of the evidence available on record. It is the duty of the trial Court to consider the evidence collected by the investigating officer during the course of investigation and power under Section 319 Cr.P.C. should not be exercised merely on statement of the complainant or the witnesses who have reiterated their statements recorded under Section 161 Cr.P.C. during the course of investigation which the investigating officer did not find credible and cogent on the basis of other plethora of evidence collected by him.

28. In the present case, learned trial Court has not considered overwhelming evidence collected by the investigating officer during the course of investigation which would demonstrate that the present revisionist was not present at the time and place of occurrence. I find order impugned herein is unsustainable and against the law. Thus, this revision is allowed and order dated 3.03.2020 passed by the Addl Sessions Judge, Court No.11, Hardoi in S.T. No.111 of 2018: State vs Pawan Singh and Ors. arising out of Crime No.267 of 2017 under Sections 452, 302, 504, 506 IPC, Police Station Kachauna, Hardoi is hereby quashed.

(2021)03ILR A243
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.02.2021

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Revision No. 849 of 2019

Akhlesh Kumar Vaidhya ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Devi Prasad Tripathi, Sri Manish Pandey

Counsel for the Opposite Parties:
A.G.A., Sri Babul Kumar Sharma, Sri Harish Chandra Mishra

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 125 - Indian Penal Code, 1860 - Sections 498-A, 323, 504, 506 - Dowry Prohibition Act,1961 - Section3 / 4 - 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. (Para - 7)

Wife of revisionist filed an application before the family court under section 125 Cr.P.C. - Revisionist has filed an objection against the interim maintenance - Family Court awarded interim maintenance to opposite party no. 2 and 3 (wife and son) - aggrieved by order of the family court - revision has been filed by the revisionist. (Para - 3)

HELD:- 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. There is no illegality or irregularity in the assessment of the maintenance allowance so there is no interference warranted in the order passed by learned family court.(Para - 12,14)

Criminal Revision dismissed. (E-6)

List of Cases Cited:-

1. Amur Chand Agrawal Vs Shanti Bose &anr., AIR 1973 SC 799

2. Orissa Vs Nakula Sahu, AIR 1979 SC 663

3. Akalu Aheer Vs Ramdeo Ram, AIR 1973 SC 2145

4. Karnataka Vs Appu Balu Ingele, AIR 1993 SC 1126 II (1992) CCR 458 (SC)

5. Pathumma & anr. Vs Muhammad, AIR 1986 SC 1436

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

1. This criminal revision has been filed by the revisionist against the order dated 3.7.2018 passed by learned Principal Judge, Family Court, Jhansi in Case No. 338 of 2017 (Smt. Neelu and Others Vs. Akhlesh) under section 125 Cr.P.C., Police Station Babina, District Jhansi, whereby application for interim maintenance in aforesaid case has been allowed and awarded Rs. 15,000/- (Rs. 10,000/- for wife Smt. Neelu / opposite party no. 2 and Rs. 5000/- for her son Dhairya / opposite party no. 3) per month as maintenance to opposite party no. 2 and 3.

2. The facts of this revision emerges as such that opposite party no. 2 / Smt. Neelu has filed an application before the Principal Judge, Family Court, Jhansi on 1.7.2017 under section 125 Cr.P.C. with submission that revisionist / Akhlesh Kumar Vaidhya and opposite party no. 2 have got marriage on 4.7.2013 according to Hindu rituals and rites. At the time of said marriage, on demand of family members of the revisionist, father of opposite party no. 2 had given Rs. 10,00,000/- (Rs. Ten Lacs), gold, silver and other household articles. During substantiate of this wedlock, one male child namely, Dhairya, born in October, 2014. After some time the revisionist and his family members continuously harassing opposite party no. 2 on account of additional demand of dowry. Being aggrieved with torture of the revisionist and his family members, opposite party no. 2 has left her matrimonial house and since then she is living at her parental home. Opposite party no. 2 has lodged first information report under sections 498-A, 323, 504, 506 and 3 / 4 of Dowry Prohibition Act on 13.5.2017 at Police Station Babina, District Jhansi against the revisionist and his family members. Opposite party no. 2 has filed an application before the family court, Jhansi on 1.7.2017 under section 125 Cr.P.C. with allegation that she is a household lady and

unable to maintain herself and her son so she claims for maintenance of Rs. 1,00,000/- for herself and Rs. 50,000/- for her son / opposite party no. 3. During pendecy of this application before the family court an application for interim maintenance was also filed by the opposite party no. 2 on 7.4.2018 before the family court. Revisionist has filed an objection against the interim maintenance in which he has stated that he is now unemployed and out of job and anyhow he is surviving his life. After hearing both the party, by means of an order dated 3.7.2018, learned Family Court, Jhansi awarded interim maintenance to opposite party no. 2 and 3 as aforesaid and being aggrieved by order of the family court, this revision has been filed by the revisionist.

3. I have heard Sri Devi Prasad Tripathi, learned counsel for the revisionist and Sri Babul Kumar, learned counsel for opposite party no. 2 as well as the learned A.G.A.

4. Learned counsel for the revisionist submits that learned trial court without considering the ground taken by the revisionist in his objection and also without determining the income of the revisionist and without assigning any reason, passed the interim maintenance order dated 3.7.2018 by which Rs. 15,000/- per month (Rs. 10,000/- for opposite party no. 2 and Rs. 5000/- for opposite party no. 3) shall be given to the opposite party no. 2 by the revisionist. Learned counsel for the revisionist further submits that marriage of the opposite party no. 2 / Smt. Neelu was solemnized with the revisionist according to Hindu rituals and rites in very simple manner without any demand of dowry. It is further submits that opposite party no. 2 is a women of rude nature and she always quarreled with revisionist in Abu Dhabi (U.A.E.) and due to her violent behavior, revisionist has filed a divorce petition under section 13 of Hindu Marriage Act on 16.3.2017 and being aggrieved with this petition, opposite party no. 2 has lodged an F.I.R. against the entire family member of the revisionist including revisionist on 13.5.2017 under section 498-A, 323, 504, 506 I.P.C. and 3 /4 of Dowry Prohibition Act. Learned counsel further submits that revisionist is presently unemployed and have no source of income while opposite party no. 2 is earning Rs. 25,000/- per month from tuition so she is fully able to maintain herself and her son. Hence, she required no maintenance. Learned family court without considering the circumstances of this case wrongly allowed the application of opposite party no. 2 and award the interim maintenance in her favour. 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 too excessive.

5. Learned counsel for the respondent no. 2 and learned A.G.A. have vehementaly opposed the prayer of the revisionist by submitting that at the present time revisionist is still doing his job in Abu Dhabi (U.A.E.) but opposite party no. 2 has no source of income and she is totally depend upon her parents. Submission of the revisionist that opposite party no. 2 is earning Rs. 25,000/- per month from tuition is hypothetical and it is only creation of mind of the revisionist. It is further contended that opposite party no. 2 have no source of income except the maintenance awarded by the court below but revisionist has not made any single penny to the opposite party no. 2 and 3 till date. Learned

Family Court, Jhansi has passed the legal order after considering entire facts and circumstances as well as after perusing all the records. Hence, submission of learned counsel for the revisionist is devoid of merits, so revision preferred by the revisionist is liable to be quashed.

6. I have considered the rival submissions made by the learned counsel for the parties and the written submissions filed on behalf of the revisionist.

7. 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.

8. 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.

9. 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.

10. 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".

11. 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".

12. 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.

13. Maintenance underSection 125includes expenses for food, clothing, residence, medical and other expenses relating to normal persuit of life 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.

14. 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 at her parental house due to continuous harassment and demand of dowry by the revisionist and his family members. Learned trial court after appreciating each and every fact awarded the maintenance allowance of Rs. 15,000/- (Rs. 10,000/- to opposite party no. 2 and Rs. 5000/- to opposite party no. 3) in favour of opposite party 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 3.7.2018 passed by learned family court.

15. **Revision is devoid of merit and is accordingly dismissed with no cost.**

16. Interim order, if any, stands vacated.

17. A copy of this order be communicated to the lower court for necessary compliance.

(2021)03ILR A247
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.02.2021

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Revision No. 3523 of 2019

Chandra Shekhar Singh ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Kameshwar Singh

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

(A) Criminal Law-Code of Criminal Procedure, 1973-Section 397-calling for recrods to exercise powers of revision, Section 401-High Court's power of revision, Section 319-Power to proceed against other persons appearing to be guilty of offence, Indian Penal Code, 1860-Section 306, 120 -B-for the exercise of power under Section 319 Cr. P.C.-use of word "evidence" means material that has come before the Court during an inquiry or trial by it and not otherwise-If from the evidence led in the trial court has also committed the offence, it may summon such person under Section 319 Cr.P.C.(Para 10)

Trial Court on the basis of oral statement of witness-summoned the revisionist under section 319 Cr.P.C. to face trial-being aggrieved with the said order this revisio has been filed by the revisionist. (Para 3)

Held:-Oral statement of the witness does not come into purview of the evidence. So only on ths basis of oral examination of the witness, trial court hypothetically only on the basis of assumption and presumption summon the revisionist under section 319 Cr.P.C..Since neither the Chief trial court, so only on the basis of query by trial court or only on the basis of oral submission of witness wrongly summoned the revisionist under trial court is totally based on surmises and conjectures. Learned trial court has committed irregularity and illegality. (Para-11)

Criminal Revision allowed. (E-6)

List of Cases cited:-

1. Labhu Jee Amrat Jee Thako & ors. Vs St. of Guj., Crl. Appl. No. 1348/2018, SLP No. 6392/2018

2. Vijendra & ors. Vs St. of Raj., Crl. Appl. No. 763/2017.

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

1. This criminal revision has been filed under section 397/ 401 of Cr.P.C. against the interim order dated 28.8.2019 passed by Additional Session's Judge, Court No. 3, Ballia, by which the revisionist was summoned under section 319 Cr.P.C. to face trial under sections 306, 120-B I.P.C., Police Station Sikandarpur, District Ballia.

2. Brief facts of this case as such that on 25.9.2017 father of deceased namely, Rajendra Singh, lodged an F.I.R. with allegation that her daughter namely, Renu Singh, was married about 22 years ago with Rajesh Singh. Out of the said wedlock a daughter Sonali aged about 18 years and a son Aditya aged about 16 years born. Due to harassment of husband, Rajesh Singh, and father-in-law, Chandra Shekhar Singh, daughter of the first informant, Renu Singh, committed suicide. So F.I.R. was lodged by the first informant, Rajendra Singh, against the revisionist, Chandra Shekhar Singh, as well as his son namely, Rajesh Singh, under section 306 I.P.C. at police station Sikandarapur, District Ballia as Case Crime No. 703 of 2017.

3. After lodging the F.I.R. post mortem of the body of deceased, Renu Singh, was conducted on 25.9.2017 and doctor opined cause of death due to ante mortem hanging. During investigation, Investigating Officer recorded statements of the first informant, Rajendra Singh, and his wife, Shiv Kumari Singh, under section 161 Cr.P.C. They clearly deposed in their statements that revisionist, Chandra Shekhar Singh, was residing separately from Rajesh Singh (husband of deceased) and during investigation statement of villagers also recorded. Villagers also deposed that Chandra Shekhar Singh was living apart from main accused, Rajesh Singh, so the revisionist, Chandra Shekhar Singh, was exonerated from this matter and charge-sheet was submitted only against Rajesh Singh (husband of deceased). During trial three witnesses, PW-1 / Rajendra Singh, PW-2 / Sonali Singh and PW-3 / Smt. Shiv Kumari Singh have been examined before the trial court and all these witnesses never mentioned in their statements name of the revisionist, Chandra Shekhar Singh. Learned trial court on the basis of oral statement of witness, Om Prakash Singh, summoned the revisionist under section 319 Cr.P.C. to face above mentioned trial. Being aggrieved with the said order this revision has been filed by the revisionist.

4. Learned counsel for the revisionist submitted that learned trial court without any cogent and credible evidence available

on record only on the basis of oral submission of witness, Om Prakash Singh, summoned the revisionist under section 319 Cr.P.C. to face trial under section 306 I.P.C and 120-B I.P.C. So in these circumstances, order passed by learned Additional Sessions Judge, Ballia is wholly illegal and improper and is only based on surmises and conjectures.

5. Learned counsel for the revisionist rely upon the judgments of Hon'ble Supreme Court in ***Labhu Jee Amrat Jee Thako and Others Vs. State of Gujrat, Criminal Appeal No. 1348/2018, SLP No. 6392/2018, Vijendra and Others Vs. State of Rajasthan, Criminal Appeal No. 763/2017, Hardip Singh Vs. State of Punjab 2014(3) S.C. Cases 92, Sunil Kumar Gupta and Others Vs. State of U.P. 2019 (108) ACC***. In Sunil Kumar Gupta (supra) Hon'ble Supreme Court held that:-

9.Section 319(1)Cr.P.C. empowers the Court to proceed against any person not shown as an accused if it appears from the evidence that such person has committed any offence for which such person could be tried together along with the accused. It is fairly well settled that before the court exercises its jurisdiction in terms ofSection 319Cr.P.C., it must arrive at satisfaction that the evidence adduced by the prosecution, if unrebutted, would lead to conviction of the persons sought to be added as the accused in the case. In Hardeep Singh, the Constitution Bench held as under:-

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

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power underSection 319CrPC. InSection 319CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting underSection 319CrPC to form any opinion as to the guilt of the accused." [underlining added]

6. Learned counsel for the revisionist submits that order passed by learned A.D.J. Ballia is perverse and bad in the eye of law, hence order dated 28.8.2019 is liable to be quashed and revision is liable to be allowed.

7. Learned A.G.A. opposed the prayer of the revisionist by submitting that order dated 28.8.2019 passed by learned Additional Sessions Judge, Ballia is perfectly just and legal and there is no

illegality or irregularity in the impugned order and after recording the sufficient reasons, trial court has passed this order so no interference warranted against the order of learned trial court. Hence, revision is liable to be dismissed.

8. I have considered the rival submissions made by the learned counsel for the revisionist and the learned A.G.A. and also perused the record.

Section 319 Cr.P.C.

"319. Power to proceed against other persons appearing to be guilty of offence

1. Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

2. Where such person is not attending the Court he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

3. Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

4. Where the Court proceeds against any person under Sub- Section (1) then-

(a) the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard;

(b).subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

9. Learned counsel for the revisionist also rely upon judgment of hon'ble Supreme Court:- ***"In Hardeep Singh (supra) Hon'ble Apex Court has also examined scope and meaning of the word 'evidence' used in section 319 Cr.P.C. i.e. Whether it is examination in chief only or also together with cross-examination? The Court relying upon the decisions in the cases of Rakesh Vs. State of Haryana [2001 (43) ACC 392 (SC)]; Ranjit Singh Vs. State of Punjab [AIR 1998 SC 3148]; Mohd. Shafi Vs. Mohd. Rafiq and Another [AIR 2007 SC 1899]; Harbhajan Singh and Another Vs. State of Punjab and Another [(2009) 13 SCC 608] and held in paragraph 85 of the judgment as under :***

"85. Thus, in view of the above, we hold that power under section 319, Cr.P.C. can be exercised at the stage of completion of examination in chief and Court does not need to wait till the said evidence is tested on cross-examination for it is the satisfaction of the Court recorded by the Court, in respect of complicity of some other person(s), not facing the trial in the offence."

10. The word *"evidence"* in section 319 Cr.P.C. contemplates the evidence of the witnesses given in the court. Therefore, for the exercise of power under section 319 Cr.P.C. the use of word "evidence" means material that has come before the court during an inquiry or trial by it and not otherwise. If from the evidence led in the trial court the court is of the opinion that a person not an accused before it has also committed the offence, it may summon such person under section 319 Cr.P.C. ***In Hardeep Singh***

Vs. State of Punjab and Others [2014 (85) ACC 313] Hon'ble Apex Court has also examined the scope and meaning of word *"evidence"*. In which Hon'ble Apex Court held that:-

"99. Thus, we hold that though only a prima facie case is to be established from the evidence led before the Court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the Court should refrain from exercising, power under section 319, Cr.P.C. In section 319, Cr.P.C. the purpose of providing if 'it appears from the evidence that any person not being accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not 'for which such person could be convicted'. There is, therefore, no scope for the Court acting under section 319, Cr.P.C. to form any opinion as to the guilt of the accused."

11. It is pertinent to mention that in this case neither the complainant nor the public prosecutor has moved the application under section 319 Cr.P.C. regarding summoning of the revisionist. Learned trial court *suo motu* summon the revisionist to face the trial under sections 306, 120-B I.P.C. Now the question arises that whether without recording the evidence and only by putting two questions to the alleged witness, Om Prakash, and after recording the oral reply, learned trial court is competent to summon the revisionist to face trial. Under Section 165 of Evidence Act, the trial court have ample power to put question in order to discover relevant fact. But power under section 165 of Evidence Act is permissible only when the evidence as deposed by witness recorded in the court. Oral statement of the witness does not come into purview of the evidence. So only on the basis of oral examination of the witness, learned trial court hypothetically only on the basis of assumption and presumption summon the revisionist under section 319 Cr.P.C. Since neither the chief-examination nor the cross-examination of the witness was recorded by the learned trial court, so only on the basis of query by learned trial court or only on the basis of oral submission of witness wrongly summoned the revisionist under section 319 Cr.P.C., which is not permissible in the eye of law. Order of the learned trial court is totally based on surmises and conjectures. Learned trial court has committed irregularity and illegality, so in these circumstances, revision is hereby allowed and impugned order dated 28.8.2019 passed by learned Additional District Judge, Court No. 3, Ballia is hereby quashed.

12. **Revision is allowed.**

13. A copy of this order be communicated to the lower court for necessary compliance.

(2021)03ILR A251
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2021

BEFORE

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

Criminal Misc. Writ Petition No. 812 of 2021

Rinku @ Brijendra ...Petitioner (In Jail)
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar Singh, Sri Sudheer Rana

Counsel for the Respondents:
A.G.A.

(A) Criminal law - Parole - Code of Criminal Procedure, 1973 - Section 432(5) - procedure for suspension of sentences and the conditions on which objections presented and dealt with - The U.P. (Suspension of Sentence of Prisoners) Rules 2007 - Rule 3 - Power to suspend sentence, Rule 4 - Extension of the period of suspension after two months, Rule 5 - Procedure for suspension of sentence, Rule 6 - Conditions for suspension of sentence , Indian Penal Code, 1860 - Sections 148, 302/149 , Arms Act, 1959 - Sections 29 & 30 - writ petition not the proper remedy for the purposes of parole - remedy lies before the competent authority under Rule 3 of the U.P. (Suspension of sentence of prisoners) Rules 2007 as amended in the year 2013.(Para - 4)

Petition filed by the petitioner for commanding the respondents to grant parole to the petitioner for at least for one month, so that the petitioner may get medically examined to his old aged, ail mother, who is suffering from heart disease and is confined to bed .(Para 2,3)

HELD:- A complete procedure has been provided under the Rules 2007 for suspension of sentence by the competent authority. Therefore, writ petition under Article 226 of the Constitution of India is not the proper remedy for aforesaid purpose. (Para - 14)

Criminal Misc. Writ Petition dismissed. (E-6)

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

& Hon'ble Shamim Ahmed, J.)

1. Heard Sri Sudheer Rana, learned counsel for the petitioner and Smt. Manju Thakur, learned A.G.A. for the State – respondents.

2. This writ petition has been filed praying for the following relief:

"A- Issue a writ, order or direction in the nature of mandamus commanding the respondents to grant parole to the petitioner in connection with Sessions Trial No. Sessions Trial No.300 of 2007, and 303 of 2007, Case Crime no.314 of 2007, 317 of 2007, under sections 148, 302/149 of IPC and section 29, 30 of Arms Act, police station - Sisolar, District - Hamirpur, in connection with judgment and order passed by Additional District and Sessions Judge/Special Judge, DAA, Hamirpur, in the light of Government order no. 472-JL-22-3.07-21-G-89, and the perusal of sub-para 3-(1)(K), dated 15.02.2007, for at least for one month, so that the petitioner may get medically examined to his old aged, ail mother, who is suffering from heart disease and is confined to bed."

3. Learned counsel for the petitioner submits that the petitioner may be released on parole for the purposes of medical treatment of his old mother who is suffering from heart disease.

4. Learned A.G.A. has raised a preliminary objection as to maintainability of the writ petition on the ground that writ petition is not the proper remedy for the purposes of parole rather the remedy lies before the competent authority under Rule 3 of the U.P. (Suspension of sentence of prisoners) Rules 2007 (hereinafter referred

to as "the Rules 2007") as amended in the year 2013.

5. We have carefully considered the submissions of learned counsels for the parties and we find much force in the submission of learned A.G.A.

6. Undisputedly, the petitioner is a convict in Session Trial No.300 of 2007 and 303 of 2007 (Case Crime No.314 of 2007 and 317 of 2007) under Sections 148, 302/149 I.P.C. and Sections 29 & 30 of Arms Act, Police Station - Sisolar, District – Hamirpur.

7. The U.P. (Suspension of Sentence of Prisoners) Rules 2007, framed under sub Section 5 of Section 432 of Cr.P.C. deals with the procedure for suspension of sentences and the conditions on which objections presented and dealt with.

8. Rules 3, 4, 5 and 6 of the Rules 2007 as amended by the Ist Amendment Rules 2012 provide as under :-

*"**3. Power to suspend sentence.-***

(1) The Government may suspend the sentences of a prisoner up to one month on the following grounds :

(a) illness of prisoner's parents, husband or wife, son, daughter, brother or sister, or

(b) death of any one of the relative mentioned in sub-clause (a), or

(c) marriage of son, daughter, brother or sister;

(d) for sowing or harvesting of agricultural crops on his own land provided no other alternative arrangement for the same is available;

(e) for the essential repair of his house provided no other alternative arrangement for the same is available.

2. The Government may in special circumstances extend the period of suspension of sentence referred to in sub-rules (1) for a period not exceeding one month.

*3. **The District Magistrate** of the district to which prisoner belongs, **may suspend the sentence of a prisoner upto 72 hours** on the following grounds:*

(a) Death of mother, father, husband or wife, son, daughter, brother or sister;

(b) Marriage of son, daughter, brother or sister."

*"**4. Extension of the period of suspension after two months.** - (1) The period of suspension of a sentence of a prisoner beyond two months may in exceptional circumstances, be increased with prior approval of the Governor.*

(2) The total period of suspension of sentence of a prisoner may ordinarily not exceed twelve months, but in exceptional circumstances the period of suspension of sentences of a prisoner may exceed twelve months with prior approval of the Governor.

***5. Procedure for suspension of sentence.** - (1) The application for suspension of sentences may be submitted in prescribed Form-I by the prisoner himself or by a member of the family or a close relative of the prisoner in duplicate through the Superintendents of the Jail concerned, who shall forward one copy of it along with his comments and Jail reports in Form II to the Government and another copy to the District Magistrate concerned.*

(2) The Government may call for the report from the District Magistrate and Superintendent of Police concerned on the desirability of the suspensions of the sentence of the prisoner, who after conducting such enquiry as deemed

necessary shall submit their report in Form III within 30 days to the Government. In appropriate cases Government may call for the opinion under sub-section (2) of Section 432 of the Code of Criminal Procedure, 1973.

(3) The Government shall call for report from the Superintendent of the Jail concerned regarding age, condition of health, sentence and conduct of the prisoner in Jail.

(4) No prisoner shall be released on suspension of a sentence unless he furnishes sureties along with personal bond to the satisfaction of the District Magistrate to the effect that he shall surrender in Jail concerned on expiry of the period of suspension of sentence and shall maintain peace and good conduct during the period of suspension of sentence.

6. Conditions for suspension of sentence. -

(1) Suspension of sentence shall not be granted to the prisoner convicted for life imprisonment for an offence of murder unless the prisoner has served minimum three years sentence without remission, and for those convicted for an offence of dacoity served minimum four years sentence without remission. In all other cases suspension of sentence shall not be granted unless the prisoner has served minimum one year sentence without remission.

(2) Suspension of sentence may not be granted to a prisoner convicted for heinous crime or to a habitual offender if the District Magistrate or Superintendent of Police is of the opinion that the release of the prisoner may adversely affect peace and tranquillity of the area.

(3) The period of suspension of sentence shall not count towards the period of sentence served.

(4) The sentence of a prisoner may be suspended for not more than one in a calendar year :

Provided that in exceptional circumstances such as death of prisoner's parents, husband or wife, son, daughter, brother or sister or marriage of a prisoner's son, daughter, brother or sister or in natural calamities. The sentence of prisoner may be suspended for the second time in a calendar year."

11. As per the Rules 2007, the Government of Uttar Pradesh may suspend the sentences of a prisoners upto one month on grounds, namely, **(a)** illness of prisoner's parents, husband or wife, son, daughter, brother or sister, or **(b)** death of any one of the relative mentioned in sub-clause (a), or **(c)** marriage of son, daughter, brother or sister; **(d)** for sowing or harvesting of agricultural crops on his own land provided no other alternative arrangement for the same is available; **(e)** for the essential repair of his house provided no other alternative arrangement for the same is available.

12. Sub-Rule (2) further provides that the Government may in special circumstances extend the period of suspension of sentence referred to in sub-rules (1) for a period not exceeding one month. To meet with the emergent situations in the event of death of mother, father, husband or wife, son, daughter, brother or sister; or marriage of son, daughter, brother or sister, the District Magistrate of the district to which prisoner belongs may suspend the sentence of a prisoner upto 72 hours. Thus, parole may be granted by the Government on the grounds enumerated in sub-Rule (1) of Rule 3 for one month. Extension of parole may be granted for another period not

exceeding one month under sub - Rule (2). To meet the emergent situations in the interest of justice, the District Magistrate of the District to which the prisoner belongs has been empowered to suspend the sentence of a prisoner upto 72 hours on the grounds mentioned in Clauses (a) and (b) of sub Rule (3) of Rule 3.

13. Extension of the period of suspension after two months is provided in Rule 4. Procedure for suspension of sentence is provided in Rule 5 which requires submission of an application in prescribed Form-I by the prisoner himself or by a member of the family or a close relative of the prisoner in duplicate through the Superintendents of the Jail concerned, who shall forward one copy of it along with his comments and Jail reports in Form II to the Government and other copy to the District Magistrate concerned.

14. The Government may call for a report from the District Magistrate and the Superintendent of Police concerned on the desirability of the suspensions of the sentence of the prisoner, who after conducting such enquiry as deemed necessary shall submit their report in Form III within 30 days to the Government. In appropriate cases the Government may call for opinion under sub-section (2) of Section 432 of the Code of Criminal Procedure, 1973. After complying with the procedure as provided in sub Rule 1,2 and 3 of Rule 5 of the Rules 2007 a Prisoner may be released on parole on suspension of sentence provided he furnishes security alongwith personal bond to the satisfaction of the District Magistrate to the effect that he shall surrender in Jail concerned on expiry of the period of suspension of sentence and shall maintain peace and good conduct during the period of suspension of sentence. Condition of suspension of sentence is provided in Rule 6 of the Rules 2007. Thus, a complete procedure has been provided under the Rules 2007 for suspension of sentence by the competent authority. Therefore, writ petition under Article 226 of the Constitution of India is not the proper remedy for aforesaid purpose.

15. For all the reasons aforestated we do not find any merit in the present writ petition. Consequently, the writ petition fails and is hereby **dismissed**.

(2021)03ILR A255
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2021

BEFORE

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

Criminal Misc. Writ Petition No. 15692 of 2020
with
Criminal Misc. Writ Petition No. 15750 of 2020
and other connected cases

Ajay Kumar Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sachida Nand Tiwari

Counsel for the Respondents:
A.G.A.

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 156(3) - Fair and proper investigation - confers power upon any officer in-charge of a police station to investigate any cognizable case - provides for a cheque by the Magistrate on the police performing its duties under Chapter XII, Cr.P.C. - cases where the

Magistrate finds that police has not done its duty of investigating the case at all or has not done it satisfactorily - he can issue a direction to the police to do the investigation properly and can monitor the same.(Para -11)

(B) Criminal law - criminal justice system - any investigation into the crime should be fair, in accordance with law and should not be tainted - interested or influential persons are not able to misdirect or hijack the investigation, so as to throttle a fair investigation resulting in the offenders escaping punitive course of law - Breach of rule of law amounts to negation of equality under Article 14 of the Constitution of India - Article 21 of the Constitution of India makes it clear that the procedure in criminal trials must be right, just and fair and not arbitrary, fanciful or oppressive.(Para - 7)

Petitions filed by the petitioners praying for a direction to the concerned police authorities for fair and proper investigation in criminal cases in which investigation is going on.(Para -2)

HELD:- If an informant/ petitioner is aggrieved that proper/ fair investigation is not being done by the investigating officer, then he/ she may approach the concerned Magistrate by moving an application under Section 156(3) Cr.P.C. for appropriate orders instead of invoking writ jurisdiction under Article 226 of the Constitution of India. (Para -14)

Criminal Misc. Writ Petitions dismissed. (E-6)

List of Cases Cited:-

1. Menka Gandhi Vs U.O.I., AIR 1978 SC 597

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

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

4. Commissioner of Police, Delhi Vs Registrar, Delhi High Court, New Delhi, AIR 1997 SC 95

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

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

7. Dilawar Vs St. of Har., (2018) 16 SCC 521

8. Hussainara Khatoon (I) Vs St. of Bihar, (1980) 1 SCC 81

9. Abdul Rehman Antulay Vs R.S. Nayak, (1992) 1 SCC 225

10. P. Ramchandra Rao Vs St. of Karnatka, (2002) 4 SCC 578

11. H.N. Rishbud Vs St. of Delhi, AIR 1955 SC 196

12. Sakiri Vasu Vs St. of U.P. & ors., (2008) 2 SCC 409 .

13. Mohd. Yousuf Vs Smt. Afaaq Jahan, (2006) 1 SCC 627

14. Dilawar Singh Vs St. of Delhi1, JT 2007 (10) SC 585

15. St.of Bihar Vs A.C. Saldana, AIR 1980 SC 326

16. U.O.I. Vs Paras Laminates (P) Ltd., (1990) 4 SCC 453

17. I.T.O. Vs Mohd. Kunhi, AIR 1969 SC 430

18. R.B.I. Vs Peerless General Finance & Investment Comp.Ltd, (1996) 1 SCC 642

19. Chief Executive Officer & Vice Chairman Gujarat Maritime Board Vs Haji Daud Haji Harun Abu, 1996 (11) SCC 23

20. J.K. Synthetics Ltd. Vs Collector of Central Excise, (1996) 6 SCC 92

21. State of Karnataka Vs Vishwabharati House Building Co-op Society, 2003 (2) SCC 412

22. Sudhir Bhaskar Rao Tambe Vs Hemant Yaswant Dhage, (2016) 6 SCC 277

23. Vinay Tyagi Vs Irshad Ali, (2013) 5 SCC 762

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

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

1. Heard learned counsels for the petitioners and the learned A.G.A. for the State-respondents in this batch of writ petitions.

2. All the above noted writ petitions have been filed by the petitioners praying for a direction to the concerned police authorities for fair and proper investigation in criminal cases in which investigation is going on. Thus, following **questions of law** are involved in the present writ petition:-

(a) Whether the jurisdictional Magistrate has power to direct the police authority concerned for fair and proper investigation?

(b) Whether the petitioners are justified to file writ petitions under Article 226 of the Constitution of India without approaching the concerned Magistrate under Section 156(3) of the Code of Criminal Procedure, 1973 for fair and proper investigation?

Submissions:

3. Learned counsel for the petitioners submitted that an important facet of the rule of law is that in criminal justice system, investigation into the crime should be fair, in accordance with law and should not be tainted. Therefore, if the investigating authority is not fairly and properly investigating into crime then this court has power to issue appropriate directions under Article 226 of the Constitution of India. They further submitted that once the power is available to this court, there is no need to invoke the powers of the concerned Magistrate under Section 156(3) of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C.').

4. Learned A.G.A. submitted that the Magistrate has the power under Section 156(3) of the Cr.P.C. to order for fair and proper investigation and, therefore, the petitioners should have approached the concerned Magistrate for redressal of their grievances.

Discussion and Findings:

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

6. Relevant provisions for the purposes of controversy involved in the present writ petitions are Sections 2(c), 2(d), 2(g), 2(h), 36 and 156, Cr.P.C., which are reproduced below:

"Section 2(c):- "cognizable offence" *means an offence for which, and* ***"cognizable case"*** *means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.*

Section 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.

Section 2(g):- "inquiry" *means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court;*

Section 2(h):- "investigation" *includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf.*

Section 36:- Powers of superior officers of police. *Police officers superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station.*

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."***

Fair Investigation - Rule of Law:

7. The criminal justice system mandates that any investigation into the crime should be fair, in accordance with law and should not be tainted. It is equally important that interested or influential persons are not able to misdirect or hijack the investigation, so as to throttle a fair investigation resulting in the offenders escaping punitive course of law. These are important facets of the rule of law. Breach of rule of law amounts to negation of equality under Article 14 of the Constitution of India. Article 21 of the Constitution of India makes it clear that the procedure in criminal trials must be right, just and fair and not arbitrary, fanciful or oppressive, vide **Menka Gandhi vs. Union of India**1 (para-7) and **Vinubhai Haribhai Malviya and others vs. State of Gujrat and another**2 (paras-16 and 17) and **Subramanian Swamy vs. C.B.I.**3 **(para-86)**. Article 21 enshrines and guarantees the precious right of life and personal liberty to a person which can only be deprived on following the procedure established by law in a fair trial which assures the safety of the accused. **The assurance of a fair trial is the first imperative** of the dispensation of justice, vide **Commissioner of Police, Delhi vs. Registrar, Delhi High Court, New Delhi4 (para-16)**. The ultimate aim of all investigation and inquiry whether by the police or by the Magistrate is to ensure that those who have actually committed a crime, are correctly booked and those who have not, are not arraigned to stand trial. This is the minimal and fundamental requirement of Article 21 of the Constitution of India. Interpretation of provisions of Cr.P.C. needs to be made so as to ensure that Article 21 is followed both in letter and in sprit. "A speedy trial" is the essence of companion in concept in "fair trial". Both being inalienable jurisprudentially, the guarantee under Article 21 of the Constitution of India embraces both life and liberty of the accused as well as interest of the victim, his near and dear ones as well as of the community at large and, therefore, cannot be alienated from each other. A fair trial

includes fair investigation as reflected from Articles 20 and 21 of the Constitution of India. If the investigation is neither effective nor purposeful nor objective nor fair, the courts may if considered necessary, may order fair investigation, further investigation or reinvestigation as the case may be to discover the truth so as to prevent miscarriage of justice. However, no hard and fast rules as such can be prescribed by way of uniform and universal invocation and decision shall depend upon facts and circumstances of each case.

8. Fair and proper investigation is the primary duty of the investigating officer. In every civilized society, the police force is invested with powers of investigation of a crime to secure punishment for the criminal and it is in the interest of the society that the investigating agency must act honestly and fairly and not resort to fabricating false evidence or creating false clues only with a view to secure conviction because such acts shake the confidence of the common man not only in the investigating agency but in the ultimate analysis in the system of dispensation of criminal justice. Proper result must be obtained by recourse to proper means, otherwise it would be an invitation to anarchy, vide **Rampal Pithwa Rahidas vs. State of Maharastra**5 (para-37). Investigation must be fair and effective and must proceed in the right direction in consonance with the ingredients of the offence and not in a haphazard manner moreso in serious case. Proper and fair investigation on the part of the investigating officer is the backbone of rule of law vide **Sasi Thomas vs. State**6 (para-15 and 18).

Investigation under the Cr.P.C.:-

9. No investigating agency can take unduly long time in completing investigation. There is implicit right under Article 21 for speedy trial which in turn encompasses speedy investigation, inquiry, appeal, revision and retrial. There is clear need for time line in completing investigation for having in-house oversight mechanism wherein accountability for adhering to lay down timeline, can be fixed at different levels in the hierarchy, vide **Dilawar vs. State of Haryana**7 (paras-4 to 8), **Menka Gandhi** (supra), **Hussainara Khatoon (I) vs. State of Bihar**8**, Abdul Rehman Antulay vs. R.S. Nayak**9 **and P. Ramchandra Rao vs. State of Karnatka**10.

10. For the purposes of investigation, offences are divided into two categories "cognizable" and "non-cognizable". When information of a cognizable offence is received or such commission is suspected, the proper police officer has the authority to enter in the investigation of the same but where the information relates to a non-cognizable offence, he shall not investigate it without the order of the competent Magistrate. **Investigation includes all the proceedings under the Cr.P.C. for the collection of evidence conducted by a police officer or by any person other than a Magistrate** (who is authorised by a Magistrate in his behalf). **Investigation consists of steps, namely (i) proceeding to spot, (ii) ascertainment of the facts and circumstances of the case,** (iii) discovery and arrest of the suspected offender, (iv) collection of evidence relating to the commission of the offence and (v) formation of opinion as to whether on the material collected therein to place the accused before a Magistrate for trial and if so to take necessary steps for the same by filing a chargesheet under Section 173, Cr.P.C., vide **H.N. Rishbud vs. State of Delhi**11.

Remedy for Proper Investigation:-

11. Section 156(1) confers power upon any officer in-charge of a police station to investigate any cognizable case. Section 156(3) provides for a cheque by the Magistrate on the police performing its duties under Chapter XII, Cr.P.C. In cases where the Magistrate finds that police has not done its duty of investigating the case at all or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly and can monitor the same.

12. In **Sakiri Vasu vs. State of U.P. and others**12 (paras-11 to 18 and 27 to 30) Hon'ble Supreme Court considered Section 156(3), Cr.P.C. and after referring to its earlier decisions in **Mohd. Yousuf vs. Smt. Afaaq Jahan13 (para-11), Dilawar Singh vs. State of Delhi14 (para-17), State of Bihar vs. A.C. Saldana15 (para-19)** and also refering to its judgments on the point of "doctrine of implied powers", in **Union of India vs. Paras Laminates (P) Ltd.16,I.T.O. vs. Mohd. Kunhi17, Reserve Bank of India vs. Peerless General Finance and Investment Company Ltd18,Chief Executive Officer & Vice Chairman Gujarat Maritime Board vs. Haji Daud Haji Harun Abu19,J.K. Synthetics Ltd. vs. Collector of Central Excise20, State of Karnataka vs. Vishwabharati House Building Co-op Society**21, held as under:

"11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR underSection 154Cr.P.C., then he can approach the Superintendent of Police underSection 154(3)Cr.P.C. by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application underSection 156(3)Cr.P.C. before the learned Magistrate concerned. ***If such an application underSection 156(3) is filed before the Magistrate,*** *the Magistrate can direct the FIR to be registered* ***and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.***

12. Thus inMohd. Yousuf vs. Smt. Afaq Jahan & Anr. this Court observed: (SCC p.631 para 11)

"11. The clear position therefore is that any judicial Magistrate, before taking cognizance of the offence, can order investigation underSection 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 inSection 154of the Code. Even if a Magistrate does not say in so many words while directing investigating underSection 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."

13. The same view was taken by this Court in Dilawar Singh vs. State of Delhi (2007) 12 SCC 641 (JT vide para 17). ***We would further clarify that even if an FIR has been registered*** *and even if the police has made the investigation, or is actually making the investigation, which the aggrieved person feels is not proper,* ***such a person can approach the Magistrate underSection 156(3)Cr.P.C., and if the Magistrate is satisfied he can order a proper investigation and take other suitable steps and pass such order orders as he thinks necessary for ensuring a proper investigation.*** *All these powers a Magistrate enjoys underSection 156(3)Cr.P.C.*

14. Section 156(3) states:

"156(3) Any Magistrate empowered underSection 190may order such an investigation as abovementioned."

The words "as abovementioned" obviously refer toSection 156(1), which contemplates investigation by the officer in charge of the Police Station."

15. Section 156(3)provides for a check by the Magistrate on the police performing its duties under Chapter XIICr.P.C. In cases ***where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same.***

16. The power in the Magistrate to order further investigation underSection 156(3)is an independent power, and does not affect the power of the investigating officer to further investigate the case even after submission of his report videSection 173(8). Hence the Magistrate can order re-opening of the investigation even after the police submits the final report, videState of Bihar vs. A.C. Saldanna(1980) 1 SCC 554 (SCC: para 19).

17. ***In our opinionSection 156(3)Cr.P.C. is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation****, and it includes the power to order registration of an F.I.R. and of* ***ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police.Section 156(3)Cr.P.C.****, though briefly worded, in our opinion,* ***is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.***

18. It is well-settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, ***when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective.*** *Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary to its execution.*

27. As we have already observed above, ***the Magistrate has very wide powers to direct registration of an FIR and to ensure a proper investigation, and for this purpose he can monitor the investigation to ensure that the investigation is done properly (though he cannot investigate himself). The High Court should discourage the practice of filing a writ petition or petition under Section 482Cr.P.C.*** *simply because* ***a person has a grievance that*** *his FIR has*

not been registered by the police, or after being registered, ***proper investigation has not been done by the police. For this grievance, the remedy lies underSections 36and154(3)before the concerned police officers, and if that is of no avail, underSection 156(3)Cr.P.C. before the Magistrate*** *or by filing a criminal complaint underSection 200Cr.P.C.* ***and not by filing a writ petition or a petition underSection 482Cr.P.C.***

28. ***It is true that alternative remedy is not an absolute bar to a writ petition, but it is equally well settled that if there is an alternative remedy the High Court should not ordinarily interfere.***

29. In Union of India vs. Prakash P. Hinduja and another(2003) 6 SCC 195 (SCC vide para 13), it has been observed by this Court that a Magistrate cannot interfere with the investigation by the police. However, in our opinion, the ratio of this decision would only apply when a proper investigation is being done by the police. If the Magistrate on an application underSection 156(3)Cr.P.C. is satisfied that proper investigation has not been done, or is not being done by the officer-in-charge of the concerned police station, he can certainly direct the officer in charge of the police station to make a proper investigation and can further monitor the same (though he should not himself investigate)."(Emphasis supplied)

13. The principles laid down in the case of **Sakiri Vasu (supra)** has been reiterated by Hon'ble Supreme Court in **Sudhir Bhaskar Rao Tambe vs. Hemant Yaswant Dhage**22 (paras-2, 3 and 4) and **Vinay Tyagi vs. Irshad Ali**23 (paras-40 to 40.6, 43, 44, 45, 46, 47, 48). In the case of **Vinay Tyagi (supra)**, Hon'ble Supreme Court held as under:

"43. At this stage, we may also state another well-settled canon of criminal jurisprudence that the superior courts have the jurisdiction underSection 482of the Code or evenArticle 226of the Constitution of India to direct "further investigation', "fresh' or "de novo' and even "reinvestigation'. "Fresh', "de novo', and "reinvestigation' are synonymous expressions and their result in law would be the same. The superior courts are even vested with the power of transferring investigation from one agency to another, provided the ends of justice so demand such action. ***Of course, it is also a settled principle that this power has to be exercised by the superior courts very sparingly and with great circumspection.***

44. We have deliberated at some length on the issue that the powers of the High Court underSection 482of the Code do not control or limit, directly or impliedly, the width of the power of Magistrate underSection 228of the Code. Wherever a charge sheet has been submitted to the Court, even this Court ordinarily would not reopen the investigation, especially by entrusting the same to a specialised agency. ***It can safely be stated and concluded that in an appropriate case, when the court feels that the investigation by the police authorities is not in the proper direction and that in order to do complete justice and where the facts of the case demand, it is always open to the Court to hand over the investigation to a specialised agency.*** *These principles have been reiterated with approval in the judgments of this Court in the case ofDisha v. State of Gujarat & Ors. [(2011) 13 SCC 337].Vineet Narain v. Union of India [(1998) 1 SCC 226],Union of India v. Sushil Kumar Modi [1996 (6) SCC 500] andRubabbuddin Sheikh v. State of Gujarat [(2010) 2 SCC 200].*

48. What ultimately is the aim or ***significance of the expression ''fair and proper investigation' in criminal jurisprudence?*** *It has a twin purpose:* ***Firstly, the investigation must be unbiased, honest, just and in accordance with law;*** *secondly,* ***the entire emphasis on a fair investigation has to be to bring out the truth of the case before the court of competent jurisdiction.*** *Once these twin paradigms of fair investigation are satisfied, there will be the least requirement for the court of law to interfere with the investigation, much less quash the same, or transfer it to another agency. Bringing out the truth by fair and investigative means in accordance with law would essentially repel the very basis of an unfair, tainted investigation or cases of false implication.* ***Thus, it is inevitable for a court of law to pass a specific order as to the fate of the investigation, which in its opinion is unfair, tainted and in violation of the settled principles of investigative canons."****(Emphasis supplied)*

14. In the case of **Vinubhai Haribhai Malviya and others vs. State of Gujrat and another24 (para-23)**, Hon'ble Supreme Court held as under:

"23. It is thus clear that the ***Magistrate's power underSection 156(3)of the CrPC is very wide, for it is this judicial authority that must be satisfied that a proper investigation by the police takes place. To ensure that a "proper investigation" takes place in the sense of a fair and just investigation by the police - which such Magistrate is to supervise - Article 21of the Constitution of India mandates that all powers necessary, which may also be incidental or implied, are available to the Magistrate to ensure a proper investigation which, without doubt, would include the ordering of further investigation*** *after a report is received by him underSection 173(2); and which power would continue to enure in such Magistrate at all stages of the criminal proceedings until the trial itself commences. Indeed, even textually, the "investigation" referred to inSection 156(1)of the CrPC would, as per the definition of "investigation" under Section 2(h), include all proceedings for collection of evidence conducted by a police officer; which would undoubtedly include proceedings by way of further investigation under Section 173(8)of the CrPC."(Emphasis supplied)*

15. In the case of **Sudhir Bhaskar Rao Tambe** (supra) **(paras-2, 3 and 4)**, Hon'ble Supreme Court following the judgment in the case of **Sakiri Vasu (supra)** held 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 the Constitution of India but to approach the Magistrate concerned under Section 156(3), Cr.P.C. If such an application under Section 156(3) Cr.P.C. 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 the investigating officer so that a proper investigation is done in the matter. **Thus, the law laid down by Hon'ble Supreme Court is that after registration of the First Information Report if proper investigation is not being done by the investigating officer, then informant may**

approach the magistrate concerned under Section 156(3), Cr.P.C. so that proper investigation is done. A three judges bench of Hon'ble Supreme Court in the case of **M. Subramaniam and others vs. S. Janki and others (Criminal Appeal No.102 of 2011 decided on 20.03.2020)** quoted with approval the law laid down by two judges bench in the case of **Sakiri Vasu (supra)** and **Sudhir Bhaskar** (supra) and thus, it affirmed the principles laid down in those judgments that even if a first information report has already been registered, on an application under Section 156(3) Cr.P.C., the Magistrate can direct proper investigation **and writ petition for this purpose should not generally be entertained by the High Court in view of the remedy available before the Magistrate under Section 156(3), Cr.P.C.**

16. In a recent judgment of this court dated 08.01.2021 in Criminal Misc. Writ Petition No.16288 of 2020 (Ram Shila Gupta vs. State of U.P. and 3 others), a Division Bench of this court has held as under:

*"In the case of **M. Subramanian and another Vs. Janki and another (Criminal Appeal No.102 of 2011)** decided on 20.03.2020, the Hon'ble Supreme Court observed that if FIR has already been registered then the Magistrate can direct proper investigation to be done which includes his discretion, if he deems it necessary, recommending change of the investigation officer, so that a proper investigation is done in the matter. **The High Courts have been flooded with writ petitions praying for registration of the first information report or praying for a proper investigation and 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. Hon'ble Supreme Court further held that the complainant must avail of his alternative remedy to approach the Magistrate concerned under Section 156(3) Cr.P.C** 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 recommend to the Senior Superintendent of Police/ Superintendent of Police concerned a change of the investigating officer, so that a proper investigation is done. The Magistrate can also monitor the investigation, though he cannot himself investigate. The observations made by the Hon'ble Supreme Court are also in reiteration of the principle laid down by the Hon'ble Supreme Court in the case of **SUDHIR BHASKARRAO TAMBE VS. HEMANT YASHWANT DHAGE AND OTHERS; 2016(6) SCC 277 and in the case of SAKIRI VASU VS. STATE OF UTTAR PRADESH AND OTHERS, 2008(2) SCC 409.***

In view of the aforesaid, we do not find any good reason to entertain the writ petition.

Consequently, considering the submissions of the learned counsel for the parties, this writ petition is dismissed leaving it open to the petitioner to avail such remedy as may be available to him under law."

17. In view of the discussions made above, **we hold that if an informant/ petitioner is aggrieved that proper/ fair investigation is not being done by the investigating officer, then he/ she may approach the concerned Magistrate by moving an application under Section**

156(3) Cr.P.C. for appropriate orders instead of invoking writ jurisdiction under Article 226 of the Constitution of India.

18. For all the reasons aforestated, **all the writ petitions are dismissed** leaving it open to the petitioners to approach the Magistrate concerned under Section 156(3) of Cr.P.C. for fair and proper investigation.

(2021)03ILR A265
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.01.2021

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE SANJAY KUMAR PACHORI, J.

First Appeal Defective No. 338 of 2020

Sunil Sharma ...Appellant
Versus
Smt. Gunjan Kumari @ Sitara Begum ...Respondent

Counsel for the Appellant:
Sri Ram Jatan Yadav, Sri Rakesh Kumar Verma

Counsel for the Respondent:

Appeal against the interim maintainance-husband claims that before mariage-his wife had converted herself as Muslim and also married a muslim-and had a child-all the facts were concealed-anulment petition filed-Maintenance u/s 125 Cr.P.C. may be claimed irrespective of religious community-Appeal dismissed. (E-7)

Cases cited:

1. Bhagwan Dutt Vs Kamla Devi, 1975 (2) SCC 386

2.Rajnesh Vs Neha & ors., MANU/SC/0833/2020

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.
& Hon'ble Sanjay Kumar Pachori,J.))

1. Heard learned counsel for the appellant.

2. Cause shown in the affidavit accompanying the delay condonation application is sufficient. The application is allowed. Office is directed to accord regular number to the appeal.

3. Present appeal has been preferred assailing the validity of the order dated 28.02.2020 passed by Addl. Principal Judge, Family Court No.2, Agra on the interim maintenance application 9-Ga under Section 24 of the Hindu Marriage Act, 19551 filed in Case No.172 of 2017 (Sunil Sharma v. Smt. Gunjan Kumari) by which the opposite party (appellant herein) was directed to pay Rs. 5000/- per month as interim maintenance on 10th of each month with further direction that if opposite party is being given maintenance in any other proceeding, the same would be adjusted in this interim maintenance.

4. Brief facts giving rise to present appeal is that the marriage of the appellant (husband) was solemnized with respondent (wife) as per Hindu rites and rituals on 21.11.2015 at Arya Samaj Temple, Raja Ki Mandi, Agra. It is alleged that after the marriage the appellant came to know that before the marriage the respondent had converted herself and practised Muslim religion and was known as Sitara Begum. She married on 10.04.2013 with one Azeem Uddin @ Kunal @ Sameer son of Shri Shamim Ahmad resident of Rajavpur P.S. Rajavpur Distt. J.P. Nagar and out of

the said wedlock a son was also born namely Riyan @ Aryan. Later she separated from the said wedlock with compromise and concealing this fact she has remarried with the appellant. When the said fact of her being non-Hindu was revealed she herself left the house of appellant and with the collusion of her parental members she filed a Case No. 329 of 2017 (Smt. Gunjan Sharma & Ors. v. Sunil Sharma & Ors.) under the provisions of Protection of Women from Domestic Violence Act, 20052 in which the Addl. Chief Judicial Magistrate, Court No.7, Agra has passed an order on 21.8.2018 directing the appellant to pay a sum of Rs. 3000/- per month to the respondent and also pay a sum of Rs. 1000/- to the child of respondent namely Ayran Sharma. It is also contended that as the respondent did not change her religion, her marriage with appellant is null and void. The Addl. Principal Judge, Family Court No. 2 has not considered the factual aspect of the matter and passed the order impugned.

5. The matrimonial case no. 172 of 2017 has been filed by the appellant against the respondent under Section 11 of HMA for declaration that the marriage dated 21.11.2015 solemnised between the parties is null and *void-ab-initio*.

6. While preferring the interim maintenance application 9-Ga filed in Case No. 172 of 2017 the version of the respondent was that after the marriage the appellant has left her in destitution. Once she has requested to keep her with him, he has threatened her of dire consequences. She had pleaded before the court below that she has no income for livelihood and in this backdrop the order impugned has been passed.

7. The Court has proceeded to examine the record in question and find that this is admitted situation that the respondent is legally wedded wife of the appellant. This fact has also been admitted by the appellant before the court below that he is earning Rs. 6000/- per month. He has also not been able to prove that the respondent is in any employment. The court below while passing the order impugned has opined that it is the moral and social responsibility of the husband to give maintenance to his wife as per his capacity. In this backdrop the order impugned has been passed.

8. The Court finds that the maintenance laws have been enacted as a measure of social justice to provide recourse to dependant wives and children for their financial support, so as to prevent them from falling into destitution and vagrancy. The legislations which have been framed on the issue of maintenance are the Special Marriage Act, 1954,3 Section 125 of the Code of Criminal Procedure, 19734; and the DV Act which provide a statutory remedy to women, irrespective of the religious community to which they belong, apart from the personal laws applicable to various religious communities. Maintenance may be claimed under one or more of the aforementioned statutes, since each of these enactments provides an independent and distinct remedy framed with a specific object and purpose. For instance, a Hindu wife may claim maintenance under the Hindu Adoptions and Maintenance Act 19565, and also in a substantive proceeding for either dissolution of marriage, or restitution of conjugal rights, etc. under the HMA by invoking Section 24 and 25 of the said Act.

9. The HMA is a complete code which provides for the rights, liabilities and obligations arising from a marriage between two Hindus. Sections 24 and 25 of the HMA make provision for maintenance to a party who has no independent income sufficient for his or her support, and necessary expenses. This is a gender-neutral provision, where either the wife or the husband may claim maintenance. The pre-requisite is that the applicant does not have independent income which is sufficient for her or his support, during the pendency of the lis. Section 24 of the HMA provides for maintenance *pendente-lite*, where the Court may direct the respondent to pay the expenses of the proceeding, and pay such reasonable monthly amount, which is considered to be reasonable, having regard to the income of both the parties. Section 25 provides for permanent alimony and maintenance. Section 26 of the HMA provides that the court may from time to time pass interim orders with respect to the custody, maintenance and education of the minor children.

10. HAMA is a special legislation which was enacted to amend and codify the laws relating to adoption and maintenance amongst Hindus, during the subsistence of the marriage. Section 18 provides that a Hindu wife shall be entitled to be maintained by her husband during her lifetime. She is entitled to make a claim for a separate residence, without forfeiting her right to maintenance. Section 18 read in conjunction with Section 23 states the factors required to be considered for deciding the quantum of maintenance to be paid. Under sub-section (2) of Section 18, the husband has the obligation to maintain his wife, even though she may be living separately. The distinction between maintenance under HMA and HAMA is that the right under Section 18 of HAMA is available during the subsistence of a marriage, without any matrimonial proceeding pending between the parties. Once there is a divorce, the wife has to seek relief under Section 25 of HMA. Section 125 of Cr.PC. also provides for maintenance of wife, children and parent in summary proceeding.

11. Maintenance under Section 125 of the Cr.P.C. may be claimed by a person irrespective of the religious community to which they belong. The purpose and object of Section 125 Cr.P.C. is to provide immediate relief to an applicant. Maintenance is awarded on the basis of the financial capacity of the husband and other relevant factors. The remedy provided by Section 125 is summary in nature, and the substantive disputes with respect to dissolution of marriage can be determined by a civil court/ family court in an appropriate proceeding, such as the HMA. The object of these provisions being to prevent vagrancy and destitution, the Magistrate has to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is modestly consistent with the status of the family vide **Bhagwan Dutt v Kamla Devi**6.

12. The DV Act provides relief to an aggrieved woman who is subjected to "domestic violence." The "aggrieved person" has been defined by Section 2 (a) to mean any woman who is, or has been, in a domestic relationship with the respondent, and alleges to have been subjected to any act of domestic violence. Section 2 (f) defines "domestic relationship" to include a relationship between two persons who live, or have at any point of time lived together in a shared

household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption, or are family members living together as a joint family.

13. "Domestic violence" has been defined in Section 3 of the DV Act, which includes economic abuse as defined in Explanation-1 (iv) to Section 3, as :

"Explanation-1 (iv)- Economic abuse which means deprivation of all or any economic or financial resources, to which the aggrieved person is entitled under any law or custom, whether payable under an order of a Court or otherwise, or which the aggrieved person requires out of necessity, including but not limited to household necessities for the aggrieved person, or her children."

14. Section 17 by a non-obstante clause provides that notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the "shared household", irrespective of whether she has any right, title or beneficial interest in the same. Section 17 of the DV Act, reads as :

*"**17. Right to reside in a shared household.-(1)** Notwithstanding anything contained household: in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.*

(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law."

15. Section 20 of the DV Act, provides for monetary relief to the aggrieved woman:

***"20. Monetary reliefs.-** (1) While disposing of an application under sub-section (1) of section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of domestic violence and such relief may include, but is not limited to,-*

(a) the loss of earnings;

(b) the medical expenses;

(c) the loss caused due to destruction, damage or removal of any property from the control of the aggrieved person; and

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.

(2) The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.

(3) The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require."

16. Section 20 (1) (d) of the DV Act, provides that maintenance granted under the D.V. Act to an aggrieved woman and children, would be given effect to, in addition to an order of maintenance awarded under Section 125 of the Cr.P.C., or any other law in force.

17. Under sub-section (6) of Section 20 of the DV Act, the Magistrate may direct the employer or debtor of the respondent, to directly pay the aggrieved person, or deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent.

18. Section 22 of the DV Act, provides that the Magistrate may pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence perpetrated by the respondent.

19. Section 23 of the DV Act, provides that the Magistrate may grant an *ex-parte* order, including an order under Section 20 for monetary relief. The Magistrate must be satisfied that the application filed by the aggrieved woman discloses that the respondent is committing, or has committed an act of domestic violence, or that there is a likelihood that the respondent may commit an act of domestic violence. In such a case, the Magistrate is empowered to pass an ex parte order on the basis of the affidavit of the aggrieved woman.

20. Section 26 of the DV Act provides that any relief available under Sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding before a Civil Court, Family Court or Criminal Court. Sub-section (2) of Section 26 provides that the relief mentioned in sub-section (1) may be sought in addition to, and alongwith any other relief that the aggrieved person may seek in a suit or legal proceeding before a civil or criminal court. Section 26 (3) provides that in case any relief has been obtained by the aggrieved person in any proceeding other than proceedings under this Act, the aggrieved woman would be bound to inform the Magistrate of the grant of such relief.

21. Section 36 provides that the DV Act shall be in addition to, and not in derogation of the provisions of any other law for the time being in force.

22. The issue of overlapping jurisdictions under the HMA and DV Act or Cr.P.C. came up for consideration before a division bench of the Delhi High Court in **RD v BD**7, wherein the Court held that maintenance granted to an aggrieved person under the DV Act, would be in addition to an order of maintenance under Section 125 Cr.P.C., or under the HMA. The legislative mandate envisages grant of maintenance to the wife under various statutes. It was not the intention of the legislature that once an order is passed in either of the maintenance proceedings, the order would debar re-adjudication of the issue of maintenance in any other proceeding. In paragraphs 16 and 17 of the judgment, it was observed that :

"16. A conjoint reading of the aforesaid Sections 20, 26 and 36 of DV Act would clearly establish that the provisions of DV Act dealing with maintenance are supplementary to the provisions of other laws and therefore maintenance can be granted to the aggrieved person (s) under the DV Act which would also be in addition to any order of maintenance arising out of Section 125 of Cr.P.C.

17. On the converse, if any order is passed by the Family Court under Section 24 of HMA, the same would not debar the Court in the proceedings arising out of DV Act or proceedings under Section

125 of Cr.P.C. instituted by the wife/aggrieved person claiming maintenance. However, it cannot be laid down as a proposition of law that once an order of maintenance has been passed by any Court then the same cannot be re-adjudicated upon by any other Court. The legislative mandate envisages grant of maintenance to the wife under various statutes such as HMA, Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as 'HAMA'), Section 125 of Cr.P.C. as well as Section 20 of DV Act. As such various statutes have been enacted to provide for the maintenance to the wife and it is nowhere the intention of the legislature that once any order is passed in either of the proceedings, the said order would debar re adjudication of the issue of maintenance in any other Court."

23. The Delhi High Court held that under Section 20(1)(d) of the DV Act, maintenance awarded to the aggrieved woman under the DV is in addition to an order of maintenance provided under Section 125 Cr.P.C. The grant of maintenance under the DV Act would not be a bar to seek maintenance under Section 24 of HMA.

24. The test for determination of maintenance in matrimonial disputes depends on the financial status of the respondent, and the standard of living that the applicant was accustomed to in her matrimonial home. The maintenance amount awarded must be reasonable and realistic, and avoid either of the two extremes i.e. maintenance awarded to the wife should neither be so extravagant which becomes oppressive and unbearable for the respondent, nor should it be so meagre that it drives the wife to penury. The sufficiency of the quantum has to be adjudged so that the wife is able to maintain herself with reasonable comfort.

25. Recognising the need for uniformity, consistency, procedural fairness and temeliness in the disposal of maintenance applications, in **Rajnesh v. Neha & Ors.**,8 Hon'ble the Supreme Court issued guidelines on the payment of maintenance in matrimonial disputes. While setting out the criteria for determining the amount of maintenance to be paid, the Apex Court recognised that there is no one-size-fits-all formula for deciding the maintenance in matrimonial case. Stressing the importance of maintaining a careful and just balance between all relevant factors, the Apex Court held that the amount of maintenance awarded must be reasonable and realistic. In addition to the statutory guidance, the Apex Court directed a number of indicative factors to be considered when determining the amount of maintenance to be paid, including; the status of the parties; the reasonable needs of the wife and dependent children; whether the applicant is educated and professionally qualified; whether the applicant has any independent source of income; whether the income is sufficient to enable the applicant to maintain the same standard of living to which she was accustomed in her matrimonial house; whether the applicant was employed prior to marriage; whether the applicant worked during the subsistence of the marriage; whether the applicant had to sacrifice her employment opportuities to care for the couple's family and children; and the reasonable costs of litigation for a non-working wife.

26. Further to the above guidelines, the Apex Court set out additional factors for determining the amount of maintenance

to be paid, including; the age and employment status of the parties; the duration of the marriage; the maintenance of any minor children; and any serious disability or ill health of a spouse, child from the marriage or dependent relative who requires constant care and recurrent expenditure. These factors are not exhaustive and the court can exercise its discretion to consider any other factors which may be necessary or relevant in the facts of a particular case.

27. Hon'ble the Supreme Court in **Rajnesh (Supra)** considering the issue of maintenance and overlapping jurisdiction has held as under:-

"(a) Issue of overlapping jurisdiction

98. To overcome the issue of overlapping jurisdiction, and avoid conflicting orders being passed in different proceedings, it has become necessary to issue directions in this regard, so that there is uniformity in the practice followed by the Family Courts/District Courts/Magistrate Courts throughout the country. We direct that:

(i) where successive claims for maintenance are made by a party under different statutes, the Court would consider an adjustment or set-off, of the amount awarded in the previous proceeding/s, while determining whether any further amount is to be awarded in the subsequent proceeding;

(ii) it is made mandatory for the applicant to disclose the previous proceeding and the orders passed therein, in the subsequent proceeding;

(iii) if the order passed in the previous proceeding/s requires any modification or variation, it would be required to be done in the same proceeding.

(b) Payment of Interim Maintenance

99. The Affidavit of Disclosure of Assets and Liabilities annexed as Enclosures I, II and III of this judgment, as may be applicable, shall be filed by both parties in all maintenance proceedings, including pending proceedings before the concerned Family Court/District Court/ Magistrates Court, as the case may be, throughout the country.

(c) Criteria for determining the quantum of maintenance

100. For determining the quantum of maintenance payable to an applicant, the Court shall take into account the criteria enumerated in Part B - III of the judgment.

101. The aforesaid factors are however not exhaustive, and the concerned Court may exercise its discretion to consider any other factor/s which may be necessary or of relevance in the facts and circumstances of a case.

(d) Date from which maintenance is to be awarded

102. We make it clear that maintenance in all cases will be awarded from the date of filing the application for maintenance, as held in Part B - IV above.

(e) Enforcement/Execution of orders of maintenance

103. For enforcement/execution of orders of maintenance, it is directed that an order or decree of maintenance may be enforced under Section 28A of the Hindu Marriage Act, 1956; Section 20 (6) of the D.V. Act; and Section 128 of Cr.P.C., as may be applicable. The order of maintenance may be enforced as a money decree of a civil court as per the provisions of the CPC, more particularly Sections 51, 55, 58, 60 r.w. Order XXI.

104. Before we part with this judgment, we note our appreciation of the valuable assistance provided by the Ld. Amici Curiae Ms. Anitha Shenoy and Mr. Gopal Sankaranarayanan, Senior Advocates in this case.

105. A copy of this judgment be communicated by the Secretary General of

this Court, to the Registrars of all High Courts, who would in turn circulate it to all the District Courts in the States. It shall be displayed on the website of all District Courts/Family Courts/Courts of Judicial Magistrates for awareness and implementation."

28. In the aforesaid facts and circumstances of the case, the Court does not find any infirmity or illegality in the order impugned so as to make interference by this Court under Section 19 of the Family Courts Act, 19849. The court below has passed just and reasoned order and no interference is required in the matter.

29. Consequently, first appeal fails and is accordingly **dismissed**.

30. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad, self attested by the appellant alongwith a self attested identity proof of the said person (preferably Aadhar Card) mentioning the mobile number to which the said Aadhar Card is linked.

31. 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)03ILR A272
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2020

BEFORE
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

FAFO No. 78 of 2011

Virendra Kumar ...Appellant
Versus
Vijay Kumar & Ors. ...Respondents

Counsel for the Appellant:
Sri B.P. Verma, Sri Mayank

Counsel for the Respondents:
Sri S.C. Srivastava

Claimant suffers a permanent disability from injuries-assesment of compensation under head of loss of future earnings-depend upon his earning capacity-in terms of percentage of income-then to be quantified in money-adoption of multiplier method -Appeal allowed. (E-7)

Cases cited:

1. Rajesh Kumar @ Raju Vs Yudhvir Singh & anr., 2008 (3) T.A.C. 17 (SC)

2. Smt. Sarita Verma & ors. Vs Delhi Transport Corporation & anr., 2009 ACJ 1298

3. Syed Sadiq & ors. Vs Divisional Manager, United India Ins. Company, 2014 (2) SCC 735

4. National Insurance Company Limited Vs Pranay Sethi & ors, (2017) 16 SCC 680

5. The New India Assurance Company Ltd. Through Divisional Manager Vs Mohammad Navi, 2008 (72) ALR 620

6. The New India Assurance Co. Ltd Vs Amzad Khan & ors, MANU/UP/0310/2016

7. R.D. Hattangadi Vs Pest Control (India) Pvt. Ltd, (1995) 1 SCC 551

8. Common Cause, A Registered Society Vs U.O.I., (1999) 6 SCC 667

9. Nagappa Vs Gurudayal Singh, (2003) 2 SCC 274

10. Divisional Controller, KSRTC Vs Mahadeva Shetty, (2003) 7 SCC 197

11.Nizam's Institute of Medical Sciences Vs Prasanth S. Dhananka, (2009) 6 SCC 1

12. Arvind Kumar Mishra Vs New India Assurance Co. Ltd.(2010) 10 SCC 254

13. Arun Sondhi Vs DTC I (2001) ACC 615

14. New India Assurance Co. Ltd. Vs Senthil Kumar, (2009) 2 LW 767

15. Raj Kumar Vs Ajay Kumar, (2011) 1 SCC 343

16. Govind Yadav Vs New India Insurance Company Ltd, 2012 (1) TAC-1 (S.C.)

17. Dr. Dattatraya Laxman Shinde Vs Nana Raghunath Hire, (2011) 5 Mah LJ 854

18. Ritu Vs Regional Manager Uttranchal State Road Transport Corporation, 2014 ACJ 1133

19. Pt. Parmanand Katara Vs 20 U.O.I. & ors., 1989 (III) SLVR-137

20.Civil Appeal No.242/243 of 2020 (National Insurance Company Ltd. vs Birender & ors.) decided on 13 January, 2020

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Shri B.P. Verma, learned counsel for the claimant-appellant and Shri S.C. Srivastava, learned counsel for the insurance company.

2. The present appeal under Section 173 of the Motor Vehicles Act, 1988 has been filed by the appellant, being aggrieved by the judgment and order dated 21.9.2010 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court no.7, Mathura in Motor Accident Claim Petition No.239 of 2008 (Virendra Kumar vs. Vijay Kumar and others) awarding a sum of Rs.62,866/- for the expenses incurred towards medicines and treatment of the injuries sustained by the appellant in a motor accident, alongwith 6% interest from the date of filing of the claim petition till the date of payment of compensation.

3. The claimant aged 45 years filed MAC No.239 of 2008 against the driver & owner of the vehicle and the insurance company before the Motor Accident Claims Tribunal/Additional District Judge, Court No.7, Mathura claiming a compensation of Rs.10,00,000/- along with 12% interest in respect of the injuries suffered by him in the motor accident alleged to have occurred on 17.2.2008 around 12.30 p.m.

4. The claim petition was filed stating therein that on 17.2.2008 at about 12.30 PM the claimant was going alongwith his friend Goverdhan Singh on a motorcycle No.UP-85-R-5810 from Mathura to Farah when the driver of the Qualis Vehicle No.HR-70-7263 while driving the the vehicle rashly and negligently hit the said motorcycle from behind on N.H.2 near village Mahuvan, damaging the motorcycle and causing serious injuries to the driver Goverdhan Singh as well as the pillion rider- claimant. Regarding the said accident the first information report was lodged at the concerned police station. The claimant-appellant was treated for injuries first at Lifeline Hospital, Mathura where he was under treatment from 17.2.2008 to 18.2.2008. Subsequently, when his condition was deteriorating, he was admitted to Loknayak Hospital, Delhi and he was admitted there from 19.4.2008 to 6.5.2008. During the treatment many operations were performed on his body and he was given 6 bottles blood. Due to the accident the claimant-appellant suffered serious physical and mental agony. On account of the injuries caused in the said accident the appellant suffered permanent

physical disability. Before the accident the appellant was working as Guard at Toll Plaza near Mathura Mahuvan/Barari and getting salary of Rs.4,000/- per month. He also used to earn Rs.4000/- from agricultural activities at his village. In this manner, Rs.10,00,000/- was claimed along with 12% interest.

5. The opposite party no. 3-insurance company filed its written statement and contested the claim of the claimant on various grounds. Despite service of notices, neither the opposite party nos.1 and 2 (driver and owner of the offending vehicle) appear in the proceedings nor file any written statement. In such situation, the proceedings was conducted ex-parte against them vide order dated 28.7.2009. The driver of the motorcycle also held to be guilty of contributory negligence and as such, he also contributed to the accident to the extent of 20%. Finally, the Claims Tribunal awarded Rs.46,866 towards medical expenses; Rs.5000/- towards pain and suffering; Rs.3000/- towards conveyance; Rs.3000/- towards attendant charges and Rs.5000/- towards special diet. In this manner, the claimant-appellant was made entitled to receive a compensation of Rs.46,866 + 5000+ 3000 + 3000 + 5000, total compensation Rs.62,866/- alongwith 6% interest from the date of filing the claim petition till the date of payment.

6. Learned counsel for the appellant urged at the time of the hearing that the claimant-appellant claimed compensation of Rs.10,00,000/- for the injuries caused in the accident but the Claims Tribunal had awarded the compensation of Rs.62,866/- only towards medical expenses/pain & suffering/conveyance/attendant charges/ special diet. It did not award any amount towards loss of earning capacity. The Claims Tribunal has not decided the issue no.4, whether the appellant-claimant is entitled for any compensation and if yes, then how much and from whom. There was no negligence on the part of the appellant. The Claims Tribunal has committed an error in holding that the appellant was also held 20% negligent and this is also against the evidence available on record. The Claims Tribunal further erred in law in deducting 20% compensation from the total compensation of Rs.58,583/-. The appellant filed medical bills of Rs.2,50,000/- but the same were not granted by the Tribunal on the ground that they vary in dates. The disablement of 50% as in the certificate was disbelieved by the Tribunal and the same is against the provisions of Motor Vehicle Act and Rules framed therein. It is submitted that the compensation awarded under the heads of pain and suffering, loss of amenities, conveyance, special diet and attendant charges is on a lower side and be enhanced. In support of his submission he has placed reliance on the judgements of Apex Court in **Rajesh Kumar alias Raju vs. Yudhvir Singh and another1 ; Smt. Sarita Verma and ors vs. Delhi Transport Corporation and another2; Syed Sadiq and ors vs. Divisional Manager, United India Ins. Company3; National Insurance Company Limited vs. Pranay Sethi and ors**4. He has also placed reliance on the judgement of this Court in **The New India Assurance Company Ltd. Through Divisional Manager vs. Mohammad Navi5 and The New India Assurance Co. Ltd vs. Amzad Khan and ors**6.

7. Learned counsel for the respondent, on the other hand, made an endeavour to justify the award of the MACT. In the written statement it had taken a plea that in the claim petition policy number of the

insurance of the vehicle and the validity of the insurance company have not been proved. It was the responsibility of the applicant and registered owner of the offending vehicle to prove that the said accident took place from Qualis No.HR-70-7263 and at the time of the accident the said vehicle was insured with the New India Insurance Co. Ltd. Neither the claimant made a party to the registered owner of the motorcycle nor the insurance company of the motorcycle. At the time of accident the offending vehicle/Qualis was not being driven by the driver having valid licence. It had also taken a stand that the vehicle was deliberately planted in collusion with the owner of the offending vehicle and the appellant just to shift the liability to pay the compensation as the vehicle was insured by the Insurance Company.

8. The Court has proceeded to examine the record in question as well as the evidence adduced by the appellant-claimant on the issue of injury sustained by him and finds that at the time of the accident, the appellant was working as a Guard at Toll Tax near Mathura Mahuvan/Barari. The appellant had produced evidence to the effect that he had worked as a Guard and he was paying salary of Rs.4000/-. He also earned Rs.4000/- from agriculture and thus his monthly income was Rs.8000/-. Insofar as injuries suffered by the appellant in the said accident are concerned, he had stated that his health had impaired drastically because of which he was firstly admitted in the Lifeline Hospital, Mathura and thereafter he was admitted to Loknayak Hospital, Delhi. Because of all this he has suffered 50% permanent disability, apart from mental and physical agony and the said disability is going to give him frustration and disappointment towards life. He pleaded that this disability has affected his efficiency in work as well resulting in loss of future income as well. The appellant contended that the Tribunal has not decided the issue no.4, whether the appellant-claimant is entitled for any compensation and if yes, then how much and from whom. The appellant sustained injuries and the injuries sustained by him and the treatment taken by him are evident from the medical documents and disability certificate and was further supported by oral evidence of the appellant/claimant. However, the Tribunal did not believe that the disability of the appellant/claimant to the extent of 50% caused due to the said accident. As already noticed above, the Tribunal granted him compensation of Rs.62,866/- only by reimbursing expenses incurred towards treatment; transportation, mental and physical agony.

9. The law with respect to the grant of compensation in injury cases is well-settled. The injured is entitled to pecuniary as well as non-pecuniary damages. Pecuniary damages also known as special damages are generally designed to make good the pecuniary loss which is capable of being calculated in terms of money whereas non-pecuniary damages are incapable of being assessed by arithmetical calculations. The pecuniary or special damages, generally include the expenses incurred by the claimants on his treatment, special diet, conveyance, cost of nursing/attending, loss of income, loss of earning capacity and other material loss, which may require any special treatment or aid to the insured for the rest of his life. The general damages or the non-pecuniary loss include the compensation for mental or physical shock, pain, suffering, loss of amenities of life, disfiguration, loss of

marriage prospects, loss of expected or earning of life, inconvenience, hardship, disappointment, frustration, mental stress, dejectment and unhappiness in future life, etc.

10. In **R.D. Hattangadi v. Pest Control (India) Pvt. Ltd.**7, a road accident resulted in 100% disability due to paraplegia below waist to a lawyer (retired Judge). The Supreme Court observed that no amount of compensation can restore the physical frame of the appellant. That is why it has been said by Courts that whenever any amount is determined as the compensation payable for any injury suffered during an accident, the object is to compensate such injury "so far as money can compensate" because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame. In its very nature whenever a Tribunal or a Court is required to fix the amount of compensation in cases of accident, it involves some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards. When compensation is to be awarded for pain and suffering and loss of amenity of life, the special circumstances of the claimant have to be taken into account including his age, the unusual deprivation he has suffered, the effect thereof on his future life.

11. In **Common Cause, A Registered Society v. Union of India**8, Hon'ble Supreme Court held that the object of an award of damages is to give the plaintiff compensation for damage, loss or injury he has suffered. The Court further held that the elements of damage recognized by law are divisible into two main groups: pecuniary and non-pecuniary loss. While the pecuniary loss is capable of being arithmetically worked out, the non-pecuniary loss is not so calculable. Non-pecuniary loss is compensated in terms of money, not as a substitute or replacement for other money, but as a substitute, what McGregor says, is generally more important than money: it is the best that a court can do.

12. In **Nagappa v. Gurudayal Singh**9, the Supreme Court held that if a collection of cases on the quantum of damages is to be useful, it must necessarily be classified in such a way that comparable cases can be grouped together. No doubt, no two cases are alike but still, it is possible to make a broad classification which enables one to bring comparable awards together. Inflation should be taken into account while calculating damages.

13. In **Divisional Controller, KSRTC v. Mahadeva Shetty**10, the road accident resulted in paraplegia due to serious injury to the spinal cord. The Supreme Court held that the object of providing compensation is to mitigate the hardship and place the claimant as far as possible in the same position financially as he was before the accident. The quantum of damages fixed should be in accordance with the injury. An injury may bring about many consequences like loss of earning capacity, loss of mental pleasure and many such consequential losses. A person becomes entitled to damages for mental and physical loss, his or her life may have been shortened or that he or she cannot enjoy life, which has been curtailed because of physical handicap. The compensation awarded has to be "just" and not a bonanza. Every method or mode

adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just", a wide discretion is vested in the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression "just" denotes equitability, fairness and reasonableness, and non-arbitrariness. A person not only suffers injuries on account of accident but also suffers in mind and body on account of the accident throughout his life and a feeling is developed that he is no more a normal man and cannot enjoy the amenities of life as another normal person can. The Supreme Court further held that while fixing compensation, suffering of the mind, shortening of life expectancy, loss of earning capacity, permanence of the disability, loss of amenities of life etc. are to be considered against the backdrop of age, marital status, unusual deprivation one has undertaken in one's life etc.

14. In **Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka**11, the Supreme Court held that adequate compensation must strike a balance between the inflated and unreasonable demands of a victim and the equally untenable claim of the opposite party saying that nothing is payable. The Supreme Court further held that the case of an injured and disabled person is, however, more pitiable and the feeling of hurt, helplessness, despair and often destitution enures every day. The support that is needed by a severely handicapped person comes at an enormous price not only on the victim but even more so on the injured's family and attendants and the stress saps their energy and destroys their equanimity. The Apex Court further held that compensation has been computed keeping in mind that the brilliant career of the claimant has been cut short and there is, as of now, no possibility of improvement in the claimant's condition, the compensation will ensure a steady and reasonable income to the claimant for a time when the claimant is unable to earn for himself.

15. In **Arvind Kumar Mishra v. New India Assurance Co. Ltd.**12, the road accident resulted in 100% permanent disability to a final year engineering student. The Supreme Court held the functional disability to be 70% to compute the loss of earning capacity according to the multiplier method. The Supreme Court further held that the whole idea of compensation is to put the claimant in the same position as he was insofar as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for what he had suffered.

16. In **Arun Sondhi v. DTC**13, a final year student aged 21 years pursuing B.A. course from St. Stephen's College, Delhi suffered leg amputation and paralysis in a road accident which resulted in 100% permanent disability. This Court enhanced compensation from Rs.8,68,781/- to Rs.19,16,781/-. The relevant portion of the judgment is reproduced hereunder:-

"4. It goes without saying that Appellant had become crippled and permanently disabled forever. His permanent disability was 100% and he was living his life, whatever its worth, in a wheelchair. It is also the admitted position

that he had become paraplegic and had lost control even over his urine and stool. He required assistance of an attendant and medical treatment all the time which involved a recurring expenditure. His plight would not be described in words, nor could his pain and suffering, frustration and disappointments be gathered or gauged. An athlete of yester-year must be ruing his survival which had plunged him in a veritable hell.

5. No money could obviously compensate him for all this and consequently no reasonable compensation could be determined for what he had and must be going through. But all the same the Courts had to undertake the exercise in the discharge of their duty if only to compensate him to the extent payment of money could. As was aptly observed in Ward V James 1965 (1) APPER 56:-

"Although you cannot give a man so gravely injured much for his lost year, loss during his shortened span, that is, during his expected "years of survival". You can compensate him for loss of earnings during that time and for the cost of nursing treatment and attendance. But how can you compensate him for being rendered a helpless invalid. He has lost everything that makes life worthwhile. Money is no good to him. Yet Judges and Jurisdiction have to do the best they can and give him what they think is fair. No wonder they find it well neigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part of converted sum."

6. Given regard to all this, it becomes difficult to assess the non-pecuniary damages in the present case because whatever amount was awarded to the incapacitated and crippled Appellant, it would not restore his broken body and shattered life. But all the same an effort was required to be made to grant him a reasonable compensation that could at least mitigate his suffering and hardship had reduce the intensity of his pain, if not provide him bare minimum amenities and enjoyment of life.

* * *

9. At this stage, we noticed Supreme Court judgment in A.K.Mishra Vs. Muniam Babu : [1999]2SCR518 awarding Rs. 5 lacs to a 23 year old youngman whose special cord was damaged in the road accident, by and large in similar circumstances. But this judgment, in over view, does not lay down any generalised principle or guideline for award of non-pecuniary damages in serious accident injury case. The determination of compensation in such cases would depend on the facts and circumstances of each case and notwithstanding the element of sympathy involved with the accident victim. We are also conscious of the fact that assessment of compensation in such cases had to be on objective standards and not based on any fanciful or whimsical calculations. But since a bit of conjecture was permissible, it presented no difficulty to make provision for the recurring medical expenditure and attendance for the Appellant and we feel that estimated compensation for this was based on a conservative estimate."(Emphasis Supplied)

17. In **New India Assurance Co. Ltd. v. Senthil Kumar**14, the victim of a road accident suffered fracture, compression of spinal cord and paraplegia resulting in 100% disability. The Madras High Court enhanced the compensation from Rs.8,53,000/- to Rs.9,60,000/-. The relevant portion of the judgment is as under:-

"11. In this case, the injured claimant suffered fracture and compression

of the spinal cord and has been diagnosed as a paraplegic injury. According to Webster Dictionary paraplegic means "complete paralysis of the lower half of the body usually resulting from damage to the spinal cord". The disability assessed in this case under Ex.A-12 is 100% and that is not in dispute. Therefore, adopting multiplier method will be appropriate. In view of the Full Bench decision in Cholan Roadways Corporation, compensation under two heads, viz., loss of earning power and for disability cannot be granted.

* * *

16. The Division Bench of this Court in **United India Insurance Co. Ltd. v. Veluchamy**. 2005 (1) CTC 38 sets out the parameters as to when the multiplier method can be adopted in the case of injury. In Paragraph 11 of the decision reads thus:

11. The following principles emerge from the above discussion:

(a) In all cases of injury or permanent disablement 'multiplier method' cannot be mechanically applied to ascertain the future loss of income or earning power.

(b) It depends upon various factors such as nature and extent of disablement, avocation of the injured and whether it would affect his employment or earning power, etc. and if so, to what extent?

(c) (1) If there is categorical evidence that because of injury and consequential disability, the injured lost his employment or avocation completely and has to be idle for the rest of his life, in that event loss of income or earnings may be ascertained by applying the 'multiplier method' as provided under the Second Schedule to Motor Vehicles Act, 1988. (2) Even so there is no need to adopt the same period as that of fatal cases as provided under the Schedule. If there is no amputation and if there is evidence to show that there is likelihood of reduction or improvement in future years, lesser period may be adopted for ascertainment of loss of income.

(d) Mainly it depends upon the avocation or profession or nature of employment being attended by the injured at the time of accident."(Emphasis Supplied)

18. In **Raj Kumar v. Ajay Kumar**15, the Supreme Court considered in great detail the correlation between the physical disability suffered in an accident and the loss of earning capacity resulting from it. In paragraphs 10, 11 and 13 of the judgment in Raj Kumar, this Court made the following observations:

10. Where the claimant suffers a permanentdisabilityas a result of injuries, the assessment of compensation under the head of loss of future earnings would depend upon the effect and impact of such permanent disabilityon his earning capacity.The Tribunal should not mechanically apply the percentage of permanentdisabilityas the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, the percentage of loss of earning capacity, arising from a permanentdisabilitywill be different from the percentage of permanentdisability.Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disabilitywould result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanentdisability, will hold that there is 45% loss of future earning capacity.In most of the cases, equating the extent (percentage) of loss of earning capacity to

the extent (percentage) of permanentdisabilitywill result in award of either too low or too high a compensation.

11. What requires to be assessed by the Tribunal is the effect of the permanentdisabilityon the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that the percentage of loss of earning capacity as a result of the permanentdisability is approximately the same as the percentage of permanentdisabilityin which case, of course, the Tribunal will adopt the said percentage for determination of compensation. (See for example, the decisions of this Court in Arvind Kumar Mishra v. New India Assurance Company Ltd. (2010) 10 SCC 254 and Yadava Kumar v. National Insurance Company Ltd. (2010) 10 SCC 341).

13. Ascertainment of the effect of the permanentdisabilityon the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanentdisabilityand what he could not do as a result of the permanentdisability(this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanentdisability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood."

19. The aforesaid observation made by Hon'ble Apex Court in the case of Raj Kumar (supra), was reiterated in the case of **Govind Yadav Vs. New India Insurance Company Ltd.**16, by observing as under :-

"14. The provision of the Motor Vehicles Act, 1988 ("the Act", for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalisation, medicines, transportation,

nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity). In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life.

15. In our view, the principles of law laid down in Arvind Kumar Mishra V. New India Assurance Company Ltd. (supra) and Raj Kumar V. Ajay Kumar (supra) must be followed by all the Tribunals and the High Courts in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily. If the victim of the accident suffers permanent disability, then efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and his inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident."

20. In **Dr. Dattatraya Laxman Shinde v. Nana Raghunath Hire**17, a young doctor suffered paraplegia in a motor accident. The paraplegia affected both motor and sensory below thoracic 12 with complete bladder and bowel involvement. Following R.D. Hattangadi (supra) and Raj Kumar (supra), the Bombay High Court enhanced the compensation from Rs.8,85,000/- to Rs.34,50,000/-. The relevant portion of the judgment is as under:-

"23. In the present case, the Appellant will never be able to practice medicine. He will not be able to continue as a lecturer due to physical disability. Moreover, witness examined by the Appellant admitted that the Appellant is not qualified for the post of a lecturer as he is not holding a post graduate degree. He is incapable of earning any income. No argument is necessary to come to the conclusion that this is a case of 100% loss of earning capacity. In the year 1993, the income of the Appellant as a lecturer was around Rs. 4,200/-. The Appellant had an excellent academic record. It is obvious that the income of the Appellant would have been much higher than Rs. 4,200/-. In a matter like this, exercise of determining the compensation always involves an element of guess work. Looking to the academic record of the Appellant, the income can be reasonably taken at Rs. 6,000/- per month. Multiplier of 18 will have to be applied as on the date of the accident the age of the Appellant was about 25 years. Applying multiplier of 18, the loss of income can be quantified at Rs.

12,96,000/-(Rs. 6000 × 12 × 18). As pointed out earlier, the entire body of the Appellant below waist has become paralytic and he has no control over bladder and bowel movement. He regularly requires catheterisation. As stated by Dr. Joshi, he requires an attendant for 24 hours. Even if the conservative estimate of cost of one attendant is taken at Rs. 200/- per day, the amount will be Rs. 6,000/- per month. Adopting multiplier method, the total amount will come to Rs. 12,96,000/-.

24. As far as claim of expenditure on medical treatment is concerned, it is brought on record that the Appellant was admitted in three different hospitals in Pune and in hospitals at Karad and Satara. The Appellant was also admitted to the institution at Coimbatore for a period of more than two months. Lot of expenditure must have been incurred on travelling and residence of the relatives and friends of the Appellant. The bills evidencing expenditure on medicines, medical treatment, special diet, travelling expenses and residence of the relatives and friends of the Appellant have been produced on record. There are four lists of documents marked as 85/1 to 85/4. Along with the said four lists, voluminous original documents such as bills, vouchers etc. have been produced on record. As expected, none of the documents were admitted by the Respondent No. 3. Perhaps the Respondent No. 3 wanted that large number of witnesses should be examined to prove the documents. In the examination-in-chief, the Appellant has made a reference to all the bills and vouchers. The Tribunal constituted under the said Act is not bound by strict rules of evidence. Therefore, the said bills and vouchers ought to have been taken into consideration by the Tribunal in absence of the specific case made out that the documents were fabricated. The total amount reflected from the said bills and vouchers is Rs. 1,54,526/-, which can be rounded off to Rs. 1,55,000/-. Therefore, no separate amount can be awarded by the Tribunal for purchasing equipment such as chair, water bed etc.

25. Evidence of Dr. Joshi indicates that the Appellant will have to continuously remain under medication. Dr. Joshi has stated that such patients who are suffering from paraplegia can suffer many ailments. In paragraph 5 above, the detailed version of Dr. Joshi on the treatment required in future has been reproduced. Dr. Joshi has said "The parapleagic patients are known to go into severe depressions and sometimes result is suicide. Parapleagic are known to have severe rediating pain in both legs and back which is neurological in origin. In addition to this, they suffer from multiple bladder infections which may led to superadded kidney infection and also injuries to both legs due to loss of sensation. Besides which a previously walking about patient sees a futile future and this leads him to suicidal tendency. The neuronal irritation gives rise to severe burning pains in both the legs. All these symptoms stated above were found in the said patient Dr. Shide. For subsiding this pains, tablets like Mazetol are given i.e. antiepileptic drug. The side effect of this medicine is mainly drowziness, grastic irritation, with reflex depression. It also affects appetite with the loss of appetite with decrease in multi-vitamins in the body. Such type of patient is required supplementation of multi-vitamins along with high protein diet. These patients require self catheterisation to remove the urine from the bladder from time to time. This could lead to multiple episodes of infections which have to be treated by higher antibiotics. Also these patients are required to sleep on a water bed or aid-bed

to avoid pressure sores over the legs and buttocks. In addition to that the patient requires high protein diet along with multi-vitamin supplementation and enema frequently to regularise the bowel movements. They require passive physiotherapy for both the lower limbs. Usually at night time, tranquillizers are given to help the patient sleep. At times, there is a reflex spasm of the lower limbs in certain patients which usually develops between 4 to 6 years and for which tranquillizers is given. The supplementary food contains high fiber and protein contain." The Tribunal has granted only a sum of Rs. 1,00,000/- for future expenses on treatment. The Appellant will require large amount in future on medicines and equipment like wheelchairs, water bed, catheters etc. Even by a conservative estimate, the said amount cannot be less than Rs. 2,50,000/-.

26. The real problem is in determining non-pecuniary loss because there are no fix standards for assessing the non-pecuniary loss. In a case like this where the victims suffer from paraplegia, the non- pecuniary loss will be basically under the following headings.

i. pain and suffering;

ii. loss of amenities of the life; and

iii. loss or destruction for prospects of marriage. As far as first two items are concerned, in cases of a child or young person, who suffers paraplegia, the amount will be much higher than the entitlement of a person who suffers paraplegia at a comparatively late age. Therefore, there is variance in the amounts fixed by this Court as well as the Apex Court in such cases. The Apex Court and this Court in its various decisions has granted amounts ranging from Rs. 1,00,000/- together under the first two headings to a very high amount. In the case of Nizam's Institute of Medical Sciences (supra), where the Apex Court was dealing with a case arising out of an order passed by the Consumer Redressal Forum, a very high amount of Rs. 10,00,000/- has been granted on account of the pain and suffering. That was a case of engineering student aged 20 years, who was a victim of medical negligence. The case before the Apex Court was of a young student who being the victim of paraplegia was confined to wheelchair, and who pursued career in education and ultimately got employed as I.T. engineer at a handsome salary. Reliance was placed on the judgment of the Division Bench in the case of **The New India Assurance Co. Ltd. v. Shweta Dilip Mehta** (supra). This Court dealt with the injury sustained by a minor child aged 11 years, who became paraplegic as a result of accidental injuries. In the facts of the case, this Court granted total amount of Rs. 4,00,000/- on account of pain and suffering. In the present case the compensation cannot be granted on account of loss of amenities of life in view of what is held by the Apex Court in the case of Raj Kumar. In paragraph 15 of the decision, the Apex Court held that:

"15. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may." (emphasis supplied)

27. In the case of Divisional Controller, Karnataka State Road Transport

Corporation v. Mahadeva Shetty (supra), the Apex Court granted a sum of Rs. 1,00,000/- in case of similar injuries. Ultimately, the amount will depend on facts of each case. It will depend upon the age of the victim, his social status, his marital status, his family background etc. It cannot be overlooked that a young person like the Appellant who suffers from paraplegia, also suffers in mind and in the given case, such a person may become a patient of a psychological disorder. Paraplegia can have devastating effect on the mind of a person like the Appellant, who had a brilliant academic career and who was aiming to pursue post graduate studies in Ayurvedic Medicine. It must be borne in mind that the accident occurred in the year 1993. The Appellant was unmarried at the time of the accident. The Appellant had responsibility of family consisting mother and two younger brothers. The impact of all these factors will have to be considered. The amount granted on this count by the Apex Court and Division Bench of this Court is in the range of Rs. 1,00,000/- to Rs. 4,00,000/-. Considering the facts of this case, compensation on account of pain and suffering deserves to be fixed at Rs. 3,75,000/-. As the compensation has been granted on account of 100% loss of earning capacity, separate amount cannot be granted on account of loss of amenities of life. In the case of Divisional Controller, Karnataka State Road Transport Corporation v. Mahadeva Shetty (supra), the Apex Court approved compensation of Rs. 75,000/- granted by the Tribunal on account of complete loss of prospects of marriage. The same amount deserves to be granted in this case.

28. With this Judgment a long drawn litigation has come to an end as far as this Court is concerned. Costs of the appeal will have to be quantified at Rs. 20,000/-

29. Thus, the entitlement of the Appellant to compensation is as under:

a. Loss of income Rs. 12,96,000/-;

b. Cost of attendant Rs. 12,96,000/-;

c. Expenditure on medicines, treatment, conveyance Rs. 1,55,000/-;

d. Compensation on account of pain and suffering Rs. 3,75,000/-;

e. Compensation on account of loss of prospects of the marriage Rs. 75,000/;

f. Compensation on account of medical expenditure in future Rs. 2,50,000/-;

Thus, the total compensation should be Rs. 34,47,000/-. This figure can be rounded off to Rs. 34,50,000/-.

30. After taking into consideration a sum of Rs. 8,85,000/- granted by the Tribunal, the Appellant will be entitled to enhancement of Rs. 25,65,000/-. As far as amount of Rs. 2,50,000/- is concerned, the interest will not be payable from the date of the accident and the interest will be payable from the date of this judgment. Interest on the remaining enhanced amount of Rs. 23,15,000/- will have to be granted at the rate of 7.5% per annum."(Emphasis Supplied)

21. In **Ritu v. Regional Manager Uttranchal State Road Transport Corporation**18, a six year old child suffered paraplegia with 80% disability. This Court examined the case law with respect to the award of compensation in injury cases and awarded compensation of Rs.41,19,928/-.

22. The Tribunal has erred in concluding that the claimant was also contributed to the accident without assigning any plausible reason. At no point of time the contributory negligence of claimant in the accident was proved by the insurance company by producing evidence. The claimant had also proved all the hospital and relevant medical bills to support his claim for medical expenses. In the record relevant photograph of the claimant is also appended which also gives an impression that one leg of the claim has also been shorten in the accident. On the matter of extent of contribution to the accident, the Tribunal has considered the issue no.1 and Nazra Naksa and accepted the version of counsel for the insurance company, who had taken a plea that the accident took place due to collision of motorcycle to the offending vehicle (Qualis) and the motorcycle was in the middle of the road. Even though this aspect has not been considered by the Tribunal but the stand taken by the counsel for the insurance company has been accepted and the offending vehicle was held to be contributed to the accident to the extent of 80% and the appellant-claimant was also held to be contributed to the accident to the extent of 20%. It is admitted situation that the offending vehicle hit the motorcycle from behind the back. Therefore, I am inclined to hold that the contribution of the appellant/claimant in the accident is not proved by the insurance company by producing evidence and therefore, finding of the Tribunal regarding contributory negligence is set aside (ref. **Syed Sadiq and ors vs. Divisional Manager, United India Ins. Company** (supra).

23. The Tribunal has proceeded contrary to the record specially the medical history of the claimant-appellant. In order to appreciate the material, which has been brought on record before the Tribunal it would be appropriate to reproduce the factual situation, which is emerging from the record. The accident took place on 17.2.2008 and he had undergone treatment at the local hospital at Mathura. Eventually he was admitted to Lok Nayak Hospital, Jawahar Lal Nehru Marg, New Delhi on 18.2.2008 and had been discharged on 01.4.2008. For compound injury in his left femur even though he had been operated at the said hospital but he was not cured. Eventually he had undergone surgery at Dayanand Medical College & Hospital, Ludhiana and as per discharge summary he was admitted on 6.10.2009 and had been discharged on 15.10.2009. While admitting the hospital had diagnosed **"one year and eight months old non united fracture femur M.D. third region (left) and had also mentioned operation: open reduction & internal fixation of fracture femur with broad LCP (10H) (Synthes) and bone grafting of the non union site with corticocancellous graft (graft harvested from ipsilateral iliac crest) with application of knee immoiliser on 07.10.09"**. While admitting at the hospital the history of illness has also been mentioned in detail with following observations **"Patient is a follow up case of 1 year and 8 months old compound grade lllb fracture with bone loss for which interlocking nailing was done on 27.03.08. On subsequent follow up, Patient was diagonsed to have infected non union for which debridement and irrigation, application of skeletal traction and removal of interlocking nail was done on 12.08.09. Now he has been admitted to DMCH for further management"**.

24. It is also relevant to indicate that the hospital had mentioned in the head of local examination: **Left lower Limb;**

Upper tibial skeletal traction in situ; Scar mark of 8x2 cm present on lateral aspect of thigh in proxima third region; ROM at knee and hip restricted and painful and neurovascular status intact. Therefore, the finding, which has been recorded by the Tribunal, is contrary to the record and the medical receipts alongwith history of medical treatment undergone at Lok Nayak Hospital and Dayanand Medical College & Hospital, Ludiana were before the Tribunal. While passing the award the Tribunal has disbelieved the disability certificate without any cogent reason contrary to the medical history and his treatment for two years. Even after seeing such meticulous medical history and record a layman may draw an impression that the claimant-appellant was under-treatment for two years. Even in 2009 he was also undergone corrective surgery and therefore, only in this backdrop the disability certificate of 50%, which was issued by the Medical Board of Government Medical College and is public document, cannot be doubted. Initially a nail was grafted in his left femur and subsequently corrective surgery was also done in the year 2009 as per medical history. The Tribunal has also erred in law in rejecting the disability certificate on the ground that it has been produced after two years of occurrence of the accident and the same is also unwarranted. Therefore, the medical certificate cannot be disbelieved without any cogent reason and as such, the finding recorded contrary to the aforesaid medical history by the learned Tribunal cannot sustain and accordingly, the same is rejected.

25. The disablement certificate issued by the Medical Board of a Government Medical College is a public document. The disablement of 50% as in the certificate is to be supported by other evidence either documentary or oral for the purpose of strengthening the cause before an appropriate court of law. The appellant has given a detailed evidence about his nature of injury and loss of earning capacity to which I do not find any nature of rebuttal or denial to establish the cause of the insurance company. In the present matter, no independent witness was called upon to examine on behalf of the insurance company in this regard. (Ref. **Rajesh Kumar alias Raju vs. Yudhvir Singh and another** (supra) (para-9) and **The New India Assurance Company Ltd. Through Divisional Manager vs. Mohammad Navi** (supra) (paras 4, 5 and 7).

26. In this regard it may be relevant to quote the observation of the Hon'ble Apex Court in the case of **Pt. Parmanand Katara Vs. Union of India and others**19, describing the necessity of calling the Doctor only when it is necessary by making following observation :-

"We also hope and trust that our law courts will not summon a medical professional to give evidence unless the evidence is necessary and even men in this profession are not made to wait and waste time unnecessarily and it is known that our law courts always have respect for the men in the medical profession and they are called to give evidence when necessary and attempts are made so that they may not have to wait for long. We have no hesitation in saying that it is expected of the members of the legal profession which is the other honourable profession to honour the persons in the medical profession and see that they are not called to give evidence so long as it is not necessary."

27. In my opinion, due to injuries on the body of the appellant, which is also

duly proved in evidence by the claimant and his doctor, he cannot freely move and attend to his duties. His movements are restricted to a large extent. It is for all these reasons, the Court feels that the Tribunal erred in law in not awarding any compensation under this head and hence, some enhancement under the head of pain and suffering and also under the head of permanent partial disability and loss of earning capacity is called for. This enhancement figure is arrived at taking into consideration all relevant factors.

28. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings. The Tribunal did not approach the issue in right direction and the conclusion of the Tribunal is erroneous. Having regard to the injuries suffered by the appellant, there is a definite loss of earning capacity and it calls for grant of compensation with the adoption of multiplier method.

29. The appellant/claimant was a pillion rider aged 45 years, earning Rs.8000/- per month. His permanent disability is assessed at 50% and his services were dispensed with. His chances of getting any other employment was bleak and even if he got any job, the salary was likely to be a pittance. Therefore, I assessed his loss of future earning capacity as 50%.

30. Taking into consideration the nature of injury, the permanent disability occurred on the body of the appellant/claimant, the expenditure incurred in receiving medical treatment in actual, the loss and mental pain suffered due to his involvement in accident, I consider it proper to enhance the compensation and hence the appellant/claimant is entitled to compensation under the following heads:

Monthly income of the injured before the accident	Rs.8000/- (Rs.4000/- from Toll Plaza and Rs.4000/- from Agriculture) x 12 = Rs.96,000/-
Permanent Disability	50 per cent
Loss of future earning per annum	Rs.48,000/-
Multiplier	14
Total loss of injured	Rs.6,72,000/-
Future economic loss	Rs.1,68,000/-
Pain, shock and sufferings	Rs.5000/-
Medical expenses	Rs.2,50,000/-
Travelling	Rs.5000/-
Special Diet	Rs.5000/-
Attendant charges for past & future	Rs.3000/-
Total	Rs.11,06,000/-

compensation	

31. As far as issue of rate of interest is concerned, it should be 9% in view decision of the Apex Court in Civil Appeal No.242/243 of 2020 (**National Insurance Company Ltd. vs Birender and others**) decided on 13 January, 2020 which is the latest in point of time.

32. For the aforesaid reasons, the present appeal filed by the claimant/appellant stands allowed and the award stands modified to the extent directed above. The amount be deposited by the respondent-Insurance Company within a period of 12 weeks from today with interest at the rate of 9% from the date of filing of the claim petition till the award and 6% thereafter till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

33. Incidentally, the appellant-Insurance Company prayed that the statutory deposit of Rs.25,000/- made before this Court for preferring this appeal be remitted back to the concerned Motor Accidents Claims Tribunal as expeditiously as possible in order to adjust the same with the amount of compensation to be paid to the claimant, however, such prayer is allowed.

34. Let original record be returned.

(2021)03ILR A288
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.03.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

FAFO Defective No. 1367 of 2012

Smt. Sushila Devi & Ors. ...Appellants
Versus
Devendra & Ors. ...Respondents

Counsel for the Appellants:
Anju Shukla, Sri Nigamendra Shukla

Counsel for the Opposite Parties:
Sri Rahul Sahai, Sri Ajay Singh, Sri Parihar

No future loss of income awarded in the impugned award-40% of the income as deceased was below 30 years of age. (E-7)

Cases cited:

1. Sarla Verma Vs Delhi Transport Corporation, (2009) 6 SCC 121

2.Anita Sharma & ors. Vs New India Assurance Company Limited & anr., (2021) 1 SCC 171

3. Smt. Munni Devi & 5 ors. Vs Heera Lal & 2 ors., FIRST APPEAL FROM ORDER No. - 2974 of 2017

4. Laxmi Devi & ors. Vs Md. Tanwar & ors., 2008 (2) TAC 394 SC

5. Smt. Munni Devi & 5 ors Vs Heera Lal & 2 ors, FIRST APPEAL FROM ORDER No. - 2974 of 2017

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Ajit Singh, J.)

1. Heard Sri Nigamendra Shukla, learned counsel for the appellants; Sri Rahul Sahai ably assisted by Sri Parihar, learned counsel for respondent-Sri Ram General Insurance Company; and Sri Ajay Singh, learned counsel for National

Insurance Company. Delay in filing this appeal has been condoned vide order of the date passed in delay condonation application.

2. This appeal, at the behest of the claimants, has been preferred against the judgment and order dated 06.04.2012 passed by Motor Accident Claims Tribunal/ Additional District Judge, Court no.03, Ghaziabad (hereinafter referred to as 'Tribunal') in M.A.C. No.449 of 2009 awarding a sum of Rs.3,75,761/- only with interest at rate of 6% conditionally.

3. By consent of learned counsel for parties, we propose to admit the appeal and hear and decide the lis finally as there appears prima facie error apparent on the face of the record. It is an appeal of the year 2012. The accident had taken place in the year 2009. It is apparent from award that no future loss of income has been awarded by the tribunal. The multiplier applied is also not in consonance with the judgment of **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121**. The Tribunal has awarded multiplier of 13 as per the age of the parents though the deceased was a married person. All this would permit us to take up the matter for final disposal so that the insurance company may not be burdened with huge amount by way of interest.

4. The record is not necessary as the Insurance Company have accepted their liability. The factum of accident having taken place is not in dispute. The issue of negligence decided by tribunal has also attained finality. The death was due to accidental injuries is also not disputed. The insurance company has not filed any appeal challeging the award. No orders adverse to owners or drivers are passed.

5. The only dispute raised relates to compensation which has been awarded the latest decision of the Supreme Court reported in **(2021) 1 SCC 171**, in case titled **Anita Sharma and others v. New India Assurance Company Limited and another** and the judgment of this Court in the case of **Smt. Munni Devi And 5 Ors. v. Heera Lal And 2 Ors., FIRST APPEAL FROM ORDER No. - 2974 of 2017** decided on 23.2.2021 will also have to be followed while deciding compensation.

6. The appellants have contended that the deceased was a Sales Executive in Colortech Polymer Company and was earning Rs.6,150/- with 12% P.F. and was also entitled to bonus. It is submitted by Shri Shukla that this amount has been disbelieved by the Tribunal, as no documentary evidence to prove the same was produced and oral testimony of PW-1 (father) and PW-3 (employer) has been disbelieved by the tribunal.

7. Learned counsel Shri Sahai assisted by Shri Parihar for the respondent-Insurance Company has contended that no evidence whatsoever was produced to prove that the deceased was in employment, namely, appointment letter, pay slip, and/or register in which name of the deceased might have been mentioned and, therefore, the tribunal has rightly not considered that the deceased was a salaried person and has considered his income as per the judgment of **Laxmi Devi and others v. Md. Tanwar and others, 2008 (2) TAC 394 SC** and has considered the income to be Rs.100/- per day as a labourer and, therefore, his income has rightly been considered to be Rs.2500/- per month. It is stated by Sri Sahai that the widow has already remarried and, therefore, there is no

question of any award being passed in her favour. It is further submitted that the fact that she had re-married and, therefore, the deductions should have been ½ for personal expenses. It is also submitted by Shri Parihar that as it is not proved that he was in what kind of employment and whether he was in fact employee or/not, the award of future income loss was not granted as the law was sattled in decision of Sarla Verma (Supra).

8. It is submitted by Shri Shukla that as far as the multiplier is concerned, the Tribunal has considered the judgment of Sarla Verma (Supra) but has considered the age of the parents and not of the deceased which could not have been done and the issue is no longer res integra rather, the age in case of married person even if the widow had relinquished her right. The multiplier to be awarded has to be as per the age of the deceased even if the law as applicable applied in those days, the multiplier should have been 17 as the deceased was not a bachelor. Per contra, Shri Parihar has very feebly argued that the age of the parents has been rightly considered as the widow has already remarried and, therefore, there should be no enhancement in the multiplier awarded. We cannot accept this submission of Shri Parihar.

9. It is further submitted by Sri Shukla that the rate of interest awarded in the year 2012 could not have been 6% even as per the Rule 220 (6) of Uttar Pradesh Motor Vehicles Rules (11th Amendment), 2011 should have been above 7%, in view of the judgment of this High Court it should have been 12% and according to the learned counsel, the non pecuniary damages granted are also on the lower side.

10. Having perused the judgment, one fact emerges that the widow remarried during the pendency of the litigation and the legal representatives are the parents and brother.

11. According to this Court, learned tribunal has committed an error apparent on the face of the record as strict adherence to principles of civil trappings cannot be made applicable to motor vehicles claim cases.

12. It is prima facie proved that the deceased was in service, namely, the father deposed on oath that the deceased was serving as a Sales Executive in Colour Tech Polymer Company. The claimants have examined the father of deceased as well as the widow and also the proprietor of the said company, who has deposed that the deceased was in service but there is no evidence in rebuttal led by the Insurance Company to come to a definite conclusion that the deceased was not employed. The deceased was a Graduate in Arts even if we consider the minimum wages of a labourer in the year 2009 and even if we go by the recent judgment of the Apex Court wherein it has been held that minimum wage would be made applicable which we are considering to be Rs.6,000/- per month, which we feel is just and proper, which is nearby to the income as an employee as mentioned by PW-1, PW-2 and PW-3.

13. The second error which is apparent on the face of the record is that the tribunal has not considered any amount for future loss of income. The decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050** will permit us to add future loss of income however even if it is considered that he was in employment it was a private employment and hence the parameters fixed for self employed will have to take into consideration namely 40% and not 50% as

orally submitted by Shri Shukla. We accept the alternative submission of Shri Sahai that if the Court grants future loss it has to be 40% of the income. Shri Shukla vehemently objects to this, but it would be 40% of the income as he has below 30 years of age, i.e., Rs.6000+ Rs.2400 which comes to Rs.8400/- per month.

14. The submission of Shri Sahai that, the widow has remarried and has not been granted any compensation, the loss for personal expenses should have been 1/2 and not 1/3, we are unable to accept this proposition, the reason being before the death of the deceased, he was happily married person, and he was residing with the joint family and, therefore, as per cardinal principle laid down in **Sarla Verma (Supra)** and later on **Pranay Sethi (Supra)** as there were three persons (parents and wife) 1/3 will have to be deducted for personal expenses.

15. Hence, the family would be entitled to Rs.5600/-p.m and we award the filial consortium of Rs.50,000/- in view of the latest decision of this Court in **Smt. Munni Devi And 5 Ors. v. Heera Lal And 2 Ors., FIRST APPEAL FROM ORDER No. - 2974 of 2017 decided on 23.2.2021** and Rs.30,000/- under other non-pecuniary damages.

16. Hence, the total compensation payable to the appellants as discussed herein above would be:

i. Income Rs.6000/- p.m.

ii. Percentage towards future prospects : 40% namely Rs.2400/-

iii. Total income : Rs. 6,000 + 2,400 = Rs.8,400/-

iv. Income after deduction of 1/3rd : Rs.5600/-

v. Annual income : Rs.5600 x 12 = Rs.67,200/-

vi. Multiplier applicable : 17

vii. Loss of dependency: Rs.67,200 x 17 = Rs.1142400/-

viii. Amount towards filial consortium : Rs.50,000/-

ix. Amount towards loss of estate : Rs.30,000/-

x. Amount awarded in medical expenses not disturbed.

xi. **Total compensation (vii+viii+ix): 12,22,400/-**

17. This takes us to the question of grant of interest. The repo rate is declining day in day out. The Rule 220 (6) of Uttar Pradesh Motor Vehicles Rules (11th Amendment), 2011 prescribes 7% rate of interest. We should not grant interest less than 7% interest and, therefore, in view of the decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)**, we consider it just and proper to award 7.5% rate of interest. The interest has to be from the date of filing of the claim petition and we confirm the same.

18. No other grounds are urged orally when the matter was heard.

19. 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 No.3, Sri Ram General 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 if deposited be deducted from the amount to be deposited.

20. The learned Registrar General is requested to circulate this judgment to the Tribunals for future guidance on question of multiplier and future income loss.

21. We are thankful to Shri Rahul Sahai assisted by Shri Parihar, Ajay Singh and Nigamendra Shukla for getting this matter disposed of expeditiously.

Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Ajit Singh, J.

(Ref: Civil Misc. Delay Condonation Application)

1. Heard learned counsel for the parties.

2. This is an application seeking condonation of delay in filing the appeal.

3. Cause shown for the delay is sufficient, hence, the delay is condoned.

4. This application, accordingly stands allowed.

(2021)03ILR A292
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2021

BEFORE

THE HON'BLE VIVEK AGARWAL, J.

FAO No. 2061 of 2016

The New India Assurance Company Ltd. ...Appellant
Versus
Smt. Rinku Devi & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Rakesh Bahadur

Counsel for the Opposite Parties:
Sri Yashwant Pratap Singh, Sri Awadhesh Kumar Malviya, Sri Vashishtha Tiwari

Plea of contributory negligence not made out-inspection report was not examined-neither it is an admissible document u/r 211-A of Rules, 1998-Appeal dismissed. (E-7)

Cases cited:

1. Machindranath Kernath Kasar Vs D.S. Mylarappa & ors.; (2008) 13 SCC 198

2.ICICI Lombard General Insurance Co. Ltd. Vs Smt. Reena Tyagi & ors. (FAFO No. 2190 of 2010)

3.Kusum Lata & ors. Vs Satbir & ors.; 2011 (2) TAC 4 (SC)

4. Saroj & ors. Vs Hethlal & ors.; 2011 (1) TAC 271 (SC)

5.United Provinces Vs Mt. Atiqa Begum, AIR 1941 FC 16
6. Garikapatti Veeraya Vs N. Subbiah Choudhury; AIR 1957 SC 540

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

1. Heard Sri Rakesh Bahadur, learned counsel for appellant-insurance company, Sri Yashwant Pratap Singh, learned counsel for claimant-respondent no. 1 and Sri Awadhesh Kumar Malviya, learned counsel for respondent no. 6.

2. This appeal has been filed by the insurance company being aggrieved of award dated 05.03.2016 passed by learned Motor Accident Claims Tribunal/District Judge, Deoria in MACP No. 374 of 2011, on the ground that driver of the offending vehicle was not impleaded as a party and further that aspect of contributory

negligence has not been considered by the learned claims tribunal, inasmuch as in the light of the inspection report, available on record, there was dent on the right hand side rear bumper of the vehicle bearing registration no. UP 61 T 0065 and therefore, motorcycle, on which deceased was travelling, had hit the truck from behind and on such premise, it is submitted that finding of contributory negligence should have been recorded by the learned claims tribunal.

3. Placing reliance on the provisions contained in Rule 204(7) of the U.P. Motor Vehicle Rules, 1998, it is submitted that Rules provide for impleadment of the driver of the vehicle involved in the accident to be necessarily a party in the application for compensation filed under Section 166 of the Act. Reliance is placed on the judgment of Hon'ble Supreme Court in case of ***Machindranath Kernath Kasar vs. D.S. Mylarappa and Others; (2008) 13 SCC 198***, referring to Para-42, it is submitted that *"Wrongdoers are deemed to be joint tortfeasors, within the meaning of the rule, where the cause of action against each of them in the same, namely that the same evidence would support an action against them, individually Accordingly, they will be jointly liable for a tort which they both commit or for which they are responsible because the law imputes the commission of the same wrongful act to two or more persons at the same time. This occurs in cases of (a) agency; (b) vicarious liability; and (c) where a tort is committed in the course of a joint act, whilst pursuing a common purpose agreed between them."*

Hence, employer and employee, the former being vicariously liable while the latter being primarily liable are joint tortfeasors and are therefore jointly and severally liable. However, by virtue of the fact that the cause of action is the same and that the same evidence would support an action against either, it follows that this evidence must necessarily include an examination of the driver who is primarily liable. To make a finding on negligence without involving the driver as at least a witness would vitiate the proceedings not only on the basis of the fact that the driver has not been given an opportunity to make a representation, but also because the evidence to make a finding regarding negligence would necessarily be inadequate."

4. Learned counsel for claimants, on the other hand, submits that as far as Rule 204 sub-rule (7) is concerned, that became effective from 26th September, 2011, whereas in the present case, accident had taken place on 04.07.2011, therefore, these Rules will not have any retrospective effect. Further, it is submitted that plea of contributory negligence is not made out, just due to the fact that an inspection report was produced, in which there is mention of damage to the rear bumper of the truck, inasmuch as author of the report was not examined. It is also submitted that non-impleadment of the driver will not be fatal to the case of the claimants, especially, when no such issue was framed before the learned claims tribunal and therefore, now at this stage, for the first time, raising a plea of this nature is not maintainable.

5. After hearing learned counsel for the parties and going through the record, plea of contributory negligence is not made out merely on the strength of inspection report on two grounds firstly, author of the inspection report was not examined before the court of law and secondly, it is not one of the documents admissible in evidence, as

per the provisions contained in Rule 211-A of the Rules of 1998 because there is no mention of inspection of vehicle involved in an accident under either Rules 203-A, 203-C and 203-D, in regard to which, presumption can be drawn. In fact, provision of inspection of vehicle involved in an accident is provided under Rule 203, however, it is not subject to the presumption, which can be drawn under Rule 211-A. Insurance company had also not examined any independent witness to deny the evidence of PW3 in regard to truck hitting the deceased, sitting on the motorcycle coming from opposite direction.

6. As far as impleadment of driver is concerned, it has come on record that this plea was not taken by the insurance company before the learned claims tribunal. It has also come on record that owner of the offending vehicle did not appear before the tribunal despite service of notice and therefore, he was proceeded ex-parte, as is mentioned in Para-3 of the impugned award. No such issue was framed at the instance of the insurance company in absence of any such defense taken by the insurance company before the learned tribunal.

7. Claimants had produced documents like release order of the vehicle, copy of bail application filed by the driver, his driving license, insurance policy, permit, fitness, pollution control report, etc. before the learned tribunal. Insurance company had filed copy of investigation report, in which they have not disputed the factum of accident taking place in the manner in which it was narrated to had taken place as per PW2-eye-witness. It has also come on record that PW3 had proved negligence of the driver of the offending truck and this could not be rebutted by the insurance company either confronting him with investigation report or any other document to prove that accident had taken place due to the negligence of the driver of the motorcycle.

8. As far as judgment in case of ***Machindranath Kernath Kasar (supra)*** is concerned, Hon'ble Supreme Court was dealing with the provisions contained in Rule 235 of Karnataka Motor Vehicles Rules, 1989, requiring the tribunal to send notice to the driver or owner and in that context, it held that in an application for compensation, the driver should be impleaded as a party although, he may not be a necessary party, as his non-impleadment would not vitiate the entire proceedings. In the present case, provisions similar to Rule 235 of Karnataka Motor Vehicles Rules, 1989, came into effect when sub-rule (7) of Rule 204 of U.P. Motor Vehicles Rules, 1998 was brought into effect vide Notification No. 777/XXX-4-2011-4(3)-2010, dated 26th September, 2011.

9. In case of ***ICICI Lombard General Insurance Co. Ltd. vs. Smt. Reena Tyagi and Others*** (FAFO No. 2190 of 2010), vide order dated 27.03.2017, Division Bench of this Court has discussed the law laid down in case of ***Kusum Lata and Others vs. Satbir and Others; 2011 (2) TAC 4 (SC)***, wherein it is held that for the purposes of claiming compensation under Section 166 of the Motor Vehicles Act, it is not necessary to mention the registration of the offending vehicle or even the name of the driver. Similarly, reference is also given of the judgment of Supreme Court in case of ***Saroj and Others vs. Hethlal and Others; 2011 (1) TAC 271 (SC)***, wherein the Apex Court has held that where the owner of the

vehicle admits the accident, in such cases, no further enquiry regarding the involvement of the vehicle is necessary. Thus, it is clear that when owner of the vehicle remained ex-parte, despite service of notice, then as per the law of pleading, there is deemed admission on the part of the owner of the vehicle admitting the factum of the accident, coupled with the fact that PW3 has not only proved the factum of accident, but also fact of negligence of the driver of the offending truck.

10. As far as issue of retrospective operation of the amendment in Rule 204(7) is concerned, law is clear in this regard and it provides that courts would undoubtedly rely very strongly against applying a new Act to a pending action, when language of the statute does not compel them to do so. **(United Provinces vs. Mt. Atiqa Begum), AIR 1941 FC 16.** In case of ***Garikapatti Veeraya vs. N. Subbiah Choudhury; AIR 1957 SC 540***, P.553 (Para-25), it has been held that the golden rule of construction is that, in absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed. In view of such settled principle of law, it is apparent that amendment in U.P. Motor Vehicle Rules making it mandatory to implead the driver of the vehicle involved in the accident shall not be retrospective in operation, but only beneficial provision can have retrospective application, as has been applied by Hon'ble Division Bench of this Court in case of ***ICICI Lombard General Insurance Co. Ltd. vs. Smt. Reena Tyagi and Others (supra).***

11. Thus, this plea of non-impleadment of driver having adverse impact on the case of the claimants will not be applicable to the present facts and circumstances of the case, therefore, insurance company having failed to substantiate both the grounds namely that of contributory negligence and retrospective application of the amended Rules, appeal fails and is ***dismissed***.

(2021)03ILR A295
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2021

BEFORE

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

Habeas Corpus Writ Petition No. 174 of 2021

Krishnakant Pandey (corpus) & Ors. ...Petitioners

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Kuldeep Singh, Sri Vipin Vinod

Counsel for the Respondents:
A.G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 498A, 323, 504, 506, 392 - Domestic Violence Act - Section 12 - Code of criminal procedure, 1973 - Section 125 - Dowry prohibition Act,1961 - Sections 3/4 - Hindu Marriage Act - Section 9 - Writ of Habeas Corpus -custody of minor children - an application seeking a writ of habeas corpus for custody of minor children - principal consideration for the court would be to ascertain - whether the custody of the children can be said to be unlawful and illegal - whether their welfare requires that the present custody should be changed and the children should be handed over in the care and custody of somebody else other than in whose custody they presently are. (Para - 13)

By mean of the present petition the petitioner no.3 stating himself to be the father of petitioner nos. 1 and 2 (minor children of age about 9 and 7 years respectively), has sought to assert that the two children are in illegal custody of Respondent No.4, who is their mother. (Para -2)

HELD: - In a case, as the present one, once it is ascertained that the private respondent is none other than the biological mother of the minor children, the custody of the children with their mother cannot, *prima facie*, be stated to be illegal. (Para -17)

Habeas corpus petition dismissed. (E-6)

List of Cases cited: -

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

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

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

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

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

6. Rachhit Pandey (Minor) & anr. Vs State of U.P. & 3 ors. , 2021 (2) ADJ 320

7. Master Manan @ Arush Vs St. of U.P. & ors., (Habeas Corpus W. P. no. 1026 /2019, decided on 18.02.2021)

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

1. Heard Sri Kuldeep Singh, learned counsel for the petitioners and Sri Arvind Kumar, learned AGA for the State-respondents.

2. By mean of the present petition the petitioner no.3 stating himself to be the father of petitioner nos. 1 and 2 (minor children of age about 9 and 7 years respectively), has sought to assert that the two children are in illegal custody of Respondent No.4, who is their mother.

3. The principal grievance which is sought to be raised by the counsel for the petitioners is with regard to the custody of two minor children and a claim for grant of visitation rights. Proceedings under Section 12 of the Domestic Violence Act and Section 125 Cr.P.C. initiated by the Respondent No.4 are also stated to be pending. An FIR under Sections 498A, 323, 504, 506, 392 IPC and 3/4 of Dowry Prohibition Act is stated to have been lodged by the respondent no. 4 which was registered as Case Crime No. 399 of 2013 and the criminal case is said to be pending.

4. As per the pleadings in the petition the Respondent No.4 (wife) left her matrimonial home on 15.07.2013 on account of a matrimonial discord and a petition under Section 9 of the Hindu Marriage Act registered as Case No. 164 of 2013 (Manoj Kumar Pandey vs. Priya Pandey) was filed before the Family Court which is stated to be pending.

5. It is sought to be contended that some efforts for re-conciliation between the parties were made sometime in the year 2019. However, the fact remains undisputed that the Respondent No.4 (wife) has not returned to her matrimonial home and that she is living separately with her minor children.

6. Learned AGA appearing for the State-respondents submits that in view of admitted fact that respondent no.4 left her matrimonial home way back in the year 2013 along with her minor children and is

living separately it cannot be said that the minor children are any kind of illegal custody. He further pointed out that a petition for restitution of conjugal rights has been filed by the petitioner no.3 (husband) which is pending and also cases under the Domestic Violence Act, Section 125 Cr.P.C. and also a criminal case registered pursuant to an FIR lodged by the Respondent No.4 (wife) are also pending.

7. In a petition seeking a writ of habeas corpus in a matter relating to a claim for custody of a child, the principal issue which is to be taken into consideration is as to whether from the facts of the case, it can be stated that the custody of the child is illegal.

8. The writ of habeas corpus is a prerogative writ and an extraordinary remedy. It is writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown, as held in **Mohammad Ikram Hussain vs. State of U.P. and others**1 and **Kanu Sanyal vs. District Magistrate Darjeeling**2.

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

10. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration in **Nithya Anand Raghvan v State (NCT of Delhi) and another**3, and it was held that the principal duty of the court in such matters is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person.

11. Taking a similar view in the case of **Sayed Saleemuddin vs. Dr. Rukhsana and others**4, it was held that in a habeas corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful or illegal and whether the welfare of the child requires that the present custody should be changed.

12. The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for custody of a minor was examined in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others**5, and it was held that the petition would be maintainable where detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective.

13. In an application seeking a writ of habeas corpus for custody of minor children, as is the case herein, the principal consideration for the court would be to ascertain whether the custody of the children can be said to be unlawful and illegal and whether their welfare requires that the present custody should be changed and the children should be handed over in the care and custody of somebody else other than in whose custody they presently are.

14. Proceedings in the nature of habeas corpus may not be used to examine

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

15. In a case where facts are disputed and a detailed inquiry is required, the court may decline to exercise its extraordinary jurisdiction and may direct the parties to approach the appropriate court. The aforementioned legal position has been considered in recent decisions of this Court in **Rachhit Pandey (Minor) And Another vs. State of U.P. and 3 others6** and **Master Manan @ Arush vs. State of U.P. and others**7.

16. In the present case it is undisputed that the respondent no. 4 (wife) along with her minor children, is living separately from the petitioner no. 3 (husband) since the year 2013.

17. In a petition for a writ of habeas corpus, the Court would be required to examine, at the threshold, whether the minor is in lawful or unlawful custody of the private respondent named in the petition. In a case, as the present one, once it is ascertained that the private respondent is none other than the biological mother of the minor children, the custody of the children with their mother cannot, *prima facie*, be stated to be illegal.

18. In the facts of the case, as aforesaid, only in exceptional situation, the custody of the minor children may be directed to be taken away from the mother for being given to any other person, including the father of the children, in exercise of writ jurisdiction.

19. It may be reiterated that a writ of habeas corpus, though a writ of right is not to be issued as a matter of course, particularly when the writ is sought against a parent for the custody of a child.

20. Proceedings for restitution of conjugal rights under Section 9 of the Hindu Marriage Act initiated on a petition stated to have been filed by the petitioner no. 3 (husband), being pending, any claim with regard to ancillary reliefs pertaining to custody or visitation rights may be agitated in the said proceedings and the present petition seeking a writ of habeas corpus is not liable to be entertained in the facts of the case.

21. The petition stands accordingly dismissed.

(2021)03ILR A298
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.03.2021

BEFORE

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

Habeas Corpus Writ Petition No. 192 of 2021

Master Tarun @ Akchhat Kumar & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rajesh Maurya

Counsel for the Respondents:
A.G.A.

Father claims custody of his minor children-claiming custody with their mother as illegal-custody of minor is

directed to be taken away from mother - only in exceptional circumstances-custody not illegal-W.P. dismissed. (E-7)

Held, In a petition for a writ of habeas corpus concerning a minor child, the Court, in a given case, may direct to change the custody of the child or decline the same keeping in view the attending facts and circumstances.For the said purpose it would be required to examine whether the custody of the minor with the private respondent, who is named in the petition, is lawful or unlawful. In the present case,the private respondent is none other than the biological mother of the minor children. This being the fact, it may be presumed that the custody of the children with their mother is not unlawful.**(para17)**

Cases cited:

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

2. Kanu Sanyal Vs District Magistrate Darjeeling, (1973) 2 SCC 674

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

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

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

6. Rachhit Pandey (Minor) & anr. Vs St. of U.P. & 3 ors., 2021 (2) ADJ 320

7. Master Manan @Arush Vs St. of U.P. & 8 ors., 2021 0 Supreme (All) 230

8.Krishnakant Pandey (Corpus) & 2 ors. Vs St. Of U.P. & 4 ors., 2021 0 Supreme (All) 220

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

1. Heard Sri Rajesh Maurya, learned counsel for the petitioners and Sri Ratnendu Kumar Singh, learned A.G.A. appearing for the State respondents.

2. The present petition for a writ of habeas corpus has been filed on behalf of two minor children of age about 11 years and 5 years respectively, by one Ramesh Chandra Kanaujiya asserting himself to be their father and natural guardian. It is sought to be contended that the two minor children, who are living with respondent no. 4 their mother, are under her illegal custody, and accordingly Ramesh Chandra Kanaujiya, being the father, has claimed their custody.

3. The records of the case reflect that earlier a Habeas Corpus Writ Petition No. 561 of 2020 (Meenu Devi Kanaujiya Vs. State of U.P. and 3 others) was filed by Ramesh Chandra Kanaujiya on behalf of his wife for a writ of habeas corpus by claiming that she was under an illegal detention. In the aforestated writ petition, pursuant to issuance of a *rule nisi*, the wife, Smt. Meenu Kanaujiya, was produced before the Court on 10.11.2020 and considering the stand taken by her, it was held that no case of illegal confinement or illegal detention had been made out and in view thereof the *rule nisi* stood discharged and the petition was dismissed.

4. The pleadings in the petition indicate that the respondent no. 4 is working as a staff nurse at Community Health Centre, Dasna in District Ghaziabad.

5. It is undisputed that the respondent no. 4 is living independently and separately from her husband and the two minor children, petitioner nos. 1 and 2, are under her care and custody. The judgment and order dated 10.11.2020 passed in earlier Habeas Corpus Writ Petition No. 561 of 2020 also indicates that the respondent no.

4 is living separately from her husband on her own free will.

6. Learned counsel for the petitioners has not disputed the aforesaid fact with regard to the respondent no. 4 living separately and having her own independent source of income and the two minor children being under the care and custody of the respondent no. 4, their mother.

7. Learned A.G.A. appearing for the State respondents points out that the custody of the minor children with their mother in the facts and circumstances of the case cannot be stated to be illegal and any claim which is sought to be set up on behalf of the father with regard to guardianship or custody may be agitated before the appropriate forum and a petition for a writ of habeas corpus would not be entertainable in the facts of the case.

8. The writ of habeas corpus is a prerogative writ and an extraordinary remedy. It is writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown, as held in **Mohammad Ikram Hussain vs. State of U.P. and others**1 and **Kanu Sanyal vs. District Magistrate Darjeeling**2.

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

10. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration in **Nithya Anand Raghvan v State (NCT of Delhi) and another**3, and it was held that the principal duty of the court in such matters is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person.

11. Taking a similar view in the case of **Sayed Saleemuddin vs. Dr. Rukhsana and others**4, it was held that in a habeas corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful or illegal and whether the welfare of the child requires that the present custody should be changed. It was stated thus:-

"11. ...it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court…"

12. The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for custody of a minor was examined in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others**5, and it was held that the petition would be maintainable where

detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective. The observations made in the judgment in this regard are as follows:-

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

x x x

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

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

13. In an application seeking a writ of habeas corpus for custody of minor children, as is the case herein, the principal consideration for the court would be to ascertain whether the custody of the children can be said to be unlawful and illegal and whether their welfare requires that the present custody should be changed and the children should be handed over in the care and custody of somebody else other than in whose custody they presently are.

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

15. In a case where facts are disputed and a detailed inquiry is required, the court may decline to exercise its extraordinary jurisdiction and may direct the parties to approach the appropriate court. The aforementioned legal position has been considered in a recent decisions of this Court in **Rachhit Pandey (Minor) And Another vs. State of U.P. and 3 others6, Master Manan @ Arush vs. State of U.P. and 8 others7** and **Krishnakant Pandey (Corpus) And 2 Others vs. State Of U.P. And 3 Others**8.

16. It is undisputed that two minor children are under the care and custody of their mother, respondent no. 4, who is living independently and separately from her husband. It is not the case of the petitioner that the children were forcibly taken away by the mother from the custody of the father.

17. In a petition for a writ of habeas corpus concerning a minor child, the Court, in a given case, may direct to change the custody of the child or decline the same keeping in view the attending facts and circumstances. For the said purpose it would be required to examine whether the custody of the minor with the private respondent, who is named in the petition, is lawful or unlawful. In the present case, the private respondent is none other than the biological mother of the minor children. This being the fact, it may be presumed that the custody of the children with their mother is not unlawful. It would only be in an exceptional situation that the custody of a minor may be directed to be taken away from the mother for being given to any other person - including father of the child, in exercise of writ jurisdiction. This would be so also for the reason that the other parent, in the present case, the father, can take resort to the substantive statutory remedy in respect of his claim regarding custody of the child.

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

19. Counsel for the petitioners has not disputed the aforesaid factual position and the only grievance, which is sought to be raised, is with regard to a claim for visitation rights on behalf of the father.

20. The contention which has been sought to be raised by the counsel for the petitioner with regard to the father's claim for custody and visitation rights, are matters which are to be agitated in appropriate proceedings.

21. In view of the aforestated facts, this Court is not inclined to entertain the writ petition seeking a writ of habeas corpus, in the facts and circumstances of the case.

22. The petition stands accordingly dismissed.

(2021)03ILR A303
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.02.2021

BEFORE

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

Habeas Corpus Writ Petition No. 283 of 2020

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

Counsel for the Petitioners:
Sri Sushil Kumar Pandey

Counsel for the Respondents:
A.G.A.

Husband filed petition seeking wife's custody-undisputed fact of husband's extra marital affair and child born out of it-wife went away out of free will-writ of habeas corpus to regain his wife-may not be available as a matter of course-W.P. dismissed. (E-7)

Cases cited:

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

2.Kanu Sanyal Vs District Magistrate, Darjeeling, (1973) 2 SCC 674

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

1. Heard Sri Sushil Kumar Pandey, learned counsel for the petitioners and Sri Arvind Kumar, learned Additional Government Advocate appearing for the State – respondents.

2. The present petition for a writ of habeas corpus has been filed with a prayer to produce the corpus of the petitioner no.1, stated to be under detention.

3. A progress report/affidavit of the Circle Officer, City-I, District Muzaffarnagar was filed by the learned Additional Government Advocate on the previous occasion on 02.02.2021 and on the basis thereof a submission was made that the investigation had revealed that the petitioner no.1 had left her matrimonial home on her own on account of discord with her husband, petitioner no.2, for the reason that he is stated to have entered into another marriage and a child is also stated to have been born out of the wedlock and in view of the same it was contended that the present petition for a writ of habeas corpus would not be entertainable.

4. Learned counsel for the petitioners had prayed for an adjournment in order to address the Court on the aforesaid objection raised by the learned Additional Government Advocate.

5. Today, when the matter is taken up, the learned counsel appearing for the petitioners though disputing the *factum* of the second marriage has not controverted the fact of the petitioner no.2 being in an extra marital relationship and also that a child was born out of the said relationship. He has also not disputed the fact that the petitioner no.1 (wife) left her matrimonial home on account of the discord with the petitioner no.2 (husband).

6. No other point was urged.

7. The writ of habeas corpus is a prerogative writ and an extraordinary remedy. It is writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being

shown, as held in **Mohammad Ikram Hussain *v* State of U.P. and others**1 and **Kanu Sanyal *v* District Magistrate Darjeeling**2.

8. The writ of habeas corpus has been held as a *festinum remedium* and accordingly the power would be exercisable in a clear case. The remedy of writ of habeas corpus at the instance of a person seeking to obtain possession of someone whom he claims to be his wife would therefore not be available as a matter of course. The observations made in the decision in **Mohammad Ikram Hussain** (supra) in this regard are as follows:-

"13. Exigence of the writ at the instance of a husband is very rare in English Law, and in India the writ of habeas corpus is probably never used by a husband to regain his wife and the alternative remedy under S. 100 of the Code of Criminal Procedure is always used. Then there is the remedy of civil suit for restitution of conjugal rights. Husbands take recourse to the latter when the detention does not amount to an offence and to the former if it does. In both these remedies all the issues of fact can be tried and the writ of habeas corpus is probably not demanded in similar cases if issues of fact have first to be established. This is because the writ of habeas corpus is *festinum remedium* and the power can only be exercised in a clear case. It is of course singularly inappropriate in cases where the petitioner is himself charged with a criminal offence in respect of the very person for whose custody he demands the writ."

9. In view of the other remedies available for the purpose under criminal and civil law, issuance of a writ of habeas corpus at the behest of a husband to regain his wife may not be available as a matter of course and the power in this regard may be exercised only when a clear case is made out.

10. In view of the facts of the present case, the petitioner no.1 having left her matrimonial home on her own on account of a matrimonial discord, the present petition for a writ of habeas corpus at the behest of the petitioner no.2 (husband) would not be entertainable.

11. The petition stands accordingly dismissed.

(2021)03ILR A304
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.03.2021

BEFORE

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

Habeas Corpus Writ Petition No. 340 of 2020

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

Counsel for the Petitioners:
Sri Ajay Kumar

Counsel for the Respondents:
A.G.A., Sri Pankaj Kumar Govil, Sri Pankaj Govil

Father claimed custody of minor girl as recorded by high school certificate-and alleged her abduction by opposite parties-minor sttated she wants to live with opposite party and has married out of her free will-she has life threat with her father-unil she atains majority she has to be housed in shelter home-and upon attaining majority -she is free to go wherever she likes-Petition allowed.(E-7)

Cases cited:

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

2.Smt. Priyanka Devi Vs St. of U.P. & ors., 2018 (1) ACR 1061

3. Suhani Vs St. of U.P.,8 2018 SCC OnLine SC 781

4. Nisha Naaz @ Anuradha & anr. Vs St. of U.P. & ors., 2019 SCC OnLine All 4062

5. Independent Thought Vs U.O.I. & anr., (2017) 10 SCC 800

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

This Habeas Corpus Writ Petition has been instituted on behalf of Km. Chhavi by her father Chhanga, praying that this Court do issue a *rule nisi*, ordering respondent nos. 2, 3 and 4 to produce Km. Chhavi before this Court, and order her to be set at liberty, according to her will and wish.

2. It is asserted in the Habeas Corpus Writ Petition that Chhavi is a minor, who was born on 18.07.2003. She is Chhanga's daughter, who is the second petitioner here. This petition has been effectively brought by Chhanga. A First Information Report1 was lodged by Chhanga on 20.03.2020 and registered with Police Station - Barsana, in the District of Mathura, at 01:53 p.m., against one Laxman, son of Kamal Yadav, Vishnu, son of Kamal Yadav, and Girdhari Yadav, son of Gopal, with allegations that on 18.03.2020 at 4 O' clock in the afternoon, Chhanga's minor daughter, Chhavi, aged about 16 years, had gone to fetch her cattle, when the three accused were seen around her by Seema, wife of Prem Chandra. Chhavi went traceless ever since. A hunt was launched, but to no avail. It was reported that Seema had told the informant that she had seen the three accused talking to Chhavi, and further that she had seen Chhavi accompanying the three men towards bus stand. It was said in the First Information that Seema thought that Chhavi was going with the accused in connection with some errands. It is further reported that when co-accused Girdhari Yadav was asked about Chhavi by the informant and his family, he confessed that Chhavi had gone along with his nephew (reference to Laxman). It was said in the First Information further that Chhavi was a minor, and the three accused had taken her away by blandishment. The aforesaid information was registered as Crime No. 84 of 2020, under Sections 363 and 366 of Indian Penal Code, 18602, Police Station - Barsana, District - Mathura. There is a further information lodged about some kind of a video relating to Chhavi, that was made viral by co-accused Girdhari Yadav. The video shows that Chhavi was in the company of Laxman. This FIR was registered on 15.05.2020 separately as Crime No. 133 of 2020, under Section 66 of the Information Technology Act, 2000, Police Station - Barsana, District – Mathura.

3. It appears that Chhavi was recovered by the police and produced before the Magistrate on 20.05.2020, where her statement under Section 164 of the Code of Criminal Procedure, 1973, was recorded. The statement unequivocally says that on 18.03.2020, Chhavi had accompanied Laxman of her freewill, whom she knew for the past 3-4 years. She also said that she was in love with him. It is clearly indicated that she was not taken away by blandishment, but had gone of her freewill. It was also said that she has married Laxman and is now in the family way. Chhavi was then forwarded, in custody, to the Child Welfare Committee, Mathura3. It is asserted in the writ petition that the CWC handed over Chhavi, who is a victim, into the care and custody of Meena, wife of Kamlesh. Meena is Laxman's sister. It is also said that there is no document available to the petitioner to

show that any written order was made by the CWC, entrusting custody of Chhavi to the fourth respondent. It is asserted that it is in collusion between the Investigating Officer, the Chairperson of the CWC and the accused Laxman, that Chhavi has been entrusted into the custody of Laxman's sister Meena, the fourth respondent. It is also brought on record that after investigation, a charge-sheet has been filed against Laxman under Sections 363, 366, 376 of IPC and Section 7/4 of the Protection of Children from Sexual Offences Act, 20124. Chhanga asserts that his daughter is, for the time being, in Meena's custody, who is, as already said, the accused's sister, under some kind of an order of the CWC. It is asserted that Chhavi's custody with Meena is absolutely illegal, and she ought to be liberated therefrom.

4. This petition was admitted to hearing on 08.10.2020, and a *rule nisi* was issued, ordering the Senior Superintendent of Police, Mathura to cause Chhavi to be produced from the custody of respondent no. 4, before the Court on 14.10.2020. The Chairperson of the CWC, respondent no. 3, was also directed to file a counter affidavit, showing cause how Chhavi's custody, who is a minor, was entrusted by her in her capacity as the Head of the CWC, to a stranger, as against the father.

5. In compliance with the *rule nisi* issued on 08.10.2020, an affidavit of compliance has been filed by the Investigating Officer, but Chhavi was not produced. The defence for not carrying out the rule was that Chhavi is in the family way, and not in a position to be produced before the Court. The Court, *vide* order dated 14.10.2020, accepted the aforesaid explanation, but in order to prevent the rule from being frustrated, modified it to provide that the District Judge, Mathura, would depute a lady Judicial Officer posted in his judgeship to go over to Chhavi, for the time being residing at Baldev ka Bansh, Police Station - Sikri, District - Bharatpur, Rajasthan, and record her stand about the case of illegal detention by the fourth respondent, Meena. Necessary assistance to the Judicial Officer was ordered to be provided by the District Magistrate, Mathura and the Senior Superintendent of Police, Mathura. The two were also required to get in touch with their respective counterparts in District Bharatpur, State of Rajasthan, to facilitate execution of the Court's commission. No return was filed by the Chairperson, CWC, in compliance with the order dated 08.10.2020 and, therefore, she was granted further time to file a counter affidavit. The matter was directed to come up on 20.10.2020, along with the Judicial Magistrate's report. There was some delay in the restoration of the Judicial Magistrate's report to the record, on account of which, there were short adjournments. The matter was taken up on 22.10.2020, when we had before us, the Judicial Magistrate's report dated 15.10.2020, carrying Chhavi's statement recorded on commission at Bharatpur. It would be relevant to extract the stand that Chhavi took before the Judicial Magistrate, Mathura, acting as this Court's commissioner. The said statement recorded on 15.10.2020 reads :

नाम– छवि उम्र– 20 वर्ष पिता– छग्गा निवासी– बरसाना मथुरा द्वारा आज दिनांकित 15.10.2020 को स्वैच्छा से बयान दिया जा रहा है कि– मेरी उम्र 20 वर्ष है। मैंने 12जी की पढ़ाई ब्रजेश्वरी बालिका एण्टर कॉलेज बरसाना मथुरा से की है। मेरी कागज पर 18.07.2003 जन्मतिथि अंकित है। मेरे पिता ने कागजों पर कम उम्र

लिखाई है। मैं लक्ष्मण को 3–4 साल से जानती थी। मैंने हिन्दू रीति रिवाज से 24.3.2020 को भोपाल में अपनी मर्जी से लक्ष्मण से शादी कर ली। मेरे गर्भ को 9 माह पूरे हो चुके है। शादी के समय मैं 2 माह की गर्भवती थी। 4 माह पूर्व मैंने स्वयं अपनी ननद मीना को फोन किया और नारी–निकेतन से ले जाने को कहा। 4 माह पूर्व मैं अपनी मर्जी से मीना के साथ बल्देव वास आ गई। मैं मीना के साथ किसी दबाव में नहीं आयी थी। तब से मैं स्वैच्छा से मीना के ससुराल बल्देव बास में रह रही हूं। मीना द्वारा मुझे बल्देव वास में किसी दबाव में नहीं रखा गया। मैं यहां स्वैच्छा से रह रही हूं। मैं स्वैच्छा से बिना किसी दबाव के मीना के पास रहना चाहती हूं। फिर मैं अपने पति लक्ष्मण के पास जाउंगी। मेरे पापा मुझे व लक्ष्मण को जान से मारने की कहते है। इसके अलावा मुझे कुछ नहीं कहना है।

प्रश्न– आप जो आज बयान दे रही है वो किसी भी प्रकार के दबाव में तो नहीं दे रहीं है?

उत्तर– मैं अपनी स्वैच्छा से बिना किसी दबाव के बयान दे रही हूं।

Date- 15/10/2020
ह0 (Archana Singh)
ह0 छवि न्यायिक मजिस्ट्रेट
छवि हस्ताक्षर मथुरा

प्रमाणित किया जाता है कि उक्त बयान छवि के स्वैच्छा पूर्वक बोलने पर मेरे द्वारा अंकित किया गया। छवि ने उक्त बयान स्वैच्छा से बिना किसी दबाव के दिया है। छवि द्वारा बयान पढ़कर सुनकर तस्दीक किया गया।

Date- 15/10/2020
ह0 (Archana Singh)
छवि न्यायिक मजिस्ट्रेट
छवि हस्ताक्षर मथुरा

6. An affidavit of compliance was filed by Ms. Archana Varshney, Chairperson, CWC dated 19.10.2020. A perusal of this affidavit shows that it is the Chairperson's stand on behalf of the CWC that on 08.10.2020, Chhavi submitted an application before the CWC that she went along with Laxman of her freewill, and that she was in the family way. She further disclosed to the CWC that she did not want to go to her parents, as they would murder her and cause a pre-mature termination of her pregnancy. She also disclosed to the CWC that Laxman's parents and his sister would look after her well, as also her child. She said that she wants to go with them. She made a request that she may be entrusted to Meena's care. A copy of the application made on behalf of Chhavi has been annexed as Annexure-1 to the counter affidavit filed by the Chairperson of the CWC. It is also said in the affidavit under reference that on 22.05.2020, respondent no. 4 Meena, Laxman's sister, submitted an application to the CWC, with a request that she wants to take Chhavi in her care and custody, and that she would take proper care of Chhavi and her child. A copy of that application too, is annexed to the return filed by the Chairperson, CWC. There is a specific assertion in paragraph no. 8 of the affidavit filed under reference, that neither Chhavi's parents nor any of her family members made an application to the CWC, asking for her custody.

7. The CWC, taking into account the proliferation in the number of active CoViD-19 cases, and bearing in mind Chhavi's welfare and that of her child, that could be best secured under the circumstances, directed that she be placed in the custody of the fourth respondent, Meena. Meena was put under a direction to take all proper care of Chhavi and to periodically apprise the CWC with regard to her welfare. The CWC also directed the Investigating Officer to submit a report to them from time to time regarding Chhavi's welfare. There is a specific assertion in paragraph no. 9 of the Chairperson, CWC's affidavit that the fourth respondent, Meena,

is regularly updating the CWC with regard to Chhavi's welfare. It is also asserted that the Investigating Officer has also submitted a report with regard to the victim's care. A copy of the order of the CWC dated 22.05.2020, entrusting her care and custody to the fourth respondent, is annexed, as also an undertaking furnished by respondent no. 4 Meena, attested by two witnesses, to wit, Sushil, son of Ami Chand and Amar Singh, son of Late Gopal. A copy of the Investigating Officer's report dated 24.08.2020 submitted to the CWC regarding Chhavi's welfare is also annexed. The Chairperson of the CWC has also asserted in paragraph no. 11 of her affidavit that Chhavi has made an application to the District Magistrate, Mathura, asserting that her parents would do her to death, and that they are threatening to do so by an acid attack. She has also expressed an apprehension about a threat to her child's life, then still in her womb, informing the District Magistrate that she does not want to meet her parents.

8. It must be noticed that the order of the CWC, which is signed by the Chairman and two members, is one passed under Rule 18(8) and 19(7) of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016. The order is made in Form 19 to the Rules. It is an order apparently made pending inquiry and directs Chhavi to be placed in the foster care of respondent no. 4, temporarily. Apart from the standard directions carried in the order, the following directions have been specifically made :

किशोरी को Foster care में दिया जा रहा है। पिता पक्ष से कोई भी प्रार्थना पत्र सुपुर्दगी में लेने हेतु नहीं दिया गया है। किशोरी का Follow-up प्रतिमाह किया जाएगा। I.O. ऐसा करना सुनिश्चित करें।

सूचनार्थ–

1. I.O. थाना बरसाना
2. D.P.O. मथुरा

9. This Court has perused the record and considered the stand of parties, including the stand of the CWC, expressed through its Chairperson. There is little issue on facts between Chhanga, Chavi's father, on one hand, and Chhavi and Meena on the other. Chhavi's stand, recorded by the learned Judicial Magistrate, Mathura, spares no doubt that she is staying of her freewill with respondent no. 4, without any compulsion, duress or pressure. Speaking in simple terms, for a fact, Chhavi cannot be said to be in any kind of illegal confinement. Rather, it is apparent that she is staying with Meena of her freewill. The statement also makes it vivid that Chhavi has married Meena's brother, Laxman, of her freewill. The sole question, therefore, to determine is, whether Chhavi is within her rights under the law to stay of her freewill with Meena, who is Laxman's sister, the man she has married. Now, Chhavi is claimed to be a minor and she has acknowledged her date of birth recorded in her high school certificate to be 08.07.2003, with the qualification that she is aged 20 years for a fact, and that her date of birth has been incorrectly recorded at her father's instance. Now, if it were to be held that Chhavi was a minor on the date she married Laxman, a subsidiary question that would also be of same consequence to the parties' future is, whether the marriage would be void or voidable.

10. In the opinion of this Court, it is very difficult to accept the submission advanced on behalf of both Chhavi and Smt. Meena, that this Court may hold her to be a major, by considering evidence contrary to Chhavi's recorded date of birth

in her high school certificate. To our mind, Chhavi cannot be referred to a medical examination for the determination of her age, so long as her date of birth founded on her high school certificate is available. This Court has perused the high school certificate relating to Chhavi, where she appeared in the examination of 2018 conducted by the U.P. Board of High School and Intermediate Education. A copy of the said certificate is on record as a part of Annexure no. 3 to the writ petition. There, Chhavi's date of birth is clearly mentioned as 08.07.2003. This fact is acknowledged by Chhavi in her statement made before the Judicial Magistrate, too. Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 20155 provides :

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. Section 94(2) of the Act of 2015, which provide for the determination of a juvenile's age, have been extended in their application to the victim as well in **Jarnail Singh v. State of Haryana**6. The issue was considered in a Division Bench decision of this Court in **Smt. Priyanka Devi v. State of U.P. and Others**7 to which I was a party. It was held in **Priyanka Devi** *(supra)* 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) of the Act of 2015 spare no room for the Court to look into any evidence, in the face of a date of birth certificate from the school or the matriculation, or an equivalent certificate from the examination board. In the event, evidence about the date of birth postulated in Clause (i) of sub-Section (2) of Section 94 of the Act of 2015 is not available, the birth certificate given by the corporation or municipal authority or a *panchayat*, as the case may be, is the next evidence, in order of priority, that would become relevant and can be considered to determine the prosecutrix's age. If the evidence envisaged in Clause (ii) of sub-Section (2) of Section 94 is also not forthcoming, the age of the victim/prosecutrix is required to be determined by an ossification test or any other medical test for the determination of age that may have gained scientific acceptability. That test is to be conducted on the orders of the CWC or the Juvenile Justice Board. In a given situation, the jurisdiction to order a medical test may also be exercised by a court before whom an issue about the victim's age arises. Therefore, notwithstanding the prosecutrix's stand that she is 20-years-old and has married Laxman of her freewill, she cannot be heard to prove her age anything different from what it is recorded in her high school certificate. There is no scope for her to be referred to a medical board for the determination of her age, for that reason. After the decision of their Lordships of the Supreme Court in **Suhani v. State of U.P.**8 there was some uncertainty, whether a victim could be referred to the medical examination of a board of doctors for the determination of her age, in the face of a recorded date of birth in the high school certificate. The decision of the Supreme Court in **Suhani** *(supra)* did lead to some doubt whether a victim could be referred for a medical determination of her age, notwithstanding the availability of her recorded date of birth in the high school certificate. That doubt, however, is no longer there, after the decision of the Division Bench of this Court in **Nisha Naaz *alias* Anuradha & Another v. State of U.P. & Others**9 where it has been held that the decision in **Suhani** does not lay down any law, but is one on facts. The consequence of the holding in **Nisha Naaz** *(supra)* is that the principles in **Priyanka Devi**, following

Jarnail Singh emerge as the law to govern the field. In **Nisha Naaz**, 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. In view of what the consistent position of law appears to be, Chhavi has to be held a minor on the date of her marriage and till date. Her recorded date of birth in her high school certificate is 08.07.2003 and she would turn a major on 09.07.2021. The CWC have ordered her to be given in the foster care of Laxman's sister. Laxman is an accused in Crime No. 84 of 2020, under Sections 363, 366 IPC, Police Station - Barsana, District - Mathura. Even if Chhavi's case that she has married Laxman of her freewill were accepted, she cannot be permitted to live in the foster care of his sister, where access to each other cannot be

guarded. So long as Chhavi is a minor, irrespective of the validity of her marriage to Laxman, she cannot be permitted to be placed in a position where there is a likelihood of carnal proximity. If it were permitted, it would be an offence both under the Penal Code and under the Act of 2012. In no eventuality, so long as Chhavi is a minor, can she be placed in a situation where any exposure of the kind indicated above cannot reasonably be expected to be guarded against. The decision of the Supreme Court in **Independent Thought v. Union of India & Another**10 completely excludes the possibility of sanctioning or decriminalising carnal relations between a man and his wife, the wife being below the age of 18 years. The entire protective regime of the Act of 2012 is not compatible with an arrangement of the kind of foster care ordered for Chhavi by the CWC. Of course, as soon as Chhavi turns a major, she would be free to go wherever she likes and stay with whomsoever she wants, but till she attains the age of majority, in the considered opinion of this Court, she cannot be permitted to stay in the foster care of Meena, Laxman's sister.

14. The conclusion on facts that Chhavi is not inaccessible to Laxman in the foster care of Meena, is particularly based on a note of the Judicial Magistrate, Mathura, while proceeding to examine Chhavi on this Court's commission, on 15.10.2020. This note reads thus :

माननीय उच्च न्यायालय के रिट पिटीशन संख्या 340 सन् 2020 में आदेश दिनांकित 14.10.2020 के प्रकाश में माननीय जिला न्यायाधीश मथुरा के आदेश दिनांकित 15.10.2020 प्राप्त होने पर मैं अर्चना सिंह न्यायिक मजिस्ट्रेट, मथुरा, बल्देव वास सीकरी भरतपुर राजस्थान मीना पत्नी राधाकृष्ण के घर उपस्थित आई। मीना के ससुर राजेन्द्र, पति राधाकृष्ण, ननद पूनम मिले व गांव के सभ्रान्त लोग सत्यपाल, लक्ष्मण, बलराम, गोपी उपस्थित आये। उपरोक्त ने अवगत कराया कि मीना व छवि यहीं रहते है। मीना व छवि को 13.10.2020 को S.I. जितेन्द्र सिंह के साथ इलाहाबाद जाने के लिये गई थी। रास्ते में गर्भवती छवि की तबीयत खराब होने पर उसे कुम्हेर भरतपुर राजस्थान में सरकारी अस्पताल ले गये है। इसी अस्पताल में ही छवि का इलाज चल रहा है।

ह0 (Archana Singh)
न्यायिक मजिस्ट्रेट
मथुरा।

15. The circumstances indicated in the note above extracted show that Chhavi is staying in a home in the foster care of Meena, where, besides Meena, she has her father-in-law Rajendra, husband Radha Krishna and her sister-in-law *(nanad)* Poonam. Meena, being Laxman's sister, who is staying with her in-laws, cannot be trusted with that kind of a foster care for Chhavi, where she is not inaccessible to Laxman. Going by Chhavi's stand that she has validly married Laxman, the fact that at the time of the Magistrate's visit, she had begotten a child from Laxman, are also circumstances which point to the possibility of carnal relations between the two. It is not difficult to infer that in the home, where Laxman's sister Meena stays with her in-laws, Chhavi cannot be extended the protective cover envisaged for a girl below the age of 18 years, insulating her from any kind of sexual activity, even with her husband.

16. There is one more facet of the matter that deserves note. Chhavi was reported to be in the family way by the learned Judicial Magistrate, Mathura, and by now, may have been blessed with a child. Therefore, wherever Chhavi is placed until time that she turns a major, the child

would have to stay with her and be taken care of as well.

17. Now, what is required to be examined is the validity of Chhavi's marriage to Laxman. As said earlier, the validity of that marriage would have consequences for the parties later in life. Chhavi is not far away from attaining majority and if she elects to go along with Laxman, accepting him as her husband, the validity of that marriage would be decisive. In the opinion of this Court, the validity of the marriage must be examined in order to do substantial justice to the parties. Given that Chhavi was a minor on the date of marriage, which she claims to have solemnized with Laxman, the provisions of Sections 3 and 12 of the Prohibition of Child Marriage Act, 200611 are required to be surveyed. Sections 3 and 12 of the Act of 2006 read :

"**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."

18. Now, Chhavi, in her stand about her marriage to Laxman recorded by the Judicial Magistrate on 15.10.2020, has clearly said that she has married Laxman according to Hindu rites, on 24.03.2020, of her free will. There are, thus, no circumstances indicating enticement of the prosecutrix, taking her out of the keeping of the lawful guardian, or a case of compelling her by force, or inducing her by deceitful means to go to any place along with Laxman. There is also no case about

the prosecutrix being sold for the purpose of marriage, and made to go through a form of marriage. There is nothing there in Chhavi's stand, recorded by the Judicial Magistrate, that may attract the provisions of Section 12 of the Act of 2006. Thus, Chhavi's marriage to Laxman is not a void marriage; rather it is a marriage which is voidable at the option of Chhavi, by virtue of Section 3 of the Act last mentioned. Chhavi, after she turns a major or even before that, can petition the competent court to have the marriage annulled, and she can do so within two years of attaining majority. Of course, she can acknowledge and elect to accept the marriage. All that Chhavi chooses to do is not this Court's determination, but it is to clarify the *inter se* rights of parties *vis-à-vis* their marriage, that the Court has ventured to examine the legal status of the marriage, which Chhavi supports as her voluntary act, while a minor.

19. So far as the question of custody or care for Chhavi, while she is a minor different from the foster care of Meena is concerned, one possible option for Chhavi would be to go back to her father Chhanga, who has petitioned this Court. That option, however, stands foreclosed in unqualified terms, in view of Chhavi's unequivocal stand in her statement to the Judicial Magistrate made on 15.10.2020. There, she has clearly indicated that her father would do her and Laxman to death. Apparently, she has a serious threat perception from her father and apprehends an honour killing. In the circumstances, she cannot be placed in the custody of her father, or even within his reach.

20. In the opinion of this Court, under the circumstances, Chhavi has to be housed in a State facility or shelter home, ideally at Agra, which shall be other than a Nari Niketan or a home meant for delinquents. She has to be accommodated in a safe home/shelter home with all necessary facilities, where she and her child can stay comfortably, till she attains the age of eighteen years, that is to say, until 09.07.2021. During this period of time, the learned District Judge, Agra shall depute a lady Judicial Officer in his judgeship to visit Chhavi, on a fortnightly basis, and ascertain her welfare - physical and psychological. The lady Judicial Officer would also ascertain the welfare of the child. If there be any shortcoming reported to or noticed by the Judicial Officer, it will be her duty to report the matter to the learned District Judge, who will take immediate steps to remedy it. The District Magistrate, Agra, shall extend all cooperation to the learned District Judge and the lady Judicial Officer, in the terms required by them.

21. In the result, this habeas corpus writ petition **succeeds** and stands **allowed**. The *rule nisi* is made **absolute**, in the terms that Chhavi will be caused to be liberated from the foster care of Meena, respondent no. 4, forthwith, and housed in a suitable safe home/shelter home, within the district of Agra, where she will stay until 09.07.2021. She will be free to go, on 09.07.2021, wherever she likes and stay with whomsoever she wants, including her husband Laxman. Until then, she will be housed and taken care of, in terms indicated hereinabove.

22. Before parting with this matter, this Court places on record its appreciation for the very conscientious and careful execution of this Court's commission undertaken by Ms. Archana Singh, Judicial Magistrate, Mathura.

23. Let this order be communicated to the learned District Judge, Mathura, the Senior Superintendents of Police of Agra and Mathura and the District Magistrate, Agra by the Joint Registrar (Compliance), **forthwith**.

(2021)03ILR A316
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.03.2021

BEFORE

THE HON'BLE SANJAY YADAV, J.
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE SIDDHARTHA VARMA, J.

Habeas Corpus Writ Petition No. 362 of 2020

Km. Rachna & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Avinash Pandey, Sri Shagir Ahmad (Senior Adv./Amicus Curiae)

Counsel for the Respondents:
G.A., Sri J.K. Upadhyay, Sri Amit Sinha

Habeas Corpus - 362 of 2020

(A) Constitution of India - Article 226 - Juvenile Justice (Care and Protection of Children) Act 2015 (J.J. Act) - Sections 2(35), 2(12), 2(13), 2(14), 27, 29 & 30 - Child welfare committee - Powers of committee - Functions and responsibilities of committee , Section 36 - enquiry, Section 37 - Orders passed regarding a child in need of care and protection , Section 94 - presumption and determination of age - Section 101 - Appeals , Section 102 - Revision - interest of minor is paramount - before proceeding to pass order for custody of the minor - welfare of the minor has to be kept in mind - wish of minor and the wish/desire of girl can always be considered by the Magistrate concerned/Committee - as per her wishes/desire further follow up action be taken in accordance with law under the J.J. Act.(Para -77)

(B) Constitution of India - Article 226 - Writ of Habeas Corpus - maintainability - sending the victim to the Juvenile Home/Nari Niketan/Child Care Home - not maintainable against the judicial order passed by the Magistrate or by the Child Welfare Committee under Section 27 of the J.J. Act (Para - 44,71)

(C)Civil Law - Juvenile Justice (Care and Protection of Children) Act 2015 - Section 27 (9) - Committee exercises the power of Judicial Magistrate - No Magistrate has an absolute right to detain any person at the place of his choice. (Para- 49,64)

(D) Civil Law - Juvenile Justice (Care and Protection of Children) Act 2015 - Section 37 - Committee, on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection - may, on consideration of Social Investigation Report submitted by Child Welfare Officer - taking into account the child's wishes in case the child is sufficiently mature to take a view - pass one or more of the orders mentioned in Section 37 (1) (a) to (h). (Para - 68)

Habeas Corpus Writ Petition has been filed by the petitioners seeking a writ of habeas corpus, commanding 4th respondent/Superintendent, Children Home (Girl), to release corpus/2nd petitioner who has been illegally detained in the Children Home (Girl). (Para - 4)

HELD: - A writ of habeas corpus would not be maintainable, if the detention in custody is pursuant to judicial orders passed by a Judicial Magistrate or a court of competent jurisdiction or by the Child Welfare Committee. An illegal or irregular exercise of jurisdiction by the Magistrate passing an order of remand or by the Child Welfare Committee under J.J. Act cannot be treated as an illegal detention. Such an order can be cured by way of challenging the legality, validity and correctness of the order by filing an

appropriate proceeding before the competent appellate or revisional forum under the statutory provisions of law but cannot be reviewed in a petition seeking writ of Habeas Corpus. (Para - 78)

Issues referred for determination answered. (E-6)

List of Cases cited: -

1. Menu Patel Vs St. of U.P., 2015 SCC Online AII 5892

2. Smt. Neelam Vs St. of U. P. & ors., Habeas Corpus Writ Petition No. 36519 of 2015 decided on 20.07.2015

3. Pushpa Devi Vs St. of U.P. & ors.,1994 HVVD (AII) C.R. VoL II 259

4. Smt. Raj Kumari Vs Suptt., Women Protection, Meerut & ors., 1997 (2) A.W.C. 720

5. Kajal & anr. Vs St. of U.P. & ors., Habeas Corpus W.P. No. 3914/2018 decided on 22.02.2019

6. Smt. Kalyani Chowdhary Vs St. of U.P., 1978 Cr. L.J. 1003 (D.B.)

7. Saurabh Pandey Vs St. of U.P., 2019 SCC Online AII 4430

8. Smt. Shahjahan Vs St. of U. P. & ors., 2015 SCC Online AII 5224

9. Km. Mona @ Reema Vs St. of U.P., 2014 SCC Online AII 7099

10. Guria Bhagat @ Guria Rawani Vs St. of Jharkhand & ors., 2013 SCC Online Jhar 2149

11. Smt. Himani Vs St.of U.P. & ors. , 2013 SCC Online ALL 1308

12. Akash Kumar Vs St. of Jharkhand & ors., 2014 (19) R.C.R. (Criminal) 816

13. Irfan Khan Vs St.of M.P. & Ors. , 2016 (3) MPLJ 449

14. Manish S/o Natvarlal Vaghela Vs St. of Guj., Special Criminal Application No. 5659 of 2019 decided on 23.12.2019

15. Shikha Kumari Vs St. of Bih., 2020 CRI. LJ 2184

16. Rahul Kumar Singh & anr. Vs St. of UP, Habeas Corpus W.P. No. 47442 of 2015 decided on 15.09.2015

17. Seema Devi @ Simran Kaur Vs St. of H.P., 1998 (2) Crimes 168

18. Lila Gupta Vs Laxmi Narain, AIR 1978 Supreme Court 1351

19. Gindan & ors. Vs Barelal, AIR 1976 M.P. 83

20. Shankerappa Vs Ushilabai , AIR 1984 Karnataka 112

21. Greene Vs Home Secretary, (1941) 3 AII ER 388

22. Smt. Maneka Gandhi Vs U.O.I. & anr., AIR 1978 SC 597

23. Kanu Sanyal Vs D.M., Darjeeling & ors., (1973) 2 SCC 674

24. A.K. Gopalan Vs Govt.of India, AIR 1966 SC 816

25. Janardan Reddy & ors. Vs The St. of Hyderabad & ors. , 1951 SCR 344

26. B. Ramachandra Rao Vs St. of Orissa, (1972) 3 SCC 256

27. St. of Mah. & ors. Vs Tasneem Rizwan Siddiquee , (2018) 9 SCC 745

28. Saurabh Kumar Vs Jailor, Koneila Jail & anr. , (2014) 3 SCC 436

29. Manubhai Ratilal Patel Vs St. of Guj. & ors. (2013) 1 SCC 314

30. Serious Fraud Investigation Office Vs Rahul Modi & anr., (2019) 5 SCC 266

31. Jaya Mala Vs Home Secretary, Government of J &K & ors., (1982) 2 Supreme Court Cases 538

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

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Sri Saghir Ahmad, learned Senior Advocate/Amicus Curiae and Sri Manish Goyal, learned Additional Advocate General, assisted by Sri Amit Sinha and Sri J.K.Upadhyay, learned Additional Government Advocates for the State of U.P.

2. This writ petition has been listed before us in view of reference made by a Division Bench of this Court, considering the various provisions of the Juvenile Justice (Care and Protection of Children) Act 20151 and the law laid down by various Courts. While referring the case to Hon'ble the Chief Justice to constitute a larger Bench, the Division Bench framed following issues to be decided by the larger Bench:-

"(1) Whether a writ of habeas corpus is maintainable against the judicial order passed by the Magistrate or by the Child Welfare Committee appointed under Section 27 of the Act, sending the victim to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home?;

(2) Whether detention of a corpus in Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home pursuant to an order (may be improper) can be termed/viewed as an illegal detention?; and

(3) Under the Scheme of the Juvenile Justice (Care and Protection of Children) Act, 2015, the welfare and safety of child in need of care and protection is the legal responsibility of the Board/Child Welfare Committee and as such, the proposition that even a minor cannot be sent to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home against his/her wishes, is legally valid or it requires a modified approach in consonance with the object of the Act ?"

3. Since the reference is desired to be resolved by the larger Bench, the same has come up for consideration before us under the order of Hon'ble the Chief Justice dated 26.1.2021.

4. Present Habeas Corpus Writ Petition has been filed by the petitioners seeking a writ of habeas corpus, commanding 4th respondent/Superintendent, Children Home (Girl), District Saharanpur to release corpus/2nd petitioner Km. Anchal, who has been illegally detained in the Children Home (Girl) District Saharanpur.

5. Brief matrix of the case, as is reflected from the record, is that the first information report was lodged by the mother of second petitioner on 16.2.2020, alleging that on 15.2.2020 her minor daughter Km. Anchal2 aged 17 years has been enticed by one Arjun S/o Rishipal. She also alleged that while leaving the house, the petitioner corpus had taken certain ornaments and cash amount. She also alleged that the father, mother and brother of Arjun had helped him in taking the petitioner corpus. The first information report was registered under Sections 363 and 366 of IPC against Arjun, his parents and relatives at Police Station Behat, District Saharanpur. The petitioner corpus was recovered on 04.3.2020 and on the same day, her statement under Section 161

Cr. P.C. was recorded, wherein she alleged that as quite often, she was beaten by her mother and out of frustration, without informing her parents, she had left home on 15.2.2020 and gone to the house of her friend namely Km. Rachna-first petitioner (sister of Arjun). She made a statement that she had gone of her own freewill and was living with her friend. However, she refused for medical examination. As per High School Certificate, her age has been found to be 17 years, whereas as per radiological examination conducted on 06.3.2020, her age was found to be about 20 years. Her statement under Section 164 of Cr. P.C. was also recorded on 07.3.2020, wherein she also reiterated her previous statement made under Section 161 Cr.P.C.

6. Thereafter, the petitioner corpus was produced before the Chief Judicial Magistrate, Saharanpur on 13.3.2020. It was submitted by the police that as per High School Certificate, the age of the petitioner corpus is 17 years & 20 days and, therefore, suitable order be passed in regard to her custody. The mother of petitioner corpus also filed an application before the Chief Judicial Magistrate to the effect that the petitioner corpus is minor and, therefore, in the interest of justice, she may be sent to Balika Vikas Grih/Child Development Home. The finding was recorded by the Magistrate, determining the age of petitioner corpus to be 17 years. The Magistrate had directed for producing her before Bal Kalyan Samiti/Child Welfare Committee3 for issuance of further direction with regard to the custody of petitioner corpus. Pursuant to the order passed by the Magistrate, the petitioner corpus was produced before the Committee and an order was passed by the Committee for keeping her in Children Home (Girl). Pursuant to the said order, the petitioner corpus is in Children Home (Girl) Saharanpur.

7. Aggrieved with the said order, the present petition has been preferred for issuance of a writ of habeas corpus. While pressing the writ petition before the Division Bench, it has been urged that in her statement under Section 164 of Cr. P.C., the petitioner-corpus has categorically stated that on account of torture by her mother and brother, she left her house and is living happily with the first petitioner. Once the custody of the petitioner corpus has been denied by her parents, the petitioner corpus wanted to go with the first petitioner and therefore, she cannot be sent to Children Home (Girl) against her wishes. Even if the petitioner corpus is minor, she cannot be kept in Children Home (Girl) against her wishes.

8. Before the Division Bench, learned A.G.A. opposed the petition by claiming that the petitioner corpus is minor as per her date of birth recorded in the High School certificate. It has been urged that the age of the petitioner corpus is to be determined by applying the principles provided in Section 94 of the J.J. Act under which primacy is to be recorded to the date of birth entered in the educational certificate over the medical evidence. It has also been objected by learned A.G.A. that the writ of habeas corpus is not maintainable as the order impugned has been passed by the Committee pursuant to the order of the Magistrate and the judicial order, right or wrong cannot be questioned/assailed in petition seeking writ of hapeas corpus. It has also been urged that the petitioner corpus has efficacious alternative remedy of filing an appeal under Section 101 of the J.J. Act. The plea was taken that the Committee had exercised the

power of Magistrate and in view of the provisions of Section 27 of the J.J. Act, for all purposes, the Committee acts like the Magistrate. Once the order has been passed by the Magistrate then it can only be assailed before the appropriate Court by filing an appeal.

9. The Division Bench considered two sets of judgements; (i) the first set of judgements laid down the law that writ of habeas corpus is maintainable, even if the same has been filed against a judicial order of the Magistrate, sending the corpus to Juvenile Home/Nari Niketan/Child Care Home or any other Home duly authorized/recognized and (ii) in second set of judgements, contrary view has been taken by the coordinate Benches of this Court, wherein it has been held that if a corpus has been sent to the Juvenile Home/Nari Niketan/Child Care Home pursuant to the order passed by the Committee, detention of the corpus cannot be said to be illegal, requiring issuance of a writ of habeas corpus.

(FIRST SET OF JUDGEMENTS)

10. The reliance has been placed before the Division Bench on the judgement of this Court in **Menu Patel vs. State of UP**4, wherein it has been held as under:-

"9. The issue whether the victim/corpus who is a minor, can be sent to Nari Niketan against her wish, is no longer res-integra and has been conclusively settled by a catena of decisions of this Court. In the case of Smt. Kalyani Chowdhary v. State of U.P. reported in 1978 Cr. L.J. 1003 (D.B.), a Division Bench of this Court has taken the view that:

"no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women and Girls Protection Act or under some other law permitting her detention in such a home. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home."

11. Similar view has also been taken in (**Smt. Neelam vs. State of Uttar Pradesh and** ors5 in which a Division Bench of this Court has again held that:-

"The issue whether the victim/corpus who is a minor, can be sent to Nari Niketan against her wish, is no longer res-integra and has been conclusively settled by a catena of decisions of this Court. In the case of Smt. Kalyani Chowdhary v. State of U.P. reported in 1978 Cr. L.J. 1003 (D.B.), a Division Bench of this Court has taken the view that:

"no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women and Girls Protection Act or under some other law permitting her detention in such a home. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home."

12. The reliance has also been placed on the judgement in **Pushpa Devi vs. State of Uttar Pradesh & ors**6, wherein it was held:-

"In any event, the question of age is not very material in the petitions of the nature of habeas corpus as even a minor

has a right to keep her person and even the parents cannot compel the detention of the minor against her will, unless there is some other reason for it.

We have no mind to enter into the question and decide as to when a particular minor is to be set at liberty in respect of her person or whether she shall be governed by the direction of her parents. The question of custody of the petitioner as a minor, will depend upon various factors such as her marriage which she has stated to have taken place with Guddu before the Magistrate.

Apart from the above factors, the more important aspect is as to whether there is any authority for detention of the petitioner with any person in law. Though, it is said that she has been detained in the Nari Niketan under the directions of the Magistrate, the first thing to be seen should be as to whether the Magistrate can direct the detention of a person in the situation in which the petitioner is. No Magistrate has an absolute right to detain any person at the place of his choice or even any other place unless it can be justified by some law and procedure. It is very clear that this petitioner would not be accused of the offence under Sections 363 and 366 I. P. C. We are taking the version because she could only be a victim of it. A victim may at best be a witness and there is no law at least now has been quoted before us whereunder the Magistrate may direct detention of a witness simply because he does not like him to go to any particular place. In such circumstances, the direction of the Magistrate that she shall be detained at Nari Niketan is absolutely without jurisdiction and illegal. Even the Magistrate is not a natural guardian or duly appointed guardian of all minors."(emphasis supplied)

13. The Division Bench in the case of **Smt. Raj Kumari vs. Superintendent, Women Protection, Meerut &** ors.7 had taken a similar view and held as under:-

"In view of the above, it is well settled view of this Court that even a minor cannot be detained in Government Protective Home against her wishes. In the instant matter, petitioner has desired to go with Sunil Kumar besides this according to the two medical reports, i. e. of the Chief Medical Officer and L. L. R. M., College Meerut, the petitioner is certainly not less than 17 years and she understands her well being and also is capable of considering her future welfare. As such, we are of the opinion that her detention in Government Protective Home, Meerut against her wishes is undesirable and impugned order dated 23.11.96 passed by the Magistrate directing her detention till the party concerned gets a declaration by the civil court or the competent court of law regarding her age, is not sustainable and is liable to be quashed."

14. Before the Division Bench, the reliance has also been placed on the judgement passed in **Kajal & another vs. State of Uttar Pradesh & ors.**8, wherein it has been held as under:-

"It may also be appreciated that the issue whether the victim/corpus who is a minor, can be sent to Nari Niketan against her wish, is no longer res-integra and has been conclusively settled by a catena of decisions of this Court. In the case of **Smt. Kalyani Chowdhary v. State of U.P.**9, a Division Bench of this Court has taken the view that:

"no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women and Girls Protection Act or under some other law

permitting her detention in such a home. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home."

... ... …

Thus, merely because the petitioner has been sent to Nari Niketan pursuant to a judicial order which per se appears to be without jurisdiction, her detention cannot be labelled as "legal" rendering this Habeas Corups writ petition liable to be dismissed as not maintainable."

(SECOND SET OF JUDGEMENTS)

15. Contrary view has been taken by the coordinate Bench of this Court in the case of **Saurabh Pandey v. State of Uttar Pradesh**10, which reads as under:-

"10. Once the corpus is found a child, as defined by Section 2 (12) of the J.J. Act, 2015, and, allegedly, a victim of a crime (in this case Case Crime No.475 of 2018 detailed above), she would fall in the category of child in need of care and protection in view of clauses (iii), (viii) and (xii) of sub-section (14) of section 2 of the J.J. Act, 2015. Hence, the order passed by the Child Welfare Committee placing the corpus in a protection home would be within its powers conferred by section 37 of the J.J. Act, 2015.

11. In view of the above, as the corpus is in Women Protection Home pursuant to an order passed by the Child Welfare Committee, which is neither without jurisdiction nor illegal or perverse, keeping in mind the provisions of the J.J. Act, 2015, the detention of the corpus cannot be said to be illegal so as to warrant issuance of a writ of habeas corpus. If the petitioner is aggrieved by the order of the Child Welfare Committee, the petitioner is at liberty to take recourse to the remedy of an appeal provided under Section 101 of the J. J. Act, 2015."

16. Similar view has also been taken in the case of **Smt. Shahjahan v. State of Uttar Pradesh & Ors.**11, wherein it has been observed as under:-

"6. Having considered the submissions raised and the aforesaid background, once the petitioner has already filed a revision in relation to the custody of the same victim against the order dated 8.10.2014 that is stated to be pending, it cannot be said that the victim is under unlawful custody.

8. The victim, therefore, does not appear to be in unlawful custody and, therefore, the present Habeas Corpus Writ Petition in the aforesaid background would not be maintainable. It is open to the petitioner to seek her remedy in the revision which she has filed before the appropriate Court."

17. Further, in the case of **Km. Mona @ Reema v. State of Uttar Pradesh**12 it has been held as under:-

"After considering the facts and circumstances of the case, the corpus was sent to Muzaffarnagar by learned A.C.J.M., Court No. 3, Muzaffarnagar on 9.5.2013. It is a very serious case in which a girl of the Bihar State has been kidnapped who herself lodged the FIR in police station, Nai Mandi, Muzaffarnagar (U.P.). On the application moved by the I.O. she has been sent to Nari Niketan, Meerut by learned A.C.J.M., Court No. 3, Muzaffarnagar vide order dated 9.5.2013. The order dated 9.5.2013 is not suffering from any illegality and irregularity. The order has been passed in welfare of the corpus. The deponent of

this writ petition Nadeem Ahmad is real brother of the accused Intazar, it appears that this petition has been filed with ulterior motive without disclosing the credential of the person who has filed this writ petition on behalf of the corpus Km. Mona @ Reema. The corpus has been sent from Muzaffarnagar to Meerit in pursuance of the judicial order dated 9.5.2013, in any case her detention is not illegal. The present writ petition is devoid of merit, therefore, the prayer for setting the corpus on her liberty is refused."

18. In the case of **Guria Bhagat @ Guria Rawani v. State of Jharkhand & Ors**13 it has been held as under:-

"5. ... ... Thus, in no circumstances, it can be said that the custody of the petitioner with the Nari Niketan at Deoghar is an illegal custody. If the petitioner is aggrieved by the order of Judicial Magistrate, First Class, Dhanbad, she is at liberty to challenge the same in accordance with law before an appropriate forum. So far this writ of Habeas Corpus is concerned, the same is not tenable at law as the custody of the present petitioner with the Nari Niketan at Deoghar is by virtue of the order of Judicial Magistrate, First Class, Dhanbad dated 26.9.2013 and more particularly, when the application preferred by the petitioner for her release has been rejected by the Judicial Magistrate, First Class, Dhanbad by a detailed speaking order dated 22.10.2013. These two orders, make the custody of the petitioner with the Nari Niketan at Deoghar is a legal one. Unless these two orders are challenged in an appropriate matter before the appropriate forum as per the law applicable to the petitioner as well as the respondent, there is no substance in this writ petition. Hence, the same is hereby dismissed, reserving the liberty with the petitioner to challenge the orders passed by the Judicial Magistrate, First Class, Dhanbad."

19. In **Smt. Himani v. State of Uttar Pradesh & Ors.**14 it has been held that:-

"9. Considering the facts, circumstance of the case, submission made by learned counsel for the petitioner, learned A.G.A.for the State of U.P., counsel appearing on behalf of respondent no.4 and counsel appearing on behalf of Pt. Vigyan Prakash Sharma, it appears that in the present case the corpus was allegedly kidnapped by Devendra Singh alias Bunty on 20.6.2012, its FIR has been lodged on 2.7.2012 in case crime no. 111 of 2012 under sections 363, 366 I.P.C., Police Station Nangal District Bijnor. According to the school certificate, the date of birth of the corpus is 10.5.1996, but according to the first medical examination report she was aged about 19 years but according to second medical examination done by Medical Board, constituted by C.M.O. Bijnor, she was found above 18 years and below 20 years of age. According to the statement recorded under section 164 Cr.P.C., she has not supported the prosecution story, she stated that she had gone in the company of Devendra Singh alias Bunty with her free will and consent. The Marriage certificate filed with this petition as Annexure-2 shows that it has been issued by Pt. Vigyan Prakash Sharma, Purohit of Sri Jharkhand Mahadeo Mandir on 24.2.2012 mentioning therein that the corpus and Devendra Singh have performed marriage in the temple on 24.2.2012 at 5.30 P.M. but marriage certificate shows that it was not bearing the signatures of family members of corpus and Pt. Vigyan Prakash Sharma was not legally authorized to issue such type of

marriage certificate but Pt. Vigyan Prakash Sharma who appeared before this Court tendered his unconditional apology and assured the Court that in future he shall not issue such type of certificate, therefore, this Court is restrained to proceed further against Pt. Vigyan Prakash Sharma by accepting unconditional apology tendered by him. According to the school record, the date of birth of the corpus is 10.5.1996, according to her date of birth she was minor aged about 16 years on the date of the alleged incident. In such an age, she was playing with emotions and she was not capable to foresee her future prospects of her life. The corpus has refused to go in the company of her father. In such circumstances, the learned Judicial Magistrate/Civil Judge (J.D.) Najibabad, District Bijnor sent the corpus to Nari Niketan Moradabad vide order dated 24.7.2012. The order dated 24.7.2012 is not suffering from any illegality or irregularity. The corpus has been detained in Nari Niketan Moradabad in pursuance of the judicial order dated 24.7.2012, therefore, her detention is not illegal. The present petition is devoid of the merits. The prayer for quashing the impugned order dated 24.7.2012 is refused."

20. In the case of **Akash Kumar v. State of Jharkhand & Ors.**15 it has been held by the Jharkhand High Court that:-

"4. Having heard learned counsel for both the sides and looking to the facts and circumstances of the case, we see no reason to entertain this writ of Habeas Corpus mainly for the following facts and reasons:

(i) It appears that the custody of this petitioner is with the respondent State in pursuance of the judicial order passed by the Judicial Magistrate, 1st Class, Ranchi in G.R. No. 2366 of 2013 dated 27th May, 2013 which is at Annexure-5 to the memo of this writ application. Once the custody with the State is in pursuance of the judicial order, it cannot be said that the State is having illegal custody of the petitioner and, hence, the writ of Habeas Corpus is not tenable, at law.

(ii) Learned counsel for the petitioner has relied upon Sections 6, 7 and 14 of the Juvenile Justice Act, 2000 and submitted that the order passed by the Judicial Magistrate, 1st Class in G.R. No. 2366 of 2013 is de hors the provisions of this Act and, hence, custody with the respondent is illegal. The contention for issuance of prerogative writ of Habeas Corpus under Article 226 of the Constitution of India, is not accepted by this Court. For issuance of the writ of Habeas Corpus in exercise of power under Article 226 of the Constitution of India, it must be established by the petitioner that the custody with the State of any person is illegal. Here, there is no illegal custody of the petitioner with the respondents, on the contrary, this is as per the order passed by the Judicial Magistrate, 1st Class, Ranchi in G.R. No. 2366 of 2013 dated 27th May, 2013 (Annexure-5). The order passed by the concerned trial court may be illegal, but, the custody with the respondent State is absolutely legal. It is one thing that the order passed by the Judicial Magistrate, 1st Class, Ranchi may be illegal and it is altogether another thing so far as custody with respondent-State is concerned, otherwise, in all bail matters, there shall be writ of Habeas Corpus. If the argument of the counsel for the petitioner is accepted, in bail application also under Section 439 of the Code of Criminal Procedure, where person is in judicial custody by virtue of the order passed by the learned trial court, writ of Habeas Corpus should be filed. This

is a fallacy in the argument canvassed by the counsel for the petitioner. Until and unless the order passed by the Judicial Magistrate, 1st Class, Ranchi in this case is quashed and set aside by the competent court in appropriate proceeding, the custody of the petitioner with the respondent-State is legal."

21. The Division Bench has also considered the judgement passed by Madhya Pradesh High Court in the case **Irfan Khan v. State of MP & Ors.**16 The Gujarat High Court, in **Manish S/o Natvarlal Vaghela vs. State of Gujarat**17 has dealt with the similar question and held that:

"11. It is pertinent to note that the allegations of the petitioner are regarding non-compliance of various provisions of the Act and Rules. Against this, the Child Welfare Committee has came with a case that after following procedure and getting order from the Court, it has given the child to adoptive father. Therefore, when the child has been given in adoption by the order of the Court to adoptive parents, then that act cannot be treated as an illegal act of granting custody of minor. Even if there is lack of following due procedure under the Act and Rules by the Child Welfare Committee that can be agitated by the petitioner under the provisions of appeal/revision, as referred to above by taking out separate proceedings. When there is an efficacious alternative remedy available, writ of habeas corpus cannot be issued especially when the Child Welfare Committee has got necessary orders from the Court before handing over the custody of minor to adoptive parents.

22. The Division Bench also considered the Full Bench judgement passed by Patna High Court in the case of **Shikha Kumari v. State of Bihar**18, wherein the matter was referred to the larger Bench and it has held by the Bench that:

"67. Thus, it is evident that a writ of habeas corpus would not be maintainable, if the detention in custody is pursuant to judicial orders passed by a Judicial Magistrate or a court of competent jurisdiction. It is further evident that an illegal or irregular exercise of jurisdiction by a Magistrate passing an order of remand cannot be treated as an illegal detention. Such an order can be cured by way of challenging the legality, validity and correctness of the order by filing appropriate proceedings before the competent revisional or appellate forum under the statutory provisions of law but cannot be reviewed in a petition seeking the writ of habeas corpus.

68. We, accordingly, sum up our conclusions in respect of the first three issues for determination as follows:-

Question No.1 : "Whether, in a petition for issuance of writ of habeas corpus, an order passed by a Magistrate could be assailed and set-aside?"

Answer : Our irresistible conclusion in view of the ratio laid down by the Supreme Court in the aforementioned cases is that a writ of habeas corpus would not be maintainable, if the detention in custody is as per judicial orders passed by a Judicial Magistrate or a court of competent jurisdiction. Consequently an order of remand passed by a Judicial Magistrate having competent jurisdiction cannot be assailed or set aside in a writ of habeas corpus.

Question No.2: "Whether an order of remand passed by a Judicial Magistrate could be reviewed in a petition

seeking the writ of habeas corpus, holding such order of remand to be an illegal detention ?"

Answer: An illegal or irregular exercise of jurisdiction by a Magistrate passing an order of remand can be cured by way of challenging the legality, validity and correctness of the order by filing appropriate proceedings before the competent revisional or appellate court under the statutory provisions of law. Such an order of remand passed by a Judicial Magistrate of competent jurisdiction cannot be reviewed in a petition seeking the writ of habeas corpus.

Question No.3: "Whether an improper order could be termed/viewed as an illegal detention ?"

Answer: In view of the clear, unambiguous and consistent view of the Supreme Court in the aforediscussed cases, we unhesitatingly conclude and hold that an illegal order of judicial remand cannot be termed/viewed as an illegal detention."

23. The Division Bench has also proceeded to observe that apart from above mentioned cases, attention of this Court has also been drawn to many other cases, wherein issuance of a writ of habeas corpus has been held to be maintainable, whereas in some cases, the view of this Court is otherwise. Such situation impelled the Division Bench for formulating the aforementioned questions to be decided by the larger Bench.

24. Sri Saghir Ahmad, learned Senior Advocate/Amicus Curiae submitted that the habeas corpus writ petition is not maintainable and the efficacious remedy of the petitioner is to file an appeal.

25. Sri Manish Goyal, learned Additional Advocate General, appearing for the State of U.P., submitted that the writ of habeas corpus is not maintainable as the order impugned has been passed by the Committee pursuant to the order of the Magistrate and the judicial order, right or wrong, cannot be challenged in a petition seeking writ of habeas corpus. The petitioner corpus has an efficacious alternative remedy of filing an appeal under Section 101 of J.J. Act and the judicial order can only be challenged before the appellate Court. While passing the order impugned, the Committee has exercised the power of Magistrate and in view of the provisions of Section 27 of the J.J. Act, for all purposes, the Committee acts like the Magistrate. Once the order has been passed by the Magistrate, then it can only be assailed before the appropriate Court by filing an appeal.

26. It has been submitted that sub-section (4) of Section 1 of J.J. Act provides that provision of the J.J. Act shall apply to all the matters concerning children in need of care and protection and children in conflict with law. He has also placed reliance on Section 2 (14) (iii) (a) of J.J. Act, which provides that "child in need of care and protection" means a child who resides with a person (whether a guardian of child or not) and such person has injured, exploited, abused or neglected the child or has violated any other law for the time being in force for the protection of child. Therefore, the girl child detained in Nari Niketan/Children Home will come under child in need of care and protection. In such situation, Section 27 of J.J. Act would be attracted, wherein there is provision of Child Welfare Committee, which deals with child in need of care and protection and the State Government has been empowered to constitute for every district, one or more Child Welfare

Committees for exercising the powers and to discharge the duties conferred on such Committees in relation to children in need of care and protection. Section 27 (9) provides that the Committee shall function as a Bench and shall have the powers conferred by the Code of Criminal Procedure, 1973 on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class. Under Sections 29 and 37 of J.J. Act, the Child Welfare Committee has powers to send the children to children's home or fit facility etc. Therefore, he submitted that a person aggrieved by an order passed by the Child Welfare Committee can file an appeal in the Children Court under Section 101 of the J.J. Act. The order passed by the Committee pursuant to which the corpus has been sent to Children's Home or Nari Niketan is a judicial order and hence, the detension of corpus cannot be termed to be illegal. Moreover, the order passed by the Committee is appealable and hence the Habeas Corpus Petition is not maintainable and is liable to be dismissed.

27. Shri Manish Goyal, learned Additional Advocate General further submitted that in **Smt. Neelam vs. State of UP & 4 others** (supra)**; Rahul Kumar Singh & another vs. State of UP 19** and **Kajal & another vs. State of UP and ors** (supra), as relied upon by the Division Bench, wherein the Habeas Corpus Writ Petitions had been maintained, the Court had failed to consider the provisions of J.J. Act and as such, it may safely be said that the orders passed in the aforesaid cases are per incuriam. In support of his submission, he has placed reliance on the judgement passed by the Full Bench of Patna High Court in **Shikha Kumari vs. State of Bihar** (supra) and submitted that so far as the questions formulated by this Court are concerned, in similar circumstances, the Patna High Court in **Shikha Kumari**'s case (supra) has considered and answered all the three questions.

28. Having heard the parties, apart from considering the issues referred by the Division Bench, we need to deal with certain ancillary issues attached in cases of elopement of minor girls and on recovery, sending them to Nari Niketan/Protection Home/Care Home. We find increasing number of habeas corpus petitions being filed by the parents/guardians or alleged husband for production of their wards or wife, who leave their parental houses in these "Run away Marriages". While the parents of the couples go through agony, the couples are on the run with husband being accused of kidnapping and/or rape. The Court while dealing with habeas corpus petitions are required to ensure that the person whose production is sought is not illegally detained. For this purpose, the court ascertains whether the person is being detained against his/her wishes or is otherwise illegally detained and gives directions, as required. In most of the cases, where a minor girl after meeting her parents and/or on reflection has second thoughts about her marriage or escaped, her custody is restored to parents as in the first case. Generally, difficulty arises in cases where the minor girl has entered into matrimonial alliance and is steadfast in her resolve to continue to cohabit with the partner of her choice. At times, the girl is even on family way.

29. Let us notice the legal position with regard to marriages performed with below the prescribed age under the "Hindu Mariage Act, 1955" and the "Child Marriage Restraint Act,1929". For facility of reference, we reproduce the relevant

provisions contained in Sections 5(iii), 11, 12 and 18 of the Hindu Marriage Act, 1955.

"5. **Conditions for a Hindu Marriage.**- A marriage may be solemnized between any two Hindus, if the following conditions are fulfillled, namely:-

(i) …

(ii) …

(iii) the bridegroom has completed the age of (twenty one years) and the bride, the age of (eighteen years) at the time of the marriage;

(iv) …

(v) …

11. Void marriages.- Any marriage solemnized after the commencement of this Act shall be null and void any may, on a petition presented by either party thereto (against the other party), be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5.

12. Voidable marriages.- (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-

(a) that the marriage has not been consummated owing to the impotence of the respondent; or

(b) that the marriage is in contravention of the condition specified in clause (ii) of section 5; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner (was required under Section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978) the consent of such guardian was obtained by force (or by fraud as to the nature of Page 2375 the ceremony or as to any material fact or circumstance concerning the respondent); or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage-

(a) on the ground specified in clause (c) of sub-section (1) shall be entertained if -

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied-

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized; after

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of (the said ground)."

18. **Punishment for contravention of certain other conditions for Hindu marriage**.- Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions Page 2377 specified in clauses (iii), (iv), and (v) of Section 5 shall be punishable-

(a) in the case of a contravention of the condition specified in clause (iii) of section 5 with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both;

(b) in the case of a contravention of the condition specified in clause (iv) or clause (v) of section 5, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both."

30. From a perusal of the grounds given in Sections 11 and 12 of the Hindu Marriage Act, as reproduced above, it would be seen that contravention of the prescribed age under Section 5(iii) of the Act is not given as a ground on which the marriage could be void or voidable. We are also conscious that the Legislature at the same time desired to discourage child marriages. To fulfill such an obligation the Legislature enacted "Child Marriage Restraint Act, 1929". The object and intent of the Act is to prevent child marriages. Definition of child is, "For a male who has not completed 21 years of age and for a female, who has not completed 18 years of age". The Act aims to restrain performances of child marriages. At the same time, the said Act does not affect the validity of a marriage, even though it may be in contravention of the age prescribed under the Act. In spite of the marriage not being declared void or made voidable, no doubt the Legislature disapproves of child marriages and makes the performance of such marriage punishable under the law with imprisonment which can extend up to three months and with fine. Even Section 12 of the Act provides to issue an injunction to prevent performance of any child marriage. There appears to be a rationale and public policy in the Legislature not making marriages solemnized in breach of the statutory age, as prescribed under the Hindu Marriage Act and the Child Marriage Restraint Act, void or voidable. The Legislature was conscious of the fact that if such marriages performed in contravention of the age restriction, are made void or voidable it could lead to serious consequences and exploitation of the women, who are vulnerable on account of their social and economic circumstances. Both the Acts are aimed to discourage performance of such marriages by making them punishable with imprisonment and fine, while recognizing the necessity of protecting marriages performed even though in contravention of the prescribed age as valid and subsisting. (Ref. **Seema Devi @ Simran Kaur v. State of H.P.20 and Lila Gupta v. Laxmi Narain**21).

31. The Apex Court in **Lila Gupta v. Laxmi Narain** (supra) while reviewing the provisions of the Hindu Marriage Act in the context of a case falling within ambit of proviso to Section 15 observed as under:-

"4. At the outset it would be advantageous to have a clear picture of the scheme of the Act. Section 5 prescribes the conditions for a valid Hindu Marriage that may be solemnized after the commencement of the Act. They are six in number. Condition No. (i) ensures monogamy. Condition No. (ii) refers t the mental capacity of one or the other person contracting the marriage and prohibits an idiot or lunatic from contracting the marriage. This condition incidentally provides for consent of the bride and the bridegroom to the marriage as the law treats them mature at a certain age. Condition (iv) forbids marriage of parties within the degrees of prohibited

relationship unless the custom or usage governing each of them permits of a marriage between the two. Condition No. (v) is similar with this difference that it prohibits marriage between two sapindas. Condition No. (vi) is a corollary to condition (iii) in that where the bride has not attained the minimum age as prescribed in condition (iii) the marriage will none the less be valid if the consent of her guardian has been obtained for the marriage. Section 6 specifies guardians in marriage who would be competent to give consent as envisaged by Section 5(vi). Section 11 is material. It provides that any marriage solemnised after the commencement of the Act shall be null and void and may on a petition presented by either party thereto be so declared by a decree of nullity if it contravenes any one of the conditions Page 2377 specified in Cls. (ii), (iv) and (v) of Section 5. Incidentally at this stage it may be noted that Section 11 does not render a marriage solemnised in violation of conditions (ii), (iii) and (vi) void, all of which prescibe personal incapacity for marriage. Section 12 provides that certain marriages shall be voidable nullity on any of the grounds mentioned in the section. Clause (b) of sub-section (1) inter alia provides that the marriage in contravention of condition specified in Clause (ii) of Section 5 will be voidable. Similarly, sub-clause (c) provides that the consent of the petitioner or where consent of the guardian in marriage is required under Section 5 and such consent was obtained by force or fraud, the marriagbe shall be voidable, Section 13 provides for dissolution of marriage by divorce on any of the grounds mentioned in the section. Section 14 prohibits a petition for divorce being presented by any party to the marriage within a period of three years from the date of the marriage which period has been reduced to one year by Section 9 of the Marriage Laws (Amendment) Act, 1976. Then comes Section 15 as it stood at the relevant time, which is material for the purpose of this judgment and may be reproduced in extenso …."

6. A comprehensive review of the relevant provisions of the Act unmistakably manifests the legislative thrust that every marriage solemnised in contravention of one or other condition prescribed for valid marriage is not void. Section 5 prescribes six conditions for valid marriage. Section 11 renders marriage solemnised in contravention of conditions (i), (iv) and (v) of Section 5 only, void. Two incontrovertible propositions emerge from a combined reading of Sections 5 and 11 and other provisions of the Act, that the Act specifies conditions for valid marriage and a marriage contracted in breach of some but not all of them renders the marriage void. The statute thus prescribes conditions for valid marriage and also does not leave it to inference that each one of such conditions is mandatory and a contravention, violation or breach of any one of them would be treated as a breach of a pre-requisite for a valid marriage rendering it void. The law while prescribing conditions for valid marriage simultaneously prescribes that breach of some of the conditions but not all would render the marriage void. Simultaneously, the Act is conspicuously silent on the effect on a marriage solemnised in contravention or breach of the time bound prohibition enacted in Section 15. A further aspect that stares into the fact is that while a marriage solemnised in contravention of Clauses (iii), (iv), (v) and (vi) of Section 5 is made penal, a marriage in contravention of the prohibition prescribed by the proviso does not attract any penalty. The Act is suggestively silent on the question as to what is the effect on

the marriage contracted by two persons one or both of whom were incapacitated from contracting marriage at the time when it was contracted in view of the fact that a period of one year ha not elapsed since the dissolution of their earlier marriage by a decree of divorce granted by the Court or first instance. Such a marriage is not expressly declared void nor made punishable though marriages in breach of conditions Nos. (iii), (iv), (v) and (vi) of Section 5 are specifically made punishable by Section 18. These express provisions would show that Parliament was aware about treating any specific marriage void and only specific marriages punishable. This express provision prima facie would go a long way to negative any suggestion of a marriage being void though not Page 2378 covered by Section 11 such as in breach of proviso to Section 15 as being void by necessary implication. The net effect of it is that at any rate Parliament did not think fit to treat such marriage void or that it is so opposed to public policy as to make it punishable."

32. The reference to "age of discretion" is to be seen in the context of the girls having left of their own without inducement or enticement for the purpose of the charge of kidnapping and not to suggest any approval of the errant conduct.

33. The matter is no longer res-integra. The question has been considered in several cases. In **Gindan and others v. Barelal**22 the High Court of Madhya Pradesh held that a marriage solemnised in contravention of age mentioned in Section 5(iii) of Hindu Marriage Act is neither void ab initio nor even voidable and such violation of Section 5(iii) does not find place either in Section 11 or in Section 12 of the Act. The Court has said that it is only punishable as an offence under Section 18 and the marriage solemnised would remain valid, enforceable and recognisable in courts of law.

34. In **Smt. Lila Gupta v. Laxmi Narain and others** (supra) the Apex Court considered the proviso to Section 15 of the Hindu Marriage Act. While doing so, the Apex Court referred to the provisions of Section 5 and also Sections 11 and 12 of the Hindu Marriage Act. The following passages in the judgment of the Supreme Court are quite relevant and instructive:

"6. A comprehensive review of the relevant provisions of the Act unmistakably manifests the legislative thrust that every marriage solemnised in contravention of one or other condition prescribed for valid marriage is not void. Section 5 prescribes six conditions for valid marriage. Section 11 renders marriage solemnised in contravention of conditions (i), (iv) and (v) of Section 5 only' void. Two incontrovertible propositions emerge from a combined reading of Sections 5 and 11 and other provisions of the Act, that the Act specifies conditions for valid marriage and a marriage contracted in breach of some but not all of them renders the marriage void. The statute thus prescribes conditions for valid marriage and also does not leave it to inference that each one of such conditions is mandatory and a contravention, violation or breach of anyone of them would be treated as a breach of a prerequisite for a valid marriage rendering it void. The law while prescribing conditions for valid marriage simultaneously prescribes that breach of some of the conditions but not all would render the marriage void. Simultaneously, the Act is conspicuously silent of the effect on a marriage solemnised in contravention

or breach of the time bound prohibition enacted in Section 15. A further aspect that stares into the face is that while a marriage solemnised in contravention of clauses (iii), (iv), (v) and (vi) of Section 5 is made penal, a marriage in contravention of the prohibition prescribed by the proviso does not attract any penalty. The Act is suggestively silent on the question as to what is the effect on the marriage contracted by two persons one or both of whom were incapacitated from contracting marriage at the time when it was contracted in view of the fact that a period of one year had not elapsed since the dissolution of their earlier marriage by a decree of divorce granted by the court of first instance. Such a marriage is not expressly declared void nor made punishable though marriages in breach of conditions Nos. (i) (iv) and (v) are expressly declared void and marriages in breach of conditions Nos. (iii), (iv), (v) and (vi) of Section 5 are specifically made punishable by Section 18. These express provisions would show that Parliament was aware about treating any specific marriage void and only specific marriages punishable. This express provision prima facie would go a long way to negative any suggestion of a marriage being void though not covered by section 11 such as in breach of proviso to Section 15 as being void by necessary implication. The net effect of it is that at any rate Parliament did not think fit to treat such marriage void or that it is so opposed to public policy as to make it punishable.

19. Similarly, a reference to Child Marriage Restraint Act would also show that the Child Marriage Restraint Act was enacted to carry forward the reformist movement of prohibiting child marriages and while it made marriage in contravention of the provisions of the Child Marriage Restraint Act punishable, simultaneously it did not render the marriage void. It would thus appear that voidness of marriage unless statutorily provided for is not to be readily inferred.

20. Thus, examining the matter from all possible angles and keeping in view the fact that the scheme of the Act provides for treating certain marriages void and simultaneously some marriages which are made punishable yet not void and no consequences having been provided for in respect of the marriage in contravention of the proviso to Section 15, it cannot be said that such marriage would be void."

35. Hon'ble Supreme Court had also considered the provisions of the Child Marriage Restraint Act and observed that any marriage in contravention of the provisions of the said Act would only lead to punishment and that the marriage would not be void. In **Shankerappa v. Sushilabai**23, the Court held that the marriage solemnised in violation of the conditions concerning age of eligibility of Section 5 (iii) would not be a nullity and such a violation is only made punishable under Section 18. The Court relied upon the judgment of the Supreme Court in Lila Gupta's case (supra). In most of the cases it has also been urged that the custody cannot be entrusted to the accused as he is facing a criminal trial under Sections 363, 366, 368 and 376 of the Indian Penal Code. So long as he is the husband and the marriage between him and the petitioner is valid, he is entitled to custody unless a competent Court passes an order otherwise.

36. In order to bring clarity to the matter, we deem it appropriate to consider whether a writ of habeas corpus is maintainable against the judicial order passed by the Magistrate or by the Child Welfare Committee under Section 27 of the

J.J. Act sending the victim to the Juvenile Home/Nari Niketan/Child Care Home and to firstly examine the literal meaning and ambit of writ of habeas corpus. In Halsbury Laws of England24, it is observed :

"The writ of habeas corpus ad subjiciendum" which is commonly known as the writ of habeas corpus, is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from the unlawful or unjustifiable detention whether in prison or in private custody. It is a prerogative writ by which the queen has a right to inquire into the causes for which any of her subjects are deprived of their liberty. By it the High Court and the judges of that Court, at the instance of a subject aggrieved, command the production of that subject, and inquiry into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released. Release on habeas corpus is not, however, an acquittal, nor may the writ be used as a means of appeal."

37. According to Dicey (A. V. Dicey), Introduction to the Study of Law of the Constitution, Macmillan and Co., Ltd., p.215(1915): *"if, in short, any man, woman or child is, or is asserted on apparently good grounds to be deprived of liberty, the court will always issue a writ of habeas corpus to anyone who has the aggrieved person in his custody to have such person brought before the court and if he is suffering restraint without lawful cause, set him free."*

38. In **Greene vs. Home Secretary**25, it has been observed :

"Habeas corpus is a writ in the nature of an order calling upon the person who has Patna High Court CR. WJC No.1355 of 2019 dt. 05-03-2020 detained another to produce the later before the court, in order to let the court know on what ground he has been confined and to set him free if there is no legal jurisdiction of imprisonment."

39. In India, by Articles 32 and 226 of Constitution of India, the Supreme Court and all the High Courts got jurisdiction to issue writ of habeas corpus throughout their respective territorial jurisdiction when the Constitution came into force. Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.

40. In **Smt. Maneka Gandhi vs. Union of India & Anr.**26, it has been held by the Apex Court that the procedure established by law as contemplated under Article 21 should be just, fair and reasonable and any unjust, unfair and unreasonable procedure by which liberty of a person is taken away shall destroy such freedom. There is also difference between a writ of Habeas Corpus maintained under Article 32 and under Article 226 of Constitution of India. A writ of habeas corpus under Article 32 of the Constitution of India in the Supreme Court is available in case of violation of fundamental rights guaranteed under Article 21 but it does not relate to interference with the personal liberty by a private citizen. However, the High Court has jurisdiction to issue writ of habeas corpus under Article 226 of the Constitution of India not only for violation of fundamental rights of freedom but also for other purposes. The High Court can issue such writ against a private person also.

41. The nature and scope of the writ of habeas corpus has been considered by the Constitution Bench of the Hon'ble Apex Court in the case of **Kanu Sanyal vs. District Magistrate, Darjeeling & Ors.**27 and it was held:-

"It will be seen from this brief history of the writ of habeas corpus that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the Court, but the production of the body of the person detained is directed in order that the circumstances of his detention may be inquired into, or to put it differently, "in order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restraint". The form of the writ employed is "We command you that you have in the King's Bench Division of our High Court of Justice -- immediately after the receipt of this our writ, the body of A.B. being taken and detained under your custody -- together with the day and cause of his being taken and detained -- to undergo and receive all and singular such matters and things as our court shall then and there consider of concerning him in this behalf". The italicized words show that the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy Patna High Court CR. WJC No.1355 of 2019 dt. 05-03-2020 for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness and, as pointed out by Lord Halsbury, L.C., in Cox v. Hakes (supra), "the essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom" and his release, if the detention is found to be unlawful. That is the primary purpose of the writ; that is its substance and end. …"

42. It is also well settled that in dealing with a petition for habeas corpus the Court has to see whether the detention on the date, on which the application is made to the Court, is legal, if nothing more has intervened between the date of the application and the date of hearing. ..." (Ref. **A.K. Gopalan v. Government of India**28).

43. In **Janardan Reddy & Ors. vs. The State of Hyderabad & Ors.**,29 the petitioners, who were convicted by a Special Tribunal of Hyderabad of murder and other offences and sentenced to death by hanging and whose conviction and sentence have been confirmed by the Hyderabad High Court, applied to the Supreme Court under Article 32 for writs of prohibition, certiorari and habeas corpus. While considering the maintainability of the writ petition, the Supreme Court observed that there is a basic difference between want of jurisdiction and an illegal or irregular exercise of jurisdiction, mere non-compliance with the rules of procedure (e.g, misjoinder of charges) cannot be made a ground for granting a writ under Article 32 of the Constitution. The defect, if any, can, according to the procedure established by law, be corrected only by a court of appeal or revision, and if the appellate court, which was competent to deal with the matter, has considered the matter and pronounced its judgment, it cannot be

reopened in a proceeding under Article 32 of the Constitution. The Supreme Court further observed that the writ of habeas corpus could not be granted as a return that the person is in detention in execution of a sentence on indictment of a criminal charge, is sufficient answer to an application for such a writ.

44. It can be safely said that a writ of habeas corpus could not be issued, firstly, in cases where the detention or custody is authorized by an order of remand issued by a competent court of jurisdiction and secondly, where a person is committed to jail by a competent court by an order which does not appear to be without jurisdiction. The order has to be passed by a court of competent jurisdiction. It is, moreover, well settled that no writ of habeas corpus lies against the order of remand made by a court of competent jurisdiction. It is well accepted principle that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical or wholly illegal manner. In **B. Ramachandra Rao vs. State of Orissa**30 and **Kanu Sanyal vs. District Magistrate, Darjeeling & Ors** (supra) it has been held by the Apex Court that the Court is required to scrutinise the legality or otherwise of the order of detention, which has been passed. Unless the Court is satisfied that a person has been committed to jail custody by virtue of an order that suffers from the vice of lack of jurisdiction or absolute illegality, a writ of habeas corpus cannot be granted.

45. In **State of Maharashtra & Ors. vs. Tasneem Rizwan Siddiquee**31 the question before the Supreme Court was again as to whether a writ of habeas corpus could be maintained in respect of a person, who is in police custody pursuant to remand order passed by the Jurisdictional Magistrate in connection with offence under investigation. In that case, relying on the ratio laid down in **Saurabh Kumar vs. Jailor, Koneila Jail & Anr.**32 and **Manubhai Ratilal Patel vs. State of Gujrat & Ors.**33 the Supreme Court held as follows :-

"The question as to whether a writ of habeas corpus could be maintained in respect of a person who is in police custody pursuant to a remand order passed by the jurisdictional Magistrate in connection with the offence under investigation, this issue has been considered in Saurabh Kumar v. Jailor, Koneila Jail [(2014) 13 SCC 436 : (2014) 5 SCC (Cri) 702] and Manubhai Ratilal Patel v. State of Gujarat [(2013) 1 SCC 314 : (2013) 1 SCC (Cri) 475] . It is no more res integra. In the present case, admittedly, when the writ petition for issuance of a writ of habeas corpus was filed by the respondent on 18-3- 2018/19-3-2018 and decided by the High Court on 21-3-2018 [Tasneem Rizwan Siddiquee v. State of Maharashtra, 2018 SCC OnLine Bom 2712] her husband Rizwan Alam Siddiquee was in police custody pursuant to an order passed by the Magistrate granting his police custody in connection with FIR No. I-31 vide order dated 17-3-2018 and which police remand was to enure till 23-3-2018. Further, without challenging the stated order of the Magistrate, a writ petition was filed limited to the relief of habeas corpus. In that view of the matter, it was not a case of continued illegal detention but the incumbent was in judicial custody by virtue of an order Patna High Court CR. WJC No.1355 of 2019 dt. 05-03-2020 passed by

the jurisdictional Magistrate, which was in force, granting police remand during investigation of a criminal case. Resultantly, no writ of habeas corpus could be issued." (emphasis supplied)

46. In **Serious Fraud Investigation Office vs. Rahul Modi & Anr.**,34 the Supreme Court cancelled bail granted by the Delhi High Court to Rahul Modi and Mukesh Modi accused of duping investors of several hundred crores through a ponzi scheme run by their Gujarat based other co-operative societies. Both the accused were released by the Delhi High Court in a habeas corpus writ petition even though they were remanded to judicial custody under the orders of a competent court. After elaborately dealing with the ratio laid down by the Supreme Court in earlier cases, the Supreme Court held as follows :-

"The act of directing remand of an accused is thus held to be a judicial function and the challenge to the order of remand is not to be entertained in a habeas corpus petition. The first question posed by the High Court, thus, stands answered. In the present case, as on the date when the matter was considered by the High Court and the order was passed by it, not only were there orders of remand passed by the Judicial Magistrate as well as the Special Court, Gurugram but there was also an order of extension passed by the Central Government on 14-12-2018. The legality, validity and correctness of the order or remand could have been challenged by the original writ petitioners by filing appropriate proceedings. However, they did not raise such challenge before the competent appellate or revisional forum. The orders of remand passed by the Judicial Magistrate and the Special Court, Gurugram had dealt with merits of the matter and whether continued detention of the accused was justified or not. After going into the relevant issues on merits, the accused were remanded to further police custody. These orders were not put in challenge before the High Court. It was, therefore, not open to the High Court to entertain challenge with regard to correctness of those orders. The High Court, however, considered the matter from the standpoint whether the initial order of arrest itself was valid or not and found that such legality could not be sanctified by subsequent order of remand. Principally, the issue which was raised before the High Court was whether the arrest could be effected after period of investigation, as stipulated in the said order dated 20-6-2018 had come to an end. The supplementary issue was the effect of extension of time as granted on 14-12- 2018. It is true that the arrest was effected when the period had expired but by the time the High Court entertained the petition, there was an order of extension passed by the Central Government on 14-12-2018. Additionally, there were judicial orders passed by the Judicial Magistrate as well as the Special Court, Gurugram, remanding the accused to custody. If we go purely by the law laid down by this Court with regard to exercise of jurisdiction in respect of habeas corpus petition, the High Court was not justified in entertaining the petition and passing the order."(emphasis supplied)

47. Before we proceed to set out our answer and examine the provisions of J.J. Act, we will pause to observe that J.J. Act is a self-contained Act and is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of J.J. Act is to ensure and cater the need of the child, who is in conflict with law and child in

need of care and protection etc. The language of J.J. Act is conclusive and must be construed according to ordinary principles, so as to give effect to the plain meaning of the language used. No doubt, in the case of an ambiguity, that meaning must be preferred which is more in accord with justice and convenience, but in general the words used read in their context must prevail. We may now proceed to examine the relevant sections of the J.J. Act, which generally deals with the issue before us. Sub-section (4) of Section 1 of the J.J. Act reads as under:-

"(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict with law, including –

(i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law;

(ii) procedures and decisions or orders relating to rehabilitation, adoption, re-integration, and restoration of children in need of care and protection."

Sub-section 14 (iii) (a) of Section 2 of the Act is as under:

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

... ... …

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

49. The 'Child Welfare Committee' finds place in Section 27 of Chapter-V of the J.J. Act. Section 27 (1) provides that the State Government shall by notification in the Official Gazette constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committees in relation to children in need of care and protection under this Act. The powers of the Comittee are defined in Section 27 (9). Provisions of Section 27 (9) of the J.J. Act make it clear that while passing such orders, the Committee exercises the power of Judicial Magistrate. Section 27 of the Act reads as under:

"27. Child Welfare Committee.--(1) The State Government shall by notification in the Official Gazette constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committees in relation to children in need of care and protection under this Act and ensure that induction training and sensitisation of all members of the committee is provided within two months from the date of notification.

(2) The Committee shall consist of a Chairperson, and four other members as the State Government may think fit to appoint, of whom at least one shall be a woman and another, an expert on the matters concerning children.

(3) The District Child Protection Unit shall provide a Secretary and other staff that may be required for secretarial support to the Committee for its effective functioning.

(4) No person shall be appointed as a member of the Committee unless such person has been actively involved in health, education or welfare activities pertaining to children for at least seven years or is a practicing professional with a degree in child psychology or psychiatry or law or social work or sociology or human development.

(5) No person shall be appointed as a member unless he possesses such other qualifications as may be prescribed.

(6) No person shall be appointed for a period of more than three years as a member of the Committee.

(7) The appointment of any member of the Committee shall be terminated by the State Government after making an inquiry, if--

(i) he has been found guilty of misuse of power vested on him under this Act;

(ii) he has been convicted of an offence involving moral turpitude and such conviction has not been reversed or he has not been granted full pardon in respect of such offence;

(iii) he fails to attend the proceedings of the Committee consecutively for three months without any valid reason or he fails to attend less than three-fourths of the sittings in a year.

(8) The District Magistrate shall conduct a quarterly review of the functioning of the Committee.

(9) The Committee shall function as a Bench and shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class.

(10) The District Magistrate shall be the grievances redressal authority for the Child Welfare Committee and anyone connected with the child, may file a petition before the District Magistrate, who shall consider and pass appropriate orders."

50. Section 29 of the J.J. Act is as under:-

"29. Powers of Committee. (1) The Committee shall have the authority to dispose of cases for the care, protection, treatment, development and rehabilitation of children in need of care and protection, as well as to provide for their basic needs and protection.

(2) Where a Committee has been constituted for any area, such Committee shall, notwithstanding anything contained in any other law for the time being in force, but save as otherwise expressly provided in this Act, have the power to deal exclusively with all proceedings under this Act relating to children in need of care and protection."

51. The functions and responsibilities of the Committee are defined in Section 30 of the J.J. Act, which read as under:-

"30. **Functions and responsibiliteis of Committee.**- The functions and responsibilities of the Committee shall include--

(i) taking cognizance of and receiving the children produced before it;

(ii) conducting inquiry on all issues relating to and affecting the safety and wellbeing of the children under this Act;

(iii) directing the Child Welfare Officers or probation officers or District Child Protection Unit or non-governmental organisations to conduct social investigation and submit a report before the Committee;

(iv) conducting inquiry for declaring fit persons for care of children in need of care and protection;

(v) directing placement of a child in foster care;

(vi) ensuring care, protection, appropriate rehabilitation or restoration of children in need of care and protection, based on the child's individual care plan and passing necessary directions to parents or guardians or fit persons or children's homes or fit facility in this regard;

(vii) selecting registered institution for placement of each child requiring institutional support, based on the child's age, gender, disability and needs and keeping in mind the available capacity of the institution;

(viii) conducting at least two inspection visits per month of residential facilities for children in need of care and protection and recommending action for improvement in quality of services to the District Child Protection Unit and the State Government;

(ix) certifying the execution of the surrender deed by the parents and ensuring that they are given time to reconsider their decision as well as making all efforts to keep the family together;

(x) ensuring that all efforts are made for restoration of abandoned or lost children to their families following due process, as may be prescribed;

(xi) declaration of orphan, abandoned and surrendered child as legally free for adoption after due inquiry;

(xii) taking suo motu cognizance of cases and reaching out to children in need of care and protection, who are not produced before the Committee, provided that such decision is taken by at least three members;

(xiii) taking action for rehabilitation of sexually abused children who are reported as children in need of care and protection to the Committee by Special Juvenile Police Unit or local police, as the case may be, under the Protection of Children from Sexual Offences Act, 2012;

(xiv) dealing with cases referred by the Board under sub-section (2) of section 17;

(xv) co-ordinate with the police, labour department and other agencies involved in the care and protection of children with support of the District Child Protection Unit or the State Government;

(xvi) in case of a complaint of abuse of a child in any child care institution, the Committee shall conduct an inquiry and give directions to the police or the District Child Protection Unit or labour department or childline services, as the case may be;

(xvii) accessing appropriate legal services for children;

(xviii) such other functions and responsibilities, as may be prescribed."

52. Section 36 of the J.J. Act deals with the Inquiry. It reads as under:-

36. **Inquiry**.- (1) On production of a child or receipt of a report under section 31, the Committee shall hold an inquiry in such manner as may be prescribed and the Committee, on its own or on the report from any person or agency as specified in sub-section (2) of section 31, may pass an order to send the child to the children's home or a fit facility or fit person, and for speedy social investigation by a social worker or Child Welfare Officer or Child Welfare Police Officer:

Provided that all children below six years of age, who are orphan, surrendered or appear to be abandoned shall be placed in a Specialised Adoption Agency, where available. (2) The social investigation shall be completed within fifteen days so as to enable the Committee to pass final order within four months of first production of the child:

Provided that for orphan, abandoned or surrendered children, the time for completion of inquiry shall be as specified in section 38.

(3) After the completion of the inquiry, if Committee is of the opinion that the said child has no family or ostensible support or is in continued need of care and protection, it may send the child to a Specialised Adoption Agency if the child is below six years of age, children's home or to a fit facility or person or foster family, till suitable means of rehabilitation are found for the child, as may be prescribed,

or till the child attains the age of eighteen years:

Provided that the situation of the child placed in a children's home or with a fit facility or person or a foster family, shall be reviewed by the Committee, as may be prescribed.

(4) The Committee shall submit a quarterly report on the nature of disposal of cases and pendency of cases to the District Magistrate in the manner as may be prescribed, for review of pendency of cases.

(5) After review under sub-section (4), the District Magistrate shall direct the Committee to take necessary remedial measures to address the pendency, if necessary and send a report of such reviews to the State Government, who may cause the constitution of additional Committees, if required:

Provided that if the pendency of cases continues to be unaddressed by the Committee even after three months of receiving such directions, the State Government shall terminate the said Committee and shall constitute a new Committee.

(6) In anticipation of termination of the Committee and in order that no time is lost in constituting a new Committee, the State Government shall maintain a standing panel of eligible persons to be appointed as members of the Committee.

(7) In case of any delay in the constitution of a new Committee under sub-section (5), the Child Welfare Committee of a nearby district shall assume responsibility in the intervening period."

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

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

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

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

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

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

(e) foster care orders under section 44;

(f) sponsorship orders under section 45;

(g) directions to persons or institutions or facilities in whose care the

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

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

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

(i) declaration of fit persons for foster care;

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

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

54. We are also of the opinion that the Magistrate or the Committee in case directing the girl to be kept in protective home under the J.J. Act the Magistrate or the Committee, as may be, should give credence to her wish.

55. Section 101 of the Act reads as under:-

"101. Appeals.- (1) Subject to the provisions of this Act, any person aggrieved by an order made by the Committee or the Board under this Act may, within thirty days from the date of such order, prefer an appeal to the Childrens Court, except for decisions by the Committee related to Foster Care and Sponsorship After Care for which the appeal shall lie with the District Magistrate:

Provided that the Court of Sessions, or the District Magistrate, as the case may be, may entertain the appeal after the expiry of the said period of thirty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time and such appeal shall be decided within a period of thirty days.

(2) An appeal shall lie against an order of the Board passed after making the preliminary assessment into a heinous offence under section 15 of the Act, before the Court of Sessions and the Court may, while deciding the appeal, take the assistance of experienced psychologists and medical specialists other than those whose assistance has been obtained by the Board in passing the order under the said section.

(3) No appeal shall lie from,--

(a) any order of acquittal made by the Board in respect of a child alleged to have committed an offence other than the heinous offence by a child who has completed or is above the age of sixteen years; or

(b) any order made by a Committee in respect of finding that a person is not a child in need of care and protection.

(4) No second appeal shall lie from any order of the Court of Session, passed in appeal under this section.

(5) Any person aggrieved by an order of the Children's Court may file an appeal before the High Court in accordance with the procedure specified in the Code of Criminal Procedure, 1973 (2 of 1974)."

56. Section 102 of the Act is as under:

"102. Revision.- The High Court may, at any time, either on its own motion or on an application received in this behalf, call for the record of any proceeding in which any Committee or Board or Children's Court, or Court has passed an order, for the purpose of satisfying itself as

to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit:

Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard."

57. In **Kanu Sanyal vs. District Magistrate, Darjeeling & Ors.** (supra), while dealing with writ of habeas corpus, the Supreme Court has held that it is essentially a procedural writ. It deals with the machinery of justice and not the substantive law. The object of the writ is to secure release of a person, who is illegally restrained of his/her liberty. In **Manubhai Ratilal Patel vs. State of Gujrat & Ors.** (supra), the Supreme Court has held that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical or wholly illegal manner. In **Saurabh Kumar vs. Jailor, Koneila Jail & Anr.** (supra), the Supreme Court has held that since the petitioner was in judicial custody by virtue of an order passed by a Judicial Magistrate and, hence, it could not be held to be an illegal detention. The Supreme Court has further held that even if the Magistrate has acted mechanically in remanding the accused to judicial custody and has dealt with the process in a cavalier fashion which shows inconsistencies towards the denial of personal liberty of citizen, a writ of habeas corpus would not be maintainable. In **State of Maharashtra & Ors. vs. Tasneem Rizwan Siddiquee** (supra), the Supreme Court has held that no writ of habeas corpus could be issued when the detenue was in detention pursuant to an order passed by the Court. In **Serious Fraud Investigation Office vs. Rahul Modi & Anr.** (supra), the Supreme Court has held that the action of directing remand of an accused is a judicial function and challenge to the same is not to be entertained in habeas corpus writ petition.

58. In **Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir and Others**35, it was held by Hon'ble Supreme Court as under:

"9. Detenu was arrested and detained on October 18, 1981. The report by the expert is dated May 3, 1982, that is nearly seven months after the date of detention; Growing in age day by day is an involuntary process and the anatomical changes in the structure of the body continuously occur. Even on normal calculation, if seven months are deducted from the approximate age opined by the expert in October, 1981 detenu was around 17 years of age, consequently the statement made in the petition turns out to be wholly true. However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side. Undoubtedly, therefore, the detenu was a young school going boy. It equally appears that there was some upheaval in the educational institutions. This young school going boy may be enthusiastic about the students' rights and on two different dates he marginally crossed the bounds of law. It passes comprehension to believe that he can be visited with drastic measure of preventive detention. One cannot treat young people, may be immature, may be even slightly misdirected, may be a little more enthusiastic, with a sledge hammer. In our opinion, in the facts and circumstances of this case the detention

order was wholly unwarranted and deserved to be quashed.

10. We must record our appreciation that Mr. Altaf Ahmed, learned standing counsel for the State of Jammu and Kashmir submitted the State case with utmost fairness."

59. In order to bring clarity to the matter, we deem it appropriate to consider the judgement of **Raj Kumari vs. Superintendent Women Protection House and others** (supra), wherein it has been held that a minor cannot be sent to Nari Niketan against her wishes and the same preposition of law is being incorporated in the orders passed by this Court while entertaining the Habeas Corpus Writ Petition of minor girl, who has been detained in Nari Niketan by a judicial order.

60. So far as the reliance over the judgements given by the Division Bench of this Court in the first set of judgments, as referred above, are concerned, all the Division Benches have referred the judgement in **Ms. Kalyani Chaudhary vs. State of UP** (supra) and **Raj Kumari vs. Superintendent Women Protection House and others** (supra)

61. In **Ms. Kalyani Chaudhary vs. State of UP** (supra) the petitioner claimed that she was wrongully detained in Mahila Ashram, Moti Nagar, Lucknow. She accordingly had prayed for a writ in the nature of habeas corpus. The Court had formulated the question for determination as to whether her deterntion in Mahila Ashram, which is a Protective Home, is in accordance with law and proceeded to observe that Protective Homes find a mention in the Suppression of Immoral Traffic in Women and Girls Act, 1956 (in short, the Act of 1956). Sub-section (2) of Section 10 of the Act of 1956 provides that where a woman or girl is convicted of any offence under Section 7 or Section 8, she may be kept in the protective homes. The Court further proceeded to consider the provisions of Suppression of Immoral Traffic in Women and Girls Act and observed that a person can be kept in a Protective Home only when she is being dealt with under the Act. No person can be kept in the protective home unless she is required to be kept there either in pursuance of the Suppression of Immoral Traffic in Women and Girls Act, or under some other law permitting her detention in such a Home. The Court categorically proceeded to observe that "it is admitted that the case does not fall under this Act, no other law has been referred to. The order of the learned Magistrate gives no reason why the girl be kept in the Protective Home. His order mentions no provision of law under which he has passed such a direction. The order of the Magistrate directing the girl to be kept to the 'Protective Home' thus suffers from inherent lack of jurisdiction. Her custody in the protective home cannot, therefore, be held to be a legal custody". The relevant portion of the judgement is reproduced herein below:-

"4. A reading of the provision of the Suppression of Immoral Traffic in Women and Girls Act clearly shows that a person can be kept in a Protective Home only when she is being dealt with under the Act. No person can be kept in the protective home unless she is required to be kept there either in pursuance of the Suppression of Immoral Traffic in Women and Girls Act, or under some other law permitting her detention in such a Home. It is admitted that the case does not fall under this Act, no other law has been referred to.

5. The order of the learned Magistrate gives no reason why the girl be kept in the Protective Home. His order mentions no provision of law under which he has passed such a direction. The order of the Magistrate directing the girl to be kept in the 'Protective Home' thus suffers from inherent lack of jurisdiction. Her custody in the protective home cannot, therefore, be held to be a legal custody.

6. Learned Counsel for the father of the girl has urged that because, according to him, the girl was a minor she could be kept in the protective home, and if not, she should be given in custody of the father as she was not a legally married woman. The evidence of the girl shows that she is a major. Moreover, in the present case the question of minority is Irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home. The question of giving the girl in the custody of the father also does not arise in the present case as the father was himself instrumental in getting the girl, sent into the Protective Home through the aid of the Police. We are, in these proceedings, also not required to determine the question about the minority or marriage of the girl or about the right of any person to keep In his custody the petitioner, as that is a matter which can arise in proceedings such as under the Guardians and Wards Act and not in a petition for Habeas Corups where the petitioner seeks freedom from illegal detention. The objection raised on behalf of the father cannot therefore be sufficient for our holding that the petitioner is not entitled at liberty from her illegal detention.

7. Learned Counsel for the petitioner Mrs. Kalyani Chowdhary (Kumari Kalyani Devi) and the girl herself have stated that she will appear In the criminal court whenever she is summoned in connection with the case which the police may be investigating and in connection with which the order was secured from the City Magistrate.

8. There is no allegation that the petitioner has committed any offence; there can therefore be no legal validity for the curtailment of the petitioner's liberty. The order of the learned Magistrate cannot accordingly validate the detention.

9. In the result, the petition is allowed and Mrs. Kalyani Chowdhary (Kumari Kalyani Devi) is set at liberty forthwith."

62. In **Raj Kumari vs. Superintendent Women Protection House and others** (supra) the Court has also considered the case of **Ms. Kalyani Chaudhary vs. State of UP** (supra) wherein the Division Bench of this Court has taken the view that no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women & Girls Protection Act or under some other law permitting her detention in such a home. The Court had also considered the Division Bench judgement of **Pushpa Devi vs. State of UP** and allowed the habeas corpus writ petition. Relevant portion of the judgement is extracted herein below:-

"16. In view of the above it is well settled view of this Court that: even a minor cannot be detained in Government Protective Home against her wishes, In the instant matter petitioner has desired to go with Sunil Kumar, besides this according to the two medical reports i.e. of the Chief Medical Officer and LLRM, Medical College, Meerut, the petitioner is certainly not less than 17 years and she understands her well being arid also is capable of considering her future, As such we are of

the opinion that her detention in govt. Protective Home, Meerut against her wishes is undesirable and impugned order dated 23-11 -1996 passed by the Magistrate directing her detention till the party concerned gets a declaration by the Civil Court or the competent Court of law regarding her age, is not sustainable and is liable to be quashed.

17. I n the result the writ petition succeeds and is allowed.

18. The impugned order dated 23-11-1996 passed by the City Magistrate, Bulandshahr in case No. 2/96 under Section 97/98 Cr.P.C. is quashed and the Supdt. Govt. Women Protective Home, Meerut is directed to set the petitioner at liberty according to her wishes."

63. The Court had also considered an issue as to whether there is any authority for detention of the corpus with any person in law. Though it was pleaded that she has been detained in the Nari Niketan under the directions of the Magistrate, the first thing is to be seen as to whether the Magistrate can direct the detention of a person in the situation in which the petitioner is. No Magistrate has an absolute right to detain any person at the place of his choice or even any other place unless it can be justified by some law and procedure. The petitioner would not be accused of the offence under Sections 363, 366 IPC because she could only be a victim of it. A victim may at best be a witness and there is no law atleast now has been quoted before us as to whether the Magistrate may direct detention of a witness simply because she does not like to go to any particular place. In such circumstances, the direction of the Magistrate that she shall be detained at Nari Niketan is absolutely without jurisdiction and illegal.

64. Similar view has also been taken in **Pushpa Devi vs. State of UP** (supra) wherein the Division Bench of this Court had also formulated an issue as to whether the Magistrate can direct the detention of a person in the situation in which the petitioner is. No Magistrate has an absolute right to detain any person at the place of his choice or even any other place unless it can be justified by some law and procedure. The relevant portion of the aforesaid judgement is reproduced hereinbelow:-

"In any event, the question of age is not very material in the petitions of the nature of habeas corpus as even a minor has a right to keep her person and even the parents cannot compel the detention of the minor against her will, unless there is some other reason for it.

We have no mind to enter into the question and decide as to when a particular minor is to be set at liberty in respect of her person or whether she shall be governed by the direction of her parents. The question of custody of the petitioner as a minor, will depend upon various factors such as her marriage which she has stated to have taken place with Guddu before the Magistrate.

Apart from the above factors, the more important aspect is as to whether there is any authority for detention of the petitioner with any person in law. Though, it is said that she has been detained in the Nari Niketan under the directions of the Magistrate, the first thing to be seen should be as to whether the Magistrate can direct the detention of a person in the situation in which the petitioner is. No Magistrate has an absolute right to detain any person at the place of his choice or even any other place unless it can be justified by some law and procedure. It is very clear that this petitioner would not be accused of the offence under Sections 363 and 366 I. P. C. We are taking the version because she could only be a victim of it. A victim may

at best be a witness and there is no law at least now has been quoted before us whereunder the Magistrate may direct dentition of a witness simply because he does not like him to go to any particular place. In such circumstances, the direction of the Magistrate that she shall be detained at Nari Niketan is absolutely without jurisdiction and illegal. Even the Magistrate is not a natural guardian or duly appointed guardian of all minors"

65. All the three questions raised above can be considered together conveniently. In the first set of judgements in most of the cases reliance has been placed upon the judgments in **Smt. Kalyani Chowdhary v. State of U.P** and **Seema Devi @ Simran Kaur v. State of H.P.** wherein it has been held that no person can be kept in Protective Home, unless required to be kept, either in pursuance to the suppression of Immoral Traffic in Women and Girls Act or some other Act for protection in such a Home. The Court pointed out that where the Magistrate's order mentions any provision of law under which he has passed such a direction, the order directing the girl to be kept in the protective home suffers from inherent lack of jurisdiction. Her custody in the protective home cannot, therefore, be held to be a legal custody. The Court said that the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a protective home and the question of giving the girl in the custody of the father also did not arise in that case as the father was himself instrumental in getting the girl sent to the protective home through the aid of the police. It is thus clear that in **Smt. Kalyani Chowdhary v. State of U.P** the Division Bench has clearly proceeded to observe that the Magistrate's order mentioned no provision of law under which he has passed such a direction. The order directing the girl to be kept in protective home suffers from inherent lack of jurisdiction, whereas in the present matter we are dealing with the matters under the J.J. Act.

66. In **Independent Thought. v. Union of India**36 the Apex Court after taking a conspectus of the provisions contained in the Constitution of India, the Indian Penal Code, the Prevention of Children from Sexual Offences Act, 201237 and the J. J. Act, 2015, held as follows:

"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."

67. In most of the cases, wherein it has been held that the habeas corpus writ petition is maintainable, the Division Benches placed reliance on the judgement of **Jaya Mala vs. State of Jammu and Kashmir** (supra). The judgement of Jaya Mala was distinguished by the Full Bench of Patna High Court in **Shikha Kumari vs. State of Bihar** (supra) in paragraphs 86 and 87.

68. If we look at the relevant Sections of the J.J. Act, the object of the J.J. Act is pro-child legislation. The J.J. Act itself provides all remedial measures of rehabilitation and care to a child who is in need of care and protection. We attach equal importance to other Sections of the J.J. Act. They are emphatic, and in case the petitioner is aggrieved, and the corpus is sent to the shelter home arbitrarily, then the said situation may also be looked into and examined in the regular appeal or revision. Section 37 of J.J. Act clearly provides that the Committee on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by the Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the following orders. The framers have also consciously taken due care of child's wishes in case the child is sufficiently mature to take a view. It is the paramount responsibility of the Committee to take all necessary measures for taking into account the child's wishes after making due enquiry, which contemplates under Section 36 of J.J. Act and take final decision.

69. Therefore, in such situation it cannot be presumed that in case the corpus is in Women Protection Home pursuant to an order passed by the Child Welfare Committee, which is neither without jurisdiction nor illegal or perverse, keeping in mind the provisions of the J.J. Act, the detention of the corpus cannot be said to be illegal and in case the petitioner is aggrieved by the order of the Child Welfare Committee, or the Magistrate, the petitioner is at liberty to take recourse of remedy of an appeal or revision provided under Sections 101 and 102 of the J.J. Act.

70. In afore-mentioned matters the Court clearly proceeded to observe that no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women & Girls Protection Act or under some other law permitting her detention in such a home. No such situation contemplates under the J.J. Act and therefore, it cannot be said that the Magistrate or by the Committee does not inher the power. The Juvenile Justice (Care and Protection of Children) Act, 200038 was initially enacted in the year 2000 to provide for protection of children. The Act was amended in the years 2006 and 2011. However, several issues, such as increasing incidents of abuse of children in institutions, inadequate facilities, quality of care and rehabilitation

measures in Homes, delays in adoption due to faulty and incomplete processing, lack of clarity regarding roles, responsibilities and accountability of institutions, sale of children for adoption purposes etc. had cropped up in recent times. Such numerous change was required in the Act of 2000 to address the above mentioned issues. Such situation impelled the legislature to re-enact a comprehensive legislation. The J.J. Act ensures proper care, protection, development, treatment and social re-integration of children in difficult circumstance by adopting a child-friendly approach keeping in view the best interest of the child. It had also prompted the legislature to make drastic changes in the Act of 2000 to tackle child offenders in the age group and re-enact a comprehensive legislation inter alia to provide for general principles of care and protection of children, procedures in case of children in need of care and protection and children in conflict with law, rehabilitation and social re-integration measures for such children, adoption or orphan, abandoned and surrendered children, and offences committed against children.

71. Analysing the orders passed by this Court as well as Jharkhand High Court, Madhya Pradesh High Court and Patna High Court, it can be safely concluded that the writ of Habeas Corpus is not maintainable against the judicial order or an order passed by the Child Welfare Committee under the J.J. Act.

72. It is also apparent from perusal of the documents available on record and the statement of the petitioner corpus/victim recorded under Section 164 Cr.P.C. That the petitioner corpus refused to go with her mother and insisted that she may be sent alongwith her friend, first petitioner. As per High School Marksheet, her date of birth is 05.02.2003 and on the said date, she was 17 years, one month and eight days' old. Consequently, the Child Welfare Committee, by an order dated 16.3.2020, directed the petitioner corpus to be placed in Women Protection Home, upon finding her to be minor. Once the petitioner corpus is found as child, as defined in Section 2 (12) of J.J. Act, and allegedly a victim of crime in Case No.64/2000, detailed above, she would fall in the category of child in need of care and protection in view of clause (iii), (viii) and (xii) of sub-section (14) of Section 2 of J.J. Act. Once the order passed by the Committee placing the petitioner corpus in protection home would be within its power conferred by Section 37 of the J.J. Act then it cannot be presumed that the said order is without jurisdiction, illegal or perverse, keeping in mind the provisions of the J.J. Act and the detention of the corpus cannot be said to be illegal.

73. In that view of the matter, it was not a case of illegal detention but the petitioner corpus was in Children Home (Girl) Saharanpur by virtue of an order passed by Jurisdictional Magistrate. Even if there is lack of following due procedure under the Act and Rules by the Magistrate or by the Committee that can be agitated by the petitioner under the provisions of appeal/revision, as referred to above by taking out separate proceedings.

74. In **Janardan Reddy & Ors. vs. The State of Hyderabad & Ors.** (supra) the Apex Court, while considering the maintainability of the writ petition, has observed that there is a basic difference between want of jurisdiction and illegal or irregular exercise of jurisdiction, Mere non-compliance of the rules of procedure cannot be made a ground for granting a

writ under Article 32 of the Constitution. The defect, if any, can, according to the procedure established by law, be corrected only by a court of appeal or revision, and if the appellate court, which was competent to deal with the matter, has to consider the matter and pronounce its judgment, it cannot be reopened in a proceeding under Article 32 of the Constitution. The Apex Court further observed that the writ of habeas corpus could not be granted as a return that the person is in detention in execution of a sentence on indictment of a criminal charge, is sufficient answer to an application for such a writ.

75. Section 27 of the J.J. Act deals with Child Welfare Committee, wherein sub-section (8) provides that the District Magistrate shall conduct a quarterly review of the functioning of the Committee. Sub-section (9) also provides that the Committee shall function as a Bench and shall have the powers conferred by the Code of Criminal Procedure, 1973 on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class. Section 29 provides the powers of Committee, which shall have the authority to dispose of cases for the care, protection, treatment, development and rehabilitation of children in need of care and protection, as well as to provide for their basic needs and protection. Sub-section (2) of Section 29 of the J.J. Act provides that where a Committee has been constituted for any area, such Committee shall, notwithstanding anything contained in any other law for the time being in force, but save as otherwise expressly provided in this Act, have the power to deal exclusively with all proceedings under this Act relating to children in need of care and protection. Section 30 of the J.J. Act deals with the functions and responsibilities of Committee, which include taking cognizance of and receiving the children produced before it. Most importantly Section 30 (ii) of the J.J. Act provides for conducting inquiry on all issues relating to and affecting the safety and well-being on the children under the Act. Sub-section (iii) of Section 30 of the J.J. Act provides for directing the Child Welfare Officers or Probation Officers or District Child Protection Unit or non-governmental organisations to conduct social investigation and submit a report before the Committee. Section 30 (vi) of the J.J. Act provides for ensuring care, protection, appropriate rehabilitation or restoration of children in need of care and protection, based on the child's individual care plan and passing necessary directions to parents or guardians or fit persons or children's homes or fit facility in this regard.

76. Full fledged mechanism is also provided in sub-section (viii) of Section 30 of J.J. Act for conducting an inspection visits per month of residential facilities for children in need of care and protection and recommending action for improvement in quality of services to the District Child Protection Unit and the State Government. Sub-section (1) of Section 37 of the J.J. Act, which deals with orders passed regarding a child in need of care and protection, provides that the Committee on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the following orders, namely (a) declaration that a child is in need of care and protection; (b) restoration of the child to

parents or guardian or family with or without supervision of Child Welfare Officer or designated social worker; (c) placement of the child in Children's Home or fit facility or Specialised Adoption Agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child; (d) placement of the child with fit person for long term or temporary care; (e) foster care orders under section 44; (f) sponsorship orders under section 45; (g) directions to persons or institutions or facilities in whose care the child is placed, regarding care, protection and rehabilitation of the child, including directions relating to immediate shelter and services such as medical attention, psychiatric and psychological support including need-based counselling, occupational therapy or behaviour modification therapy, skill training, legal aid, educational services, and other developmental activities, as required, as well as follow-up and coordination with the District Child Protection Unit or State Government and other agencies and (h) declaration that the child is legally free for adoption under Section 38.

77. Once corpus is minor and the girl had refused to go with her parents, then in such situation arrangement has to be made. Her interest is paramount and before proceeding to pass order for custody of the minor, the welfare of the minor has to be kept in mind. The wish of minor and the wish/desire of girl can always be considered by the Magistrate concerned/Committee and as per her wishes/desire further follow up action be taken in accordance with law under the J.J. Act.

78. Thus, it is evident that a writ of habeas corpus would not be mintainable, if the detention in custody is pursuant to judicial orders passed by a Judicial Magistrate or a court of competent jurisdiction or by the Child Welfare Committee. Suffice to indicate that an illegal or irregular exercise of jurisdiction by the Magistrate passing an order of remand or by the Child Welfare Committee under J.J. Act cannot be treated as an illegal detention. Such an order can be cured by way of challenging the legality, validity and correctness of the order by filing an appropriate proceeding before the competent appellate or revisional forum under the statutory provisions of law but cannot be reviewed in a petition seeking writ of habeas corpus.

79. We accordingly come on our conclusions in respect of question nos.1, 2 and 3 for determination as follows:-

Question No.1 : "(1) Whether a writ of habeas corpus is maintainable against the judicial order passed by the Magistrate or by the Child Welfare Committee appointed under Section 27 of the Act, sending the victim to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home?;

Answer : If the petitioner corpus is in custody as per judicial orders passed by a Judicial Magistrate or a Court of Competent Jurisdiction or a Child Welfare Committee under the J.J. Act. Consequently, such an order passed by the Magistrate or by the Committee cannot be challenged/assailed or set aside in a writ of habeas corpus.

Question No.2: "Whether detention of a corpus in Women Protection Home/Nari Niketan/Juvenile Home/Child

Care Home pursuant to an order (may be improper) can be termed/viewed as an illegal detention?"

Answer: An illegal or irregular exercise of jurisdiction by a Magistrate or by the Child Welfare Committee appointed under Section 27 of the J.J. Act, sending the victim to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home cannot be treated an illegal detention.

Question No.3 : "Under the Scheme of the Juvenile Justice (Care and Protection of Children) Act, 2015, the welfare and safety of child in need of care and protection is the legal responsibility of the Board/Child Welfare Committee and as such, the proposition that even a minor cannot be sent to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home against his/her wishes is legally valid or it requires a modified approach in consonance with the object of the Act ?"

Answer: Under the J.J. Act, the welfare and safety of child in need of care and protection is the legal responsibility of the Board/Child Welfare Committee and the Magistrate/Committee must give credence to her wishes. As per Section 37 of the J.J. Act the Committee, on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the orders mentioned in Section 37 (1) (a) to (h).

80. Thus, all the three issues referred for determination are answered, accordingly.

81. Let the matter be placed before the appropriate Bench for orders.

82. Before parting with the matter we place on record our appreciation for the active assistance rendered by learned Senior Advocate Shri Shagir Ahmad and the learned Addl. Advocate General.

(2021)03ILR A352
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.03.2021

BEFORE

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

Habeas Corpus Writ Petition No. 389 of 2020

Master Aryan & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shams Uz Zaman

Counsel for the Respondents:
G.A., Sri Pankaj Bharti

Mother claims custody of her two minor sons -she is accused of murdering her own husband-custody denied.(E-7)

Cases cited:

1. Githa Hariharan (Ms) & anr. Vs R.B.I. & anr., (1999) 2 SCC 228

2.Nil Ratan Kundu & anr. Vs Abhijit Kundu,(2008) 9 SCC 413

3. Shaurya Gautam & anr. Vs St. of U.P. & ors., 2020 SCC OnLine All 1372

4. Angelina Miranda Minor Child, Rajan Chawla Vs Lisbon John Miranda, 2012 SCC OnLine Bom 1791

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

Master Aryan and Master Chetan are two young boys, who have lost their father

to a crime. Their deceased father, the late Pramod Kumar, was murdered. The boys' misfortune was worsened, as their mother, Sonia, was arrested as a co-accused in the crime, along with Pramod, son of Rajbira and Mahbood, son of Yusuf Ansari. She was arrested and sent to jail, on 05.09.2019. She was admitted to bail by this Court and released from prison, on 13.02.2020. During the period of her incarceration, the two boys were taken away by respondent nos. 4 to 11, who are their late father's family members. Once Sonia emerged from jail, she demanded her children's custody, which respondent nos. 4 to 11 denied. Sonia, who is the mother and the natural guardian of Master Aryan and Master Chetan, has instituted this petition for a writ of habeas corpus, asking this Court to order respondent nos. 4 to 11 to produce her sons and to set them at liberty, in the manner that they be entrusted to her custody.

2. This petition was admitted to hearing on 28.08.2020, and a *rule nisi* was issued to respondent nos. 4 to 11, ordering the Superintendent of Police to cause the two boys, who were in custody of respondent nos. 4 to 11, to be produced before this Court on 02.09.2020. On the date of return, Aryan and Chetan were produced before the Court. Respondent nos. 5 and 9 alone put in appearance through Mr. Pankaj Bharti, Advocate. The Court interacted with the elder of the two children, Chetan, in order to ascertain his wishes about his choice of the person he would like to be with. The Court not only ascertained his wishes, but also recorded impressions about the expression of choice by Chetan, in the order dated 02.09.2020. It would be alluded to in some detail later in this judgment.

3. The matter was adjourned for further hearing to 02.09.2020 and in the meantime, Mr. Pankaj Bharti was granted time to file a counter affidavit. The matter came up again on 24.09.2020, when a counter affidavit was filed on behalf of respondent no. 5, acting for himself and for respondent no. 9. The case was adjourned for further hearing to 08.10.2020. On 08.10.2020, learned counsel appearing for the parties concluded their submissions and judgment was reserved.

4. The short case of the petitioner, Sonia, is that being the minors' mother, she is their natural guardian, who has a right to their custody, by virtue of Section 6(a) of The Hindu Minority and Guardianship Act, 19561 as also the well settled principles that regard the minor's welfare best secured in the hands of the mother. It is her case that the respondents, including respondent nos. 5 and 9 are relatives of the minors' father, who is no more. They have no right or authority to deprive the mother of her minor children's custody. Refusal by the private respondents to hand over custody of the petitioner's minor children to her constitutes unlawful detention, and they ought to be liberated from that custody, entrusting them to her care. In the return filed on behalf of respondent nos. 5 and 9, it is made out that Sonia, the minor's mother, is an accused in her husband's murder. It is asserted that Pramod Kumar was done to death in consequence of a conspiracy hatched by Sonia, with her paramour, one Pramod son of Rajbira and another Mahbood, son of Yusuf Ansari. A First Information Report of the incident was lodged by Mukesh, respondent no. 5, against Pramod, Sonia and an unknown offender, on 03.09.2019, giving rise to Case Crime No. 343 of 2019, under Sections 302, 201, 120B Indian Penal Code, Police Station - Kandhala, District - Shamli. Sonia was arrested on 05.09.2019,

in connection with the said crime. The two minor children have been living with respondent nos. 4 to 11, since their mother's arrest. Sonia was released on bail vide order dated 13.02.2020 passed by this Court in *Criminal Misc. Bail Application No. 6545 of 2020*. Post-investigation, a charge-sheet has been submitted against Sonia, as also co-accused Pramod and Mahbood. All the three accused, including Sonia, are facing trial on the charge of murdering Pramod *vide* Sessions Trial No. 14 of 2020. It is pointed out that of respondent nos. 4 to 11, respondent no. 4 has passed away. The other respondents are uncles and cousins of the minors. Aryan is aged about five years, whereas Chetan is seven years old. Both of them are pursuing studies in the Mother India Model Junior High School, Kairana, Shamli. It is said that both Chetan and Aryan are staying with respondent nos. 4 to 11 of their volition, and are not inclined to go to their mother, Sonia. It is also asserted that Sonia wants to hold the children in her custody, contrary to their wishes, in order to tamper with evidence relating to her husband's murder, by pressurizing witnesses. It is urged that the minors' welfare is not at all secure in their mother's hands, in view of the circumstances here.

5. Heard Mr. Shams Uz Zaman, learned counsel for the petitioners, Mr. Pankaj Bharti, learned counsel for the respondent nos. 5 and 9, and Mr. J.P. Tripathi, learned counsel for the State.

6. Normally, minors, particularly young children, ought to be with their mothers, as it is the mother in whose hands a child's welfare is best secured. It is a salutary principle that in deciding about a minor's custody or his/her guardianship, the welfare of the minor is of paramount consideration. This principle is embodied under Section 17 of The Guardians and Wards Act, 18902 and elsewhere too. Section 6(a) of the Act of 1956 reads thus :

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

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

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

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

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

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

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

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

7. Now, Section 6(a) indeed makes the mother a natural guardian, along with the father. After the decision in **Githa Hariharan (Ms) and another v. Reserve Bank of India and Another**3, the father and the mother, as natural guardians, stand at par, with no preference to the father. By virtue of the proviso to Section 6(a) of the Act of 1956, custody of children up to the age of five years is envisaged ordinarily to

be with the mother. It is not that the age of five is a mathematically precise calibration, after which the child's welfare may be judged free from the principle carried in the proviso to Section 6(a). The principle that animates the proviso last mentioned is that the welfare of a young child is best secured in the mother's hands. In the opinion of this Court, that preference about welfare would not abruptly come to an end at the age of five, as if it were a statutory cut-off. The principle there would continue to apply, so long as the minor is of tender years. At the same time, what cannot be lost sight of is the fact that the provisions of Section 6(a) regard the mother's pre-eminence to hold custody of a young child, ordinarily. The word "ordinarily" has much significance. It takes into account the circumstances that could be emergent in a case where the mother might be disqualified to hold a child's custody. There could be cases where the minor's welfare may not be best secured in the mother's hand. Of course, those disentitling circumstances would have to be clearly pleaded and undisputedly proved. These could be, the mother being physically or mentally incapacitated, or demonstrably living in circumstances where the children's welfare - physical, mental and psychological, would not be secure, or accused of a crime involving moral turpitude, that would impact the minor's welfare. These situations are only illustrative and there could be many more. In **Nil Ratan Kundu and Another v. Abhijit Kundu**4, the facts show that the father claimed the minor's custody from his grandfather and grandmother (both maternal). Like the case here, the father was an accused in the case relating to his wife's dowry death. The father's involvement in the crime concerning his wife's dowry death was recorded by their Lordships of the Supreme Court as a very important factor to be considered by the court, while judging the issue about the minor's welfare. The Court held the fact about the involvement of a natural guardian, in a criminal case relating to his spouse's death, to be a factor going much against him, while deciding the question about the minor's welfare. In this regard, it was held in **Nil Ratan Kundu** *(supra)* thus :

62. Now, it has come in evidence that after the death of Mithu (mother of Antariksh) and lodging of first information report by her father against Abhijit (father of Antariksh) and his mother (paternal grandmother of Antariksh), Abhijit was arrested by the police. It was also stated by Nil Ratan Kundu (father of Mithu) that mother of accused Abhijit (paternal grandmother of Antariksh)*absconded* and Antariksh was found sick from the house of Abhijit.

63. In our considered opinion, on the facts and in the circumstances of the case, both the courts were duty-bound to consider the allegations against the respondent herein and pendency of the criminal case for an offence punishable under Section 498-A IPC. One of the matters which is required to be considered by a court of law is the *"character"* of the proposed guardian. In *Kirtikumar*[(1992) 3 SCC 573 : 1992 SCC (Cri) 778] , this Court, almost in similar circumstances, where the father was facing the charge under Section 498-A IPC, did not grant custody of two minor children to the father and allowed them to remain with the maternal uncle.

64. Thus, a complaint against the father alleging and attributing the death of the mother, and a case under Section 498-A IPC is indeed a relevant factor and a court of law must address the said circumstance

while deciding the custody of the minor in favour of such a person. To us, it is no answer to state that in case the father is convicted, it is open to the maternal grandparents to make an appropriate application for change of custody. Even at this stage, the said fact ought to have been considered and an appropriate order ought to have been passed.

8. I had occasion to consider this question in **Shaurya Gautam and Another v. State of U.P. and Others**5, which was a case of a father accused of his wife's murder, demanding his children's custody from maternal grandmother. The elder of the two children had expressed his disinclination to go back to his father, or stay with him. In **Shaurya Gautam** *(supra)* I held :

16. This Court has looked into the allegations in the First Information Report, which shows that the father is facing trial on a charge of murder of his wife. The First Information Report indicates that his wife had called her mother on 17.09.2017 that there was a conspiracy afoot, where she could be crushed to death under the wheels of a tractor. Later on, she was found dead near Jalesar Road, portraying it as an accident. At least, that is the case in the First Information Report. The postmortem report shows crush injuries, from the skull to the upper abdomen. Awadhesh Gautam has said in the petition that his wife met an unnatural death, due to accidental burn injuries. This does appear to be the case.

17. This Court does not consider it appropriate to say anything more about the issue. Whatever has been remarked hereinabove, is only to fathom the nature of the allegations against Awadhesh Gautam. It is, in no way, an expression of opinion about the criminal charges against him. The totality of the circumstances on record show that unless acquitted, it would not be appropriate to place the two minor children in their father's custody. .....…

9. A similar view was taken by the Bombay High Court in **Angelina Miranda Minor Child, Rajan Chawla v. Lisbon John Miranda**6 where it was held :

28. My attention has been drawn to the judgment of the Supreme Court in the case of *Nil Ratan Kundu v. Abhijit Kundu*, (2008) 9 SCC 413 : AIR 2009 Supp SC 732 and in the case of *Bimla Devi v. Subhas Chandra Yadav "Nirala'*, AIR 1992 Pat 76 in which also Upon the unnatural death of the mother and the father facing the charge under section 498-A the Court preferred the child to remain with the maternal uncle to the father. Upon seeing the wishes of the children in that case, the Supreme Court held that the moral and ethical values were even more important and essential considerations over physical comforts. Consequently, in this case the father would be a wholly unfit guardian at least before he is acquitted of the charge against him and since the aunt has filed the petition only at the instance of the father she would not be clothed with the required essential fitness to be the guardian.

10. It is true that the involvement of a spouse in the homicidal death of the other is a matter that has serious bearing on the issue, whether the child's custody could be entrusted to the accused parent, so long as his/her guilt or innocence is not determined. Generally, it does not augur well for the child's welfare, to be placed in the custody of a parent, whose fitness to cater to his welfare is seriously in doubt, unless acquitted. Here, it is true that the charge against the wife is one of

conspiracy, but true or not, she is accused of her husband's murder, along with a paramour. If the charge were true, the mother would not be an ideal person to groom the young children, whose welfare not only requires fulfillment of their physical needs, but many other things, which includes their moral character. That apart, the circumstances which faintly appear in this case about the crime, and which this Court does not wish to know or probe in greater detail, suggest that if the charge were true, the minors' safety might also be compromised.

11. Here, this Court must refer to the interaction that we had with the minors. The elder of them, Chetan, who is seven-years-old, expressed his mind to the Court. He appears to be a bright and intelligent child, capable of clearly expressing his mind and preference. He expressed his dislike for his mother and said that he wishes to stay with his aunt and uncle (respondent nos. 5 and 9). He has said a few things about his mother, which did not appear to come from him spontaneously. He has expressed his feelings of animosity and dislike for his mother, that are traceable to tutoring by his uncle and aunt (respondent nos. 5 and 9). On being asked why he disliked his mother, he candidly told the Court that he was informed about it all by his uncle and aunt (respondent nos. 5 and 9). Whatever Chetan told the Court, appears to be heavily under the influence of respondent nos. 5 and 9, who are his kindred, but this is one facet of the matter. For the present, the mother, indeed, faces a charge about her husband's murder, in relation to which, she is facing trial. There is a possibility, remote or not so remote, that she might be convicted and sentenced on the charge relating to her husband's and the minors' father's murder. If that were to happen, while the minors are staying with her, it would cause great trauma to the minors, to know that their mother, with whom they have bonded and are living, stands convicted of the father's murder. Of course, this is not so much to suggest or believe, so far as this Court is concerned, that the mother is guilty. All that this Court says, bears in mind the minors' welfare, if the contingency above mentioned were to come true. It is certainly a situation which ought to be avoided at the cost of depriving the minors of their mother's care and custody. Of course, if the mother is acquitted, it would be open to her to apply to the court of competent jurisdiction, asking for her sons' custody, and if in that contingency, the mother does apply, the court, exercising jurisdiction under the Act of 1890, would decide her claim about the minors' custody, consistent with their welfare, but unaffected by anything said in this order.

12. Subject to what has been said above, this Court does not find any good ground to make the *rule nisi* absolute. It is, accordingly, discharged.

13. In the result, this petition fails and stands **dismissed**.

(2021)03ILR A357
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.02.2021

BEFORE

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

Habeas Corpus Writ Petition No. 499 of 2020

Ujaif @ Noor Alam & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Brijesh Kumar Mishra

Counsel for the Respondents:
A.G.A., Sri Araf Khan, Sri Lihazur Rahman Khan

(A) Writ of habeas corpus - custody of a minor child - an application seeking a writ of habeas corpus for custody of a minor child - principal consideration for the court - to ascertain whether the custody of the child can be said to be unlawful and illegal and whether the welfare of the child requires that the present custody should be changed - where facts are disputed and a detailed inquiry is required - court may decline to exercise its extraordinary jurisdiction and may direct the parties to approach the appropriate court.(Para - 24,25)

(B) Civil Law - Guardians and Wards Act, 1890 (GWA) - Section 12 - court is empowered to make interlocutory orders for protection of a minor including an order for temporary custody and protection of the person or property of the minor, Section17 - matter to be considered by the court in appointing guardian - provisions of the personal law are to be applied consistently with the provisions of the GWA. (Para - 10)

Petitioner no.3 claims to be the father and natural guardian of the petitioner nos.1 and 2 (aged about six years and two years respectively) - wife of the petitioner no.3 expired - petitioner nos.1 and 2 were taken away by the respondent no.4 (father of the deceased wife) - custody of the petitioner nos.1 and 2 with the respondent no.4 is illegal - petitioner nos.1 and 2 be handed over to the petitioner no.3. (Para -3)

HELD: - The facts of the present case do not in any manner suggests that it is a case of illegal custody and in View thereof, the present petition seeking a writ of habeas corpus would not be entertainable. As regards the claim for custodial rights, it is always open to the parties to avail the appropriate remedy for the purpose before the proper forum. (Para - 27,28)

Habeas Corpus petition dismissed. (E-6)

List of Cases cited: -

1. Imambandi & ors. Vs Mutsaddi & ors., (1918) ILR 45 PC 878

2. Athar Hussain Vs Syed Siraj Ahmed & ors., (2010) 2 SCC 654

3. Siddiqunnisa Bibi Vs Nizamuddin Khan & ors., AIR 1932 AII 215

4. Mohammad Ikram Hussain Vs St. of U.P. & ors. AIR 1964 SC 1625

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

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

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

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

9. Rachhit Pandey (minor) & anr. Vs St. of U.P. & 3 ors., 2021 (92) ADJ 320

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

1. Heard Sri Brijesh Kumar Mishra, learned counsel for the petitioners, Sri Vinod Kant, learned Additional Advocate General alongwith Sri Arvind Kumar, learned Additional Government Advocate appearing for the State - respondents and Sri Lihazur Rahman Khan appearing alongwith Sri Araf Khan, learned counsel for the respondent no.4.

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

"1. Issue a writ, order or direction in the nature of Habeas Corpus directing the respondents to produce the petitioner

no.1 and 2 before this Hon'ble court and save the right of personal liberty of the corpus from the illegal detention of respondent no.4.

2. Issue a writ, order in the nature of mandamus directing the respondents to give the custody of petitioner no.1 and 2 to the petitioner as he has the father and natural guardian of petitioner no.3."

3. The petitioner no.3 claims to be the father and natural guardian of the petitioner nos.1 and 2 (aged about six years and two years respectively). It is contended that the wife of the petitioner no.3 expired on 27.05.2020 and thereafter, the petitioner nos.1 and 2 were taken away by the respondent no.4 (father of the deceased wife). Counsel for the petitioners contends that the custody of the petitioner nos.1 and 2 with the respondent no.4 is illegal and that the custody of the aforesaid petitioner nos.1 and 2 be handed over to the petitioner no.3.

4. Sri Lihazur Rahman Khan, learned counsel appearing for the respondent no.4, has placed reliance upon the counter affidavit and submits that the petitioner no.3 himself had entrusted custody of the petitioner nos.1 and 2 to the respondent no.4 (maternal grandfather of the minor children) and their maternal grandmother. Reliance in this regard has also been placed on a notarial affidavit of the petitioner no.3 himself, to support the contention that the custody of the petitioner nos.1 and 2 was handed over by him on his own volition to the maternal grandparents of the minor children.

5. Further reliance has been placed on the principles enunciated in Sections 352 and 353 of Mulla Principles of Mahomedan Law1 to contend that in case of a male child below the age of seven years and a female child who has not yet attained puberty, the mother is entitled to the custody *(hizanat)* and that failing the mother, the custody belongs to the mother's mother.

6. Counsel for the petitioners has not disputed the fact with regard to the affidavit having been executed by the petitioner no.3, in terms of which the custody of the petitioner nos.1 and 2 was handed over by the petitioner no.3 to the respondent no.4 and the maternal grandmother. He has, however, sought to contend that being the father, he would be the natural guardian of the minor children and would be entitled to their custody.

7. Learned Additional Advocate General appearing for the State - respondents submits that once the petitioner no.3 does not dispute the fact that the custody of the petitioner nos.1 and 2 (minor children) was handed over to their maternal grandparents by the petitioner no.3 himself, it would not be a case of illegal custody and the present petition seeking a writ of habeas corpus would not be entertainable.

8. Rival contentions now fall for consideration.

9. The law relating to guardians and wards is governed in terms of the Guardians and Wards Act, 18902 and an order with regard to guardianship upon an application filed by a person claiming entitlement may be passed under the aforesaid enactment.

10. The provision with regard to making of an application regarding claims based on entitlement of guardianship is under the GWA and under Section 12

thereof the court is empowered to make interlocutory orders for protection of a minor including an order for temporary custody and protection of the person or property of the minor.

11. Section 17 of the GWA relates to matter to be considered by the court in appointing guardian and in terms thereof it is provided that the court while deciding the question of guardianship of a minor, shall, as far as possible, do so consistently with the law to which the minor is subject, keeping in view the welfare of a minor. Thus, the provisions of the personal law are to be applied consistently with the provisions of the GWA.

12. It is common ground between the parties that insofar as the question of custody is concerned, their rights are to be governed by the personal law.

13. The matters relating to "Guardianship of Person and Property" are provided under Chapter XVIII of Mulla Principles of Mahomedan Law and Part A thereof pertains to "Appointment of Guardians". In terms of Section 349 all applications for the appointment of a guardian of the person or property or both of a minor are to be made under the GWA. Further, Section 351 of Mulla Principles of Mahomedan Law, which is in terms of Section 17 of the GWA, imposes a duty upon the court in appointing guardian to make the appointment consistently with the law to which the minor is subject, keeping in view the welfare of the minor.

14. The subject matter relating to "Guardianship of a Person of a Minor" is dealt with under Part B of Chapter XVIII of Mulla Principles of Mahomedan Law, and Sections 352 and 353 thereof are extracted below:-

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

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

(1) mother's mother, how highsoever;

(2) father's mother, how highsoever;

(3) full sister;

(4) uterine sister;

(5) consanguine sister;

(6) full sister's daughter;

(7) uterine sister's daughter;

(8) consanguine sister's daughter;

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

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

15. A conjoint reading of the aforesaid provisions indicates that the mother is entitled to the custody *(hizanat)* of her male child until he has completed the age of seven years and of her female child until she has attained puberty, and failing the mother, the custody of a boy under the age of seven years and of a girl who has not attained puberty, belongs to the female relatives in an order under which the mother's mother is shown first.

16. The custody of the two minor children (male aged about six years and female aged about two years) with their maternal grandmother and maternal grandfather cannot therefore be stated to be *prima facie* illegal. It may, however, be added that the entitlement of the mother or failing the mother, the mother's mother of the minor child, is up to a certain age according to the sex of the child, but she is not the natural guardian and it is the father who is the legal guardian under the personal law as held in the decision of the Privy Council in **Imambandi and others v Mutsaddi and others**3.

17. The question of custody is different from the question of guardianship and the rights with regard to custody can be independent of and distinct from that of custody, in the facts and circumstances of each case, as held in **Athar Hussain v Syed Siraj Ahmed and others**4, wherein it was held that though the father can be the natural guardian, custody can be entrusted to another person keeping in view the welfare of the children. In the facts of the case it was held that under the personal law governing the children, maternal relatives shall have preference for custody.

18. In the case of **Athar Hussain** (supra) while considering the question regarding the right of a female relation of a minor in distinction with the right of guardianship under the personal law, reference was made to an earlier decision in **Siddiqunnisa Bibi v Nizamuddin Khan and others**5, wherein it was stated as follows:-

"A question has been raised before us whether the right under the Mahomedan law of the female relation of a minor girl under the age of puberty to the custody of the person of the girl is identical with the guardianship of the person of the minor or whether it is something different and distinct. The right to the custody of such a minor vested in her female relations, is absolute and is subject to several conditions including the absence of residing at a distance from the father's place of residence and want of taking proper care of the child. It is also clear that the supervision of the child by the father continues in spite of the fact that she is under the care of her female relation, as the burden of providing maintenance for the child rests exclusively on the father…"

19. The question of custody and guardianship were held to be independent and keeping in mind the paramount consideration of the welfare of the children, their Lordships in the case of **Athar Hussain** (supra) held as follows:-

"34. Thus the question of guardianship can be independent of and distinct from that of custody in facts and circumstances of each case.

35. Keeping in mind the paramount consideration of welfare of the children, we are not inclined to disturb their custody which currently rests with their maternal relatives as the scope of this order is limited to determining with which of the contesting parties the minors should stay till the disposal of the application for guardianship."

20. The writ of habeas corpus is a prerogative writ and an extraordinary remedy. It is writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown, as held in **Mohammad Ikram Hussain v State of U.P. and others6** and **Kanu Sanyal v District Magistrate Darjeeling**7.

21. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration in **Nithya Anand Raghvan v State (NCT of Delhi) and another**8, and it was held that the principal duty of the court in such matters is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person.

22. Taking a similar view in **Sayed Saleemuddin v Dr. Rukhsana and others**9, while considering the scope of a habeas corpus petition seeking transfer of custody of children it was held that the principal consideration for the court would be to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that the present custody should be changed and the children should be left in the care and custody of some one else. It was stated thus:-

"11. ...it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court…"

23. The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for custody of a minor was examined in **Tejaswini Gaud and others v Shekhar Jagdish Prasad Tewari and others**10 and it was held that the petition would be maintainable where detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective. The observations made in the judgment in this regard are as follows:-

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

x x x

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

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

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

25. In a case where facts are disputed and a detailed inquiry is required, the court may decline to exercise its extraordinary jurisdiction and may direct the parties to approach the appropriate court.

26. The aforementioned legal position has been discussed in a recent judgment of this Court in **Rachhit Pandey (minor) and another v State of U.P. and 3 others**11.

27. The facts of the present case do not in any manner suggests that it is a case of illegal custody and in view thereof, the present petition seeking a writ of habeas corpus would not be entertainable.

28. As regards the claim for custodial rights, it is always open to the parties to avail the appropriate remedy for the purpose before the proper forum.

29. The observations made hereinabove are *prima facie* in nature and the same would be without prejudice to the rights and contentions of the parties which may be agitated in appropriate proceedings.

30. The petition fails and is accordingly dismissed.

(2021)03ILR A363
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.01.2021

BEFORE

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

Habeas Corpus Writ Petition No. 828 of 2020

Pankaj & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Phool Chandra

Counsel for the Respondents:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 498-A, 304-B - Dowry Prohibition Act, 1961- Section 3/4 - Writ of habeas corpus - Custody of a minor child- pendency of a criminal case, wherein the father has been charged of causing the death of the minor's mother - is a relevant factor required to be considered before an appropriate order could be passed - prerogative writ of habeas corpus, is in the nature of extraordinary remedy - which may not be used to examine the question of custody of a child except where in the circumstances of a particular case, it can

be held that the custody of the minor is illegal or unlawful. (Para -7,9)

Petitioner nos. 2 and 3 (stated to be minor children of petitioner no. 1 of age about 8 years and 3 years, respectively) have been detained by the respondent nos. 4 and 5 (maternal grandparents of the minor children).

HELD: - Not been able to demonstrate as to how, in the facts and circumstances of the present case, the custody of the petitioner nos. 2 and 3 with their maternal grandparents can be said to be illegal or unlawful so as to persuade this Court to exercise its extraordinary prerogative jurisdiction for issuing a writ of habeas corpus. Makes a prayer to withdraw the petition and states that the other remedies available to him under law with regard to the custodial rights would be pursued. (Para -10,11)

Habeas Corpus petition dismissed. (E-6)

List of Cases cited: -

1. Nil Ratan Kundu & anr. Vs Abhijit Kundu, (2008) 9 SCC 413

2. Kirtikumar Maheshankar Joshi Vs Pradipkumar Karunashanker Joshi, (1992) 3SCC 573

3. Rachit Pandey (minor) & anr. Vs St. of U.P. & 3 ors., Habeas Corpus Writ Petition no. 193 of 2020

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

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

6. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari 7 ors., (20190 7 SCC 42

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

1. Supplementary affidavit filed today is taken on record.

2. Heard Sri Phool Chandra, learned counsel for the petitioners and Sri Vinod Kant, learned Additional Advocate General, appearing alongwith Ms. Akansha Gaur, learned counsel for the State respondents.

3. The present petition for a writ of habeas corpus has been filed with an assertion that petitioner nos. 2 and 3 (stated to be minor children of petitioner no. 1 of age about 8 years and 3 years, respectively) have been detained by the respondent nos. 4 and 5 (maternal grandparents of the minor children).

4. Learned Additional Advocate General has pointed out that a copy of the First Information Report, which has been filed as S.A.-1 alongwith supplementary affidavit, indicates that the same was lodged on 28.8.2019 under Sections 498-A, 304-B IPC and Section 3/4 of the Dowry Prohibition Act, 1961. In the said First Information Report, the petitioner no. 1 herein, is named as the principal accused. It is submitted that the First Information Report is in respect of an incident relating to the death of the wife of the petitioner no. 1 i.e. mother of the children, whose custody is being sought.

5. Counsel for the petitioners has admitted the fact that petitioner no. 1 was sent to jail and thereafter, he was granted bail.

6. Learned Additional Advocate General submits that petitioner no. 1 being the principal accused in the pending criminal case, the prayer of the petitioner no. 1 seeking custody of the minor children may be detrimental to their interests.

7. In somewhat similar set of facts, in the case of **Nil Ratan Kundu and another vs. Abhijit Kundu**1, where the custody of a minor was sought in the background of the pendency of a criminal case under Sections 498 and 304 I.P.C. against the father charging him of causing the death of a minor's mother, it was held that the paramount consideration in such matters would be the welfare of the child, and the court, exercising *'parens patriae'* jurisdiction, must give due weightage to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings as well as physical comfort and moral values and the character of the proposed guardian is also required to be considered. It was held that the pendency of a criminal case, wherein the father has been charged of causing the death of the minor's mother, was a relevant factor required to be considered before an appropriate order could be passed. It was held as follows :-

"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 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…

..…

63. In our considered opinion, on the facts and in the circumstances of the case, both the courts were duty-bound to consider the allegations against the respondent herein and pendency of criminal case for an offence punishable under Section 498-A IPC. One of the matters which is required to be considered by a court of law is the *"character"* of the proposed guardian. In *Kirtikumar*, this Court, almost in similar circumstances where the father was facing the charge under Section 498-A IPC, did not grant custody of two minor children to the father and allowed them to remain with maternal uncle.

64. Thus, a complaint against the father alleging and attributing the death of mother, and a case under Section 498-A IPC is indeed a relevant factor and a court of law must address the said circumstance while deciding the custody of the minor in favour of such a person.

8. In an earlier decision in the case of **Kirtikumar Maheshankar Joshi vs. Pradipkumar Karunashanker Joshi**2, where in almost similar circumstances the father was facing a charge under Section 498-A I.P.C., it was held that though the father being a natural guardian, has a preferential right to the custody of the children, but in the facts and circumstances of the case, it would not be in the interest of children to hand over their custody to the father.

9. In a recent decision in **Rachit Pandey (minor) and another vs. State of**

U.P. and 3 others3 this Court after referring to the authoritative pronouncements in the case of **Nithya Anand Raghvan vs. State (NCT of Delhi) and another4, Sayed Saleemuddin vs. Dr. Rukhsana and others5** and **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others**6, has held that in an application seeking a writ of habeas corpus for custody of a minor child, the principal consideration for the Court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether the welfare of the child requires that the present custody should be changed and the child should be handed over in the care and custody of someone else other than in whose custody the child presently is. It was held that the pregorative writ of habeas corpus, is in the nature of extraordinary remedy, which may not be used to examine the question of custody of a child except where in the circumstances of a particular case, it can be held that the custody of the minor is illegal or unlawful.

10. Counsel for the petitioners has not been able to demonstrate as to how, in the facts and circumstances of the present case, the custody of the petitioner nos. 2 and 3 with their maternal grandparents can be said to be illegal or unlawful so as to pursuade this Court to exercise its extraordinary prerogative jurisdiction for issuing a writ of habeas corpus.

11. At this stage, learned counsel for the petitioners makes a prayer to withdraw the petition and states that the other remedies available to him under law with regard to the custodial rights would be pursued.

12. The petition stands, accordingly, dismissed.

(2021)03ILR A366
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.03.2021

BEFORE

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

Habeas Corpus Writ Petition No. 988 of 2019

Shiva & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Manvendra Singh, Sri Mazhar Ullah, Sri Shrawan Kumar Ojha

Counsel for the Respondents:
A.G.A., Ajay Kumar Srivastava

(A) Civil Law - Guardians and Wards Act, 1890 - Section 17 - Writ of habeas corpus - Custody of minor child - minor's custody between parents - whenever custody is to be entrusted to a guardian, natural or otherwise - welfare of the minor is of paramount importance - Hindu Minority and Guardianship Act, 1956 - Section 6(a) - Natural guardians of a Hindu minor - in the case of a boy or an unmarried girl - the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother - issue - about custody and not guardianship - welfare of young children is better ensured by the mother's caring hand than a father's equally concerned supervision. (Para - 12,16,17)

Wife and her husband are an estranged couple - two children - both minors - Both the children currently stay with their father, along with their grandmother and their father's brother - mother says that the two children ought to stay with her in order to secure their welfare better - minors' father, their grandmother and their uncle, resist this claim - It is this tussle over the

minors' custody that has led wife to institute these proceedings for the issue of a writ in the nature of habeas corpus.

HELD: - Minors, ought to remain in their mother's custody and care. At the same time, father cannot be deprived of their company altogether, and the minors, his paternal affection. This can be ensured by ordering a suitable schedule of visitation for the father, where he could meet the minors and spend time with them, as they stay with their mother. The *rule nisi* dated 19.10.2020 is made absolute in the terms that the custody of two minors, shall be entrusted by father to mother within a week of delivery of this judgment at mother's home.(Para - 30,32)

Habeas Corpus petition allowed. (E-6)

List of Cases cited: -

1. Hariharan (Ms) & anr. Vs R.B.I. & anr., (1999) 2 SCC 228

2. Amit Bery Vs Sheetal Beri, AIR 2003 All 18

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

4. Aharya Baranwal & 3 ors. Vs St. of U.P. & 2 ors., Habeas Corpus W.P. No.3921 of 2018

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

6. Nil Ratan Kundu & anr. Vs Abhijit Kundu, (2008) 9 SCC 413

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

1. Smt. Pushpa Devi @ Mahi and her husband, Devendra Kumar, are an estranged couple. They have two children, Shiva and Suraj, both minors. Shiva is aged five years old, whereas Suraj is three and a half years in age. Both the children currently stay with their father, Devendra Kumar, along with their grandmother, Smt. Neelam and their father's brother, Dhan Singh. The mother says that the two children ought to stay with her in order to secure their welfare better. Devendra Kumar, the minors' father, Smt. Neelam, their grandmother and Dhan Singh, their uncle, resist this claim. It is this tussle over the minors' custody that has led Smt. Pushpa Devi @ Mahi to institute these proceedings for the issue of a writ in the nature of habeas corpus.

2. This petition was instituted on 31st of October, 2019. The proceedings in this case commenced on 05.11.2019, when notice was issued to Devendra Kumar to produce the two minors before the Court on 04.12.2019. The case was adjourned on 04.12.2019, awaiting a compliance report from the Chief Judicial Magistrate, Shahjahanpur. On 02.01.2020, the Court recorded that notice had been served upon respondent no.4 personally, but the minors have not been produced. The Chief Judicial Magistrate was directed to ensure the minors' presence, attended with a direction to the Senior Superintendent of Police, Shahjahanpur to facilitate the process. On 21.01.2020, which was the date fixed for the return *vide* order dated 02.01.2020, the minors were produced, but their personal appearance was exempted until ordered otherwise. The case came up again on 10.02.2020 and was adjourned to 17.02.2020. There was then an adjournment from 17.02.2020 to 25.02.2020 and from 25.02.2020 to 04.03.2020. It must be remarked here that all proceedings until 19.10.2020 were taken without a formal admission of the petition to hearing.

3. On 19.10.2020, when the petition came up, a detailed order was passed, admitting the petition to hearing and ordering the Superintendent of Police, Shahjahanpur to cause the minors to be produced from the custody of respondent nos.4, 5 and 6 on the date of return, which was indicated to be 22.10.2020. It was also ordered that Devendra Kumar, the minors' father and Smt. Pushpa Devi @ Mahi, the minors'

mother, who had effectively petitioned on behalf of the minors, shall also remain present in person.

4. On 22.10.2020, this Court after considering the overall circumstances of the case and particularly, the fact that the minors' estranged parents were a young couple, thought it to be a possibility that their differences were reconciled. This the Court thought would best serve not only the interest of the estranged spouses, but the minors too. Bearing this in mind, both parties were referred to the mediation of the Allahabad High Court Mediation and Conciliation Centre *vide* order dated 22.10.2020.

5. The parties appeared before the Centre and two sessions were held on 22.10.2020 and 23.02.2020. The Centre's report dated 23.10.2020 made in Mediation Case no.922 of 2020 indicates the following :

"Mediation Completed. No agreement."

6. The attempt to reconcile parties being not successful, the matter was taken up on 09.11.2020, but hearing could not proceed, as the minors were not produced. Their parents were also not present. Accordingly, by an order dated 09.11.2020, the Superintendent of Police, Shahjahanpur was again ordered to cause the minors to be produced on 11.11.2020. The case was heard on 11.11.2020 in the presence of Devendra Kumar, the minors' father and Smt. Pushpa Devi @ Mahi, their mother, and judgment was reserved.

7. It must be remarked here that no counter affidavit was filed on behalf of respondent nos.4, 5 & 6, though Mr. Ajay Kumar Srivastava, learned Advocate appeared on their behalf. The facts before the Court are those, that are set out in the petition. There is no affidavit in rebuttal, though Smt. Pushpa Devi's claim has been contested by respondent no. 4 at the hearing.

8. Heard Mr. Mazharullah, learned Counsel for the petitioners, Mr. Ajay Kumar Srivastava, learned Counsel appearing for the respondent nos.4, 5 and 6 and Mr. Jhamman Ram, learned A.G.A. appearing on behalf of the State.

9. Smt. Pushpa Devi @ Mahi and Devendra Kumar were married about five years ago. According to Pushpa, she was ill-treated by Devendra Kumar, her mother and Devendra's brother, for the past two years. She was forcibly detained at her in-laws' place and not permitted to go home and meet her parents. Her mother underwent a heart surgery. She requested Devendra, besides respondent nos. 5 and 6, to permit her to visit her mother. It is claimed by Pushpa that she was abused and assaulted by her husband and in-laws. She was then thrown out of her husband's home and her two sons, Shiva and Suraj, were forcibly detained by Devendra and her in-laws. It is alleged that she was asked to pay her husband and in-laws a sum of Rs.5 lakhs, and upon doing that, she was told, she could take her sons along with her. She is said to have gone back to her parents and informed them about these unpleasant developments in her life. It is asserted that Pushpa and her parents requested Devendra, his mother and brother to permit them to meet Pushpa's sons, but that request was declined. Pushpa then lodged a complaint with the Superintendent of Police, Shahjahanpur on 11.09.2019, detailing all that had befallen her. A copy of this complaint is on record as Annexure

no.1 to the petition. This complaint did not elicit any action. Pushpa then approached the State Women Commission, Lucknow through a complaint dated 18.09.2019. A copy of this complaint, bearing an acknowledgment of receipt from the Women Commission, is also on record.

10. It also appears that on 06.09.2019, Pushpa's sister Geeta had laid a complaint to the Superintendent of Police, Shahjahanpur, reporting the matrimonial violence and offence that Pushpa had suffered at the hands of her in-laws. A copy of this complaint of 6th September, 2019 is also on record. Pushpa also appears to have complained in the matter to the Chief Minister on 18.09.2019, a copy whereof has been annexed to this petition.

11. This Court has perused the material on record. The short issue involved in this petition is whether the two minor children of parties, Shiva and Suraj, should be relieved from the custody of their father, Devendra and entrusted to the care and custody of the mother, while the couple stay estranged.

12. This Court takes note of the fact that both Pushpa and Devendra are natural guardians of the two minors, being their parents. This is evident from the provisions of Section 6(a) of the Hindu Minority and Guardianship Act, 1956 (for short, "the Act of 1956'), which provide :

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

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

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

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

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

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

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

13. There was at one time some cavil about the issue that the mother was the natural guardian after the father and, therefore, so long as the father was there, he alone could be regarded as the natural guardian.

14. The issue here is not about natural guardianship, but about the custody, which is different from guardianship. This aspect of the issue would be addressed a little later. For the present, it must be remarked that the natural guardianship of a minor under Section 6(a) of the Act of 1956 is no longer held by the father, in preference to the mother. The mother and the father are at par as natural guardians of the minor, in view of the law laid down by the Supreme Court in Githa **Hariharan (Ms) and another vs. Reserve Bank of India and another, (1999) 2 SCC 228.**

15. As already said, the issue here is about custody and not guardianship. Guardianship, natural or otherwise, is more about the right exercised by a person over a

minor in relation to his person or property, while dealing with a third party on the minor's behalf, or the minor himself. Custody is something related to the day-to-day care and supervision of the minor by an adult. Normally and invariably, guardianship and custody coalesce, but it need not always be so. There can be situations, where custody may be entrusted to a person other than the guardian, particularly, the natural guardian or between two natural guardians to one of them.

16. The proviso to Section 6(a) of the Act of 1956 is a statutory illustration about this distinction. Under the proviso to Section 6(a) last mentioned, the custody of a minor up to the age of five years, "ordinarily' is to remain with the mother, notwithstanding the fact that both the father and the mother are natural guardians. This principle engrafted in the statute, represents the precipitate wisdom of generations amongst mankind, that the welfare of young children is better ensured by the mother's caring hand than a father's equally concerned supervision.

17. There is no cavil by now about the principle that in deciding who should have the minor's custody between parents, or for that matter, whenever custody is to be entrusted to a guardian, natural or otherwise, welfare of the minor is of paramount importance. This principle is also statutorily embodied in Section 17 of the Guardians and Wards Act, 1890 (for short, "the Act of 1890') and Section 13(1) of the Act of 1956.

18. In so far as young children are concerned, there is a strong presumption that the mother is better equipped to ensure their welfare than the father, though both the parents may be equally loving and sacrificing. This presumption in favour of the mother must be dispelled by cogent reasons, supported by glaring evidence about the mother's lack of her natural ability to better take care of her children. There could be cases where the mother is differently abled, which handicaps her inherently in ensuring her young child's welfare, or accused of an offence, involving moral turpitude, particularly, the homicidal death of the child's father, or proven to be neglectful in her conduct towards the minor, where she habitually attends nightclubs and comes back home late. The last of the contingencies was acknowledged as good ground to throw off the presumption in the mother's favour about a better welfare for the minor in her hands by this Court in **Amit Bery vs. Sheetal Beri, AIR 2003 All 18.**

19. There is no fact pleaded, or evidence brought on record, to show that the welfare of the two minors, who are young boys, aged five years and three and a half years, would not be better secured by the mother. Here, the Court may refer to the guidance of the Supreme Court in **Roxann Sharma vs. Arun Sharma, (2015) 8 SCC 318**, where it has been held:

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

carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this section or for that matter any other provision including those contained in the G and W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years."

20. In **Roxann Sharma** *(supra)*, it has been further held:

"18. .....There can be no cavil that when a court is confronted by conflicting claims of custody there are no rights of the parents which have to be enforced; the child is not a chattel or a ball that is bounced to and fro the parents. It is only the child's welfare which is the focal point for consideration. **Parliament rightly thinks that the custody of a child less than five years of age should ordinarily be with the Mother and this expectation can be deviated from only for strong reasons..…"(emphasis by Court)**

21. This Court took note of the mother's special role in ensuring welfare of a minor child in **Habeas Corpus Writ Petition No.3921 of 2018, Aharya Baranwal and 3 others vs. State of U.P. and 2 others** decided on 22.05.2019. In **Ahrya Baranwal** *(supra)*, it was held :

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

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

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

23. It is further observed that an incidental aspect, which has a bearing on the question, may also be adverted to. In determining whether it will be for the best interests of a child to grant its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment."**(emphasis supplied)**

22. The issue of a minor's welfare, where he is a young child, below or about five years, came up before me for consideration in the context of Section 6(a) of the Act of 1956 in **Master Atharva (Minor) and another vs. State of Uttar Pradesh and 7 others, 2020 (143) ALR 332**, where it was held:

"9. A reading of the terms of the proviso to Section 6 shows that quite apart from the question of natural guardianship,

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

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

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

23. During the hearing of this matter, this Court interacted with both the parents, that is to say, Devendra and Pushpa Devi @ Mahi. The Court also interacted with the elder of the two children, to wit, Shiva in order to ascertain his wishes about the parent he would like to stay with. This course of action was adopted because the Court found that Shiva, though a child of five years, is a bright child, who could express an intelligent choice about the parent he would like to be with. During this interaction, this Court was told by Devendra that he works as an unskilled casual labourer, earning a daily-wage to the tune of Rs. 200 - 300/-. He can garner a monthly income of Rs.7000 - 8000/-. He has, amongst his family, besides the minors, his mother, five nieces and a brother. He told the Court that the minors are looked after by his nieces. About the children's schooling, he said that they used to attend school before the lock-down, but, for the present, they were not. He also candidly accepted the fact that he is absolutely illiterate. He said that the older of the two children, Shiva, is five years old and the younger three and a half years. Here, this Court must remark that the mother has said in paragraph no.12 of the petition, the affidavit in support whereof sworn on 15th December, 2019, that Shiva is four years old and Suraj one year and a half. This petition was heard on 11.11.2020 and by a reckoning in time, Shiva would

indeed be five years, according to both parties. There is some discrepancy about Suraj's age. That, however, need not detain this Court to ponder over and decide the precise age of the two minors. Broadly speaking, they are young children, where the elder of them is five years old and the younger, definitely less than five years.

24. The mother told the Court that she has read up to Class-VIII and is, therefore, better educated than the husband. She works at home and said that she had her mother, father and brother in her family, with whom she stays. The family are engaged in agriculture. On being asked whether she and her family would be willing to raise the children, she said that they would be more than willing. As she said this, this Court noticed that Shiva, who was present in Court, yearned to be in his mother's custody and seem to be quite familiar with her. To the contrary, he appeared rather estranged from his father. Pushpa, on being particularly asked whether there was a school around the place where her family lives, said that there was an English Medium School there. She told the Court that that she stays in a place called Bhurwa Sumerpur in the district of Hamirpur.

25. This Court also interacted with the elder child, Shiva. As already remarked, Shiva appears to be quite a bright child and well aware of matters around him. He introduced himself to the Court, on being asked to do so, quite confidently. The Court asked Shiva about his choice in the matter of the parent he would like to be with, given the circumstances. He said in unequivocal words that he would like to stay with his mother. This Court noticed that the child, while saying so, was extremely delighted about the idea and looked forward to staying with his mother.

26. It must be noticed that there are some very salient points, on the basis of which, the issue about the custody of a minor is to be decided in a given case, laid down by the Supreme Court in **Nil Ratan Kundu and Another v. Abhijit Kundu, (2008) 9 SCC 413.** In **Nil Ratan Kundu**, it has been held:

"Principles governing custody of minor children

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."

27. What this Court notices in the present case is the fact that both Shiva and Suraj are very young children, with Shiva just turning five. Suraj is one below his fifth year. The principle embodied in the proviso to Section 6(a) of the Act of 1956 is not to be applied like a statutory cutoff. It has to be understood and applied in its spirit, which is no more than this, that generally speaking, and invariably, the welfare of a minor child can be better secured by the mother in comparison to the father. It is not that the moment the child turns five, or crosses that age by a few months, the preference for the mother would be nullified. There are many factors that must enter consideration, before deciding upon the question of the minor's welfare. It is to be judged not only by the financial capacity, but the time, attention and care that one parent or the other can better provide. It is also about the moral grooming of the child, which is a very important factor. The prospects of education of the child are still more important, apart from health and other myriad factors. Amongst all these, in a case where the child can express an intelligent choice about his preference, it is one important factor, which must enter into consideration while deciding the question of custody.

28. This Court finds that Pushpa Devi @ Mahi, the minors' mother is better educated than the father, who is an illiterate. There is also no better comfort or environment in the father's home, compared to that of the mother's, which this Court was able to gather. The father has his mother, brother and nieces living with him, with the nieces being left to care for the minors. The father earns his livelihood by working as an unskilled casual labourer. His pursuit for livelihood would leave him no time to extend any personal care to the minors. It is for this reason that he has to leave the minors to the care of his nieces. Between the father's nieces, who are the minors' cousins and the minors' mother, decidedly, the mother's constant care and supervision would ensure a better welfare for the two minors here. The slightly better education of the mother than the father, would also augur well for the minors' prospects in the matter of their education. There is an English Medium School about the place where the mother resides and this fact has not been challenged by the father.

29. There is no doubt that the two minors would be admitted to a suitable institution of formal instruction/ school in order to equip them educationally. At the same time, the father, as already said, busy as he is with earning his daily bread, the minors might be neglected, resulting in either of them or both, going wayward in life. On the other hand, the mother stays home and would, therefore, be better equipped to exercise a closer vigil over the minors' daily activities.

30. In the circumstances, this Court is of opinion that the minors, Shiva and Suraj, ought to remain in their mother's custody and care. At the same time, Devendra, being their father too, cannot be deprived of their company altogether, and the minors, his paternal affection. This can be ensured by ordering a suitable schedule of visitation for the father, where he could meet the minors and spend time with them, as they stay with their mother.

31. In the opinion of this Court, it would be appropriate in the circumstances

that the father may be permitted to meet both, Shiva and Suraj, once every fortnight between 10:00 a.m. to 2:00 p.m. Devendra can meet the minors either on alternate Sundays or any other week day, suitable to him, going by the contingencies of his engagement, which he may intimate to Pushpa Devi @ Mahi. The visitation, as aforesaid, shall be adjusted by the parties by mutual consent about the day of visitation, but with the restriction that there have to be two visitations every month. This arrangement would continue till Shiva and Suraj attain the age of majority.

32. This habeas corpus writ petition succeeds and is **allowed**. The *rule nisi* dated 19.10.2020 is made **absolute** in the terms that the custody of two minors, Shiva and Suraj, shall be entrusted by Devendra to Smt. Pushpa Devi @ Mahi within a week of delivery of this judgment at Pushpa's home, located in Village and Post Bhurwa Sumerpur, District of Hamirpur. In the event of default, the Chief Judicial Magistrates, Hamirpur and Shahjahanpur, in coordination amongst themselves and the Superintendent of Police, Shahjahanpur shall cause the custody of the two minors, Shiva and Suraj, sons of Devendra Kumar, to be delivered to their mother, Smt. Pushpa Devi @ Mahi at her home in the district of Hamirpur.

33. Let this order be communicated to the learned Chief Judicial Magistrate, Hamirpur, the learned Chief Judicial Magistrate, Shahjahanpur and the Superintendent of Police, Shahjahanpur, by the Joint Registrar (Compliance).

(2021)03ILR A375
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2021

BEFORE

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

Habeas Corpus Writ Petition No. 1026 of 2019

Master Manan @ Arush ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bhishm Pal Singh

Counsel for the Respondents:
A.G.A., Sri Abhay Nitin Singh, Sri Shailesh Kumar Yadav

(A) Writ of Habeas Corpus - prerogative writ of habeas corpus-extraordinary remedy-writ is issued, where in the circumstances of a particular case, the ordinary remedy provided under law is either not available or is ineffective - power of the High Court, in granting a writ, in child custody matters - may be invoked only in cases where the detention of a minor is by a person who is not entitled to his/her legal custody - where facts are disputed and a detailed inquiry is required - court may decline to exercise its extraordinary jurisdiction and may direct the parties to approach the appropriate court . (Para - 14,15)

Mother of the corpus living separately from her husband (respondent no. 6) - corpus (minor child) about seven and a half year of age taken away by the respondent no. 6 (father) - existence of a dispute with regard to the handing over the custody of the child to the mother, pursuant to some agreement between the parties, the terms of which, are now being disputed. (Para - 3, 16)

HELD: - Mother's claim for custody and visitation rights, are matters which are to be agitated in appropriate proceedings / appropriate forum. This Court is not inclined to exercise its extraordinary jurisdiction in the matter. (Para - 19,21)

Habeas Corpus Petition dismissed. (E-6)

List of Cases cited: -

1. Mohammad Ikram Hussain Vs St. of U.P. & ors. AIR 1964 SC 1625

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

3. Nithya Anand Raghvan Vs St. (NCT of Delhi) & 3 anr. (2017) 8 SCC 454

4. Sayed Saleemuddin Vs Dr. Rukhsana & 4 ors. (2001) 5 SCC 247

5. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & 5 ors. (2019) 7 SCC 42

6. Rachhit Pandey (Minor) & anr. Vs St. of U.P. & 3 ors. 2021 (2) ADJ 320

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

1. Heard Sri Bhishm Pal Singh, learned counsel for the petitioner, Sri Abhay Nitin Singh, learned counsel for the respondent nos. 6 to 9 and Sri Vinod Kant, learned Additional Advocate General, alongwith Sri Pankaj Saxena, learned A.G.A.-I for the State respondents.

2. Pursuant to the directions issued earlier, the corpus (minor child) of age about seven and a half years, has been brought in Court by the respondent no. 6, who is stated to be his father, and has been identified by the counsel for the said respondent.

3. The basic facts which are undisputed are that the mother of the corpus is living separately from her husband (respondent no. 6) since the year, 2017. It has been pointed out that on 22.8.2019 the corpus (minor child) was taken away by the respondent no. 6 (father) to Ajmer, and that he is living with his father since then under his care and custody. A mutual agreement on a notarial affidavit is stated to have been entered into between the parents of the minor child on 02.09.2019. Amongst the various conditions which were agreed upon between the parties, one was with regard to the minor child having been handed over to the mother with a further stipulation that he would remain with the mother, subject to certain conditions.

4. The present petition, which has been filed through the mother of the minor child, contending that the custody of the minor has not been handed over to her and that the minor is being illegally detained by the respondent no. 6 (father of the minor child) and the other respondents i.e. respondent nos. 7, 8 and 9.

5. From the submissions made by the counsel for the parties, it appears that there is a serious dispute with regard to the terms and conditions of the agreement, which is stated to have been entered into between the husband and the wife, with both the parties alleging that the other has not abided by the terms thereof.

6. The dispute between the parties, which is sought to be agitated by means of the present petition, essentially is, regarding the custody of the minor child, who is presently about seven and a half years of age (date of birth-09.08.2013).

7. In a petition seeking a writ of habeas corpus in a matter relating to a claim for custody of a child, the principal issue which is to be taken into consideration is as to whether from the facts of the case, it can be stated that the custody of the child is illegal.

8. The writ of habeas corpus is a prerogative writ and an extraordinary remedy. It is writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown, as held in **Mohammad Ikram Hussain vs. State of U.P. and others1** and **Kanu Sanyal vs. District Magistrate Darjeeling**2.

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

10. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration in **Nithya Anand Raghvan v State (NCT of Delhi) and another**3, and it was held that the principal duty of the court in such matters is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person.

11. Taking a similar view in the case of **Sayed Saleemuddin vs. Dr. Rukhsana and others**4, it was held that in a habeas corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful or illegal and whether the welfare of the child requires that the present custody should be changed. It was stated thus:-

"11. ...it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court…"

12. The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for custody of a minor was examined in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others**5, and it was held that the petition would be maintainable where detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective. The observations made in the judgment in this regard are as follows:-

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

detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

x x x

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

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

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

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

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

approach the appropriate court. The aforementioned legal position has been considered in a recent judgement of this Court in **Rachhit Pandey (Minor) And Another vs. State of U.P. and 3 others**6.

16. In the present case, it is undisputed that the child is with his father since 22.8.2019 under his care and custody. It is not the case of either party that the child was forcibly taken away by the father from the custody of the mother. The pleadings and the material on record indicates the existence of a dispute with regard to the handing over the custody of the child to the mother, pursuant to some agreement between the parties, the terms of which, are now being disputed.

17. It has been pointed out that the date of birth of the child is 09.08.2013, and accordingly, the child being more than 5 years of age, the custody of the child with the father, in view of the provisions under Section 6(a) of The Hindu Minority and Guardianship Act, 1956, cannot be said to be *prima facie* illegal.

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

19. The contention which has been sought to be raised by the counsel for the petitioner with regard to the mother's claim for custody and visitation rights, are matters which are to be agitated in appropriate proceedings.

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

21. Having regard to the aforestated facts, this Court is not inclined to exercise its extraordinary jurisdiction in the matter.

22. The petition thus fails and is accordingly, dismissed.

(2021)03ILR A379
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2021

BEFORE

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

Habeas Corpus Writ Petition No. 1217 of 2019

Gyanmati Kushwaha & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Azad Khan, Sri Mohini Jaiswal

Counsel for the Respondents:
A.G.A., Sri Ali Hasan, Sri Fakhruzzaman, Sri Om Prakash, Sri Fakhra Uz Jama

(A) Civil Law - The Hindu Minority and Guardianship Act, 19562 - Section 6(a) - Writ of Habeas Corpus - Custody of minor daughter - Code of criminal procedure, 1973 - Section 97 - Search for persons wrongfully confined - Natural guardians of a Hindu minor - in the case of a boy or an unmarried girl - the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother - The guardians and wards Act, 1890 - Section 17 - matters to be considered by the court in appointing guardian - Section 17(2) - If the minor is old enough to form an intelligent preference, the court may consider that preference .(Para - 5,8,14)

Petitioner no. 1 facing trial as a co-accused in the case relating to her husband's murder - release on bail - petitioner no.1 asked petitioner no. 5 (maternal Father - in - law) that she may be handed back her daughter's custody - refused - filed an application to the District Magistrate under Section 97 of the Code of Criminal Procedure, 1973 - with a case that her minor daughter was in illegal confinement of petitioner no. 5 (maternal Father - in - law) - No action taken on application - First petitioner, asking that her minor daughter aged about two years, be ordered to be produced before this Court from the custody of respondent no. 5 (Maternal father in law) and emancipated there from in the manner that she be entrusted into the care and custody of the first petitioner, her mother. (Para -1,5)

HELD: - It is made clear that in the event the mother is acquitted by judgment based on doubt or otherwise, she would have the right to move a court of competent jurisdiction for her daughter's custody, which would then be decided in accordance with law. This Court does not find any good ground to make the rule absolute. It is, accordingly, discharged. (Para -16,17)

Habeas Corpus petition dismissed. (E-6)

List of Cases cited: -

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

2. Nil Ratan Kundu & anr. Vs Abhijit Kundu, (2008) 9 SCC 413

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

1. This petition for a writ of habeas corpus has been instituted by the first petitioner, Gyanmati Kushwaha, asking that her minor daughter, Drisha Kushwaha, aged about two years, be ordered to be produced before this Court from the custody of respondent no. 5, Kamal Kushwaha, and emancipated therefrom in the manner that she be entrusted into the care and custody of the first petitioner, her mother.

2. Pending admission, by an order dated 12.02.2020, Suresh Kushwaha was ordered to be impleaded as respondent no. 6, inasmuch as it transpired from an order passed by the City Magistrate dated 20.11.2019 that the minor, Drisha, petitioner no. 2 was in the former's custody, who is Drisha's grandfather (paternal). He was, accordingly, impleaded as respondent no. 6.

3. This petition was admitted to hearing *vide* order dated 24.09.2020, and a *rule nisi* was issued, ordering Drisha Kushwaha, the minor, to be produced on 08.10.2020. On the date of return, a counter affidavit was filed on behalf of respondent no. 6, to which a rejoinder affidavit was filed too, in Court. On that day, Drisha's mother, Gyanmati Kushwaha, the first petitioner, her grandfather Suresh Kushwaha, the sixth respondent, and her father's maternal uncle Kamal Kushwaha, the fifth respondent were present. The matter was heard at length. The hearing was adjourned to 15.10.2020. It was further heard on 15.10.2020, with Smt. Gyanmati Kushwaha and Suresh Kushwaha being in attendance. On the said date, judgment was reserved, with a direction that Gyanmati Kushwaha and Suresh Kushwaha will appear on the date fixed for delivery of judgment, to be intimated by the Registry.

4. The facts that appear from the record are that the first petitioner, Gyanmati Kushwaha and the late Krishna Kushwaha, son of Suresh Kushwaha, were married, according to Hindu rites, on 11.11.2011 at Shree Durga Bhavani Seva Mandal, Shivaji Nagar, B.M.C. Colony, Bandra East, Mumbai. This marriage was according to the wishes of the husband and wife, and as it appears, did not have origins in the blessings of the couple's families. Later on, Smt. Gyanmati Kushwaha and her late husband, Krishna Kushwaha, appear to have persuaded their respective families to bless the couple, which followed a marriage in right earnest being

solemnized all over again on 26.11.2012. There is a photostat copy of the invitation card relating to that marriage on record, which no one has disputed before this Court. In course of time, a daughter was born to the parties, who came to be named Drisha. She was born on 28.05.2017. It is about her custody that the mother and her grandfather, Suresh Kushwaha, are engaged in a strife.

5. To revert some paces in time, in the sequential narration of events, it is Gyanmati's case that she, her husband Krishna Kushwaha and her daughter Drisha were domiciled in Mumbai. Gyanmati's husband Krishna Kushwaha had come away to his native place at Jhansi on 11.05.2018, while Gyanmati stayed back in Mumbai. She received a call from Kamal Kushwaha, her husband's maternal uncle, on 13.05.2018, that some unknown offenders had done Krishna to death. Kamal Kushwaha asked Gyanmati Kushwaha to come over to Jhansi along with her daughter. She immediately proceeded to Jhansi along with Drisha. Once there, she met Kamal Kushwaha. Kamal took along Gyanmati to the police station, where she was surprised to know that she had been implicated in her husband's murder, as she says at the instance of Kamal, and was arrested. Gyanmati Kushwaha was remanded to judicial custody on 16.05.2018, and at that time, Kamal snatched away Drisha from her. It is said that at that time, Drisha had not yet been weaned away, but still, Gyanmati was deprived her daughter's care and custody, while in jail. Gyanmati Kushwaha applied for bail and was released from prison on 10.09.2018. The parties are *ad idem* that Gyanmati Kushwaha is currently facing trial as a co-accused in the case relating to her husband's murder. After her release on bail, Gyanmati Kushwaha asked Kamal Kushwaha that she may be handed back her daughter's custody, but he refused. It is said that she is a native of Mumbai, and did not know anybody at Jhansi. Therefore, she returned to Mumbai on 30.09.2018. She came back to Jhansi on 05.01.2019 once again and requested Kamal Kushwaha to hand over her minor daughter back. Kamal Kushwaha did not allow Gyanmati Kushwaha to meet Drisha. He told Gyanmati Kushwaha that her in-laws had shifted to Mumbai and taken away Drisha with them. Once again, Gyanmati came to Jhansi to meet her lawyer in connection with the criminal case pending against her in the District Court at Jhansi. She reiterated her request to Kamal Kushwaha that her daughter may be handed back to her. The request was again refused. Gyanmati Kushwaha then filed an application to the District Magistrate on 21.08.2019 under Section 97 of the Code of Criminal Procedure, 19731, with a case that her daughter was in illegal confinement of Kamal Kushwaha, and that the minor may be emancipated therefrom and handed back to her. No action was taken on this application. The petitioner then moved a habeas corpus writ petition before this Court, being Habeas Corpus Writ Petition No. 922 of 2019, which was disposed of directing the District Magistrate to pass appropriate orders on the pending application made by Gyanmati Kushwaha under Section 97 of the Code, within two weeks of receipt of a certified copy of the order made by the Court. The District Magistrate, in passing that order, laid his hands off the matter, in view of the fact that on 18.08.2018, the Chief Judicial Magistrate had entrusted Drisha's custody to Suresh Kushwaha, respondent no. 6, on an undertaking that the latter would look

after the child's welfare. That order appears to have been passed in connection with Crime No. 263 of 2018, under Section 302 of the Indian Penal Code, 1860, Police Station - Kotwali, District - Jhansi, relating to Krishna Kushwaha's murder.

6. Faced with this deprivation of her minor daughter's custody, Gyanmati Kushwaha has petitioned this Court, where the course of proceedings, so far taken, have been delineated above.

7. Heard Ms. Mohini Jaiswal, learned counsel for the petitioners, Mr. Vishal Agarwal, Advocate holding brief of Mr. Fakhruzzaman, learned counsel appearing on behalf of respondent no. 6, Mr. Om Prakash, learned counsel appearing on behalf of respondent no. 5, and Mr. Jhamman Ram, learned A.G.A. appearing on behalf of the State.

8. It is submitted on behalf of Gyanmati Kushwaha that she is Drisha's mother, and the only surviving natural guardian, after her husband Krishna Kushwaha's death. She is entitled to Drisha's custody. It is submitted by Ms. Jaiswal on behalf of Gyanmati Kushwaha that the provisions of Section 6(a) of The Hindu Minority and Guardianship Act, 19562 are of particular relevance. She emphasizes that under the proviso to Section 6(a), the mother has the right to the custody of a minor child until the age of five years ordinarily, which is quite apart of her right to the minor's natural guardianship. It is said that pitted against the minor's father, in cases where the minor is below five years of age, the mother would have a preference in the matter of custody over the father also. Here, Suresh Kushwaha is Drisha's grandfather. It is absolutely not in the minor's welfare to entrust her custody to the grandfather, while the mother is around. There is no one better than the mother to look after the custody of a child, particularly, a young child.

9. Mr. Vishal Agarwal, Mr. Om Prakash and Mr. Jhamman Ram, on the other hand, have argued in one voice to say that the general rule postulated under the proviso to Section 6(a) of the Act of 1956, and elsewhere too, about the mother's right to a young child's custody would not be applicable here. They submit that in this case, the mother would not be entitled to Drisha's custody, because she is an accused in the case relating to her husband's murder, along with co-accused Ajay, who has been dubbed as her paramour, and other associates. She has been assigned the role of conspiracy in the crime, and charge-sheeted. She is facing trial for her husband's murder, and if convicted, the child's life might be ruined. An apprehension has also been expressed that the child's life may be in jeopardy, if the allegations about her involvement in conspiracy with Ajay to murder her husband were true. Mr. Agarwal has also raised an issue about territorial jurisdiction. He submits that the fact that the child is residing in Mumbai with the sixth respondent, there is no territorial jurisdiction with this Court to entertain this petition for a writ of habeas corpus.

10. This Court has keenly considered the rival submissions and perused the record. So far as the submissions regarding the territorial jurisdiction of this Court is concerned, there is *ex-facie* no force in the same. It is common ground between parties that Gyanmati was deprived of Drisha's custody, when she was remanded to judicial custody, post arrest at Jhansi. The

minor was taken away at Jhansi by Kamal Kushwaha, respondent no. 5, her deceased husband's maternal uncle. It was at Jhansi that under the orders of the Chief Judicial Magistrate, the minor's custody was entrusted to respondent no. 6, the minor's grandfather. Therefore, there are clear facts which give rise to a cause of action at Jhansi, within the territorial jurisdiction of this Court. The submission to the contrary, advanced by Mr. Agarwal is, accordingly, rejected.

11. Now, this brings the Court face to face with a situation indeed perplexing. The law would not certainly countenance custody of a minor to be handed over to a parent who is an undertrial, in connection with the other's murder, and that too, on a charge of conspiracy with a paramour. On the other hand, it is the mother's right to her child's care and custody, and the child's right, in turn, to her mother's love and affection, which the law takes care of to the extent that if the mother were in jail in an unrelated matter, young children up to the age of five or six years, depending on different jail rules in the various states, are allowed to stay in prison with the incarcerated mother. If one were to look at the authority in India and the world over, there is striking similarity about one principle, that in custody matters, it is the welfare of the child that is of paramount consideration. The statutes may speak about the right of one parent or the other to custody, or the right of guardianship, but, in substance, it is not at all about the right of a guardian to the minor's custody, or guardianship; it is all about the minor's welfare. Section 6(a) of the Act of 1956, read with its proviso, is also a principle founded on the wisdom of humanity transcending generations, that a young child can be best looked after by her/his mother. So far as the principles about the minor's welfare are concerned, these find eloquent statement in the provisions of Section 17 of The Guardians and Wards Act, 18903. The principle that the minor's welfare is best secured in the mother's hands and is to be departed from for very strong reasons, is enunciated by the Supreme Court in **Roxann Sharma v. Arun Sharma**4 thus :

> .....There can be no cavil that when a court is confronted by conflicting claims of custody there are no rights of the parents which have to be enforced; the child is not a chattel or a ball that is bounced to and fro the parents. It is only the child's welfare which is the focal point for consideration. Parliament rightly thinks that the custody of a child less than five years of age should ordinarily be with the Mother and this expectation can be deviated from only for strong reasons.

12. It must be remarked here that the holding of their Lordships in **Roxann Sharma** *(supra)* acknowledges the overbearing principle that for a young child, the mother is best suited to be entrusted with her/his custody, but, at the same time, the remarks in **Roxann Sharma** do indicate that for strong reasons, the rule can be departed from. Once it is the minor's welfare that is of paramount consideration, the particular circumstances affecting parties, their behaviour etc. may tip the scales to the other side. No doubt, to depart from the rule, based on a very innate facet of human experience, in the care and welfare of their young ones, there must be very strong reasons. The Supreme Court particularly considered the impact of one of the parents being involved in the death of the other spouse *vis-à-vis* the question of the minor's welfare in **Nil Ratan Kundu**

and Another v. Abhijit Kundu5, wherein it was held thus :

62. Now, it has come in evidence that after the death of Mithu (mother of Antariksh) and lodging of first information report by her father against Abhijit (father of Antariksh) and his mother (paternal grandmother of Antariksh), Abhijit was arrested by the police. It was also stated by Nil Ratan Kundu (father of Mithu) that mother of accused Abhijit (paternal grandmother of Antariksh)*absconded* and Antariksh was found sick from the house of Abhijit.

63. In our considered opinion, on the facts and in the circumstances of the case, both the courts were duty-bound to consider the allegations against the respondent herein and pendency of the criminal case for an offence punishable under Section 498-A IPC. One of the matters which is required to be considered by a court of law is the *"character"* of the proposed guardian. In *Kirtikumar*[(1992) 3 SCC 573 : 1992 SCC (Cri) 778] , this Court, almost in similar circumstances, where the father was facing the charge under Section 498-A IPC, did not grant custody of two minor children to the father and allowed them to remain with the maternal uncle.

64. Thus, a complaint against the father alleging and attributing the death of the mother, and a case under Section 498-A IPC is indeed a relevant factor and a court of law must address the said circumstance while deciding the custody of the minor in favour of such a person. To us, it is no answer to state that in case the father is convicted, it is open to the maternal grandparents to make an appropriate application for change of custody. Even at this stage, the said fact ought to have been considered and an appropriate order ought to have been passed.

13. There are some very pertinent remarks in **Nil Ratan Kundu** *(supra)* about the principles governing custody of minor children, which must be referred to. It has been observed in **Nil Ratan Kundu** thus :

Principles governing custody of minor children

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.

14. In the present case, the Court is deprived of knowing the wishes of the minor, because she is too young to express her intelligent choice. The minor's choice has been underscored by their Lordships in

Nil Ratan Kundu and also in the provisions of Section 17(3) of the Act of 1890, but that can have no application in the present case, where the minor is a very young child, presently aged about three years and a half. It is the circumstances and the facts on record that alone can serve as a guide in the foreshadow of settled principles about the minor's welfare to decide the question of her custody. It is not known to this Court as to what are the circumstances appearing against the mother, on the basis of which she has been charged with conspiracy in her husband's murder. This Court ought not to investigate those circumstances also, that are the concern of the court where she is facing trial, but, as matters stand, she is an accused in a case relating to her husband's murder. The fact that she is an accused is not in doubt. One consequence of this fact is that she faces a situation where she could be convicted, though the presumption of innocence is all along with her. If she were to be convicted, the minor's welfare would be thrown into disarray. It would be irreversibly unsettling and debilitating in her formative years. It may even expose her to insurmountable trauma, if she witnesses her mother, whom she is bonded with, convicted in the case of her father's murder.

15. This Court assumes that the possibility of conviction may be remote or not so remote, but the possibility is there. The existence of this possibility and the adverse impact of the event, if it were to come to pass, would far outweigh the transitory benefit the minor would derive from her mother's care and company. This facet of the matter apart, the possibility that the mother might truly be a conspirator in her husband's murder, predicates a personality which would not be beneficial for the minor in grooming her about her moral values - a very important aspect of a child's welfare. On the other hand, if the mother is innocent and she is acquitted, the loss, the minor would suffer on account of deprivation of her mother's care and custody, cannot be re-compensated, but nevertheless, it is a reverse that must be accepted for the minor's surer welfare, in preference to a contingent better, fraught with risk.

16. It is made clear that in the event the mother is acquitted by judgment based on doubt or otherwise, she would have the right to move a court of competent jurisdiction for her daughter's custody, which would then be decided in accordance with law.

17. Subject to what has been said above, this Court does not find any good ground to make the rule absolute. It is, accordingly, discharged.

18. In the result, this petition **fails** and stands **dismissed**.

(2021)03ILR A385
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.02.2021

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 Cr.P.C. No. 152 of 2021

Smt. Reena ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Santosh Kumar Pandey, Sri Saurabh Tripathi

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

(A) Criminal Law - Indian Penal Code, 1860 - Sections 304B - dowry death, Dowry prohibition Act,1961 - Sections 3 - penalty for giving or taking dowry , section 4 -penalty for demanding dowry - 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 - High Court cannot embark upon the appreciation of evidence while considering the petition filed under Section 482 CrPC for quashing criminal proceedings - Appreciation of evidence on merit is to be done by the court only after the charges have been framed and the trial has commenced - 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. (Para - 6,18,19)

Present application filed to quash the charge-sheet, cognizance order as well as the entire proceedings - F.I.R. lodged by the opposite party no.2 - allegation - opposite party no.2 married his daughter with brother-in-law of applicant (sister in law/jethani) - informant received an information regarding harassment of his daughter by the applicant as well as his son-in-law (husband of deceased) for non-fulfilment of additional dowry demand - informant was informed by his son-in-law that his daughter was of bad character - not ready and willing to keep her as wife - information received from Police Station about the death of his daughter - F.I.R. registered against the applicant as well as accused (husband of the deceased).(Para -3)

HELD: - Adjudication on pure questions of fact may adequately be adjudicated upon only by the trial court and even the points of law can also be more appropriately gone into by the trial court in this case. 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. No justification to quash the charge sheet or the proceedings against the applicants. No abuse of the court's process at this pre-trial stage. (Para - 20,21)

Application u/s 482 Cr.P.C. rejected. (E-6)

List of Cases cited: -

1. Mohd. Allauddin Khan Vs The St. of Bihar & ors., 2019 0 Supreme (SC) 454

2. Rajeev Kaurav Vs Balasahab & ors., 2020 0 Supreme (SC) 143

3. V.K. Rai & anr. Vs St. & anr., Application U/S 482 No. 3707 2004

4. Sri Rudra Prakash Tiwari @ Raju Tiwari & anr. Vs St. of U.P. & anr., Application U/S 482 No. 12608 of 2020

5. R.P. Kapur Vs. St.of Punj. , AIR 1960 SC 866

6. St. of Har. & ors. Vs.Ch. Bhajan Lal & ors., 1992 Supp. (1) SCC 335

7. St. of Bihar & anr. Vs P.P. Sharma & anr., 1992 Supp (1) SCC 222

8. Zandu Pharmaceuticals Works Ltd. & ors. Vs. Mohammad Shariful Haque & anr., 2005 (1) SCC 122

9. M. N. Ojha Vs Alok Kumar Srivastava; 2009 (9) SCC 682

10. Nallapareddy Sridhar Reddy Vs The St. of A.P. & ors., 2020 0 Supreme (SC) 45

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Supplementary affidavit filed by learned counsel for the applicant today in the Court, is taken on record.

2. The present 482 Cr.P.C. application has been filed to quash the charge-sheet

dated 05.02.2019 as well as the cognizance order dated 06.02.2019 as well as the entire proceedings of S.T. No. 129of 2019 (State Vs. Virendra Gupta & others), arising out of Case Crime No.12 of 2019, under Sections 304B I.P.C. as also under Sections 3/4 D.P. Act, Police Station-G.R.P., Kanpur Nagar, District-Kanpur Nagar, pending in the court of Chief Metropolitan Magistrate, Kanpur Nagar.

3. Heard Mr. Santosh Kumar Pandey, learned counsel for the applicants and Mr. Pankaj Srivastava, learned A.G.A. for the State as well as perused the entire material available on record. It is not necessary to issue notice to opposite party no.2, as he has no right to be heard at pre-cognizance stage

3. Brief facts of the case are that the present F.I.R. was lodged by the opposite party no.2 alleging therein that the opposite party no.2 married his daughter with brother-in-law of applicant, namely, Virendra on 04.03.2017 according to Hindu Rites and Rituals. After sometime, the informant received an information regarding harassment of his daughter by the applicant as well as his son-in-law, namely, Virendra (husband of deceased) for non-fulfilment of additional dowry demand. The informant and his family members put all efforts to solve problem but in vain. On 20.12.2018, the informant was informed by his son-in-law that his daughter was of bad character, therefore, he was not ready and willing to keep her as wife. After the aforesaid communication, on 21.12.2018, an information was received from Police Station G.R.P. Kanpur Nagar about the death of his daughter, therefore, an F.I.R. was registered against the applicant as well as accused Virendra Gupta (husband of the deceased). After completing statutory investigation under Chapter XII Cr.P.C., on 05.02.2019 the Investigating Officer has submitted the charge-sheet against the applicant and co-accused Virendra Gupta under under Sections 304B I.P.C. as also under Section 3/4 D.P. Act, Police Station-G.R.P. Kanpur Nagar, District-Kanpur Nagar on which the court concerned took cognizance on 06.02.2019 and directed the registration of the case, which has been registered as S.T. No. 129of 2019 (State Vs. Virendra Gupta & others), arising out of Case Crime No.12 of 2019, under Sections 304B I.P.C. as also under Sections 3/4 D.P. Act, Police Station-G.R.P., Kanpur Nagar, District-Kanpur Nagar. The husband of the deceased, namely, Virendra Gupta is languishing in jail since 22.12.2018, the said fact has been mentioned in the supplementary affidavit filed today in the Court. As per the post mortem report of the deceased, the cause of death of the deceased is Asphyxia as a result of ante-mortem throatling.

4. It has been submitted by learned counsel for the applicant that the applicant is sister-in-law (jethani) of daughter of opposite party no.2 and has been falsely implicated in the present case. The applicant has neither demanded any additional demand of dowry nor torture or beat the deceased. There is no direct or indirect evidence on the basis of which it can be said that the applicant is involved in the commission of the alleged offence. It has further been submitted that death of the deceased took place in the train and the applicant was not present there. Learned counsel for the applicant has relied upon the confessional statement of the husband of the deceased, in which, he has confessed that he committed the said crime of murdering the deceased. Learned counsel for the applicants, therefore, submitted that

the present criminal proceedings initiated against the applicant is 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 applicant that the proceedings of the above mentioned criminal case are liable to be quashed by this Court.

5. Per contra, Mr. Pankaj Srivastava, learned A.G.A. for the State has opposed the prayer made by the learned counsel for the applicant by contending that in the F.I.R., there are specific allegations against the applicant for beating, torturing the deceased for non-fulfilment of additional dowry demand. There is consistency in the prosecution story as unfolded in the first information report and statements of the informant under Section 161 Cr.P.C. The circumstances under which, the deceased has died, goes to show that, prima facie case for the alleged offence is made out against the applicant. Lastly, the learned A.G.A. states that this High Court may not quash the entire criminal proceedings under Section 482 Cr.P.C. at the pre-trial stage, 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***, wherein 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 stage is yet to come.

6. 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.

7. 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.

8. 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.

9. I have considered the submissions made by the learned counsel for the parties and gone through the records of the present application.

10. This Court finds substance in the contention raised by the learned A.G.A. that prima facie case for the alleged offence is made out against the applicant. There is consistency in the prosecution story as unfolded in the first information report and statement of the informant under Section 161 Cr.P.C. In the F.I.R., there is specific allegation against the applicant regarding beating, torturing of the deceased.

11. 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.

12. 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)."

13. 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."

14. 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."

15. 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)

16. 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)*

17. 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. ***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)***

18. 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)**

19. 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)*

20. In view of the aforesaid, this Court finds that the submissions made by the applicant's learned counsel call for adjudication on pure questions of fact which may adequately be adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. 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.

21. 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.

22. The present application under Section 482 Cr.P.C. is, accordingly, rejected. There shall be no order as to costs.

(2021)03ILR A399
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.03.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

U/S 482/3783/407 No. 1101 of 2021

Madari Singh @ Shiv Shankar Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Amit Tripathi

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 307 - Attempt to murder , Section 34 - Acts done by several persons in furtherance of common intention, Section 506- punishment for criminal intimidation , Code of Criminal Procedure,

1973 - Section 204 - issue process , Section 207 - Supply to the accused of copy of police report and other documents, Section 483 - Duty of High court to exercise continuous superintendence over courts of judicial Magistrates - court of revision / court of sessions burdened with duty to ensure the compliance of High Court's order with regard to hearing and disposal of the application for discharge through counsel - Both the courts below fell into doing technical disposal than to ensure imparting justice in view of the High Court's order.(Para-14)

Non-bailable warrant wrongly issued against the applicant - application filed before High Court under Section 482 Cr.P.C.- by order of Court dated 22.4.2019 - liberty to move application for discharge before the trial court - application for discharge before the trial court - rejected - ground - judicially triable by the Sessions Court - revision - ground - court below is looking after the case as a complaint case and as the matter pertains to warrant cases which are triable by the court of sessions - Another application was moved by the applicants for their discharge - court of Sessions dismissed the application - ground - case is not yet committed to court of Sessions by the Magistrate - application not maintainable.

HELD: - The present application moved by the accused-applicant is, thus, maintainable to enforce the earlier order of this Court dated 22.4.2019 so as to prevent the abuse of process of the Court as the court of Magistrate after rejection of revision has issued Non-bailable Warrant against the accused-applicants. (Para -15)

Application U/s 482 Cr.P.C. disposed of. (E-6)

(Delivered by Hon’ble Vikas Kunvar Srivastav, J.)

1. The case is called out.

2. Learned counsel for the applicant, Sri Amit Tripathi, Advocate and learned A.G.A. for the State, Sri S.P. Tiwari, Advocate are present.

3. The present application under Section 482 Cr.P.C. is moved on behalf of the applicant to quash the entire proceeding of the Case No.261/2020, Case Crime No.127/2003 under Sections 307/34, 506 I.P.C., Police Station- Hasanganj, District-Unnao, the order dated 18.2.2021 passed by the learned court below i.e., Additional Chief Judicial Magistrate-II, Unnao by which the learned court below has wrongly issued the non-bailable warrant against the applicant, the order dated 4.11.2020 passed by learned court below in Case No.261/2020 under Section 307/34, 506 IPC, Police Station- Hasanganj, District-Unnao, the order dated 18.12.2020 passed by learned Session Court, Unnao in Criminal Revision No.63/2020 as well as the order dated 15.2.2021 passed by Session Judge, Unnao in Criminal Misc. Case No.134/2021 and compliance for the order dated 22.4.2019 passed by this Hon'ble Court in Criminal Misc. Case No. U/S 482 No.4261 of 2009.

4. In para-2 of the application, the applicant has himself discloses that earlier also in the same matter an application was filed before this Court under Section 482 Cr.P.C. The said para-2 is quoted hereunder:-

"That it is further prayed that this Hon'ble court may kindly be passed a suitable order for compliance of the order dated 22.4.2019 passed by this Hon'ble court in Criminal Misc. case/under Section 482 No.4261 of 2009. The copy of the order dated 22/04/2019 passed by this Hon'ble court is being annexed herewith and marked as ***Annexure No.2*** *to this application."*

5. The Annexure No.2 is the order of this Court dated 22.4.2019 in aforesaid application under Section 482 Cr.P.C., of which para-3 and 4, relevant for the purpose of the present application are quoted hereunder:-

"3. Learned counsel for the petitioners submits that he would like to file an application for discharge under the provisions of Cr.P.C., to which learned counsel for the State, does not have any objection.

4. Accordingly, the petitioners are granted liberty to file an application in conformity with the provisions of Cr.P.C., within a period of two weeks from today. After the said application is filed, learned trial Court is directed to dispose of the same within a period of thirty days thereafter. The petitioners are also granted liberty to appear through his counsel. Till expiry of the aforesaid period, no coercive steps shall be taken against them."

6. Pursuant to the order of the Court as to the liberty to move application for discharge before the trial court, was sought to be availed by the applicants. They moved an application on 6.5.2019 before the court of Judicial Magistrate, Unnao through counsel, wherein the case was pending. In view of the order dated 22.4.2019 of this Court, the applicants were given protection from coercive action for 30 days from the date of order. The said application was rejected by the court of Magistrate on 4.11.2020 which is made Annexure No.9 to the present application on the ground that the applicants have been summoned under Sections 307/34, 506 I.P.C. which is judicially triable by the Sessions Court, as such, he has no jurisdiction to decide the discharge application.

7. Against the said order, applicants preferred a revision which was finally decided on 18.12.2020 on the ground that learned court below is looking after the case as a complaint case and as the matter pertains to warrant cases which are triable by the court of sessions, as such, he has no jurisdiction to decide the discharge application and the order suffers no vice.

8. Another application was moved by the applicants for their discharge, according to aforesaid order of revisional court under section 227 of the Cr.P.C. before the Session court. Learned court of Sessions dismissed the application on 15.2.2021 on the simple ground that case is not yet committed to court of Sessions by the Magistrate.

9. Learned counsel for the complainant, Sri Y.S. Srivastava, Advocate appearing with Vakalatnama executed in his favour by the complainant, the same is taken on record. Office is directed to get it registered and duly place on record.

10. Learned counsel for the complainant argued as to the maintainability of the application under Section 482 Cr.P.C. before the Court on the ground that the same is misconceived and the sole purpose of moving the application is to stifle the bonafide proceeding of the court below in case crime no.127/2003, under Sections 307/34 and 506 I.P.C. Learned counsel further drew attention towards that fact that earlier vide order dated 22.4.2019, the accused-applicants were given protection of 30 days with liberty to move application for their discharge before the trial court and their application from both the courts below was rejected, as such, they are not entitled to any further protection from the process of the Court.

11. Heard learned counsel for the applicant, learned counsel for the complainant, learned A.G.A. and perused the materials placed on record.

12. The High Court under the Code of Criminal Procedure, 1973 is vested with inherent power under Section 482 Cr.P.C., which shall not be deemed to be limited or affected by any other provisions of the Code itself, to make such order as may be necessary to give affect to any order of this Court or to protect abuse of process of any court or otherwise to secure the ends of justice.

13. While dealing with the application for discharge, moved by the applicants, before the court of Magistrate, the impugned order, passed on the application by the Magistrate dated 4.11.2020 pursuant to the order of this Court dated 22.4.2019 in an application under Section 482 Cr.P.C. of the applicants itself discloses that the Magistrate was well conversant and known to its jurisdiction that, the matter pending before it, wherein application for discharge was moved from the offences under Sections 307/34, 506 I.P.C. are not triable by it and exclusively triable by the court of Sessions, then also, without having jurisdiction, decided the application. When the order was challenged into revision, the court of Sessions, though observed in its order dated 18.12.2020 that, in order of the High Court under Section 482 Cr.P.C. the direction to dispose of the "Discharge application" was to the **trial court**, then also, the court of Sessions dealing with the revision kicked back the matter to the court of Magistrate again. The court of Magistrate, who was sitting over the matter, despite taking cognizance of offences, finding them exclusively triable by the court of Sessions, did not commit the matter to the court of Sessions.

14. Section 204 of the Code of Criminal Procedure, 1973 provides, if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding, he has to issue process in due course. In the present case also the Magistrate issued the process accordingly. In response whereof, the accused-applicants moved an application before the High Court under Section 482 Cr.P.C. and by virtue of order dated 22.4.2019, the accused-applicants put their appearance before the Court of Magistrate through counsel alongwith the application for their discharge. The Magistrate was required to ensure the compliance of order of the Court in letter and spirit, with regard to hearing on discharge application and was not expected to be technical in dismissing the application itself on the ground of lack of jurisdiction. The court of Magistrate was duty bound to honour the order of the Court by committing the case to the court of Sessions alongwith the application making compliance of Section 207 of the Cr.P.C. so that obedience and compliance of the High Court's order could be ensured. Learned court of revision was also required to call for administratively the concerned Magistrate, why he is not passing the order of committal of the proceeding than to sit over the application for discharge without having jurisdiction for disposing the same. The court of revision / court of sessions also burdened with duty to ensure the compliance of High Court's order with regard to hearing and disposal of the application for discharge through counsel. Both the courts below fell into doing technical disposal than to ensure imparting justice in view of the High Court's order.

15. The present application moved by the accused-applicant is, thus, maintainable to enforce the earlier order of this Court dated 22.4.2019 so as to prevent the abuse of process of the Court as the court of Magistrate after rejection of revision has issued Non-bailable Warrant against the accused-applicants.

16. In exercise of it's inherent power, the Court deems fit in the circumstances of the case to issue *suo moto* direction to the Court of Magistrate under Section 483 Cr.P.C. to commit the Case Crime No.127/2003 under Section 307/34, 506 I.P.C., Police Station- Hasanganj, District - Unnao forthwith without any further delay, complying the requirements under Section 207 Cr.P.C. alongwith the application of the accused applicants moved for the purpose of their discharge.

17. The accused-applicants are directed to appear through counsel before the Court of Sessions on **15.3.2021** and they are at liberty to renew their prayer for discharge from offences through a fresh application before the Sessions Court (trial court).

18. The Non-bailable warrant issued by the Court of Magistrate in Case No.261/2020, Case Crime No.127/2003 under Sections 307/34, 506 I.P.C., Police Station- Hasanganj, District- Unnao shall remain in abeyance till then.

19. The present application under Section 482 Cr.P.C. is finally **disposed of**, accordingly.

20. The Deputy Registrar (Criminal) is directed to communicate the order promptly, in addition to normal course of communication as prescribed in the rules of the court through e-mail also, to the Sessions Court and also to the Court of Magistrate for compliance. The compliance report be ensured to place before the court.

(2021)03ILR A403
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.03.2021

BEFORE

THE HON'BLE RAJENDRA KUMAR-IV, J.

Application U/S 482 Cr.P.C. No. 1298 of 2006

Vidya Sagar Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Paramatma Rai, Sri A.B. Saran, Sri Amit Kumar Singh, Sri Rajiv Kumar Mishra, Sri Rajiv Lochan Shukla, Sri S.P.S. Parmar, Sri Shailendra Sharma

Counsel for the Opposite Parties:
A.G.A., Sri D.B. Yadav

(A) Criminal Law - Indian Penal Code, 1860 - Sections 260, 263-Ka, 419, 420, 407, 468, 471 , exercise of powers under Section 482 of the Cr.P.C. is the exception and not the rule - evidence of accused-applicants or defence evidence and any question of fact cannot be determined at the stage under section 482 Cr.P.C. - Veracity or truthfulness for the statement or any documents can only be adjudicated after the evidence is adduced by the party in trial court. (Para - 6,7)

Accused-applicants filed fake stamp of respective amounts - on which Vendors name was disclosed as Randhir Singh, license no. 321 - all these stamps were found forged in an inquiry - they were not found to be issued from the Treasury - Signature and seal on the stamp papers were also found fabricated - FIR was registered - Investigation came to be conducted

- Investigating Officer, found sufficient evidence and after completion of investigation, submitted charges sheet against the accused-applicants.(Para -5)

HELD: - In view the facts and legal proposition discussed hereinabove, there is no illegality or irregularity, legal or otherwise, warranting interference in the submission of charge-sheet. It is not a case of grave injustice. No good ground to quash the charge-sheet. (Para - 13)

Application U/s 482 Cr.P.C. dismissed. (E-6)

List of Cases cited: -

1. Rajiv Thapar & ors. Vs Madan Lal Kapoor, (2013) 3 SCC 330 Supreme Court

2. Rajesh Bajaj Vs State NCT of Delhi & ors., (1999) 3 SCC 259

3. Md. Allauddin Khan Vs The St. of Bihar & ors., (2019) 6 SCC 107

4. M. Jayanthi Vs K.R. Meenakshi & anr., Criminal Appeal No. 1817 of 2019

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Heard Sri Rajiv Lochan Shukla as well as Sri Amit Kumar Singh, learned counsel for the applicants and learned A.G.A. for the State and perused the material available on record.

2. The instant application under Section 482 Cr.P.C. has been filed by the applicants, namely, Vidya Sagar Singh, Awadhesh Singh, Ram Prakash, Abhai Narayan Rai, Mahmood Ahamad, Arvind Yadav, Fauzdar Chauhan and Ravi Kant Rai for quashing the charge sheet dated 30.9.2020 in Criminal Case No. 308 of 2003, under sections 260, 263-Ka, 419, 420, 407, 468, 471 IPC, Police Station Kotwali, District and further proceedings in Criminal Case No. 308 of 2003, pending in the Court of Chief Judicial Magistrate, Mau.

3. Learned counsel for the applicants submits that the applicants are innocent and have been falsely implicated in the present case. They have committed no offence. Applicants were bona fide purchaser of alleged stamps of respective amount. Applicants were registered as Contractor of the department. They filed the alleged stamp to get agreement executed. There was no motive to accused/applicants to commit the present crime. It has been further submitted by him that stamp duty have been duly deposited, thus there is no harm to the State Government. It has been further submitted that stamp paper of respective amount was purchased by them by Stamp Vendors who used to sell in Tehsil Campus and Stamp Vendors were not traced out by Investigating Officer, therefore, Stamp Vendors has not been arrested so far and they are moving freely. It is further submitted that no offence is made out against the accused/applicants, Investigating Officer did not conduct the proper investigation. He further argued that charge-sheet has been filed against the accused/applicants in casual manner. He showed some papers in support of his contentions.

4. Per contra learned AGA vehemently opposed the prayer by submitting that accused-applicants have, admittedly, submitted fake stamps papers they used them knowing to be forged, for getting registered agreement. He further submits that all the submissions and pleas of the applicants are based on facts which cannot be adjudicated at this stage under section 482 Cr.P.C.

5. Brief facts of prosecution story for disposal of instant application is that accused-applicants filed fake stamp of respective amounts on which Vendors name was disclosed as Randhir Singh,

license no. 321 and all these stamps were found forged in an inquiry, they were not found to be issued from the Treasury. Signature and seal on the stamp papers were also found fabricated. FIR was registered. Investigation came to be conducted and Investigating Officer, found sufficient evidence and after completion of investigation, submitted charges sheet against the accused-applicants.

6. It is well settled that exercise of powers under Section 482 of the Cr.P.C. is the exception and not the rule. Under this section, although the High Court has inherent powers to make such orders as may be necessary to give effect to any order under the Code or to prevent the abuse of process of any court or otherwise to secure the ends of justice. But the expressions "abuse of process of law" or "to secure the ends of justice" do not confer unlimited jurisdiction on the High Court and the alleged abuse of process of law or the ends of justice could only be secured in accordance with law, including procedural law and not otherwise.

7. It is also well settled that evidence of accused-applicants or defence evidence and any question of fact cannot be determined at the stage under section 482 Cr.P.C. Veracity or truthfulness for the statement or any documents can only be adjudicated after the evidence is adduced by the party in trial court.

8. In case of ***Rajiv Thapar and others Vs. Madan Lal Kapoor (2013) 3 SCC 330 Supreme Court*** has held

"21. The High Court, in exercise of its jurisdiction under Section 482 of the Cr.P.C., must make a just and rightful choice. This is not a stage of evaluating the truthfulness or otherwise of allegations levelled by the prosecution/complainant against the accused. Likewise, it is not a stage for determining how weighty the defence raised on behalf of the accused is. Even if the accused is successful in showing some suspicion or doubt, in the allegations levelled by the prosecution/complainant, it would be impermissible to discharge the accused before trial. This is so, because it would result in giving finality to the accusations levelled by the prosecution/complainant, without allowing the prosecution or the complainant to adduce evidence to substantiate the same. The converse is, however, not true, because even if trial is proceeded with, the accused is not subjected to any irreparable consequences. The accused would still be in a position to succeed, by establishing his defences by producing evidence in accordance with law. There is an endless list of judgments rendered by this Court declaring the legal position, that in a case where the prosecution/complainant has levelled allegations bringing out all ingredients of charge(s) levelled, and have placed material before the Court, prima facie evidencing the truthfulness of the allegations levelled, trial must be held."

9. A look at allegations made in First Information Report would show that victim/opposite party herein, incorporated the ingredients necessary for prosecuting the accused-applicants for the offence alleged. The question whether the complainant will be able to prove the allegation in the manner known to law or accused/applicants were bona fide purchaser of the impugned stamps and they

have purchased for consideration, would arise only at a later stage after the evidence is adduced by the parties. It cannot be said that prima-facie case is made out against the applicants.

10. In **Rajesh Bajaj v. State NCT of Delhi & Ors., (1999) 3 SCC 259**, Court has held that it is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. If the factual foundation for the offence has been laid in the complaint, the court should not hasten to quash criminal proceedings during the investigation stage merely on the premise that one or two ingredients have not been stated with details.

11. In **Md. Allauddin Khan Vs. The State of Bihar and others, (2019) 6 SCC 107**, Supreme 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)

12. Recently, Apex Court in Criminal Appeal No. 1817 of 2019 **(M. Jayanthi Vs. K.R. Meenakshi and another)** decided on 02.12.2019 has held as under :-

"9. It is too late in the day to seek reference to any authority for the proposition that while invoking the power under Section 482 Cr.P.C for quashing a complaint or a charge, the Court should not embark upon an enquiry into the validity of the evidence available. All that the Court should see is as to whether there are allegations in the complaint which form the basis for the ingredients that constitute certain offences complained of. The Court may also be entitled to see (i) whether the preconditions requisite for taking cognizance have been complied with or not; and (ii) whether the allegations contained in the complaint, even if accepted in entirety, would not constitute the offence alleged."

13. Having considered the rival submissions made by learned Counsel for parties and keeping in view the facts and legal proposition discussed hereinabove, I do not see any illegality or irregularity,

legal or otherwise, warranting interference in the submission of charge-sheet. It is not a case of grave injustice. No good ground to quash the charge-sheet.

14. Application under Section 482 Cr.P.C. lacks merit and is accordingly **dismissed**.

15. It is however, provided that if the applicants move an application for discharge at proper stage, same shall be heard and decided by the court concerned preferably and expeditiously within three months in accordance with law, considering the material facts and evidence collected by the Investigating Officer during investigation and plea raised by accused-applicants.

(2021)03ILR A407
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.02.2021

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Application U/S 482 Cr.P.C. No. 2162 of 2016

Sanjay Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Aishwini Kumar, Sri Ganesh Shanker Srivastava, Sri Ashwini Kumar Srivastava

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 & Negotiable Instrument Act, 1881-Sections 138-quashing of entire proceeding-admitted fact of issuance of cheque is there, dishonour of it by bank concerned-notice to accused/applicant by complainant by registered post is there – cheque was issued by the company-complaint has not been filed against the company - the applicant had signed the cheque as its authorized signatory-the company had not been made party accused-no vicarious liability can be imposed on the accused-applicant-complaint cannot proceed against the applicant in his personal capacity-Hence, prima facie case, is not made out against the applicant u/s 138 r/w section 141 of the Act-order under challenge deserves to be quashed.(Para 2 to 46)

B. In exercising jurisdiction u/s 482 CrPC High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not.it 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 42)

C. Before a Magistrate taking cognizance of an offence u/s 138/141 of the N.I. Act, making a person vicariously liable has to ensure strict compliance of the statutory requirements.to settle the scores between the parties which are more in the nature of a civil dispute, the parties cannot be permitted to put the criminal law into motion and courts cannot be a mere spectator to it. (Para 43)

The Application is allowed. (E-5)

List of Cases cited: -

1. Aneeta Hada Vs M/s Godfather Travels & Tours Pvt. Ltd., (2012) 5 SCC 661

2. Harihara Krishnan Vs J Thomas, (2018) 13 SCC 663

3. Harshendra Kumar D. Vs Rebatilata Koley, (2011) 3 SCC 351

4. Anita Malhotra V.s Apparel Export Promotion Council & anr., (2012) 1 SCC 520

5. Pooja Ravinder Devidasani Vs St. of Mah. & anr. (2015) 88 ACC 613

6. Ashoke Bafna Vs Upper India Steel Manufacturing & Engeeniring Co. Ltd. (2018) 14 SCC 202

7. Rishipal Singh Vs St. of U.P. & ors. (2014) 7 SCC 215

8. Medchl Chemicals & Pharma (P) Ltd., (2002) 3 SCC 269

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

1. Heard Shri Ganesh Shankar Srivastava, learned counsel for the applicant, Sri Pankaj Saxena, learned A.G.A. for the State and perused the material on record.

2. This petition under section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.) has been filed with prayer for quashing of the summoning order dated 17.8.2015 passed by the Additional Chief Judicial, Magistrate, Court No. 10, Varanasi in Complaint Case No. 1153 of 2015 (Manoj Kumar vs Sanjay Singh) under Section 138 of the Negotiable Instruments (N.I.) Act, Police Station, Sigra, District-Varanasi. The applicant has also challenged the revisional order dated 28.10.2015 passed by the Additional Sessions Judge, Court No. 4, Varanasi in Criminal Revision No. 317 of 2015 (Sanjay Singh vs State of U.P. and others) as also the entire proceedings of the aforesaid complaint case.

3. By order dated 15.2.2016 a notice was issued to Opposite Party No.2/complainant and as per the office report dated 17.8.2016 notice issued to Opposite Party No. 2 has been served. However, no one has put in appearance for the Opposite Party No. 2.

4. The facts of the case as stated by the learned counsel for the applicant are that the applicant is the Director of Udit Infraheights Pvt. Ltd., a company incorporated under the Companies Act, 1956. The complainant/opposite party No.2, an employee in the railways, by giving assurance of contract of road construction from his superior officers in favour of the applicant's company, situated at Lahartara Railway Colony, Varanasi obtained post dated cheque of rupees five lacs in terms of security money. The complainant assured the applicant that when the applicant earns profits of the said contract work and presents gifts to the complainant, the complainant would return the post dated cheque. However, it is the case of the applicant that without any prior notice to the company, the complainant presented the cheque in the bank which was dishonoured due to non availability of funds. The legal notice dated 16. 6.2015 was not received to the applicant, but the second notice dated 4.7.2015 was served.

5. The opposite party No.2 complainant filed complaint registered as Complaint Case No. 1153 of 2015 (Manoj Kumar vs. Sanjay Singh) under section 138 N.I. Act, Police Station, Sigra, District-Varanasi, on the averments, inter alia, that the complainant had advanced rupees 5,50,000/- to the applicant for purchase of land as the applicant was engaged in the business of property dealing but the land was not transferred. The complainant made repeated demands for return of money and consequently the applicant gave a cheque of rupees 5,00,000/- dated 30.4.2015 to the complainant, which, on presentation in bank was dishonored. The complainant served the applicant with legal notice within the stipulated period but as the amount under cheque was not paid, the complaint was filed.

6. The Additional Chief Judicial Magistrate, Court No.10 Varanasi, on

consideration of the statement of the complainant recorded under Section 200 Cr.P.C. and the material placed before him passed the summoning order dated 17.8.2015. This order was challenged by the applicant in Criminal Revision No. 317 of 2015, but the same was rejected by the order dated 2.9.2015 passed by the Additional Sessions Judge, Court No.4, Varanasi.

7. The learned counsel for the applicant has submitted that the orders under challenge suffer from illegality and amount to abuse of the process of the court. His submission is that the cheque in question was issued by the company. The applicant had signed the cheque in the capacity of the authorised signatory of the company. He had not issued the cheque nor signed in his personal capacity, but, the company was not made party accused in the complaint. The applicant, Director of the company, could not be held liable for the alleged offence as there was no prosecution of the company. Consequently, no prosecution of the applicant could be launched and summons could not be issued to him to face the trial. Learned counsel for the applicant has placed Sections 138 and 141 of the N.I. Act and relied upon the judgement of the Hon'ble Supreme Court in the case of **Aneeta Hada Vs. M/s Godfather Travels and Tours Pvt. Ltd., reported in (2012) 5 SCC 661**, in support of his contention that there could be only vicarious liability of the person who, at the time the offence was committed, was incharge of the business of the company but even such person can not be held liable if the company is not arrayed as an accused.

8. Learned counsel for the applicant has further submitted that the cheque, undisputedly the very basis of the complaint, evidenced that it was issued in the capacity of authorized signatory for the company. Any legal notice was not served to the company. There was non compliance with the provisions of Sections 138 and 141 of N.I. Act and no offence was made out even, prima facie, against the applicant.

9. Learned A.G.A., Shri Pankaj Saxena has submitted that there is no illegality in the summoning order as the Magistrate was satisfied, on consideration of the material before him, that prima facie, offence under Section 138 N.I. Act was made out, for summoning of the applicant to face the trial.

10. Learned A.G.A. has further submitted that the Revisional Court has specifically recorded that as per the complaint case, the cheque was given to the complainant by the applicant in his personal capacity and not in the capacity of authorised signatory for the company. Consequently, the company was not a necessary party to be arrayed as accused. His submission is that Section 141 of N.I. Act is not attracted and the challenge to the impugned orders deserves rejection.

11. I have considered the submissions advanced by the learned counsel for the parties and have perused the material brought on record.

12. In the light of the submissions advanced the following points arise for consideration:

(i) Whether the Criminal prosecution against the person in charge of, and responsible for conduct of the business of the company under Section 138 Negotiable Instruments Act, can be

maintained, in the absence of any prosecution of the Company for such offence and without making the company an accused, in view of Section 141 of the Negotiable Instruments Act?

(ii) Whether the cheque in question was issued by the applicant in his personal capacity or in the capacity of director of Udit Infraheights Pvt. Ltd. Company?

(iii) Whether the orders under challenge and the criminal proceedings against the applicant deserve to be quashed in the exercise of jurisdiction under Section 482 Cr.P.C.?

13. I proceed to Consider point No.1 and for such consideration it is necessary to have a look at the provisions of Section 138 and 141 of the Negotiable Instruments Act.

14. **Section 138 Negotiable Instruments Act, 1881**

"Dishonour of cheque for insufficiency, etc., of funds in the account. --Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for 19 [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless--

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

15. Section 141 Negotiable Instruments Act reads as under:

"Offences by companies. –

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due

diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

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

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

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

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

16. The essential ingredients of offence under Section 138 of the N.I. Act are : (i)The person drew a cheque on an account maintained by him with the banker; (ii) when such a cheque is presented to the bank is returned by the bank unpaid; (iii) such cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity, which ever is earlier; (iv) the payee demanded in writing from the drawer of the cheque the payment of the amount of money due under the cheque to the payee; (v) Such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding return of the cheque, as unpaid and (vi) inspite of the demand notice the drawer of the cheque failed to make the payment within a period of 15 days from the date of receipt of the demand notice.

17. In order to constitute the offence under Section 138 N.I. Act all the aforesaid ingredients (i) to (vi) must co-exist. Each one of the ingredients (i) to (v) flows from the document, which evidences the existence of such an ingredient. The only other ingredient no. (vi) the complainant can only assert but cannot prove. The burden is essentially on the drawer of the cheque to prove that he had infact made the payment pursuant to the demand.

18. In the case of **Aneeta Hada (supra)** the Hon'ble Supreme Court has held that Section 141 of the N.I. Act is concerned with the offences by the company. It makes the other persons, vicariously liable for commission of an offence on the part of the company. The vicarious liability gets attracted when the condition precedent laid down in Section 141 of the Act stands satisfied. There can be no vicarious liability unless there is a prosecution against the company. For maintaining a prosecution under section 141 of the N.I. Act, arraying of the company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on touchstone of vicarious liability as the same has been stipulated in the provision of Section 141 N.I. Act itself. Paragraph Nos. 53 and 59 of **Aneeta Hada (supra)** read as under:

"53. It is to be borne in mind that Section 141 of the Act is concerned with the

offences by the company. It makes the other persons vicariously liable for commission of an offence on the part of the company. As has been stated by us earlier, the vicarious liability gets attracted when the condition precedent laid down in Section 141 of the Act stands satisfied. There can be no dispute that as the liability is penal in nature, a strict construction of the provision would be necessitous and, in a way, the warrant.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh (supra) which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal (supra) does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada (supra) is overruled with the qualifier as stated in para 44. The decision in Modi Distilleries has to be treated to be restricted to its own facts as has been explained by us hereinabove."

19. In Standard Chartered Bank Vs. State of Maharashtra and others (2016) 6 SCC 62, also, it has been held that there cannot be any vicarious liability unless there is a prosecution against the Company. Paras 9,11 and 12 of the report read as under:

9. On a studied scrutiny of the aforesaid provision, it is quite limpid that to constitute the criminal liability the complainant is required to show that a cheque was issued; that it was presented in the bank in question; that on due presentation, it was dishonoured; that, as enshrined in the provision, requisite notice was served on the person who was sought to be made liable for criminal liability; and that in spite of service of notice, the person who has been arraigned as an accused did not comply with the notice by making payment or fulfilling other obligations within the prescribed period, that is, 15 days from the date of receipt of notice.

11. On a perusal of the aforesaid provision, it is clear as crystal that if the person who commits an offence under Section 138 of the Act is a company, the company as well as other person in charge of or responsible to the company for the conduct of the business of the company at the time of commission of the offence is deemed to be guilty of the offence. Thus, it creates a constructive liability on the persons responsible for the conduct of the business of the company.

12. At one point of time, an issue had arisen before this Court, whether a complaint could be held to be maintainable without making the company a party. The said controversy has been put to rest by a three-Judge Bench decision in Aneeta Hada v. Godfather Travels and Tours Private Limited wherein it has been held that: (SCC p. 688, para 58)

"58..... when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof."

20. In **N. Harihara Krishnan Vs. J Thomas (2018) 13 SCC 663** the Hon'ble Supreme Court held that Section 141 stipulates the liability for the offence punishable under Section 138 N.I. Act

when the person committing such an offence happens to be a company. In other words when a drawer of the cheque happens to be a company. Relevant part of paragraphs 20, 21 and 22 of the report read as under:

"20. The offence under Section 138 of the Act is capable of being committed only by the drawer of the cheque. The logic of the High Court that since the offence is already taken cognizance of, there is no need to take cognizance of the offence against Dakshin is flawed. Section 141 stipulates the liability for the offence punishable under Section 138 of the Act when the person committing such an offence happens to be a company - in other words when the drawer of the cheque happens to be a company. Relevant portion of Section 141 reads as follows:-

"141. Offences by companies.--(1) If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:"

21. This Court in Aneeta Hada,(SCC p. 668, para 1), had an occasion to examine the question "whether an authorised signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 (for brevity "the Act") without the company being arraigned as an accused" and held as follows:-

"59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. ..."

22. The High Court failed to appreciate that the liability of the appellant (if any in the context of the facts of the present case) is only statutory because of his legal status as the Director of Dakshin. Every person signing a cheque on behalf of a company on whose account a cheque is drawn does not become the drawer of the cheque. Such a signatory is only a person duly authorised to sign the cheque on behalf of the company/drawer of the cheque."

21. It has thus been settled in **Aneeta Hada (supra)** that for maintaining a prosecution against the person in charge of and responsible for conduct of the business of the company under Section 138 N.I. Act, arraigning of the Company as an accused is imperative in view of Section 141 of the Act, as such a person can only be held vicariously liable. Consequently, on point No.1 it is so determined. Such a person, cannot be prosecuted unless there is prosecution of the company.

22. Now I proceed to consider the second point, i.e. whether the cheque in question was issued by the applicant in his personal capacity or in the capacity of the Director of the Company.

23. There is no averment in the complaint that the cheque was issued by the company or/and the applicant-accused signed the cheque in the capacity of the Director or the person in charge of the affairs of the Company. The complaint has

been filed without any refefence to the company, which has also not been made a party-accused in the Complaint.

24. In paragraph 4 of the complaint, there is an averment that the applicant-accused gave an account payee cheque No. 613677 dated 30.4.2015 drawn on ICICI Bank, Branch Sigra, for Rs. 5,00,000/- to the complainant-opposite party No.2.

25. This Court by order dated 27.1.2016 granted time to learned counsel for the applicant to enable him to file a photocopy of the cheque in question and in the light of that order the applicant filed supplementary affidavit dated 14/15.2.2016 annexing therewith copy of the cheque, as annexure No.1.

26. By order dated 15.2.2016 the supplementary affidavit was taken on record and the proceedings of the complaint case were stayed.

27. In the summoning order the Magistrate has observed that the photocopy of the cheque and other documentary evidence was filed in support of the complaint and the original of those documents was produced before him for perusal. The particulars of the cheque have been mentioned as an account payee cheque bearing No. 613677 dated 3.4.2015 drawn on ICICI Bank Branch Sigra for an amount of rupees 5 lakhs.

28. Perusal of the copy of the cheque, annexure No. 1 to the supplementary affidavit, shows that it bears the same particulars as are mentioned in the complaint and in the summoning order.

29. There is, as such, no doubt or dispute that the very cheque annexure No.1 to the supplementary affidavit, is the basis of the prosecution against the applicant under Section 138 N.I. Act.

30. The issuance of cheque, whether in the personal capacity or in the capacity of authorized signatory of the Company, can be determined from perusal of the cheque itself. It is one of the essential ingredients to constitute on offence under Section 138 N.I. Act, that the person drew a cheque on an account maintained with the Banker and the existence of this ingredient is to be proved from the document itself i.e. the cheque, and for its proof no other evidence is required. Therefore, in the exercise of jurisdiction under Section 482 Cr.P.C. this Court can determine if the cheque was issued as authorized signatory or in personal capacity by the applicant, as such a determination does not involve making of any comparative assessment of the evidence/material on record before the Magistrate or the merit or demerit of such material. This would also not involve taking of a view different from the view taken by the Courts below on assessment of the evidence. This is also not considering the defence of the accused applicant but is an exercise to see if one of the basic ingredients to constitute an offence under Section 138 N.I. Act is or is not made out, prima facie, on the basis of the material on record, the very document i.e. cheque, which is the basis of the complaint and is undisputed.

31. In **Harshendra Kumar D. Vs. Rebatilata Koley (2011) 3 SCC 351** the Hon'ble Supreme Court has laid down that while exercising jurisdiction under Section 482 Cr.P.C. or criminal jurisdiction under Section 397 Cr.P.C. in a case where complaint is sought to be quashed, in an appropraite case, if on the face of the

document which are beyond suspicion or doubt placed by the accused, the accusation against accused cannot stand, it would be travesty of justice if the accused is relegated to trial and is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of a process, the High Court may look into the materials which have a significant bearing on the matter at a prima facie stage. In **Anita Malhotra Vs. Apparel Export Promotion Council and another (2012) 1 SCC 520**, the same principle has been reiterated. Paragraphs 19 and 20 of the Anita Malhotra (supra) read as under:

"19. In Harshendra Kumar D. v. Rebatilata Koley, while considering the very same provisions coupled with the power of the High Court under Section 482 of the Code of Criminal Procedure, 1973 (in short "the Code") for quashing of the criminal proceedings, this Court held: (SCC pp.361-62, para 25)

"25. In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 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 merits of the accusations. However, in an appropriate case, if on the face of the documents - which are beyond suspicion or doubt - placed by accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

20. As rightly stated so, though it is not proper for the High Court to consider the defence of the accused or conduct a roving enquiry in respect of merit of the accusation, but if on the face of the document which is beyond suspicion or doubt placed by the accused and if it is considered the accusation against her cannot stand, in such a matter, in order to prevent injustice or abuse of process, it is incumbent on the High Court to look into those document/documents which have a bearing on the matter even at the initial stage and grant relief to the person concerned by exercising jurisdiction under Section 482 of the Code."

32. In view of the law laid down in the above judgment if a document which is beyond suspicion or doubt, even if filed by the accused, can be looked into, the document filed by the complainant forming the basis of the complaint which is beyond doubt can also be looked into for the purpose of ascertaining if prima facie offence is made out for summoning the accused.

33. A perusal of the copy of the cheque shows that it is signed by Sanjay Singh, the applicant, for Udit Infraheights Private Limited, as its authorised signatory.

34. The Magistrate, in passing the summoning order did not consider this aspect of the matter, if the averments of the complaint, even if taken to be true on their face value, were established, prima facie, from the documentary evidence, in particular, copy of the cheque filed in evidence as also from perusal of the original cheque which was produced before the Magistrate. In other words, the Magistrate had to satisfy himself, prima facie, if the cheque was issued by the applicant in his personal capacity which was the Complaint Case and this satisfaction could be easily arrived at on the basis of the cheque document itself. From perusal of the cheque document it was evident that it was issued by the applicant not in his personal capacity and as such the learned Magistrate ought to have considered that the complaint case was not supported by the documentary evidence.

35. The cheque, on its face evidencing to have been isued by the Company and the applicant having signed it in the capacity of authorized signatory, the Magistrate ought to have considered the basic question, going to the root of the maintainability of the complaint against the applicant, for want of the company being arrayed as accused, in view of Section 141 N.I. Act. In the absence of the company, as accused, any offence was not made out, even prima facie, against the applicant for his summoning under Section 138 read with Section 141 of the N.I. Act.

36. Perusal of the order passed in Revision shows that the applicant raised this plea in revision that the cheque in question was issued as Director of the Company but the company was not made a party-accused and as such no offence was made out against the applicant. Reliance was also placed on the judgment in the case of **Aneeta Hada (supra)** before the revisional Court.

37. The Revisional Court dealt with the above isue only in a cursory manner, by observing that as the averment in the complaint was, giving money to the applicant in personal capacity and giving of cheque to the complainant by the applicant in personal capacity the company was not the necessary accused-party. On this reasoning, the judgment in **Aneeta Hada (supra)** was also distinguished. The revisional court failed to look at the cheque which on the face of it was signed by the applicant as authorized signatory for the named company.

38. **In Pooja Ravinder Devidasani Vs. State of Maharashtra and another 2015 (88) ACC 613** the Hon'ble Supreme Court has held that putting criminal law into motion is not a matter of course. A Magistrate taking cognizance of an offence under Section 138/141 of the N.I. Act, making a person vicariously liable has to ensure strict compliance of the statutory requirements.

39. In **Ashoke Bafna Vs. Upper India Steel Manufacturing and Engineering Company Limited (2018) 14 SCC 202** the Hon'ble Supreme Court held that before summoning an accused under Section 138 N.I. Act, the Magistrate is expected to examine the nature of the allegations made in the complaint and the evidence, both oral and documentary, in support thereof, and then to proceed further with proper application of mind to the legal principles on the issue.

40. On the second point I hold that the cheque was issued by the applicant as authorized signatory for the company.

41. Now coming to the last point if the criminal proceedings and the orders

under challenge deserve to be quashed in the exercise of jurisdiction under section 482 Cr.P.C.

42. In **Rishipal Singh Vs. State of Uttar pradesh and others (2014) 7 SCC 215** the Hon'ble Supreme Court, while considering the scope of Section 482 Cr.P.C. held that when a prosecution at the initial stage is asked to be quashed, the test to be applied is as to whether the uncontroverted allegations as made in the complaint prima facie establish the case. The Courts have to see whether the contravention of the complaint amounts to abuse of process of law and whether contravention of criminal proceedings results in miscarriage of justice or when the court comes to a conclusion that quashing the proceedings would otherwise secure the ends of justice, then the Court can exercise the power under Section 482 Cr.P.C. The judgment in the case of **Medchl Chemicals and Pharma (P) Ltd. (2002) 3 SCC 269** was referred, in which the Hon'ble Apex Court held that in the event, the Court on perusal of the Complaint comes to a conclusion that the allegations levelled in the Complaint or charge sheet on the face of it does not constitute or disclose any offence as alleged there ought not to be any hesitation to rise up to the expectation of the people and deal with the situation as is required under law. Paragraphs 10 to 13 and 17 of **Rishipal Singh** (Supra) read as under:

"10. Before we deal with the respective contentions advanced on either side, we deem it appropriate to have thorough look at Section 482 Cr.P.C., which reads:

"482, Saving of inherent powers of High Court- 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 orders under this Code, or to prevent abuse of process of any court or otherwise to secure the ends of justice".

A bare perusal of Section 482 Cr.P.C. makes it crystal clear that the object of exercise of power under this section is to prevent abuse of process of Court and to secure ends of justice. There are no hard-and-fast rules that can be laid down for the exercise of the extraordinary jurisdiction, but exercising the same is an exception, but not a rule of law. It is no doubt true that there can be no straight jacket formula nor defined parameters to enable a court to invoke or exercise its inherent powers. It will always depend upon the facts and circumstances of each case. The Courts have to be very circumspect while exercising jurisdiction under Section 482 Cr.P.C.

11. This Court in Medchl Chemicals & Pharma (P) Ltd. v Biological E. Ltd has discussed at length about the scope and ambit while exercising power under Section 482 Cr.P.C. and how cautious and careful the approach of the Courts should be. We deem it apt to extract the relevant portion from that judgement, which reads:

"2. Exercise of jurisdiction under inherent power as envisaged in Section 482 of the Code to have the complaint or the charge-sheet quashed is an exception rather than rule and the case for quashing at the initial stage must have to be treated as rarest of rare so as not to scuttle the prosecution. With the lodgement of first information report the ball is set to roll and thenceforth the law takes its own course and the investigation ensues in accordance with the provisions of law. The jurisdiction as such is rather limited and restricted and its undue expansion is neither practicable

nor warranted. In the event, however, the court on a perusal of the complaint comes to a conclusion that the allegations levelled in the complaint or charge-sheet on the fact of it does not constitute or disclose any offence as alleged, there ought not to be any hesitation to rise up to the expectation of the people and deal with the situations as is required under the law. Frustrated litigants ought not to be indulged to give vent to their vindictiveness through a legal process and such an investigation ought not to be allowed to be continued since the same is opposed to the concept of justice, which is paramount".

12. This Court in plethora of judgments has laid down the guidelines with regard to exercise of jurisdiction by the Courts under Section 482 Cr.P.C. In State of Haryana v. Bhajan Lal this Court has listed the categories of cases when the power under Section 482 can be exercised by the Court. These principles or the guidelines were reiterated by this Court in (1) CBI v. Duncans Agro Industries Ltd (2) Rajesh Bajaj v. State (NCT of Delhi) and (3) Zandu Pharmaceuticals Works Ltd. v Mohd. Sharaful Haque. This Court in Zandu Pharmaceuticals Ltd. observed that:

"The power under Section 482 of the Code should be used sparingly and with circumspection to prevent abuse of process of Court, but not to stifle legitimate prosecution. There can be no two opinions on this, but if it appears to the trained judicial mind that continuation of a prosecution would lead to abuse of process of Court, the power under Section 482 of the Code must be exercised and proceedings must be quashed".

13. What emerges from the above judgments is that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as made in the complaint prima facie establish the case. The courts have to see whether the continuation of the complaint amounts to abuse of process of law and whether continuation of the criminal proceeding results in miscarriage of justice or when the court comes to a conclusion that quashing these proceedings would otherwise serve the ends of justice, then the Court can exercise the power under Section 482 Cr.P.C. While exercising the power under the provision, the Courts have to only look at the uncontroverted allegation in the complaint whether prima facie discloses an offence or not, but it should not convert itself to that of a trial Court and dwell into the disputed questions of fact.

17. It is no doubt true that the Courts have to be very careful while exercising the power under Section 482 Cr.P.C. At the same time we should not allow a litigant to file vexatious complaints to otherwise settle their scores by setting the criminal law into motion, which is a pure abuse of process of law and it has to be interdicted at the threshold. A clear reading of the complaint does not make out any offence against the appellant Branch Manager, much less the offences alleged under Section 34, 379, 411, 417, 418, 420, 467, 458 and 477 I.P.C. We are of the view that even assuming that the Branch Manager has violated the instructions in the complaint in letter and spirit, it all amounts to negligence in discharging official work, at the maximum it can be said that it is dereliction of duty."

43. In **Pooja Ravinder** (supra) the Hon'ble Suprme Court has held that the Superior Court should maintain purity in the administration of Justice and should not allow the abuse of the process of the Court. Paragraph 30 reads as under:

"Putting the criminal law into motion is not a matter of course. To settle the scores between the parties which are more in the nature of a civil dispute, the parties cannot be permitted to put the criminal law into motion and Courts cannot be a mere spectator to it. Before a Magistrate taking cognizance of an offence under Section 138/141 of the N.I. Act, making a person vicariously liable has to ensure strict compliance of the statutory requirements. The Superior Courts should maintain purity in the administration of Justice and should not allow abuse of the process of the Court. The High Court ought to have quashed the complaint against the appellant which is nothing but a pure abuse of process of law."

44. In view of the above, this court is satisfied that as the complaint has not been filed against the company; as the company has not been made a party accused; no vicarious liability can be imposed on the accused applicant. The complaint cannot proceed against the applicant in his personal capacity as the cheque was issued by the company and the applicant had signed the cheque as its authorized signatory. Any offence, even prima facie, is not made out against the applicant under Section 138 N.I. Act read with Section 141 of the Act.

45. The proceedings of the complaint case and the orders under challenge amount to abuse of the process of the Court and deserve to be quashed to secure the ends of justice.

46. This section 482 Cr.P.C. petition is allowed. The orders under challenge and the proceedings of Complaint Case No. 1153 of 2015 (Manoj Kumar vs Sanjay Singh) as aforesaid are hereby **quashed**.

47. No orders as to costs.

(2021)03ILR A419
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.02.2021

BEFORE

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

Application U/S 482 Cr.P.C. No. 2600 of 2021

Dhanesh Chandra Sharma & Anr.
...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Surjit Kumar

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

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 156 (3) - at the pre-cognizance stage - when only a direction has been issued by the Magistrate under Section 156 (3) Cr.P.C. to investigate - prospective accused has no locus standi to challenge a direction for investigation of a cognizable case before cognizance or the issuance of process - order by the Magistrate directing a police officer to investigate a cognizable case is an incidental step in the aid of investigation and trial and is interlocutory in nature, similar to orders granting bail, calling for records, issuing search warrants, summoning witnesses and other like matters which do not impinge upon a valuable right of a prospective accused - not amenable to a challenge in a criminal revision in view of the bar contained under Section 397(2) Cr.P.C.(Para -10)

An order passed upon an application filed by the opposite party no. 2 under Section 156 (3) Cr.P.C. -application was allowed by the Judicial Magistrate, with a direction for registration of an

F.I.R. and investigation of the case - Revisional court has rejected the revision as being not maintainable. (Para -3,4)

HELD: - An order of the Magistrate made in exercise of powers under Section 156 (3) Cr.P.C directing the police to register and investigate is not open to revision at the instance of a person against whom neither cognizance has been taken nor any process issued. An order made under Section 156 (3) Cr.P.C. directing a police officer to investigate a cognizable case is an interlocutory order and the remedy of revision against such order is barred under Section 397 (2) Cr.P.C.(Para - 9)

Application U/s 482 Cr.P.C. dismissed. (E-6)

List of Cases cited: -

1. Father Thomas Vs St.of U.P. & ors. , 2011 (72) ACC 564

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

1. Heard Sri Surjit Kumar, learned counsel for the applicants and Sri Pankaj Saxena, learned A.G.A.-I appearing for the State-opposite party.

2. The present application under Section 482 Cr.P.C. has been filed with a prayer to set aside the order dated 15.12.2020 passed by the District and Session Judge, Mathura in Criminal Revision No. 208 of 2020 (Dhanesh Chandra Sharma and another Vs. State of U.P. and another) whereby the revision has been rejected as being not maintainable.

3. Briefly stated the facts of the case are that an order dated 18.11.2020 was passed upon an application filed by the opposite party no. 2 under Section 156 (3) Cr.P.C. whereby the said application was allowed by the Judicial Magistrate, Mathura with a direction for registration of an F.I.R. and investigation of the case.

4. The revisional court relying upon a decision of a Full Bench of this Court in **Father Thomas Vs. State of U.P. and others**1, has rejected the revision as being not maintainable.

5. Learned counsel for the applicants has sought to assail the aforesaid order by trying to contend that the criminal proceedings have been initiated maliciously by falsely implicating the applicants and solely for the purpose to harass the applicants.

6. Learned A.G.A.-I appearing for the State opposite party supports the order passed by the Session Judge, Mathura in terms of which the revision filed by the applicants has been rejected as being not maintainable. To support his contention, he has relied upon the judgment of the Full Bench in the case of **Father Thomas** (supra) which was taken note by the revisional court.

7. The question as to whether the order of the Magistrate made in exercise of powers under Section 156 (3) Cr.P.C directing the police to register and investigate is open to revision at the instance of a person against whom neither cognizance has been taken nor any process issued was subject matter of consideration before the Full Bench wherein the following questions had been referred.

"A. Whether the order of the Magistrate made in exercise of powers under Section 156(3) Code of Criminal Procedure directing the police to register and investigate is open to revision at the instance of a person against whom neither

cognizance has been taken nor any process issued?

B. Whether an order made under Section 156(3) Code of Criminal Procedure is an interlocutory order and remedy of revision against such order is barred under Sub-section (2) of Section 397 of the Code of Criminal Procedure, 1973?

C. Whether the view expressed by a Division Bench of this Court in the case of Ajay Malviya v. State of U.P and Ors. reported in 2000(41) ACC 435 that as an order made under Section 156(3) of the Code of Criminal Procedure is amenable to revision, no writ petition for quashing an F.I.R registered on the basis of the order will be maintainable, is correct?"

8. The Full Bench after considering the matter at length expressed is opinion on the three questions which had been referred to in the following manner :-

"A. The order of the Magistrate made in exercise of powers under Section 156 (3) Cr.P.C directing the police to register and investigate is not open to revision at the instance of a person against whom neither cognizance has been taken nor any process issued.

B. An order made under Section 156 (3) Cr.P.C is an interlocutory order and remedy of revision against such order is barred under sub-section (2) of Section 397 of the Code of Criminal Procedure, 1973.

C. The view expressed by a Division Bench of this Court in the case of Ajay Malviya Vs. State of U.P and others reported in 2000(41) ACC 435 that as an order made under Section 156 (3) of the Code of Criminal Procedure is amenable to revision, and no writ petition for quashing an F.I.R registered on the basis of the order will be maintainable, is not correct."

9. In view of the aforesaid opinion expressed by the Full Bench, an order of the Magistrate made in exercise of powers under Section 156 (3) Cr.P.C directing the police to register and investigate is not open to revision at the instance of a person against whom neither cognizance has been taken nor any process issued. It has been further held that an order made under Section 156 (3) Cr.P.C. directing a police officer to investigate a cognizable case is an interlocutory order and the remedy of revision against such order is barred under Section 397 (2) Cr.P.C.

10. It may therefore be reiterated that at the pre-cognizance stage when only a direction has been issued by the Magistrate under Section 156 (3) Cr.P.C. to investigate a prospective accused has no locus standi to challenge a direction for investigation of a cognizable case before cognizance or the issuance of process. It may also be taken note of that the order by the Magistrate directing a police officer to investigate a cognizable case is an incidental step in the aid of investigation and trial and is interlocutory in nature, similar to orders granting bail, calling for records, issuing search warrants, summoning witnesses and other like matters which do not impinge upon a valuable right of a prospective accused and is, hence, not amenable to a challenge in a criminal revision in view of the bar contained under Section 397(2) Cr.P.C.

11. Counsel for the applicants has not been able to dispute the aforesaid legal position. He submits that the present application may be dismissed as withdrawn.

12. Learned A.G.A.-I appearing for the State-opposite party has no objection to the prayer so made.

13. The application stands accordingly dismissed.

(2021)03ILR A422
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.02.2021

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 Cr.P.C. No. 2695 of 2021

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

Counsel for the Applicants:
Sri Amit Daga

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 & Indian Penal Code, 1860-Sections 498-A, 304-B & ¾ D.P. Act,1961-discharge application-rejection-deceased committed suicide-though the applicants are sister-in-law and brother-in-law of the deceased but evidence regarding the presence of the accused at the time of incident cannot be evaluated at the stage of framing charge-accused can be discharged only when the charge is groundless. (Para 1 to 22)

B. It is well settled that at the stage of 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 5 to 21)

The Application is rejected. (E-5)

List of Cases cited: -

1. K. Subba Rao & ors. Vs St. of Telangana, (2018) 14 SC 452

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

3. St. of Bih. Vs Ramesh Singh, (1977) 4 SCC 39

4. W.B. Vs Anil Kumar Bhunja, (1980) AIR SC 52

5. St. of Bih. Vs Ramesh Singh, (1977) AIR SC 2018

6. Palwinder Singh Vs Balvinder Singh, (2009) AIR SC 887

7. St. Of Ori. Vs Debendra Nath Padhi, (2005) 1 SCC 568

8. Sanghi Bros. (Indore) Pvt. Ltd. Vs Sanjay Chaudhary (2009) AIR SC 9

9. R.P. Kapur Vs St. of Punj. (1960) AIR SC 866

10. St. of Har. Vs Bhajan Lal, (1992) SCC (Cr.) 426

11. Vijayan Vs St. of Ker. & anr. (2010) 2 SCC 398

12. M.E. Shivalingamurthy Vs C.B.I., Bengaluru, (2020) 1 Supreme 169

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Sri Amit Daga, learned counsel for the applicants and learned A.G.A. for the State.

2. This application u/s 482 Cr.P.C. has been filed against the orders dated 20.01.2020 and 06.02.2020 passed by learned Additional District & Sessions Judge (F.T.C.), constituted under the 14th Financial Commission, Jhansi in Sessions Trial No. 281 of 2019, (State of U.P. Vs. Arvind Kushwaha and others), under Sections 498A, 304B I.P.C. and Section 3/4

D.P. Act, Police Station Kotwali, District Jhansi, (arising out of Case Crime No. 281 of 2019).

3. Brief facts of the case are that the marriage of daughter of informant was solemnized with Arvind (brother of applicant no. 1) on 27.06.2018 according to Hindu Rites and Rituals. The informant had given dowry as per his capacity, but the applicants along with other family members were harassing the deceased Poonam for non-fulfillment of additional dowry demand. On 17.05.2019, at about 06:00 p.m., informant's daughter Neha received a phone call from Arvind (husband of the deceased) on which information was given that her sister Poonam had committed suicide by hanging herself and she was admitted in the hospital. On receiving such an information, when the family members of the deceased reached the hospital, they found that Poonam had already expired. Therefore, an F.I.R. was lodged on 17.05.2019 against 8 persons who are husband as well as other family members alleging therein that the accused persons namely, Arvind, Ramesh Chandra, Savitri Devi, Smt. Manju, Smt. Vinita, Kumari Arti, Govind and Ravi has done to death informant's daughter. After lodging of the F.I.R., inquest proceedings were conducted and post-mortem was also conducted.

4. When the matter was investigated, statements of the informant and his son Rahul were recorded under Section 161 Cr.P.C. The statements of other persons like Smt. Geeta Devi, Kumari Neha, Jitendra Kumar Dwivedi, Neeraj Kushwaha and Ravi Kushwaha was also recorded. After recording the statements of other witnesses of Panchayatnama, charge sheet had been submitted against accused persons on 01.07.2019.

5. It has been submitted by learned counsel for applicants that applicant no. 1 and applicant no. 3 who are sister-in-law of the deceased was married way back in the year 1998 and 2011 respectively and are living separately. Therefore, there was no occasion of roping them with vague and general allegations in the F.I.R. which has been lodged by the informant. Since, the investigating agency without collecting any credible and convincing material had submitted a charge sheet against the applicants, therefore, a discharge application dated 02.01.2020 was moved and the same has been rejected vide order dated 20.01.2020, without marshelling and evaluating the material collected by the investigating agency. Learned counsel for the applicants submits that discharge application has been rejected in a casual manner without seeing that the material collected by the Investigating Officer does not show the involvement of the applicants in the incident which led to death of the deceased.

6. Learned counsel for the applicants has placed reliance upon the judgments of the Apex Court passed in the case of **K. Subba Rao and others Vs. State of Telangana** reported in *(2018) 14 SCC 452*, wherein, it has been stated that court should be careful in proceeding against the distant relatives in crimes pertaining to matrimonial disputes and dowry deaths. The relatives of the husband should not be roped in on the basis of omnibus allegations unless specific instances of their involvement in the crime are made out.

7. He has also placed reliance on the judgement of the Apex Court passed in the case of **Kans Raj Vs. State of Punjab** reported in *(2000) 5 SCC 207*, wherein, it has been stated that for the fault of the husband, the in-laws or the other relations cannot, in all cases, be held to be involved

in the demand of dowry. In cases where such accusations are made, the overt acts are attributed to persons other than the husband are required to be proved beyond reasonable doubt.

8. All the contentions raised by the learned counsel for the applicants 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 the learned counsel. The veracity and credibility of material furnished on behalf of the prosecution has been questioned and false implication has been pleaded.

9. Per contra, learned A.G.A. for the State has opposed the contention raised by the learned counsel for the applicants and states that there is no illegality or infirmity in the orders dated 20.01.2020 and 06.02.2020. It has been next submitted that the orders dated 20.01.2020 and 06.02.2020 has been rightly rejected by the concerned court below.

10. Before proceeding to adjudge the validity of the impugned orders it may be useful to cast a fleeting glance to some of the representative cases decided by the Hon'ble Supreme Court which have expatiated upon the legal approach to be adopted at the time of framing of the charge or at the time of deciding whether the accused ought to be discharged. It shall be advantageous to refer to the observations made by the Hon'ble Apex Court in the case of **State of Bihar vs. Ramesh Singh** *1977 (4) SCC 39* which are as follows :-

"4. Under S. 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 u/s. 227 or u/s. 228 of the Code. If "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", so enjoined by s. 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) in exclusively triable by the court, he shall frame in writing a charge against the accused," as provided in S. 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 this stage of deciding the matter under s. 227 and 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, if any, cannot show that the accused committed the offence, 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 S. 227 or S. 228, then in such a situation ordinarily and generally the order which will have to be made will be one under S. 228 and not under S. 227."

11. Aforesaid case was again referred to in another Apex Court's decision Superintendent and Remembrancer of Legal Affairs, **West Bengal Versus Anil Kumar Bhunja** *AIR 1980 (SC) 52* and the Apex Court proceeded to observe as follows:

"18. It may be remembered that the case was at the stage of framing charges; the prosecution evidence had not yet commenced. The Magistrate had, therefore, to consider the above question on a general consideration of the materials placed before him by the investigating police officer. At this stage, as was pointed out by this Court in **State of Bihar v. Ramesh Singh**, *AIR 1977 SC 2018*, the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged; may justify the framing of charge against the accused in respect of the commission of that offence."

12. In yet another case of **Palwinder Singh Vs. Balvinder Singh** *AIR 2009 SC 887* the Apex Court had the occasion to reflect upon the scope of adjudication and its ambit at the time of framing of the charge and also about the scope to consider the material produced by the accused at that stage. Following extract may be profitably quoted to clarify the situation :

"12. Having heard learned counsel for the parties, we are of the opinion that the High Court committed a serious error in passing the impugned judgment insofar as it entered into the

realm of appreciation of evidence at the stage of the framing of the charges itself. The jurisdiction of the learned Sessions Judge while exercising power under Section 227 of the Code of Criminal Procedure is limited. Charges can be framed also on the basis of strong suspicion. Marshalling and appreciation of evidence is not in the domain of the Court at that point of time. This aspect of the matter has been considered by this Court in **State of Orissa v. Debendra Nath Padhi**, *(2005) 1 SCC 568* wherein it was held as under :"

"23. As a result of the 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 the accused may produce at the stage of Section 227 of the Code has not been correctly decided."

13. The following observations made by the Hon'ble Supreme Court in the case of **Sanghi Brothers (Indore) Pvt. Ltd. v. Sanjay Choudhary** *AIR 2009 SC 9* also reiterated the same position of law :-

"10. After analyzing the terminology used in the three pairs of sections it was held that despite the differences there is no scope for doubt that at the stage at which the Court is required to consider the question of framing of charge, the test of a prima facie case to be applied.

11. The present case is not one where the High Court ought to have interfered with the order of framing the charge. As rightly submitted by the learned counsel for the appellants, even if there is a strong suspicion about the commission of offence and the involvement of the accused, it is sufficient for the Court to frame a charge. At that stage, there is no necessity of formulating the opinion about the prospect of conviction. That being so, the impugned order of the High Court cannot be sustained and is set aside. The appeal is allowed.

14. In fact while exercising the inherent jurisdiction under Section 482 Cr.P.C. or while wielding the powers under Article 226 of the Constitution of India the quashing of the complaint can be done only if it does not disclose any offence or if there is any legal bar which prohibits the proceedings on its basis. The Apex Court decisions in **R.P. Kapur Vs. State of Punjab** *AIR 1960 SC 866* and **State of Haryana Vs. Bhajan Lal** *1992 SCC(Cr.) 426* make the position of law in this regard clear recognizing certain categories by way of illustration which may justify the quashing of a complaint or charge sheet.

15. In fact the scope to discharge the accused u/s 245(2) Cr.P.C. is extremely limited. There are only exceptional circumstances which may justify such discharge after passing of the summoning order without any further evidence of such a nature being produced which may completely absolve or exonerate the accused and the charge against them may appear to be groundless. There may also be such circumstances which may be brought to the notice of the court like the absence of legally required sanction or any such legal embargo which prohibits the continuation of proceedings against accused. Ordinarily it is indeed very hard to succeed in obtaining a discharge successfully on the basis of same set of evidence which was found sufficient by the court for the purpose of summoning the accused to face the trial but because the possibility,

however limited it be, does exist to get a discharge even without recording any evidence after summoning that the applications u/s 245(2) Cr.P.C. are moved and are, as they should be, entertained by the courts.

16. The legal principles applicable in regard to an application seeking discharge has been referred in the decision of **P. Vijayan Vs. State of Kerala and another**, *(2010) 2 SCC 398* and are as follows:

i. If two views are possible and one of them gives rise to suspicion only as distinguished from grave suspicion, the Trial Judge would be empowered to discharge the accused.

ii. The Trial Judge is not a mere Post Office to frame the charge at the instance of the prosecution.

iii. The Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding. Evidence would consist of the statements recorded by the Police or the documents produced before the Court.

iv. 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 offence, then, there will be no sufficient ground for proceeding with the trial".

v. It is open to the accused to explain away the materials giving rise to the grave suspicion.

vi. The court has to consider the broad probabilities, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This, however, would not entitle the court to make a roving inquiry into the pros and cons.

vii. 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.

viii. There must exist some materials for entertaining the strong suspicion which can form the basis for drawing up a charge and refusing to discharge the accused.

17. The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged under Section 227 of the Cr.P.C. The expression, "the record of the case", used in Section 227 of the Cr.P.C., is to be understood as the documents and the articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. At the stage of framing of the charge, the submission of the accused is to be confined to the material produced by the Police.

18. In the latest judgment of **M.E. Shivalingamurthy Vs. Central Bureau of Investigation, Bengaluru** reported in *2020 1 Supreme 169*, it has been held that defence of accused is not to be looked into at the stage when the accused seeks to be discharged under Section 227 of the Cr.P.C.

19. In the present case, though the applicants are sister-in-law and brother-in-law of the deceased but evidence regarding the presence of the accused at the time of incident cannot be evaluated at the stage.

20. Illumined by the case law referred to herein above, this Court has adverted to the entire record of the case.

21. The submissions made by the learned counsel for the applicants call for adjudication on pure questions of fact

which may be adequately adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. 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 complaint, the summoning order and also all other the material available on record makes out a prima facie case against the accused at this stage and this Court does not find any justifiable ground to set aside the impugned order refusing the discharge of the accused. This court has not been able to persuade itself to hold that no case against the accused has been made out or to hold that the charge is groundless.

22. The prayer for quashing or setting aside the impugned orders is refused as I do not see any illegality, impropriety and incorrectness in the impugned orders or the proceedings under challenge. There is absolutely no abuse of court's process perceptible in the same. The present matter also does not fall in any of the categories recognized by the Supreme Court which might justify interference by this Court in order to upset or quash them.

23. The present application lacks merit and is accordingly rejected.

(2021)03ILR A428
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.02.2021

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 Cr.P.C. No. 12174 of 2020

Pramod & Anr. ...Applicants
Versus
The State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Raj Kumar Kesari

Counsel for the Opposite Parties:
A.G.A., Sri Ashutosh Mishra

Matrimonial dispute - Compromise - Criminal Procedure Code (2 of 1974) , S.482 - Indian Penal Code (45 of 1860) , S.498A, S.323, S.504 - Dowry Prohibition Act (28 of 1961) , S.3, S.4 - Cruelty by husband & dowry demand - compromise during pendency of appeal against conviction - Offence non-compoundable in nature -Matrimonial dispute between parties - *Held* - High Court has inherent powers under section 482 Cr.P.C. to quash criminal proceedings arising out of a matrimonial disputes *at any stage even after conviction and during the pendency of the criminal appeal* (Para 44)

During the pendency of criminal appeal, after settling their all the disputes, accused (husband) and complainant (wife) arrived at a compromise - Both living happily as husband & wife under the same roof, with their son - If Court, in exercise of its inherent power u/s 482 Cr.P.C., does not quash the criminal proceedings as well as the order of conviction, then the happy life of husband and wife (opposite party no.2) will be ruined, especially the happy future life of their son, whose golden future remains yet to commence and who will suffer a lot - Proceedings as well as conviction, liable to be quashed. (Para 43)

Allowed

List of cases cited :

1. Kiran Tulsiram Ingle Vs Anupama P. Gayakwad 2006 0 SC(Bom) 1151

2. Vinay Kumar Vs State of U.P. & anr 2016 0 SC (P & H) 243

3. Gian Singh Vs State of Punjab (2012) 10 SCC 303

4. Arun Singh & Ors Vs State of U.P. through its Secretary & Anr 2020 (3) SCC 736

5. B.S. Joshi & ors Vs State of Haryana AIR 2003 SC 1386

6. Nikhil Merchant Vs CBI & Anr. (2008) 9 SCC 677

7. Manoj Sharma Vs State of U.P. & Ors (2008) 16 SCC 1

8. Narinder Singh & Ors Vs State of Punjab & Ors (2014) 6 SCC 466

9. Sau. Maya Sanjay Khandare & Anr Vs. State of Maha 2021 0 SC (Bom) 7

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Brief facts giving rise to the questions invovled in this case, are that a first information report was lodged by the opposite party no. 2 against the applicant no.1, Pramod and two others, which was registered as Case Crime No. 93/2012, under Sections 498-A, 323, 504 of the Indian Penal Code (for short "I.P.C.") as also under Sections 3/4 of the Dowry Prohibition Act (fort short "D.P. Act"), Police Thana, District Ghaziabad. After investigation, charge sheet was submitted against the applicant and two others co-accused namely Lalit and Rinku, under Sections 498-A, 323, 504, 506 I.P.C. and Sections 3/4 D.P. Act, on the basis of which, charges were framed under the aforesaid sections. On the basis of the statements of opposite party no. 2, learned Additional Chief Judicial Magistrate, Court No. 8, Ghaziabad vide order dated 02.12.2017 convicted the applicants under Sections 498-A and 323 IPC and Section 4 Dowry Prohibition Act.

2. Aggrieved by the judgment and order dated 02.12.2017, the applicants filed Criminal Appeal No. 164/2017 (Pramod and another vs. State of U.P., assailing the judgment and order dated 02.12.2017, the applicants have been released on bail in criminal appeal.

3. During the pendency of the criminal appeal, the parties have entered into compromise and they decided to live happily as husband and wife under one roof with their minor son Shiva, aged about 18 years. Since arriving at a compromise between the parties, they are residing under one roof as husband and wife alongwith their minor son, the applicants filed an application before the Appellate Court, alleging therein, that criminal proceeding against them may be quashed, as the continuation of criminal proceeding against them would be abuse of process of the law.

4. Heard Mr. Raj Kumar Kesari, learned counsel for the applicants, Mr. Ashutosh Mishra, learned counsel for the opposite party no. 2 and Mr. Pankaj Srivastava, learned A.G.A. for the State of U.P.

5. This application under Section 482 Cr.P.C. has been filed for quashing the criminal proceeding in Case Crime No. 93/2012, under Sections 498-A, 323, 504 IPC and under Section 3/4 Dowry Prohibition Act, Police Station Mahila Thana, District Ghaziabad and consequential conviction order dated 02.12.2017 passed by the Additional Chief

Judicial Magistrate, Court No. 8, Ghaziabad in Criminal Case No. 10/2013, "State vs. Pramod" as well as the proceeding in Criminal Appeal No. 164/2017, "Pramod and another vs. State of U.P.", pending in the Court of District and Session Judge, Ghaziabad in terms of the compromise arrived at between the applicants and the opposite party no. 2.

6. On the matter being taken up, learned counsel for the applicants submitted that applicant no. 1 is the husband and applicant no.2 is mother-in-law of opposite party no. 2 and opposite party no. 2 is legally wedded wife of applicant no. 1. Without disputing the facts of the case, counsel for the applicants submits that during the pendency of appeal, compromise has been arrived at between the parties, therefore, criminal proceeding against the applicants may be quashed in the light of the compromise entered into between the parties.

7. A joint affidavit has also been filed by the learned counsel for the applicants which is part of the record. On the basis of joint affidavit, the Court on 07.09.2020 passed the following order :

"1. Heard Mr. Raj Kumar Kesari, learned counsel for the applicants, Mr. Ashutosh Mishra, 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 entire proceedings of Case Crime No. 93 of 2012, under Section 498-A, 323, 504 IPC and 3/4 D.P. Act, P.S.-Mahila Thana, District-Ghaziabad and the consequential conviction order dated 2.12.2017 passed by the Additional Chief Judicial Magistrate, Court No.8, Ghaziabad in Criminal Case No. 10/2013 (State vs. Pramod and another) as well as the proceeding in Criminal Appeal No. 164/2017, (Pramod and another vs. State of u.p.), pending in the court of District and Session Judge, Ghaziabad.

3. Learned counsel for the applicants submits that there is a matrimonial dispute between the parties. However, during pendency of appeal against conviction the parties have entered into compromise. It has further been submitted that now, the husband and wife are staying together. A compromise has been entered between them which has been reduced in writing, copy of compromise deed has been annexed as Annexure no.4 to this affidavit in support of bail application.

4. Learned counsel appearing for the opposite party no. 2 does not dispute the correctness of the submissions so advanced by learned counsel for the applicants. He will filing counter affidavit in the registry today itself after serving copy of the same to the learned A.G.A., wherein he has accepted that the parties have amicably settled their dispute.

5. Accordingly, it is provided that the parties shall appear before the court below along with a certified copy of this order on the next date fixed and be permitted to file an application for verification of the original compromise document, which is annexed as Annexure no.4 to this application. It is expected that the trial court may fix a date for the verification of the compromise entered into between the parties and pass an appropriate order with respect to the verification within a period of one month from today. Upon due verification, the court below may pass appropriate order in that regard and send a report to this Court.

6. Put up on 2nd November, 2020 as fresh.

7. Till then, no coercive measure shall be taken against the applicants in the aforesaid case. "

8. By the order dated 07.09.2020, it was provided that the parties shall appear before the Court below alongwith certified copy of the order and were permitted to file an application for verification of the original compromise document. After which the trial Court was expected to fix a date for verification of the compromise entered into between the parties and pass an appropriate order with respect to the same.

9. In compliance of the aforesaid order dated 07.09.2020, a report has been received from Additional Sessions Judge, Ghaziabad wherein, it has been stated that since the matter relates to non compoundable offence, therefore, the parties have been directed to appear before this Court.

10. It appears that realizing the fact that conviction order was passed and during the pendency of appeal against conviction, the parties have entered into compromise, therefore, the parties have been directed by the concerned court below to be present before this Court.

11. At this juncture, the issue before this Court, which is to be decided, is whether this Court can quash the criminal proceeding under Section 482 Cr.P.C., after conviction, and during the pendency of the appeal.

12. Learned counsel for the applicants submits that the offences under Section 498-A I.P.C. as also under Section 4 of the Dowry Prohibition Act is not compoundable offence, as is clear from the perusal of the table referred to under Section 320 Cr.P.C. However, this Hon'ble Court having inherent power under Section 482 Cr.P.C. can quash the proceeding in cases of non compoundable offence.

13. Learned counsel for the applicants has further submitted that though the offence under Sections 498-A IPC is non compoundable offence, but, in the present case, when the parties have entered into compromise and both are living as husband and wife under one roof alongwith their minor son, continuation of criminal proceeding against them may be quashed as the continuous of criminal proceeding against them would be abuse of process of the law and this Court will vitiate the purpose of compromise and cordial relationship between the husband and wife.

14. Learned counsel for the applicants has lastly submitted that the Bombay High Court as well as Hon'ble Punjab and Haryana High Court in the cases of **Kiran Tulsiram Ingle vs. Anupama P. Gayakwad** reported in *2006 0 Supreme (Bom) 1151 and* ***Vinay Kumar Vs. State of U.P. and another***; reported in *2016 0 Supreme (P & H) 243*, even after conviction, Hon'ble Courts have been pleased to quash the criminal proceeding during the pendency of the appeal, exercising the power under Section 482 Cr.P.C.

15. To further bolster the aforesaid submissions, learned counsel for the applicants has placed reliance upon the following judgments the Punjab and Haryana High Court, Bombay High Court and the Apex Court:

i. **Vinay Kumar (Supra);**

ii. **Kiran Tulsiram Ingle (Supra);**

iii. **Gian Singh vs. State of Punjab** reported in *(2012) 10 SCC 303.*

16. In view of aforesaid submissions, learned counsel for the applicants submitted that the proceedings of the above mentioned criminal case are liable to be quashed by this Court as also the consequences thereof, i.e., conviction of the applicants is also liable to be set aside.

17. Mr. Ashutosh Mishra, learned counsel for the opposite party no.2, on instruction received, states that opposite party no.2 has no objection, if the proceedings arising out of the aforesaid case are quashed as well as the judgment and order of the conviction passed against the applicants, is set aside. He does not dispute the correctness of the submission advanced by the learned counsel for the applicants or the correctness of the documents relied upon by him.

18. However, on the other hand, Mr. Pankaj Srivastava, learned A.G.A. for the State has opposed the prayer made by the learned counsel for the applicants by contending that when the appeal against the conviction of the applicants is pending, wherein, they have been enlarged on bail and they have been convicted for offences under Sections 323, 498-A I.P.C. as also under Section 4 D.P. Act, which are non-compoundable, this Court, in exercise of inherent powers under Section 482 Cr.P.C. cannot quash the aforesaid criminal proceedings and the judgment and order of the conviction passed against the applicants. In support his case, the learned A.G.A. has placed reliance upon the judgment of the Apex Court in the case of **Arun Singh & Others Vs. State of U.P. through its Secretary & Another** reported in *2020 (3) SCC 736*.

19. On the cumulative strength of the aforesaid submissions, learned A.G.A. states that the present application is liable to be rejected.

20. This Court has considered the rival submissions advanced by the learned counsel for the parties and gone through the records of the present application.

21. The question, as to whether non compoundable offences should be quashed by this Court or not, has come up for consideration before the Apex court, time and again, and there is no need to go into the same at great length.

22. The issues before this Court are whether (i) this Court can convert non-compoundable offences into compoundable one (Section 498-A I.P.C. and Section 4 D.P. Act in the facts of the present case), (ii) quash the aforesaid criminal proceedings of the case and lastly (iii) set aside the judgment and order of conviction passed against the applicants while exercising its inherent power under Section 482 Cr.P.C. to arrive at the ends of justice and in view of compromised arrived at between the parties, who are none other than the husband, wife and in-law's, when there is no equally efficacious course is open for the parties to get the relief prayed for herein.

23. There are authoritative judicial precedents where the Apex Court has approved the quashing of the proceedings when it found that they emanated from mutual marital discord, even though the proceedings included some offences, which were not compoundable (Section 498-A I.P.C. and Section 4 D.P. Act in the facts of the present case). The dockets of the pending cases are already bursting on there

seams. If this court can clearly see that the continuation of some criminal proceeding in the lower court is going to result into nothing fruitful and the same will be a sheer wastage of public time and money then it shall not be loath to put an end to that fruitless exercise. In the present case, the dispute is matrimonial in nature, i.e., between the husband and wife in which the husband and mother-in-law of the wife have been convicted by the court below and they filed an appeal against the order of conviction. In the appeal, they have been enlarged on bail and for happy and peaceful life of the husband and wife as also the life of their son, they have settled their disputes during the pendency of the appeal and both husband and wife arrived at a compromise. After compromise, they are living together happily along with their son. This Court, therefore, deems it appropriate and expedient both to quash the entire criminal proceedings initiated by opposite party no.2 during the pendency of appeal filed against the judmgent and order of conviction, as they will result into a fruitless exercise in vain in the peaceful life of husband and wife as also their son.

24. But, as the advisability to exercise the powers of this Court to quash the non compoundable offences has been questioned, thus, it may be useful to give a brief reference to the law in this regard. Therefore, firstly it would be worth while to reproduce the relevant paragraphs of the judgments relied upon by the learned counsel the applicant and the learned A.G.A. for the State to examine the applicability of the aforesaid judgments in the facts and circumstances of the present case. Paragraph nos. 11 to 14 of the case of **Vinay Kumar (Supra)** reads as follows:

*"11. This Court in the case of **Sube Singh and another Versus State of Haryana and another 2013(4) RCR (Criminal) 102** has considered the compounding of offences at the appellate stage and ANJAL GUPTA 2016.02.12 17:32 I attest to the accuracy and authenticity of this document high court chandigarh has observed that even when appeal against the conviction is pending before the Sessions Court and parties entered into a compromise, the High Court is vested unparallel power under Section 482 Cr.PC to quash criminal proceedings at any stage so as to secure the ends of justice and has observed as under:-*

"15. The refusal to invoke power under Section 320 CrPC, however, does not debar the High Court from resorting to its inherent power under Section 482 Criminal Procedure Code and pass an appropriate order so as to secure the ends of justice.

*16. As regards the doubt expressed by the learned Single Judge whether the inherent power under Section 482 Criminal Procedure Code to quash the criminal proceedings on the basis of compromise entered into between the parties can be invoked even if the accused has been held guilty and convicted by the trial Court, we find that in **Dr. Arvind Barsaul etc. v. State of Madhya Pradesh & Anr., 2008(2) R.C.R. (Criminal) 910 : (2008)5 SCC 794,** the unfortunate matrimonial dispute was settled after the appellant (husband) had been convicted under Section 498A Indian Penal Code and sentenced to 18 months' imprisonment and his appeal was pending before the first appellate court. The Apex Court quashed the criminal proceedings keeping in view the peculiar facts and circumstances of the case and in the interest of justice observing that "continuation of criminal proceedings would be an abuse of the process of law" and also by invoking its power under*

Article 142 of the Constitution. Since the High Court does not possess any power akin to the one under Article 142 of the Constitution, the cited decision cannot be construed to have vested the High Court with such like unparallel power.

17. The magnitude of inherent jurisdiction exercisable by the High Court under Section 482 Criminal Procedure Code with a view to prevent the abuse of law or to secure the ends of justice, however, is wide enough to include its power to quash the proceedings in relation to not only the non-compoundable offences notwithstanding the bar under Section 320 Criminal Procedure Code but such a power, in our considered view, is exercisable at any stage save that there is no express bar and invoking of such power is fully justified on facts and circumstances of the case.

18. xxx xxx

19. xxx xxx

20. xxx xxx

21. In the light of these peculiar facts and circumstances where not only the parties but their close relatives (including daughter and son-in-law of respondent No.2) have also supported the amicable settlement, we are of the considered view that the negation of the compromise would disharmonize the relationship and cause a permanent rift amongst the family members who are living together as a joint family. Non-acceptance of the compromise would also lead to denial of complete justice which is the very essence of our justice delivery system. Since there is no statutory embargo against invoking of power under Section 482 Criminal Procedure Code after conviction of an accused by the trial Court and during pendency of appeal against such conviction, it appears to be a fit case to invoke the inherent jurisdiction and strike down the proceedings subject to certain safeguards.

22. Consequently and for the reasons afore-stated, we allow this petition and set aside the judgement and order dated 16.03.2009 passed in Criminal Case No. 425-1 of 2000 of Additional Chief Judicial Magistrate, Hisar, on the basis of compromise dated 08.08.2011 arrived at between them and their step-mother respondent No.2 (Smt. Reshma Devi) w/o late Rajmal qua the petitioners only. As a necessary corollary, the criminal complaint filed by respondent No.2 is dismissed qua the petitioners on the basis of above-stated compromise. Resultantly, the appeal preferred by the petitioners against the above- mentioned order dated 16.03.2009 would be rendered infructuous and shall be so declared by the first Appellate Court at Hisar."

12. Similarly, in the case of ***Baghel Singh Versus State of Punjab 2014(3) RCR (Criminal) 578****, whereby the accused was convicted under Section 326 IPC and was sentenced to undergo rigorous imprisonment for two years, the parties entered into compromise during the pendency of the appeal. This Court while relying upon the judgment of* ***Lal Chand Versus State of Haryana, 2009 (5) RCR (Criminal) 838 and Chhota Singh Versus State of Punjab 1997(2) RCR (Criminal) 392*** *allowed the compounding of offence in respect of offence under Section 326 IPC at the appellate stage with the observation that it will be a starting point in maintaining peace between the parties, such offence can be compounded.*

13. Accordingly, while relying upon the aforesaid judgments and coupled with the fact that the parties have entered into a compromise and learned Sessions Judge, Sangrur has submitted his report in support of genuineness of the compromise,

the present petition is allowed and FIR No.17, dated 21.05.2010, under Sections 304-A, 279, 337, 338 and 427 IPC, registered at Police Station Cheema, District-Sunam, and all subsequent proceedings arising therefrom, qua the accused-petitioner, are quashed, on the basis of compromise and affidavits dated 07.08.2012(Annexures P-2 to P-4).

14. Consequently, the judgment of conviction and order of sentence dated 12.11.2014 passed by the trial Court, are set aside. The appeal preferred by the accused-petitioner against the aforesaid judgment and order is rendered infructuous and shall be declared so by the first Appellate Court."

Paragraph nos. 1,9,10,11,12,13,14 and 15 of **Kiran Tulshiram Ingle (Supra)** read as follows:

"1. Heard advocates for the petitioner and Respondent No. 1. Petitioner is the husband and Respondent No. 1 is the wife. A case was instituted against the petitioner under Section 498Aof the Indian Penal Code. He came to be convicted by the trial Court. The matter went in appeal. Before the appellate Court, the matter was settled between the parties. The petitioner and respondent No. 1 obtained divorce by mutvial consent. Respondent No. 1 agreed not to press for the petitioners conviction. The appellate Court maintained the conviction of the petitioner and gave him benefit of provisions of Probation of Offenders' Act.

9. In this background, the advocate for the petitioner contended that the criminal case should have been quashed by the Sessions Judge, but admittedly, the Sessions Judge had no power to do so, nor any power to compound the offence and, therefore, he has moved this Court. He prayed that either the criminal case be quashed or offence under Section 498A of the Indian Penal Code be allowed to be compounded.

10. Justice Khanwilkar in the Criminal Revision, arising out of the conviction of petitioner, as referred to above, did not agree with the view of the single Judge taken in the case of State of Maharashtra v. Madhu Bhisham Bhatia and Ors. reported in 2004 All MR (Crl) 1849 : 2004 Cri LJ 5072. According to Justice Khanwilkar, the single Judge misread the judgment of the Apex Court In B.S. Joshi's Case and, therefore, he thought it fit to refer the Issue to the Division Bench. He framed following two Issues:

(1) The decision of the Apex Court, in B.S. Joshi's case is not an authority to hold that offence underSection 498A of the Indian Penal Code is a compoundable offence, which can be compounded with the permission of the Court.

(2) Whether it is open for the High Court to quash the criminal action in exercise of Inherent powers even in a case which has ended with an order of conviction after trial.

11. In our opinion, the main issue before the Supreme Court was, whether to allow the matrimonial disputes to continue indefinitely causing hardship to both the parties; or whether in case parties come to a settlement, that settlement should be given approval and sanctity. In para 2 of B.S. Joshi's Case AIR 2003 SC 1386 the Supreme Court observed as under:

The matrimonial disputes of the kind in the present case have been on considerable increase in recent times resulting in filing of complaints by the wife under Sections 498A and 406, IPC not only against the husband but his other family members also. When such matters are

resolved either by wife agreeing to rejoin the matrimonial home or mutual separation of husband and wife and also mutual settlement of other pending disputes as a result whereof both sides approach the High Court and jointly pray for quashing of the criminal proceedings of the First Information Report or complaint filed by the wife under Sections 498A and 406, IPC can the prayer be declined on the ground that since the offences are non-compoundable under Section 320 of the Code and, therefore, it is not permissible for the Court to quash the criminal proceedings or FIR or complaint.

Thereafter the Supreme Court considered 7 Judgments upon which the parties relied and then, after considering its own Judgment in G.V. Rao v. L.H.V. Prasad, and found that the observations made in that Judgment were apt and which were reproduced, are as under:

It was said that there has been an outburst of matrimonial disputes in recent times. Marriage is a sacred ceremony, the main purpose of which is to enable the young couple to settle down in life and live peacefully. But little matrimonial skirmishes suddenly extend which often assume serious proportions resulting in commission of heinous crimes in which elders of the family are also involved with the result that those who could have counselled and brought about re-approachment are rendered helpless on their being arrayed as accused in the criminal case. There are many other reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a Court of law where it takes years and years to conclude and in that process the parties lose their "young" days in chasing their "cases" in different Courts.

Then para 14 the Supreme Court observed as:

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.

These observations of the Supreme Court are very broad. In para 2, reproduced above by us, the Issue before the Supreme Court was, for quashing of criminal proceedings or FIR or complaint.

12. The single Judge felt that the powers of quashing cannot be exercised if the criminal proceedings have resulted in conviction, as in the present case. We are not in agreement with these observations. If the prime object of the Judgment of Supreme Court in B.S. Joshi's case is to allow the parties to settle their matrimonial disputes either way, then conviction, in our opinion, cannot and should not come in the way. It is a fact on record that the trial Court convicted the accused. The parties thereafter mutually obtained divorce. This fact was taken into consideration by the learned Sessions Judge. But he expressed his inability to compound the offence under Section 498A of the Indian Penal Code because he had no powers to do so. He further granted benefit of Probation of Offenders Act to the petitioner.

13. Therefore, it is clear that firstly in this case the parties have compromised even after conviction and, the object of compromise to live happily, peacefully though separately after divorce. The Sessions Court has taken cognizance of

this compromise and has reduced the conviction and altered it to a bond under the Probation of Offenders Act. Secondly, conviction by the first Court is not end of the matter and appeal therefrom is continuation of proceeding and if a revision is filed, in case conviction is maintained, altered, reduced, then the High Court in revision does get power to pass effective orders in consonance with the judgment of the Supreme Court. Conviction does not attain finality if the appeal is filed and, If the revision is filed against conviction by appellate Court, there also all issues become opened before the High Court.

14. Since the Supreme Court had approached this issue with a broader perspective and the Issue was whether it is permissible to quash criminal proceedings (Stress Added, or complaint or FIR and in our opinion, even the criminal proceedings can be quashed irrespective of whether there is conviction or otherwise. We, therefore, answer both the Issues as under:

Ans. to Issue No. 1 :- The decision of the Supreme Court gives powers to the High Court to permit compounding of matrimonial offences and the High Court has powers to quash the criminal proceedings or FIR or complaint.

Ans. to Issue No. 2 : Even in case of conviction, inherent powers can be exercised and criminal proceedings can be quashed.

15. In view of the aforesaid decision of the Supreme Court, we hold that the High Court, by exercising inherent powers, can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers of the High Court under Section 482 of the Criminal procedure Code. In view of this clear judgment of the Supreme Court we pass the following order:-

ORDER:

Reference stands answered accordingly.

The criminal proceedings against the petitioner so also his conviction by both the Courts below is hereby quashed in view of the mutual understanding, divorce and compromise between the husband and wife.

All the matters, therefore, stand disposed of accordingly."

Paragraph nos. 61 and 62 of the case of **Gian Singh (Supra)** read as follows:

"61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences

committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly ***and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the*** *possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.*

62. In view of the above, it cannot be said that B.S. Joshi, Nikhil Merchant and Manoj Sharma were not correctly decided. We answer the reference accordingly. Let these matters be now listed before the concerned Bench(es)."

(Emphasis added)

25. Apart from the above judgments relied upon by learned counsel for the applicants, this Court is also required to notice some judgments of the Apex Court, wherein the Apex Court has held that if the parties have settled their disputes and arrived at a compromise for their safe and peaceful life, the High Court, in exercise of its inherent power, can quash the criminal proceedings initiated under the compoundable and non-compoundable sections if the same relate to offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or offences arising out of matrimony relating to dowry etc., or family disputes, as it would be unfair or contrary to interest of justice to continue with criminal proceeding or continuation of criminal proceeding would tantamount to abuse of process of law and to secure ends of justice.

26. The Apex Court in the case of **B.S. Joshi & Others VS. State of Haryana & Another** reported in *(2003) 4 SCC 675* has opined that while exercising power of quashing under Section 482 Cr.P.C., it is for the High Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. Where, in the opinion of the Court chances of an ultimate conviction is bleak and therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may, while taking into consideration the special facts of a case, also quash the proceedings. The special features in such matrimonial matters are evident. It becomes the duty of the Court to encourage genuine settlements of matrimonial disputes. Paragraph nos. 2,

13 to 15 of the said judgment, which are relevant, read as follows:

"2.The question that falls for determination in the instant case is about the ambit of the inherent powers of the High Courts under Section 482, Code of Criminal Procedure (Code) read with Articles 226 and 227 of the Constitution of India to quash criminal proceedings. The scope and ambit of power under Section 482 has been examined by this Court in catena of earlier decisions but in the present case that is required to be considered in relation to matrimonial disputes. The matrimonial disputes of the kind in the present case have been on considerable increase in recent times resulting in filing of complaints by the wife under Sections 498A and 406, IPC not only against the husband but his other family members also. When such matters are resolved either by wife agreeing to rejoin the matrimonial home or mutual separation of husband and wife and also mutual settlement of other pending disputes as a result whereof both sides approach the High Court and jointly pray for quashing of the criminal proceedings or the First Information Report or complaint filed by the wife under Sections 498A and 406, IPC, can the prayer be declined on the ground that since the offences are non-compoundable under Section 320 of the Code and, therefore, it is not permissible for the Court to quash the criminal proceedings or FIR or complaint.

...

13. The observations made by this Court, though in a slightly different context, in G.V. Rao v. L.H.V. Prasad & Ors. [(2000) 3 SCC 693] are very apt for determining the approach required to be kept in view in matrimonial dispute by the courts, it was said that there has been an outburst of matrimonial disputes in recent times. Marriage is a sacred ceremony, the main purpose of which is to enable the young couple to settle down in life and live peacefully. But little matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in commission of heinous crimes in which elders of the family are also involved with the result that those who could have counselled and brought about rapprochement are rendered helpless on their being arrayed as accused in the criminal case. There are many other reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude and in that process the parties lose their "young" days in chasing their "cases" in different courts.

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."(Emphasis added)

27. The Apex Court in the case of **Nikhil Merchant Vs. Central Bureau of Investigation & Anr.** reported in (2008) 9 SCC 677, keeping in mind the decision of the Apex Court in the case of **B.S. Joshi (Supra)** has held that this is a fit case where technicality should not be allowed to stand in the way in quashing of the criminal proceedings, since, in our view, the continuance of the same after compromise arrived at between the parties would be a futile exercise. For ready reference, Paragraph nos. 29, 30, 31 which are relevant, read as follows:

"29. Despite the ingredients and the factual content of an offence of cheating punishable under Section 420 IPC, the same has been made compoundable under Sub-section (2) of Section 320 Cr.P.C. with the leave of the Court. Of course, forgery has not been included as one of the compoundable offences, but it is in such cases that the principle enunciated in B.S. Joshi's case (supra) becomes relevant.

30. In the instant case, the disputes between the Company and the Bank have been set at rest on the basis of the compromise arrived at by them whereunder the dues of the Bank have been cleared and the Bank does not appear to have any further claim against the Company. What, however, remains is the fact that certain documents were alleged to have been created by the appellant herein in order to avail of credit facilities beyond the limit to which the Company was entitled. The dispute involved herein has overtones of a civil dispute with certain criminal facets. The question which is required to be answered in this case is whether the power which independently lies with this Court to quash the criminal proceedings pursuant to the compromise arrived at, should at all be exercised?

31. On an overall view of the facts as indicated hereinabove and keeping in mind the decision of this Court in B.S. Joshi's case (supra) and the compromise arrived at between the Company and the Bank as also clause 11 of the consent terms filed in the suit filed by the Bank, we are satisfied that this is a fit case where technicality should not be allowed to stand in the way in the quashing of the criminal proceedings, since, in our view, the continuance of the same after the compromise arrived at between the parties would be a futile exercise."

28. The Apex Court in the case of **Manoj Sharma Vs. State of U.P. & Others** reported in *(2008) 16 SCC 1*, has held that the ultimate exercise of discretion under Section 482 Cr.P.C. or under Article 226 of the Constitution of India is with the Court, which has to exercise such jurisdiction in the facts of each case. Said power in no way is limited by the provisions of Section 320 Cr.P.C. It is further held that exercise of power under Section 482 Cr.P.C. or Article 226 of the Constitution of India for quashing of FIR/complaint/criminal proceedings relating to offences not compoundable under Section 320 Cr.P.C. is discretionary. For ready reference, paragraph nos. 22, 23, 26 and 27, which are relevant, read as follows:

"22. Since Section 320 Cr.P.C. has clearly stated which offences are compoundable and which are not, the High Court or even this Court would not

ordinarily be justified in doing something indirectly which could not be done directly. Even otherwise, it ordinarily would not be a legitimate exercise of judicial power under Article 22 of the Constitution or under Section 482 Cr.P.C. to direct doing something which the Cr.P.C. has expressly prohibited.Section 320(9) Cr.P.C. expressly states that no offence shall be compounded except as provided by that Section. Hence, in my opinion, it would ordinarily not be a legitimate exercise of judicial power to direct compounding of a non-compoundable offence.

23. However, it has to be pointed out that Section 320 Cr.P.C. cannot be read in isolation. It has to be read along with the other provisions in the Cr.P.C. One such other provision is Section 482 Cr.P.C. which reads:

" Saving of inherent power of High Court. - 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."

The words "Nothing in this Code" used in Section 482 is a non obstante clause, and gives it overriding effect over other provisions in the Cr.P.C. The words "or otherwise to secure the ends of justice" in Section 482 implies that to secure the interest of justice sometimes (though only in very rare cases) the High Court can pass an order in violation of a provision in the Cr.P.C.

26. While in the present case I respectfully agree with my learned brother Hon'ble Kabir J. that the criminal proceedings deserve to be quashed, the question may have to be decided in some subsequent decision or decisions (preferably by a larger Bench) as to which non-compoundable cases can be quashed under Section 482 Cr.P.C. or Article 226 of the Constitution on the basis that the parties have entered into a compromise.

27. There can be no doubt that a case under Section 302 IPC or other serious offences like those under Sections 395, 307 or 304B cannot be compounded and hence proceedings in those provisions cannot be quashed by the High Court in exercise of its power under Section 482 Cr.P.C. or in writ jurisdiction on the basis of compromise. However, in some other cases, (like those akin to a civil nature) the proceedings can be quashed by the High Court if the parties have come to an amicable settlement even though the provisions are not compoundable. Where a line is to be drawn will have to be decided in some later decisions of this Court, preferably by a larger bench (so as to make it more authoritative). Some guidelines will have to be evolved in this connection and the matter cannot be left at the sole unguided discretion of Judges, otherwise there may be conflicting decisions and judicial anarchy. A judicial discretion has to be exercised on some objective guiding principles and criteria, and not on the whims and fancies of individual Judges. Discretion, after all, cannot be the Chancellor's foot."

29. The Apex Court in the case of **Narinder Singh & Others Vs. State of Punjab & Others** reported in *(2014) 6 SCC 466* has observed that the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320. The scope of inherent power is of wide platitude with no statutory limitation, but, it has to be

exercised in accordance with the guidelines engrafted in such power viz.: (I) to secure the ends of justice, or (ii) to prevent abuse of the process of any court. For ready reference, relevant paragraph nos. 15, 16, 17, 22, 23, 24, 27, 28, 29 & 33, which are relevant, are quoted herein below:

"15. Whereas in various countries, sentencing guidelines are provided, statutorily or otherwise, which may guide Judges for awarding specific sentence, in India we do not have any such sentencing policy till date. The prevalence of such guidelines may not only aim at achieving consistencies in awarding sentences in different cases, such guidelines normally prescribe the sentencing policy as well namely whether the purpose of awarding punishment in a particular case is more of a deterrence or retribution or rehabilitation etc. In the absence of such guidelines in India, Courts go by their own perception about the philosophy behind the prescription of certain specified penal consequences for particular nature of crime. For some deterrence and/or vengeance becomes more important whereas another Judge may be more influenced by rehabilitation or restoration as the goal of sentencing. Sometimes, it would be a combination of both which would weigh in the mind of the Court in awarding a particular sentence. However, that may be question of quantum.

16. What follows from the discussion behind the purpose of sentencing is that if a particular crime is to be treated as crime against the society and/or heinous crime, then the deterrence theory as a rationale for punishing the offender becomes more relevant, to be applied in such cases. Therefore, in respect of such offences which are treated against the society, it becomes the duty of the State to punish the offender. Thus, even when there is a settlement between the offender and the victim, their will would not prevail as in such cases the matter is in public domain. Society demands that the individual offender should be punished in order to deter other effectively as it amounts to greatest good of the greatest number of persons in a society. It is in this context that we have to understand the scheme/philosophy behind Section 307 of the Code.

17. We would like to expand this principle in some more detail. We find, in practice and in reality, after recording the conviction and while awarding the sentence/punishment the Court is generally governed by any or all or combination of the aforesaid factors. Sometimes, it is the deterrence theory which prevails in the minds of the Court, particularly in those cases where the crimes committed are heinous in nature or depicts depravity, or lack morality. At times it is to satisfy the element of "emotion" in law and retribution/vengeance becomes the guiding factor. In any case, it cannot be denied that the purpose of punishment by law is deterrence, constrained by considerations of justice. What, then, is the role of mercy, forgiveness and compassion in law? These are by no means comfortable questions and even the answers may not be comforting. There may be certain cases which are too obvious namely cases involving heinous crime with element of criminality against the society and not parties inter-se. In such cases, the deterrence as purpose of punishment becomes paramount and even if the victim or his relatives have shown the virtue and gentility, agreeing to forgive the culprit, compassion of that private party would not move the court in accepting the same as larger and more important public policy of showing the iron hand of law to

the wrongdoers, to reduce the commission of such offences, is more important. Cases of murder, rape, or other sexual offences etc. would clearly fall in this category. After all, justice requires long term vision. On the other hand, there may be, offences falling in the category where "correctional" objective of criminal law would have to be given more weightage in contrast with "deterrence" philosophy. Punishment, whatever else may be, must be fair and conducive to good rather than further evil. If in a particular case the Court is of the opinion that the settlement between the parties would lead to more good; better relations between them; would prevent further occurrence of such encounters between the parties, it may hold settlement to be on a better pedestal. It is a delicate balance between the two inflicting interests which is to be achieved by the Court after examining all these parameters and then deciding as to which course of action it should take in a particular case.

22. Thus, we find that in certain circumstances, this Court has approved the quashing of proceedings under section 307,IPC whereas in some other cases, it is held that as the offence is of serious nature such proceedings cannot be quashed. Though in each of the aforesaid cases the view taken by this Court may be justified on its own facts, at the same time this Court owes an explanation as to why two different approaches are adopted in various cases. The law declared by this Court in the form of judgments becomes binding precedent for the High Courts and the subordinate courts, to follow under Article 141 of the Constitution of India. Stare Decisis is the fundamental principle of judicial decision making which requires "certainty' too in law so that in a given set of facts the course of action which law shall take is discernable and predictable. Unless that is achieved, the very doctrine of stare decisis will lose its significance. The related objective of the doctrine of stare decisis is to put a curb on the personal preferences and priors of individual Judges. In a way, it achieves equality of treatment as well, inasmuch as two different persons faced with similar circumstances would be given identical treatment at the hands of law. It has, therefore, support from the human sense of justice as well. The force of precedent in the law is heightened, in the words of Karl Llewellyn, by "that curious, almost universal sense of justice which urges that all men are to be treated alike in like circumstances".

23. As there is a close relation between the equality and justice, it should be clearly discernible as to how the two prosecutions under Section 307 IPC are different in nature and therefore are given different treatment. With this ideal objective in mind, we are proceeding to discuss the subject at length. It is for this reason we deem it appropriate to lay down some distinct, definite and clear guidelines which can be kept in mind by the High Courts to take a view as to under what circumstances it should accept the settlement between the parties and quash the proceedings and under what circumstances it should refrain from doing so. We make it clear that though there would be a general discussion in this behalf as well, the matter is examined in the context of offences under Section 30 7IPC.

24. The two rival parties have amicably settled the disputes between themselves and buried the hatchet. Not only this, they say that since they are neighbours, they want to live like good neighbours and that was the reason for restoring friendly ties. In such a scenario, should the court give its imprimatur to such a settlement. The answer depends on

various incidental aspects which need serious discourse. The Legislators has categorically recognized that those offences which are covered by the provisions ofsection 320of the Code are concededly those not only do not fall within the category of heinous crime but also which are personal between the parties. Therefore, this provision recognizes whereas there is a compromise between the parties the Court is to act at the said compromise and quash the proceedings. However, even in respect of such offences not covered within the four corners of Section 320 of the Code, High Court is given power under Section 482 of the Code to accept the compromise between the parties and quash the proceedings. The guiding factor is as to whether the ends of justice would justify such exercise of power, both the ultimate consequences may be acquittal or dismissal of indictment. This is so recognized in various judgments taken note of above.

27. At this juncture, we would like also to add that the timing of settlement would also play a crucial role. If the settlement is arrived at immediately after the alleged commission of offence when the matter is still under investigation, the High Court may be somewhat liberal in accepting the settlement and quashing the proceedings/investigation. Of course, it would be after looking into the attendant circumstances as narrated in the previous para. Likewise, when challan is submitted but the charge has not been framed, the High Court may exercise its discretionary jurisdiction. However, at this stage, as mentioned above, since the report of the I.O. under Section 173,Cr.P.C. is also placed before the Court it would become the bounding duty of the Court to go into the said report and the evidence collected, particularly the medical evidence relating to injury etc. sustained by the victim. This aspect, however, would be examined along with another important consideration, namely, in view of settlement between the parties, whether it would be unfair or contrary to interest of justice to continue with the criminal proceedings and whether possibility of conviction is remote and bleak. If the Court finds the answer to this question in affirmative, then also such a case would be a fit case for the High Court to give its stamp of approval to the compromise arrived at between the parties, inasmuch as in such cases no useful purpose would be served in carrying out the criminal proceedings which in all likelihood would end in acquittal, in any case.

28. We have found that in certain cases, the High Courts have accepted the compromise between the parties when the matter in appeal was pending before the High Court against the conviction recorded by the trial court. Obviously, such cases are those where the accused persons have been found guilty by the trial court, which means the serious charge of Section 307 IPC has been proved beyond reasonable doubt at the level of the trial court. There would not be any question of accepting compromise and acquitting the accused persons simply because the private parties have buried the hatchet.

29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:

29.1. Power conferred under Section 482 of the Code is to be

distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not be exercised in those prosecutions which involve 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. Similarly, for offences alleged to have been committed under special statute like thePrevention 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.

29.4. On the other, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307IPC 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 proving the charge under Section 307IPC. 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. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the

Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime.

..

33.We have gone through the FIR as well which was recorded on the basis of statement of the complainant/victim. It gives an indication that the complainant was attacked allegedly by the accused persons because of some previous dispute between the parties, though nature of dispute etc. is not stated in detail. However, a very pertinent statement appears on record viz., "respectable persons have been trying for a compromise up till now, which could not be finalized". This becomes an important aspect. It appears that there have been some disputes which led to the aforesaid purported attack by the accused on the complainant. In this context when we find that the elders of the village, including Sarpanch, intervened in the matter and the parties have not only buried their hatchet but have decided to live peacefully in future, this becomes an important consideration. The evidence is yet to be led in the Court. It has not even started. In view of compromise between parties, there is a minimal chance of the witnesses coming forward in support of the prosecution case. Even though nature of injuries can still be established by producing the doctor as witness who conducted medical examination, it may become difficult to prove as to who caused these injuries. The chances of conviction, therefore, appear to be remote. It would, therefore, be unnecessary to drag these proceedings. We, taking all these factors into consideration cumulatively, are of the opinion that the compromise between the parties be accepted and the criminal proceedings arising out of FIR No.121 dated 14.7.2010 registered with Police Station LOPOKE, District Amritsar Rural be quashed. We order accordingly."

30. The Apex Court in the case of the State of **Madhya Pradesh Vs. Laxmi Narayan & Others** reported in (2019) 5 SCC 688, has held that mere compromise between the parties would not be ground to

accept the same resulting in acquittal of the offender, who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and therefore, there is no question of sparing a convict found guilty of such a crime. But the Apex Court in the said judgment, taking into consideration the judgment of the Apex Court in the case of **Gian Singh (Supra)**, has opined that while exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice causing extreme injustice to him by not quashing the criminal cases. The Apex Court has also held that mere mention of Section 307 cannot be sole basis of decision for not quashing of the criminal proceedings. Relevant paragraph nos. 15 to 18 read as follows:

"15. 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:

15.1. 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;

15.2. 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;

15.3. 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;

15.4. 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;

15.5. 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.

16. Insofar as the present case is concerned, the High Court has quashed the criminal proceedings for the offences under Sections 307 and 34 IPC mechanically and even when the investigation was under progress. Somehow, the accused managed to enter into a compromise with the complainant and sought quashing of the FIR on the basis of a settlement. The allegations are serious in nature. He used the fire arm also incommission of the offence. Therefore, the gravity of the offence and the conduct of the accused is not at all considered by the High Court and solely on the basis of a settlement between the accused and the complainant, the High Court has mechanically quashed the FIR, in exercise of power under Section 482 of the Code, which is not sustainable in the eyes of law. The High Court has also failed to note the antecedents of the accused.

17. In view of the above and for the reasons stated, the present appeal is allowed. The impugned judgment and order dated 07.10.2013 passed by the High Court in Miscellaneous Criminal Case No. 8000 of 2013 is hereby quashed and set aside, and the FIR/investigation/criminal proceedings be proceeded against the accused, and they shall be dealt with, in accordance with law. Criminal Appeal No.350 of 2019

18. So far as Criminal Appeal arising out of SLP 10324/2018 is concerned, by the impugned judgment and order, the High Court has quashed the criminal proceedings for the offences punishable under Sections 323, 294, 308 & 34 of the IPC, solely on the ground that the accused and the complainant have settled the matter and in view of the decision of this Court in the case of Shiji(supra), there may not be any possibility of recording a conviction against the accused. Offence under Section 308 IPC is a non-compoundable offence. While committing the offence, the accused has used the fire arm. They are also absconding, and in the meantime, they have managed to enter into a compromise with the complainant. Therefore, for the reasons stated above, this appeal is also allowed, the impugned judgment and order dated 28.05.2018 passed by the High Court in Miscellaneous Criminal Case No. 19309/2018 is hereby quashed and set aside, and the FIR/investigation/criminal proceedings be proceeded against the accused, and they shall be dealt with, in accordance with law."

31. In the case of **Arun Singh & Others Vs. State of U.P. Through Its Secretary,** reported in *(2020) 3 SCC 736* which has heavily been relied upon by Mr. Pankaj Srivastava, learned A.G.A. for the State, the Apex Court has observed that in respect of offence against the society, it is the duty of court to punish the offender. On the other hand, there may be offences falling in the category, where the

correctional objective of criminal law would have to be given more weightage than the theory of deterrent punishment. In such cases, court may be of the opinion that a settlement between the parties would lead to better relations between them and thus, may exercise power under Section 482 Cr.P.C. for quashing the criminal proceedings. Offences under Section 493 I.P.C. and under Section 3 read with Section 4 of the D.P. Act are in fact offences against society and not private in nature. Such offences have serious impact upon the society and continuance of trial of such cases is founded on the overriding effect of public interests in punishing persons for such serious offences. In such cases, settlement even if arrived at between the parties, the same cannot constitute a valid ground to quash the FIR or the charge-sheet.

32. This Court has an occasion to have a glance on the opinion and observations made by the Apex Court in paragraph nos. 54 to 60 in the famous case of **Gian Singh (Supra)**, after referring various judgments of the Apex Court on the same issue involved herein also, which read as follows:

"54. In different situations, the inherent power may be exercised in different ways to achieve its ultimate objective. Formation of opinion by the High Court before it exercises inherent power under Section 482 on either of the twin objectives, (i) to prevent abuse of the process of any court or (ii) to secure the ends of justice, is a sine qua non.

55. In the very nature of its constitution, it is the judicial obligation of the High Court to undo a wrong in course of administration of justice or to prevent continuation of unnecessary judicial process. This is founded on the legal maxim quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non potest. The full import of which is whenever anything is authorised, and especially if, as a matter of duty, required to be done by law, it is found impossible to do that thing unless something else not authorised in express terms be also done, may also be done, then that something else will be supplied by necessary intendment. Ex debito justitiae is inbuilt in such exercise; the whole idea is to do real, complete and substantial justice for which it exists. The power possessed by the High Court under Section 482 of the Code is of wide amplitude but requires exercise with great caution and circumspection.

56. It needs no emphasis that exercise of inherent power by the High Court would entirely depend on the facts and circumstances of each case. It is neither permissible nor proper for the court to provide a straitjacket formula regulating the exercise of inherent powers under Section 482. No precise and inflexible guidelines can also be provided.

57. Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal

complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment.

58. Where High Court quashes a criminal proceeding having regard to the fact that dispute between the offender and victim has been settled although offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrong doing that seriously endangers and threatens well-being of society and it is not safe to leave the crime- doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without permission of the Court. In respect of serious offences like murder, rape, dacoity, etc; or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between offender and victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to victim and the offender and victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or F.I.R if it is satisfied that on the face of such settlement, there is hardly any likelihood of offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard and fast category can be prescribed.

59. B.S. Joshi, Nikhil Merchant, Manoj Sharma and Shiji alias Pappu do illustrate the principle that High Court may quash criminal proceedings or FIR or complaint in exercise of its inherent power under Section 482 of the Code and Section 320 does not limit or affect the powers of the High Court under Section 482. Can it be said that by quashing criminal proceedings in B.S. Joshi, Nikhil Merchant, Manoj Sharma and Shiji alias Pappu, this Court has compounded the non-compoundable offences indirectly? We do not think so. There does exist the distinction between compounding of an offence under Section 320 and quashing of a criminal case by the High Court in exercise of inherent power under Section 482. The two powers are distinct and different although ultimate consequence may be same viz., acquittal of the accused or dismissal of indictment.

60. We find no incongruity in the above principle of law and the decisions of this Court in Simrikhia, Dharampal, Arun Shankar Shukla, Ishwar Singh, Rumi Dhar (Smt.). and Ashok Sadarangani. The principle propounded in Simrikhia that the inherent jurisdiction of the High Court cannot be invoked to override express bar provided in law is by now well settled. In Dharampal15, the Court observed the same

thing that the inherent powers under Section 482 of the Code cannot be utilized for exercising powers which are expressly barred by the Code. Similar statement of law is made in Arun Shankar Shukla. In Ishwar Singh, the accused was alleged to have committed an offence punishable under Section 307, IPC and with reference to Section 320 of the Code, it was held that the offence punishable under Section 307 IPC was not compoundable offence and there was express bar in Section 320 that no offence shall be compounded if it is not compoundable under the Code. In Rumi Dhar (Smt.) although the accused had paid the entire due amount as per the settlement with the bank in the matter of recovery before the Debts Recovery Tribunal, the accused was being proceeded with for commission of offences under Section 120-B/420/467/468/471 of the IPC along with the bank officers who were being prosecuted under Section 13(2) read with 13(1)(d) of Prevention of Corruption Act. The Court refused to quash the charge against the accused by holding that the Court would not quash a case involving a crime against the society when a prima facie case has been made out against the accused for framing the charge. Ashok Sadarangani was again a case where the accused persons were charged of having committed offences under Sections 120-B, 465, 467, 468 and 471, IPC and the allegations were that the accused secured the credit facilities by submitting forged property documents as collaterals and utilized such facilities in a dishonest and fraudulent manner by opening letters of credit in respect of foreign supplies of goods, without actually bringing any goods but inducing the bank to negotiate the letters of credit in favour of foreign suppliers and also by misusing the cash-credit facility. The Court was alive to the reference made in one of the present matters and also the decisions in B.S. Joshi, Nikhil Merchant and Manoj Sharma and it was held that B.S. Joshi, and Nikhil Merchant dealt with different factual situation as the dispute involved had overtures of a civil dispute but the case under consideration in Ashok Sadarangani was more on the criminal intent than on a civil aspect. The decision in Ashok Sadarangani supports the view that the criminal matters involving overtures of a civil dispute stand on a different footing."

33. From perusal of the judgments of the Punjab and Haryana High Court at Chandigarh and High Court of Bombay, relied upon by the learned counsel for the applicant in the cases of **Vinay Kumar** and **Kiran Tulshiram Ingale (Supras)**, it is apparently clear that both the High Court has held that since Section 320 Cr.P.C. does not affect the powers of the High Court under Section 482 Cr.P.C., High Court can quash the criminal proceedings, FIR or complaint and even conviction in exercise of its inherent powers. Though, the aforesaid Division Bench's judgment of the Bombay High Court, in the case of **Kiran Tulshiram Ingale (Supra)**, on the issue framed that in a prosecution which has culminated in a conviction, whether the power under Section 482 Cr.P.C. ought to be exercised for quashing the prosecution/conviction altogether, (instead of maintaining it and considering the issue of modification of the sentence) upon a settlement between the convict and the victim/complainant?, has been accepted by the Three Judges' Full Bench of the Bombay High Court of Nagpur Bench in the case of **Sau. Maya Sanjay Khandare & Another Vs. State of Maharashtra, Police Station Officer,** vide judgment and order dated 5th January, 2021 passed in

Criminal Application (Apl) No. 709 of 2020, reported in *2021 0 Supreme (Bom) 7*. However, the Full Bench has also The relevant portion whereof reads as follows:

"We find no difficulty in recognizing such power as held in Kiran T. Ingale (supra), subject to the limitations as expressed while answering Question (A)."

34. This Court is of the opinion that from perusal of the judgments of the Apex Court in the cases of **B.S. Joshi, Nikhil Merchant, Manoj Sharma (Supras)**, which are two Judges' Division Bench and **Gian Singh (Supra)**, which is Three Judges' Full Bench, it is clear that in all the cases, the Apex Court has held that since Section 320 Cr.P.C. does not limit or affect the powers under Sections 482 Cr.P.C. or under Articles 226 and 136 of the Constitutions of India, the High Court can quash the criminal proceedings/FIR/complaint. In the case of **B.S. Joshi (Supra),** Two Judges' Bench of the Apex Court has specifically held that the object of introducing Chapter XX-A in I.P.C. was to prevent torture to a woman by her husband or by relatives of her husband. Section 498-A was added with a view to punishing a husband and his relatives who harass or torture the wife or coerce her or her relatives to satisfy unlawful demands of dowry. A hyper technical view would be counterproductive and would act against the interests of women and against the object for which this provision was added. There is likelihood that non-exercise of inherent power to quash the proceedings to meet the ends of justice would prevent women for settling earlier. This is not the objective of Chapter-XX-A of I.P.C.

35. In the case of **Gian Singh (Supra)**, the Three Judges' Full Bench of the Apex Court has specifically observed that where High Court quashes a criminal proceeding, having regard to the fact that dispute between the offender and victim has been settled, although offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrong doing that seriously endangers and threatens well-being of society and it is not safe to leave the crime- doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without permission of the Court. In respect of serious offences like murder, rape, dacoity, etc; or other offences of mental depravity under IPC or offences of moral turpitude, under special statutes, like Prevention of Corruption Act or the offences committed by public servants, while working in that capacity, the settlement between offender and victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to victim and the offender and victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may, within the framework of its inherent power, quash the criminal proceeding or criminal

complaint or F.I.R, if it is satisfied that on the face of such settlement, there is hardly any likelihood of offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard and fast category can be prescribed.

36. In **Narinder Singh (Supra)**, the two Judges' Bench of the Apex Court, while framing guidelines for quashing the proceedings in cases where the offenses involved are non-compoundable, has quashed the criminal proceedings of FIR after accepting the compromise entered into between the parties. It is pertinent to mention here that in the said case, Offence under Section 307 I.P.C. was alleged against the accused for attacking the victim, who sustained injuries also, i.e. non-compoundable offence was involved.

37. Similarly, in the case of **State of Madhya Pradesh (Supra)**, offence under Section 307 was alleged against the accused for attacking the victim, who sustained gun shot injuries. Seeing the nature of such heinous crime, which has harmful effect on the public and consist in wrong doing that seriously endangers and threatens well-being of society and it is not safe to leave the crime- doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, the Three Judges' of Apex Court has refused to quash the criminal proceedings on the basis of settlement/agreement/compromise entered into between the parties.

38. In the case of **Arun Singh (Supra)**, which has heavily been relied upon by the learned A.G.A. for the State, the Two Judges' Bench of the Apex Court has also refused to quash the criminal proceedings of a case, wherein offence punishable under Sections 3/4 D.P. Act was involved, on the basis of a compromise/settlement/agreement entered into between the parties. However, this judgment of two Judges' of the Apex Court shall not prevail over the law laid down by the Three Judges' Full Bench of the Apex Court in the case of **Gian Singh (Supra)**.

39. Apart from the above, the facts of the case of **State of Madhya Pradesh (Supra)** is clearly distinguishable in the facts of the present case.

40. The law laid down by the three Judges Full Bench of the Apex Court in the case of **Gian Singh (Supra)** leaves the matter concluded and it remains res-integra no more, which has not been overruled by any court of law i.e. more number of judges of the Apex Court and as such, still holds the field.

41. The objections raised by learned AGA could not have been more convincingly answered than by the ratio of the above noted pronouncement by the Apex Court in **Gian Singh's case.**

42. This Court is of the considered opinion that the aim and object of law is not only to punish the culprit, but, the objective of the law is also to maintain peace, tranquility, prosperity and harmony in society as well as in the country. If there is a compromise between husband and wife and they are living to live together and to lead happy family life, then it will also be ideal in building our society. Marriage is a sacred ceremony of our society, the main objective of which is to enable the young couple to settle down in life and live

peacefully. But little matrimonial skirmishes suddenly erupt which often assume serious proportions, resulting in commission of heinous crimes in which elders of the family are also involved with the result that those who could have counselled and brought about rapprochement are rendered helpless on their being arrayed as accused in the criminal case. There are many other reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude and in that process the parties lose their "young" days in chasing their "cases" in different courts.

43. In the facts of the present case, the marriage of the applicant no.1 was solemnized with opposite party no.2 but after some time of their marriage, the relations between the two became strained and incompatible resulting in initiation of present criminal proceedings by opposite party no.2 against the applicants, under Sections 498-A, 323, 504 I.P.C., as also under Sections 3/4 D.P. Act. Thereafter, the applicants have been convicted for an offence under Sections 498-A, 323 I.P.C. as also under Section 4 D.P. Act by the Additional Chief Judicial Magistrate, Court No. 8, Ghaziabad vide order dated 02.12.2017. Against the said order of conviction, applicants filed an appeal in which they have been enlarged on bail. During the pendency of the appeal, after settling their all the disputes, they have arrived at a compromise and now they are living happily as husband and wife under the same roof, and enjoying their happy family life with their son. If this Court, in exercise of its inherent power under Section 482 Cr.P.C., does not quash the criminal proceedings as well as the order of conviction, then the happy life of husband i.e. applicant no.1 and wife (opposite party no.2) will be ruined, especially the happy future life of son of applicant no.1 and opposite party no.2, who has not seen anything yet and whose golden future remains yet to commence and who will suffer a lot.

44. Thus, with regard to third issue, whether this Court can quash the criminal proceedings during the pendency of appeal filed against the judgment and order of conviction, this Court is in respectful agreement with the finding recorded by the Division Bench of the Bombay High Court in the case of **Kiran Tulshiram Ingale (Supra)**, wherein it has been observed that firstly in this case the parties have compromised even after conviction and, the object of compromise is to live happily, peacefully, though separately after divorce. The Sessions Court has taken cognizance of this compromise and has reduced the conviction and altered it to a bond under the Probation of Offenders Act. Secondly, conviction by the first court is not end of the matter and appeal therefrom is continuation of proceeding and, if a revision is filed, in case conviction is maintained, altered, reduced, then the High Court in revision does have the power to pass effective orders in consonance with the judgment of the Supreme Court. Conviction does not attain finality if the appeal is filed and, if the revision is filed against conviction by appellate court, there also all issues become open before the High Court. On the basis of said observations, the Division Bench of the Bombay High Court has held that the criminal proceedings against the petitioner so also

conviction by both the Courts below hereby stood quashed, in view of the mutual understanding, divorce and compromise between the husband and wife. The Three Judges' Full Bench of the Bombay High Court in the case of **Maya Sanjay Khandare (Supra)**, has affirmed the said decision of the Division Bench by observing that **the ratio of the decision in Kiran T. Ingale (supra) has to be understood in the context that inherent powers under Section 482 of the Code can be exercised for quashing criminal proceedings at any stage especially those arising out of a matrimonial disputes**. (Emphasis added)

45. Accordingly, while relying upon the law laid down by the Three Judges' Full Bench of the Apex Court in the case of **Gian Singh (Supra)** and the Division Bench judgment of the Bombay High Court in the case of **Kiran Tulshiram Ingale (Supra)** and considering the peculiar facts and circumstances of the present case, this Court, in exercise of its inherent power under Section 482 Cr.P.C., allows the present application and quashes the criminal case arising out of Case Crime No. 93/2012, under Sections 498-A, 323, 504 I.P.C. as also under Sections 3/4 D.P. Act, Police Thana, District Ghaziabad, on the basis of compromise so entered into between the parties.

46. Consequently, the judgment of conviction and order of sentence dated 2nd December, 2017 passed by the Additional Chief Judicial Magistrate, Court No. 8, Ghaziabad, convicting the applicants under Sections 323, 498-A I.P.C. as also under Section 4 D.P. Act, is set aside. The appeal preferred by the accused-applicants against the aforesaid judgment and order is rendered infructuous and shall be declared so by the appellate Court.

47. There shall be no order as to costs.

48. It is also clarified that the joint affidavit filed on behalf of the applicants and opposite party no.2 has been misplaced during the course of dictation. Therefore, a copy of the same has been called for from the learned counsel for the applicants and the same has also been got verified from the learned counsel for opposite party no.2 and the learned A.G.A. for the State to be kept on record. The same shall be treated as original.

(2021)03ILR A455
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.02.2021

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Application U/S 482 Cr.P.C. No. 12352 of 2004

Vinod Kumar & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Sri D.K. Tripathi

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

Criminal Procedure Code (2 of 1974) , S.173(8) - Re-investigation - Power of 're-investigation' is not available to the Magistrate & can be exercised only by a superior Court and that too on the basis of some material - power of further investigation should be exercised based upon some material and it cannot be based on whims and fancies of an authority - re-investigation is not at all permissible at the behest of a new authority without there being anything on record to have suggested that there is a valid ground for re-investigation (Para 18)

Opposite party filed application u/s 156(3) Cr.P.C. alleging forgery - matter investigated by police - final report submitted - Magistrate accepted final report - No protest petition filed - Subsequently application filed by Anti-Corruption Bureau seeking permission to ''re-investigate' - no reasons were mentioned in the application except stating that some new facts have come to the knowledge which required re-investigation - application allowed by the Magistrate as offence was grave in nature - *Held* - impugned order wholly illegal, arbitrary and contrary to mandate of Section 173 (8) of the CrPC on both the counts i.e. lack of power for directing re-investigation; secondly, lack of any material ground before it leading to passing of the said order (Para 3, 19)

Allowed

List of Cases cited:-

1. Vinay Tyagi Vs Irshad Ali @ Deepak & Ors 2012 LawSuit(SC) 845

2. K. Chandrasekhar etc. Vs The State of Kerala & Ors 1998(4) Supreme 374

3. State of Raj Vs Aruna Devi & Ors (1995) 1 SCC 1

4. Amrutbhai Shambhubhai Patel Vs Sumanbhai Kantibhai Patel & Ors (2017) 4 SCC 177

5. Vinubhai Haribhai Malviya & Ors Vs State of Gujrat & Ors (2019) 17 SCC 1

6. Athul Rao Vs State of Karnataka (2018) 14 SCC 298

7. Bikash Ranjan Rout Vs State (NCT of Delhi) (2019) 5 SCC 542

8. Reeta Nag Vs State of West Bengal (2009) 9 SCC 129

9. Babubhai Vs State of Gujarat (2010) 12 SCC 254

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Shri D.K. Tripathi, learned counsel for the applicants and Shri Manoj Kumar Dwivedi, learned AGA for the State and perused the record.

2. Counsel for the applicants argues that the present application has been filed challenging the order dated 14.10.2004 whereby the Additional Chief Judicial Magistrate, Jaunpur in case crime no.C-1/2002, under Sections 419 and 420 IPC has allowed the application filed by the Anti-Corruption Bureau, Varanasi permitting them to re-investigate the matter.

3. The facts in brief are that the opposite party no.2 filed an application under Section 156(3) Cr.P.C. alleging the forgery committed upon him by the applicants. The matter was investigated by the police authority and a final report was submitted under Section 173(2) Cr.P.C. on 10.01.2003 before the Magistrate concerned. The Magistrate vide its order dated 01.07.2003 has accepted the said final report, which is placed on record as Annexure-5. Subsequent to the acceptance of the final report, an application dated 13.10.2004 was filed by the Anti-Corruption Bureau before the court concerned stating that in terms of the investigation completed by the police authority a final report was filed, which has been accepted by the court below, however, the State authorities on the basis of some new facts which had come to its knowledge wants to re-investigate the matter and thus requested that the said authority be permitted to "re-investigate' the matter in exercise of power under Section 173(8) Cr.P.C.. The said application was allowed by the Magistrate concerned vide its order dated 14.10.2004 recording that an application has been filed for re-

investigation and as the offence is grave in nature, the permission is granted.

4. Counsel for the applicant argues that although the law is very well settled on the question of reinvestigation and argues that although in the interest of justice when the matter is pending before the Magistrate, he has the authority to permit further investigation, re-investigation cannot be done by the Magistrate moreso after the acceptance of the final report, as has been done in the present case. He further argues that the police authority had investigated the matter at the earlier instance and had filed the final report, thus, a new agency namely Anti-Corruption Bureau had no authority to file an application seeking permission to re-investigate the matter and thus the order suffers from arbitrariness on that ground also.

5. Counsel for the applicant further argues that once the final report is accepted by the Magistrate, he becomes *functus officio* and coupled with the fact that there was no protest petition on record, it was only the higher/superior Court which could have directed for further investigation and in any event the re-investigation could not have been directed but only by the Superior Court. He further argues that the application was filed seeking permission for re-investigation at the instance of third party who has no concern with either the informant or the police authority and has merely stated that he is the power-of-attorney holder of opposite party no.2 without producing any record to substantiate the averments thus, the order is liable to be set aside.

6. Counsel for the applicant has placed reliance upon the judgments of the Supreme Court in the cas of **Vinay Tyagi Vs. Irshad Ali @ Deepak and Others [2012 LawSuit(SC) 845], K. Chandrasekhar etc. Vs. The State of Kerala & Others [1998(4) Supreme 374]** in support of his submissions.

7. Counsel for the applicant has drawn my attention to the relevant paragraphs of the aforesaid judgments to argue that Cr.P.C. is very clear in terms of the power conferred upon the Magistrate which has been lucidly explained by the Supreme Court in judgments cited above.

8. Learned AGA on the other hand argues that there is no error in the order passed by the court concerned inasmuch as the intent of the Court is to find out the truth and thus, if any material comes before the Court, the Court is not powerless to direct re-investigation/further investigation as has been done in the present case. He argues that the authority namely Anti-Corruption Bureau is also a wing of State Police Authority and thus, the argument of the learned counsel for the applicant that it is a different agency deserves to be rejected. He further argues that the application in question clearly indicates that there was sufficient material for the Anti-Corruption Bureau to request for permission to carry out further investigation/re-investigation, which cannot be faulted with.

9. Learned AGA has placed reliance upon the judgments of Supreme Court in the case of **State of Rajasthan Vs. Aruna Devi and Others [(1995) 1 SCC 1], Amrutbhai Shambhubhai Patel Vs. Sumanbhai Kantibhai Patel & Others [(2017) 4 SCC 177], Vinubhai Haribhai Malviya and Others Vs. State of Gujrat and another *[(2019) 17 SCC 1]*** in support of his submissions.

10. In the light of the arguments advanced and the pleadings on the record what is to be considered by this Court is as to whether the re-investigation could have been directed by the Additional Chief Judicial Magistrate, Jaunpur as has been done by means of the impugned order.

11. The question regarding scope of Section 173 (8) of the CrPC as has been considered very lucidly by the Supreme Court in the case of **Vinubhai Haribhai Malaviya and others Vs. State of Gujarat and another, (2020) 3 Supreme Court Case (Cri) 228** wherein the Supreme Court considered the entire scheme of the CrPC and noticed the Law Commission's Report whereafter Section 173 CrPC was amended to include Section 173 (8) under the CrPC. The Supreme Court emphasised the requirement of a fair and speedy trial, right to just and fair trial is a facet of Article 21 of the Constitution of India although in the said case Supreme Court was considering the question of further investigation by the Magistrate after the police report has been forwarded to him under Section 173 CrPC and in the light of the said questions before the Court, it held as under:

"20. With the introduction of Section 173(8) in the CrPC, the police department has been armed with the power to further investigate an offence even after a police report has been forwarded to the Magistrate. Quite obviously, this power continues until the trial can be said to commence in a criminal case. The vexed question before us is as to whether the Magistrate can order further investigation after a police report has been forwarded to him under Section 173?"

"22. What is recognised by this decision is that in the circumstance that the Magistrate does not agree with the police report, he may order further investigation - which is done in his capacity as a supervisory authority in relation to investigation carried out by the police."

"25. It is thus clear that the Magistrate's power under Section 156(3) of the CrPC is very wide, for it is this judicial authority that must be satisfied that a proper investigation by the police takes place. To ensure that a "proper investigation" takes place in the sense of a fair and just investigation by the police - which such Magistrate is to supervise - Article 21 of the Constitution of India mandates that all powers necessary, which may also be incidental or implied, are available to the Magistrate to ensure a proper investigation which, without doubt, would include the ordering of further investigation after a report is received by him under Section 173(2); and which power would continue to enure in such Magistrate at all stages of the criminal proceedings until the trial itself commences. Indeed, even textually, the "investigation" referred to in Section 156(1) of the CrPC would, as per the definition of "investigation" under Section 2(h), include all proceedings for collection of evidence conducted by a police officer; which would undoubtedly include proceedings by way of further investigation under Section 173(8) of the CrPC."

"39. Paragraph 39 of the judgment then referred to the "inquiry" stage of a criminal case as follows:

"39. Section 2(g) CrPC and the case laws referred to above, therefore, clearly envisage inquiry before the actual commencement of the trial, and is an act conducted under CrPC by the Magistrate or the court. The word

"inquiry" is, therefore, not any inquiry relating to the investigation of the case by the investigating agency but is an inquiry after the case is brought to the notice of the court on the filing of the charge-sheet. The court can thereafter proceed to make inquiries and it is for this reason that an inquiry has been given to mean something other than the actual trial."

A clear distinction between "inquiry" and "trial" was thereafter set out in paragraph 54 as follows:

"54. In our opinion, the stage of inquiry does not contemplate any evidence in its strict legal sense, nor could the legislature have contemplated this inasmuch as the stage for evidence has not yet arrived. The only material that the court has before it is the material collected by the prosecution and the court at this stage prima facie can apply its mind to find out as to whether a person, who can be an accused, has been erroneously omitted from being arraigned or has been deliberately excluded by the prosecuting agencies. This is all the more necessary in order to ensure that the investigating and the prosecuting agencies have acted fairly in bringing before the court those persons who deserve to be tried and to prevent any person from being deliberately shielded when they ought to have been tried. This is necessary to usher faith in the judicial system whereby the court should be empowered to exercise such powers even at the stage of inquiry and it is for this reason that the legislature has consciously used separate terms, namely, inquiry or trial in Section 319 CrPC."

40. Despite the aforesaid judgments, some discordant notes were sounded in three recent judgments. In Amrutbhai Shambubhai Patel v. Sumanbhai Kantibai Patel (2017) 4 SCC 177, on the facts in that case, the Appellant/Informant therein sought a direction under Section 173(8) from the Trial Court for further investigation by the police long after charges were framed against the Respondents at the culminating stages of the trial. The Court in its ultimate conclusion was correct, in that, once the trial begins with the framing of charges, the stage of investigation or inquiry into the offence is over, as a result of which no further investigation into the offence should be ordered. But instead of resting its judgment on this simple fact, this Court from paragraphs 29 to 34 resuscitated some of the earlier judgments of this Court, in which a view was taken that no further investigation could be ordered by the Magistrate in cases where, after cognizance is taken, the accused had appeared in pursuance of process being issued. In particular, Devarapalli Lakshminarayana Reddy (supra) was strongly relied upon by the Court. We have already seen how this judgment was rendered without adverting to the definition of "investigation" in Section 2(h) of the CrPC, and cannot therefore be relied upon as laying down the law on this aspect correctly. The Court therefore concluded:

"49. On an overall survey of the pronouncements of this Court on the scope and purport of Section 173(8) of the Code and the consistent trend of explication thereof, we are thus disposed to hold that though the investigating agency concerned has been invested with the power to undertake further investigation desirably after informing the court thereof, before which it had submitted its report and obtaining its approval, no such power is available

therefor to the learned Magistrate after cognizance has been taken on the basis of the earlier report, process has been issued and the accused has entered appearance in response thereto. At that stage, neither the learned Magistrate suo motu nor on an application filed by the complainant/informant can direct further investigation. Such a course would be open only on the request of the investigating agency and that too, in circumstances warranting further investigation on the detection of material evidence only to secure fair investigation and trial, the life purpose of the adjudication in hand.

50. The unamended and the amended sub-section (8) of Section 173 of the Code if read in juxtaposition, would overwhelmingly attest that by the latter, the investigating agency/officer alone has been authorised to conduct further investigation without limiting the stage of the proceedings relatable thereto. This power qua the investigating agency/officer is thus legislatively intended to be available at any stage of the proceedings. The recommendation of the Law Commission in its 41st Report which manifestly heralded the amendment, significantly had limited its proposal to the empowerment of the investigating agency alone.

51. In contradistinction, Sections 156, 190, 200, 202 and 204 CrPC clearly outline the powers of the Magistrate and the courses open for him to chart in the matter of directing investigation, taking of cognizance, framing of charge, etc. Though the Magistrate has the power to direct investigation under Section 156(3) at the pre-cognizance stage even after a charge-sheet or a closure report is submitted, once cognizance is taken and the accused person appears pursuant thereto, he would be bereft of any competence to direct further investigation either suo motu or acting on the request or prayer of the complainant/informant. The direction for investigation by the Magistrate under Section 202, while dealing with a complaint, though is at a post-cognizance stage, it is in the nature of an inquiry to derive satisfaction as to whether the proceedings initiated ought to be furthered or not. Such a direction for investigation is not in the nature of further investigation, as contemplated under Section 173(8) of the Code. If the power of the Magistrate, in such a scheme envisaged by CrPC to order further investigation even after the cognizance is taken, the accused persons appear and charge is framed, is acknowledged or approved, the same would be discordant with the state of law, as enunciated by this Court and also the relevant layout of CrPC adumbrated hereinabove. Additionally had it been the intention of the legislature to invest such a power, in our estimate, Section 173(8) CrPC would have been worded accordingly to accommodate and ordain the same having regard to the backdrop of the incorporation thereof. In a way, in view of the three options open to the Magistrate, after a report is submitted by the police on completion of the investigation, as has been amongst authoritatively enumerated in Bhagwant Singh [Bhagwant Singh v. Commr. of Police, (1985) 2 SCC 537 : 1985 SCC (Cri) 267] , the Magistrate, in both the contingencies, namely; when he takes cognizance of the offence or discharges the accused, would be committed to a course, whereafter though the investigating agency may for good reasons inform him and seek his

permission to conduct further investigation, he suo motu cannot embark upon such a step or take that initiative on the request or prayer made by the complainant/informant. Not only such power to the Magistrate to direct further investigation suo motu or on the request or prayer of the complainant/informant after cognizance is taken and the accused person appears, pursuant to the process, issued or is discharged is incompatible with the statutory design and dispensation, it would even otherwise render the provisions of Sections 311 and 319 CrPC, whereunder any witness can be summoned by a court and a person can be issued notice to stand trial at any stage, in a way redundant. Axiomatically, thus the impugned decision annulling the direction of the learned Magistrate for further investigation is unexceptional and does not merit any interference. Even otherwise on facts, having regard to the progression of the developments in the trial, and more particularly, the delay on the part of the informant in making the request for further investigation, it was otherwise not entertainable as has been rightly held by the High Court."

12. The Supreme Court has specifically held that the case of **Amrutbhai Shambubhai Patel Vs. Shambhubhai Patel Vs. Sumanbhai Kantibhai Patel, (2017) 4 SCC 177, Athul Rao Vs. State of Karnataka, (2018) 14 SCC 298 and Bikash Ranjan Rout vs. State (NCT of Delhi), (2019) 5 SCC 542** does not lay down the correct law. Supreme Court specifically overruled all judgments in the case of **Reeta Nag Vs. State of West Bengal, (2009) 9 SCC 129.**

13. As regards the question of distinction between further investigation, the Supreme Court referred to the earlier judgment of the Supreme Court in the case of **Babubhai Vs. State of Gujarat, (2010) 12 SCC 254.**

14. The other specific judgment of the Supreme Court considering the question of power of "re-investigation' is the case of **Vinay Tyagi Vs. Irshad Ali @ Deepak & otheres, 2012 LawSuit(SC) 845** wherein the Supreme Court specifically dealt with the question of powers of a Magistrate for "further investigation' and "re-investigation' and held as under:

"15. ''Further investigation' is where the Investigating Officer obtains further oral or documentary evidence after the final report has been filed before the Court in terms of Section 173(8). This power is vested with the Executive. It is the continuation of a previous investigation and, therefore, is understood and described as a ''further investigation'. Scope of such investigation is restricted to the discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the Court even if they are discovered at a subsequent stage to the primary investigation. It is commonly described as ''supplementary report'. ''Supplementary report' would be the correct expression as the subsequent investigation is meant and intended to supplement the primary investigation conducted by the empowered police officer. Another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency.

This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a ''reinvestigation', ''fresh' or ''de novo' investigation.

16. However, in the case of a ''fresh investigation', ''reinvestigation' or ''de novo investigation' there has to be a definite order of the court. The order of the Court unambiguously should state as to whether the previous investigation, for reasons to be recorded, is incapable of being acted upon. Neither the Investigating agency nor the Magistrate has any power to order or conduct ''fresh investigation'. This is primarily for the reason that it would be opposed to the scheme of the Code. It is essential that even an order of ''fresh'/'de novo' investigation passed by the higher judiciary should always be coupled with a specific direction as to the fate of the investigation already conducted. The cases where such direction can be issued are few and far between. This is based upon a fundamental principle of our criminal jurisprudence which is that it is the right of a suspect or an accused to have a just and fair investigation and trial. This principle flows from the constitutional mandate contained in Articles 21 and 22 of the Constitution of India. Where the investigation ex facie is unfair, tainted, mala fide and smacks of foul play, the courts would set aside such an investigation and direct fresh or de novo investigation and, if necessary, even by another independent investigating agency. As already noticed, this is a power of wide plenitude and, therefore, has to be exercised sparingly. The principle of rarest of rare cases would squarely apply to such cases. Unless the unfairness of the investigation is such that it pricks the judicial conscience of the Court, the Court should be reluctant to interfere in such matters to the extent of quashing an investigation and directing a ''fresh investigation'. In the case of Sidhartha Vashisht v. State (NCT of Delhi) [(2010) 6 SCC 1], the Court stated that it is not only the responsibility of the investigating agency, but also that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. An equally enforceable canon of the criminal law is that high responsibility lies upon the investigating agency not to conduct an investigation in a tainted or unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law de hors his position and influence in the society. The maxim contra veritatem lex nunquam aliquid permittit applies to exercise of powers by the courts while granting approval or declining to accept the report. In the case of Gudalure M.J. Cherian & Ors. v. Union of India & Ors. [(1992) 1 SCC 397], this Court stated the principle that in cases where charge-sheets have been filed after completion of investigation and request is made belatedly to reopen the investigation, such investigation being entrusted to a specialized agency would normally be declined by the court of competent jurisdiction but nevertheless in a given situation to do justice between the parties and to instil confidence in public mind, it may become necessary to pass such orders.

Further, in the case of R.S. Sodhi, Advocate v. State of U.P. [1994 SCC Supp. (1) 142], where allegations were made against a police officer, the Court ordered the investigation to be transferred to CBI with an intent to maintain credibility of investigation, public confidence and in the interest of justice. Ordinarily, the courts would not exercise such jurisdiction but the expression ''ordinarily' means normally and it is used where there can be an exception. It means in the large majority of cases but not invariably. ''Ordinarily' excludes extra- ordinary or special circumstances. In other words, if special circumstances exist, the court may exercise its jurisdiction to direct ''fresh investigation' and even transfer cases to courts of higher jurisdiction which may pass such directions.

18. Next question that comes up for consideration of this Court is whether the empowered Magistrate has the jurisdiction to direct ''further investigation' or ''fresh investigation'. As far as the latter is concerned, the law declared by this Court consistently is that the learned Magistrate has no jurisdiction to direct ''fresh' or ''de novo' investigation. However, once the report is filed, the Magistrate has jurisdiction to accept the report or reject the same right at the threshold. Even after accepting the report, it has the jurisdiction to discharge the accused or frame the charge and put him to trial. But there are no provisions in the Code which empower the Magistrate to disturb the status of an accused pending investigation or when report is, filed to wipe out the report and its effects in law. Reference in this regard can be made to K. Chandrasekhar v. State of Kerala [(1998) 5 SCC 223]; Ramachandran v. R. Udhayakumar [(2008) 5 SCC 413], Nirmal Singh Kahlon v State of Punjab & Ors. [(2009) 1 SCC 441]; Mithabhai Pashabhai Patel & Ors. v. State of Gujarat [(2009) 6 SCC 332]; and Babubhai v. State of Gujarat [(2010) 12 SCC 254].

15. The Supreme Court finally recorded as under:

30. Having analysed the provisions of the Code and the various judgments as afore-indicated, we would state the following conclusions in regard to the powers of a magistrate in terms of Section 173(2) read with Section 173(8) and Section 156(3) of the Code :

1. The Magistrate has no power to direct ''reinvestigation' or ''fresh investigation' (de novo) in the case initiated on the basis of a police report.

2. A Magistrate has the power to direct ''further investigation' after filing of a police report in terms of Section 173(6) of the Code.

3. The view expressed in (2) above is in conformity with the principle of law stated in Bhagwant Singh's case (supra) by a three Judge Bench and thus in conformity with the doctrine of precedence.

4. Neither the scheme of the Code nor any specific provision therein bars exercise of such jurisdiction by the Magistrate. The language of Section 173(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156(3) and the language of Section 173(8) itself. In fact, such power would have to be read into the language of Section 173(8).

5. The Code is a procedural document, thus, it must receive a

construction which would advance the cause of justice and legislative object sought to be achieved. It does not stand to reason that the legislature provided power of further investigation to the police even after filing a report, but intended to curtail the power of the Court to the extent that even where the facts of the case and the ends of justice demand, the Court can still not direct the investigating agency to conduct further investigation which it could do on its own.

6. It has been a procedure of proprietary that the police has to seek permission of the Court to continue ''further investigation' and file supplementary chargesheet. This approach has been approved by this Court in a number of judgments. This as such would support the view that we are taking in the present case.

31. Having discussed the scope of power of the Magistrate under Section 173 of the Code, now we have to examine the kind of reports that are contemplated under the provisions of the Code and/or as per the judgments of this Court. The first and the foremost document that reaches the jurisdiction of the Magistrate is the First Information Report. Then, upon completion of the investigation, the police are required to file a report in terms of Section 173(2) of the Code. It will be appropriate to term this report as a primary report, as it is the very foundation of the case of the prosecution before the Court. It is the record of the case and the documents annexed thereto, which are considered by the Court and then the Court of the Magistrate is expected to exercise any of the three options afore-noticed. Out of the stated options with the Court, the jurisdiction it would exercise has to be in strict consonance with the settled principles of law. The power of the magistrate to direct ''further investigation' is a significant power which has to be exercised sparingly, in exceptional cases and to achieve the ends of justice. To provide fair, proper and unquestionable investigation is the obligation of the investigating agency and the Court in its supervisory capacity is required to ensure the same. Further investigation conducted under the orders of the Court, including that of the Magistrate or by the police of its own accord and, for valid reasons, would lead to the filing of a supplementary report. Such supplementary report shall be dealt with as part of the primary report. This is clear from the fact that the provisions of Sections 173(3) to 173(6) would be applicable to such reports in terms of Section 173(8) of the Code.

33. At this stage, we may also state another well-settled canon of criminal jurisprudence that the superior courts have the jurisdiction under Section 482 of the Code or even Article 226 of the Constitution of India to direct ''further investigation', ''fresh' or ''de novo' and even ''reinvestigation'. ''Fresh', ''de novo', and ''reinvestigation' are synonymous expressions and their result in law would be the same. The superior courts are even vested with the power of transferring investigation from one agency to another, provided the ends of justice so demand such action. Of course, it is also a settled principle that this power has to be exercised by the superior courts very sparingly and with great circumspection.

35. The power to order/direct ''reinvestigation' or ''de novo' investigation falls in the domain of higher courts, that too in exceptional

cases. If one examines the provisions of the Code, there is no specific provision for cancellation of the reports, except that the investigating agency can file a closure report (where according to the investigating agency, no offence is made out). Even such a report is subject to acceptance by the learned Magistrate who, in his wisdom, may or may not accept such a report. For valid reasons, the Court may, by declining to accept such a report, direct ''further investigation', or even on the basis of the record of the case and the documents annexed thereto, summon the accused.

36. The Code does not contain any provision which deals with the court competent to direct ''fresh investigation', the situation in which such investigation can be conducted, if at all, and finally the manner in which the report so obtained shall be dealt with. The superior courts can direct conduct of a ''fresh'/''de novo' investigation, but unless it specifically directs that the report already prepared or the investigation so far conducted will not form part of the record of the case, such report would be deemed to be part of the record. Once it is part of the record, the learned Magistrate has no jurisdiction to exclude the same from the record of the case. In other words, but for a specific order by the superior court, the reports, whether a primary report or a report upon ''further investigation' or a report upon ''fresh investigation', shall have to be construed and read conjointly. Where there is a specific order made by the court for reasons like the investigation being entirely unfair, tainted, undesirable or being based upon no truth, the court would have to specifically direct that the investigation or proceedings so conducted shall stand cancelled and will not form part of the record for consideration by the Court of competent jurisdiction."

16. Ultimately, the Supreme Court answered the question came before it as under:

"Answer to Question No. 2

No investigating agency is empowered to conduct a ''fresh', ''de novo' or ''re-investigation' in relation to the offence for which it has already filed a report in terms of Section 173(2) of the Code. It is only upon the orders of the higher courts empowered to pass such orders that aforesaid investigation can be conducted, in which event the higher courts will have to pass a specific order with regard to the fate of the investigation already conducted and the report so filed before the court of the learned magistrate."

17. In the light of the judgment as referred above and facts before this Court what is now noticed that after the completion of investigation, a final report was submitted on 14.1.2003 which was accepted by the Magistrate on 1.7.2003 and there was absolutely no protest petition filed except an application filed at the behest of Anti-Corruption Bureau wherein it was specifically requested that they may be permitted to reinvestigate the matter. In the said application absolutely no reasons were mentioned except stating that some new facts have come to the knowledge which required re-investigation and thus, it may be permitted for re-investigation and the same application was allowed without even recording any findings as to the justification for ordering re-investigation by the impugned order dated 14.10.2004 or with regards to the fate of earlier investigation.

18. In view of the law as recorded above, it is very well settled that power of "re-investigation' is not available to the Magistrate and can be exercised only by a superior Court. What is also relevant is that the power of further investigation should also be exercised based upon some material and it cannot be based on whims and fancies of an authority which have not initially investigated the matter and in any event, the re-investigation is not at all permissible that too at the behest of a new authority without there being anything on record to have suggested that there is a valid ground for re-investigation. Needless to add that re-investigation as held by Supreme Court can be directed only by a superior Court that too on the basis of some material.

19. In view of the facts and law discussed above, I am of the firm view that the order dated 14.10.2004 is wholly illegal, arbitrary and contrary to mandate of Section 173 (8) of the CrPC on both the counts i.e. lack of power for directing re-investigation; secondly, lack of any material ground before it leading to passing of the said order. Accordingly, the application is allowed and the order dated 14.10.2004 is set aside.

(2021)03ILR A466
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.02.2021

BEFORE

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

Application U/S 482 Cr.P.C. No. 19093 of 2020

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

Counsel for the Applicants:
Sri Birendra Kaushik

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

A. Criminal Law – Power to alter or add any charge - Application u/s 482 Cr.P.C – Indian Penal Code: Section 147, 148, 302, 306; Code of Criminal Procedure: Section 216 - The power u/s 216 to alter or add any charge at any time before the judgment is pronounced, is exclusive to the Court and there is no right of any party to raise a claim in regard to the same as a matter of right. (Para 11, 17)

The Court can change or alter the charge if there is defect or something is left out. The test to be applied is that it must be founded on material available on record and the principle that has to be kept in mind is that the charge so framed by the Magistrate is in accord with materials produced before him or if subsequent evidence comes on record. (Para 12, 14, 20)

In the case at hand, the F.I.R. had been lodged under Sections 147, 148 and 302 IPC and after investigation the charge-sheet was filed u/s 306 I.P.C. After examining the prosecution witnesses upon an application moved on behalf of the informants, the trial Court has duly considered the facts and circumstances of the case and the evidence, which was on record, to come to a conclusion that the necessary alteration in the charge was required and accordingly proceeded to allow the application. (Para 18)

In case where a situation so demands if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, the Court may do so on its own or upon an application of the parties. (Para 19)

B. The contention relating to the defence of the accused which seeks to impeach the veracity of the depositions made by the prosecution witnesses would be a question to be seen at the trial and need not be determined at the time of framing of charge. The stage of appreciation of evidence on merit by the Court comes up only

after the charges have been framed and the trial has commenced. For the purpose of framing of charge the Court only needs to prima facie determine that there exists sufficient material for the commencement of trial. (Para 21)

Application dismissed.(E-3)

Precedent followed:

1. P. Kartikalakshmi Vs Ganesh & anr., (2017) 3 SCC347 (Para 11)

2. Anant Prakash Sinha @ Anant Sinha Vs St. of Har.& anr., (2016) 6 SCC 105 (Para 12)

3. Hasanbhai Valibhai Qureshi Vs St. of Guj. & ors., (2004) 5 SCC 347 (Para 13)

4. Kantilal Chandulal Mehta Vs St. of Mah., (1969) 3 SCC 166 (Para 13)

5. C.B.I. Vs Karimullah Osan Khan, (2014) 11 SCC 538 (Para 13)

6. Jasvinder Saini & ors. Vs State (Government of NCT of Delhi), (2013) 7 SCC 256 (Para 13)

7. Thakur Shah Vs Emperor, AIR 1943 PC 192 (Para 14)

8. Harihar Chakravarty Vs St. of W.B., AIR 1954 SC 266 (Para 14)

9. Dr. Nallapareddy Sridhar Reddy Vs St. of A.P. & ors., (2020) 12 SCC 467 Para 15)

Present application has been filed seeking quashing of order dated 28.08.2020, passed by Additional Session Judge, Mathura.

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

1. Sri Birendra Kaushik, learned counsel for the applicants and Sri Pankaj Saxena, learned A.G.A.-I appearing for the State-opposite party.

2. The present application under Section 482 Cr.P.C. has been filed seeking to quash the order dated 28.08.2020 passed by the Additional Session Judge, Court Room No.3, Mathura, in exercise of powers under Section 216 Cr.P.C., in Session Trial No. 234 of 2016 (State Vs. Smt. Rekha and others) under Section 306 I.P.C. Police Station Jamunapar District Mathura.

3. Briefly stated the facts of the case are that an F.I.R. dated 17.01.2016 was lodged by the opposite party no. 2 against the applicants which was registered as Case Crime No.0012 of 2016 under Sections 147, 148 and 302 I.P.C. at Police Station Jamunapar, District Mathura. After investigation the police submitted a charge-sheet against the applicants under Section 306 I.P.C. on 17.04.2016 and cognizance on the charge-sheet was taken by the Additional Chief Judicial Magistrate, IV, Mathura on 06.05.2016.

4. The statements of the prosecution witnesses were recorded and thereafter an application (paper no. 68 Kha) was moved by the informant before the court to alter the charge from that under Section 306 to Section 302 I.P.C. The informant contended that the F.I.R. was registered under Sections 147, 148 and 302 I.P.C. and despite sufficient evidence being collected, the charge-sheet was filed by the police only under Section 306 I.P.C. It was contended that the statements of the prosecution witnesses which had been recorded indicated that the charge under Section 302 was also made out and accordingly the application had been filed for altering of the charge.

5. The accused filed their objections (paper no. 74 Kha) seeking to contend that the application filed under Section 216 Cr.P.C. was against the provisions of law and the criminal proceedings had been

initiated maliciously with a view to falsely implicate the accused.

6. The trial judge, upon due consideration of the contentions of the parties, the material on record and also the evidence of the prosecution witness, has passed an order under Section 216 Cr.P.C. accepting the application for altering of the charge. Aggrieved against the aforesaid order, the present application under Section 482 Cr.P.C. has been filed by the accused-applicants.

7. The principal contention sought to be raised by the counsel for the applicants is that none of the witnesses produced by the prosecution before the court was an eye witness and as such their statements could not have been relied upon by the trial judge. The other argument raised is that the applicants have been falsely implicated and the proceedings are malicious.

8. Sri Pankaj Saxena, learned A.G.A.-I appearing for the State-opposite party points out that the learned trial judge has duly considered the entire facts and circumstances of the case and the statements of all the prosecution witnesses. He also points out that one of the statements which have been considered by the trial judge is that of P.W. 2 who claims to be an eye-witness and as such the contention of the learned counsel for the petitioner is that none of the statements which have been considered is of an eye-witness is factually incorrect. The other contention which is sought to be raised on behalf of the applicants relates to their defence which may be raised at the appropriate stage before the trial judge and cannot be a ground to challenge the order passed under Section 216 Cr.P.C.

9. Rival contentions now fall for consideration.

10. In order to appreciate the controversy, the relevant provision under Section 216 Cr.P.C. may be adverted to.

"216. Court may alter charge.--(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the

Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5)If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction had been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded."

11. The ambit and scope of powers of the trial court to alter the charge under Section 216 Cr.P.C. fell for consideration in **P. Kartikalakshmi Vs. Ganesh and another**1, wherein it has been held that the power under Section 216 to alter or add any charge at any time before the judgment is pronounced, is exclusive to the Court and there is no right of any party to raise a claim in regard to the same as a matter of right. The observations made in the judgment in this regard are as follows :-

"6....Section 216 Cr.P.C. empowers the Court to alter or add any charge at any time before the judgment is pronounced. It is now well settled that the power vested in the Court is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right. It may be that if there was an omission in the framing of the charge and if it comes to the knowledge of the Court trying the offence, the power is always vested in the Court, as provided under Section 216 Cr.P.C. to either alter or add the charge and that such power is available with the Court at any time before the judgment is pronounced. It is an enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought to its notice. In such a situation if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, it may do so on its own and no order need to be passed for that purpose. After such alteration or addition when the final decision is rendered, it will be open for the parties to work out their remedies in accordance with law.

7. We were taken through Sections 221 & 222 Cr.P.C. in this context. In the light of the facts involved in this case, we are only concerned with Section 216 Cr.P.C. We, therefore, do not propose to examine the implications of the other provisions to the case on hand. We wish to confine ourselves to the invocation of Section 216 and rest with that. In the light of our conclusion that the power of invocation of Section 216 Cr.P.C. is exclusively confined with the Court as an enabling provision for the purpose of alteration or addition of any charge at any time before pronouncement of the judgment, we make it clear that no party, neither de facto complainant nor the accused or for that matter the prosecution has any vested right to seek any addition or alteration of charge, because it is not provided under Section 216 Cr.P.C. If such a course to be adopted by the parties is allowed, then it will be well nigh impossible for the criminal court to conclude its proceedings and the concept of speedy trial will get jeopardized."

12. The question as to when court can alter or add to any charge while exercising powers under Section 216 Cr.P.C. and also the duty of court while adding/altering charge and the materials which may be considered therefor came up for consideration in **Anant Prakash Sinha @ Anant Sinha Vs. State of Haryana and another**2, and it was held that the court can change or alter the charge if there is defect or something is left out. The test to be applied is that it must be founded on material available on record and the principle that has to be kept in mind is that the charge so framed by the Magistrate is in accord with materials produced before him or if subsequent evidence comes on record.

13. Taking into consideration the earlier decisions in **Hasanbhai Valibhai Qureshi Vs. State of Gujarat and others3, Kantilal Chandulal Mehta Vs.**

State of Maharashtra4, C.B.I. Vs. Karimullah Osan Khan5, and Jasvinder Saini and others vs. State (Government of NCT of Delhi)6, the following observations were made.

"9. The aforesaid provision has been interpreted in Hasanbhai Valibhai Qureshi, (2004) 5 SCC 347, wherein the Court has observed:-

"Section 228 of the Code in Chapter XVII and Section 240 in Chapter XIX deal with framing of the charge during trial before a Court of Session and trial of warrant cases by Magistrates respectively. There is a scope of alteration of the charge during trial on the basis of materials brought on record. Section 216 of the Code appearing in Chapter XVII clearly stipulates that any court may alter or add to any charge at any time before judgment is pronounced. Whenever such alteration or addition is made, the same is to be read out and informed to the accused."

10. In Hasanbhai Valibhai Qureshi, reference was made to Kantilal Chandulal Mehta v. State of Maharashtra wherein it has been ruled that the Code gives ample power to the courts to alter or amend a charge provided that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about the charge or in not giving him full opportunity of meeting it and putting forward any defence open to him on the charge finally preferred against him. Placing reliance on the said decision, it has been opined that if during trial the trial court on a consideration of broad probabilities of the case based upon total effect of the evidence and documents produced is satisfied that any addition or alteration of the charge is necessary, it is free to do so, and there can be no legal bar to appropriately act as the exigencies of the case warrant or necessitate.

11. In Jasvinder Saini v. State (Govt. of NCT of Delhi), (2013) 7 SCC 256, the charge- sheet was filed before the jurisdictional Magistrate alleging commission of offences under Sections 498-A, 304-B, 406 and 34 IPC against the appellant Nos. 1 to 4 therein. A supplementary charge-sheet was filed in which the appellant Nos. 5 to 8 therein were implicated for the case to which Section 302 IPC was also added by the investigating officer. After the matter was committed to the Court of Session, the trial court came to the conclusion that there was no evidence or material on record to justify framing of a charge under Section 302 IPC, as a result of which charges were framed only under Sections 498-A, 304-B read with Section 34 IPC. When the trial court was proceeding with the matter, this Court delivered the judgment in Rajbir v. State of Haryana and directed that all the trial courts in India to ordinarily add Section 302 to the charge on Section 304-B IPC so that death sentences could be imposed in heinous and barbaric crimes against women. The trial court noted the direction in Rajbir and being duty-bound, added the charge under Section 302 IPC to the one already framed against the appellant therein and further for doing so, it placed reliance on Section 216 CrPC. The said order was assailed before the High Court which opined that the appearance of evidence at the trial was not essential for framing of an additional charge or altering a charge already framed, though it may be one of the grounds to do so. That apart, the High Court referred to the autopsy surgeon's report which, according to the High Court, provided prima facie evidence for framing the charge under Section 302 IPC. Being of this view,

it declined to interfere with the order impugned.

12. This Court adverting to the facts held thus : (Jasvinder Saini case, SCC p.262, para 15)

"15. It is common ground that a charge under Section 304-B IPC is not a substitute for a charge of murder punishable under Section 302. As in the case of murder in every case under Section 304-B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304-B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304-B is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial court in that view of the matter acted mechanically for it framed an additional charge under Section 302 IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in Rajbir case. The High Court no doubt made a half-hearted attempt to justify the framing of the charge independent of the directions in Rajbir case, but it would have been more appropriate to remit the matter back to the trial court for fresh orders rather than lending support to it in the manner done by the High Court."

It is appropriate to note here, the Court further observed that the annulment of the order passed by the Court would not prevent the trial court from re-examining the question of framing a charge under Section 302 IPC against the appellant therein and passing an appropriate order if upon a prima facie appraisal of the evidence adduced before it, the trial court comes to the conclusion that there is any room for doing so. In that context, reference was made to Hasanbhai Valibhai Qureshi.

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13. In Karimullah Osan Khan, (2014) 11 SCC 538, the Court was concerned with the legality of the order passed by the Designated Court under the Terrorist and Disruptive Activities (Prevention) Act, 1987 for Bomb Blast Case, Greater Bombay rejecting the application filed by the Central Bureau of Investigation (for short "CBI") under Section 216 CrPC for addition of the charges punishable under Section 302 and other charges under the Penal Code and the Explosives Act read with Section 120-B IPC and also under Section 3(2) of the Terrorist and Disruptive Activities (Prevention) Act, 1987. The Designated Court framed charges in respect of certain offences and when the CBI filed an application for addition of the charge under Section 302 IPC and other offences, the Designated Court rejected the application as has been indicated earlier. In the said context, the Court proceeded to interpret the scope of Section 216 CrPC. Reference was made to the decisions in Jasvinder Saini (supra) and Thakur Shah v. King Emperor. Proceeding further, it has been ruled thus:-

"17. Section 216 CrPC gives considerable power to the trial court, that is, even after the completion of evidence, arguments heard and the judgment reserved, it can alter and add to any charge, subject to the conditions mentioned therein. The expressions "at any time" and before the "judgment is pronounced" would indicate that the power is very wide and can be exercised, in appropriate cases, in the interest of justice, but at the same time, the courts should also see that its orders would not cause any prejudice to the accused.

18. Section 216 CrPC confers jurisdiction on all courts, including the Designated Courts, to alter or add to any charge framed earlier, at any time before the judgment is pronounced and sub-sections (2) to (5) prescribe the procedure which has to be followed after that addition or alteration. Needless to say, the courts can exercise the power of addition or modification of charges under Section 216 CrPC, only when there exists some material before the court, which has some connection or link with the charges sought to be amended, added or modified. In other words, alteration or addition of a charge must be for an offence made out by the evidence recorded during the course of trial before the court. (See Harihar Chakravarty v. State of W.B.). Merely because the charges are altered after conclusion of the trial, that itself will not lead to the conclusion that it has resulted in prejudice to the accused because sufficient safeguards have been built in Section 216 CrPC and other related provisions."

14. A similar view has been taken in **Central Bureau of Investigation Vs. Karimullah Osan Khan**5, wherein it was held that Section 216 Cr.P.C. gives considerable powers to trial court and that it can alter and add any charge subject to the conditions mentioned therein and that the powers to be exercised are very wide. Referring to the earlier decisions in **Thakur Shah vs. Emperor**7**, Jasvinder Saini and others vs. State (Government of NCT of Delhi)**6 **and Harihar Chakravarty Vs. State of West Bengal**,8 it was stated thus :-

"15. This Court in Jasvinder Saini v. State (Government of NCT of Delhi) (2013) 7 SCC 256, had an occasion to examine the scope of Section 216 CrPC and held as follows:

"11.. the court's power to alter or add any charge is unrestrained provided such addition and/or alteration is made before the judgment is pronounced. Sub-sections (2) to (5) of Section 216 deal with the procedure to be followed once the court decides to alter or add any charge. Section 217 of the Code deals with the recall of witnesses when the charge is altered or added by the court after commencement of the trial. There can, in the light of the above, be no doubt about the competence of the court to add or alter a charge at any time before the judgment. The circumstances in which such addition or alteration may be made are not, however, stipulated in Section 216. It is all the same trite that the question of any such addition or alternation would generally arise either because the court finds the charge already framed to be defective for any reason or because such addition is considered necessary after the commencement of the trial having regard to the evidence that may come before the court.

12. In the case at hand the evidence assembled in the course of the investigation and presented to the trial

court was not found sufficient to call for framing a charge under Section 302 IPC. ....."

16. The Privy Council, as early as in Thakur Shah v. King Emperor, AIR 1943 PC 192, spoke on alteration or addition of charges as follows :

"The alteration or addition is always, of course, subject to the limitation that no course should be taken by reason of which the accused may be prejudiced either because he is not fully aware of the charge made or is not given a full opportunity of meeting it and putting forward any defence open to him on the charge finally preferred."

17. Section 216 CrPC gives considerable powers to the trial court, that is, even after the completion of evidence, arguments heard and the judgment reserved, it can alter and add to any charge, subject to the conditions mentioned therein. The expressions "at any time" and before the "judgment is pronounced" would indicate that the power is very wide and can be exercised, in appropriate cases, in the interest of justice, but at the same time, the courts should also see that its orders would not cause any prejudice to the accused.

18. Section 216 CrPC confers jurisdiction on all courts, including the Designated Courts, to alter or add to any charge framed earlier, at any time before the judgment is pronounced and sub-sections (2) to (5) prescribe the procedure which has to be followed after that addition or alteration. Needless to say, the courts can exercise the power of addition or modification of charges under Section 216 CrPC, only when there exists some material before the court, which has some connection or link with the charges sought to be amended, added or modified. In other words, alteration or addition of a charge must be for an offence made out by the evidence recorded during the course of trial before the court. (See Harihar Chakravarty v. State of West Bengal AIR 1954 SC 266). Merely because the charges are altered after conclusion of the trial, that itself will not lead to the conclusion that it has resulted in prejudice to the accused because sufficient safeguards have been built in in Section 216 CrPC and other related provisions."

15. The object and the scope of powers to be exercised by the Court under Section 216 Cr.P.C. and the test to be adopted while deciding upon addition or alteration of charge has been considered in a recent judgment in **Dr. Nallapareddy Sridhar Reddy Vs. State of Andhra Pradesh and others**9, and referring to the earlier precedents in **P. Kartikalakshmi Vs. Ganesh and another**1, **Anant Prakash Sinha @ Anant Sinha Vs. State of Haryana and another**2, **C.B.I. Vs. Karimullah Osan Khan**5 **and Jasvinder Saini and others vs. State (Government of NCT of Delhi)**6 on the point, the principles with regard to the same have been summarized as follows :-

"21. From the above line of precedents, it is clear that Section 216 provides the court an exclusive and wide-ranging power to change or alter any charge. The use of the words "at any time before judgment is pronounced" in Sub-section (1) empowers the court to exercise its powers of altering or adding charges even after the completion of evidence, arguments and reserving of the judgment. The alteration or addition of a charge may be done if in the opinion of the court there was an omission in the framing of charge or if upon prima facie examination of the material brought on record, it leads the

court to form a presumptive opinion as to the existence of the factual ingredients constituting the alleged offence. The test to be adopted by the court while deciding upon an addition or alteration of a charge is that the material brought on record needs to have a direct link or nexus with the ingredients of the alleged offence. Addition of a charge merely commences the trial for the additional charges, whereupon, based on the evidence, it is to be determined whether the Accused may be convicted for the additional charges. The court must exercise its powers Under Section 216 judiciously and ensure that no prejudice is caused to the Accused and that he is allowed to have a fair trial. The only constraint on the court's power is the prejudice likely to be caused to the Accused by the addition or alteration of charges. Sub-section (4) accordingly prescribes the approach to be adopted by the courts where prejudice may be caused. "

16. The provisions of Section 216, whereunder the court is authorised to alter or add to the charge at any time before the judgment is pronounced, find place in Chapter XVII of the Code which relates to "The Charge". The provisions contained under section 216 have been discussed in **Dr. Nallapareddy Sridhar Reddy** (supra), in the following manner.

"16. Section 216 appears in Chapter XVII of the Code of Criminal Procedure. Under the provisions of Section 216, the court is authorised to alter or add to the charge at any time before the judgment is pronounced. Whenever such an alteration or addition is made, it is to be read out and explained to the accused. The phrase "add to any charge" in sub-section (1) includes addition of a new charge. The provision enables the alteration or addition of a charge based on materials brought on record during the course of trial. Section 216 provides that the addition or alteration has to be done "at any time before judgment is pronounced". Sub-section (3) provides that if the alteration or addition to a charge does not cause prejudice to the accused in his defence, or the persecutor in the conduct of the case, the court may proceed with the trial as if the additional or alternative charge is the original charge. Sub-section (4) contemplates a situation where the addition or alteration of charge will prejudice the accused and empowers the court to either direct a new trial or adjourn the trial for such period as may be necessary to mitigate the prejudice likely to be caused to the accused. Section 217 of the Code of Criminal Procedure deals with recalling of witnesses when the charge is altered or added by the court after commencement of the trial."

17. It is therefore seen that the scope of powers of the court to alter or add any charge under Section 216 Cr.P.C. is very wide in nature and it confers exclusive jurisdiction on the court in regard to such matters which may be exercised at any time before the judgment is pronounced. The rights of the parties in regard to the same would be extremely limited and no addition or alteration or objection with regard thereto, can be raised as a matter of right.

18. In the case at hand, the F.I.R. had been lodged under Sections 147, 148 and 302 IPC and after investigation the charge-sheet was filed under Section 306 I.P.C. After examining the prosecution witnesses upon an application moved on behalf of the informants, the trial court has duly considered the facts and circumstances of the case and the evidence, which was on

record, to come to a conclusion that the necessary alteration in the charge was required and accordingly proceeded to allow the application.

19. In view of the settled legal position in case of any omission in framing of the charge if it comes to the knowledge of the court trying the offence, the power to alter the charge under Section 216 Cr.P.C. is always vested in the Court to be exercised at any time before the judgment is pronounced. The section is in the nature of an enabling provision for the Court to exercise its power under certain contingencies when the relevant facts with regard thereto are brought to its notice. In case where a situation so demands if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, the Court may do so on its own or upon an application of the parties.

20. It may be reiterated that the test to be applied in this regard is that it must be founded on material available on record and the principle that has to be kept in mind is that the charge so framed by the Magistrate is in accord with materials produced before him or the subsequent evidence which comes on record.

21. The contention relating to the defence of the accused which seeks to impeach the veracity of the depositions made by the prosecution witnesses would be a question to be seen at the trial and need not be determined at the time of framing of charge. The stage of appreciation of evidence on merit by the court comes up only after the charges have been framed and the trial has commenced. For the purpose of framing of charge the court only needs to *prima facie* determine that there exists sufficient material for the commencement of trial.

22. Counsel for the applicants has not been able to point out any material error or irregularity in the exercise of power under Section 216 Cr.P.C. so as to persuade this Court to exercise its inherent jurisdiction under Section 482 Cr.P.C.

23. The application thus fails and is accordingly dismissed.

(2021)03ILR A475
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.01.2021

BEFORE

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

Application U/S 482 Cr.P.C. No. 19490 of 2020

Beekki Verma ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Rajendra Kumar

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

A. Criminal Law – Maintainability of second FIR - Application u/s 482 Cr.P.C – Indian Penal Code,1860 - Sections 41, 411, 413, 392 - Where the substance of the allegation in the second F.I.R. is different from the first F.I.R. and the same is related to a different transaction, the second F.I.R. would be permissible. (Para 10)

"Test of sameness" - In order to examine the impact of more than one F.I.Rs., the court would be required to look into the facts and circumstances of each case and then apply the 'test of sameness' to find out whether both the F.I.Rs. relate to the same incident and to the same occurrence and whether they are in regard to the incidents which are two or more

parts of the same transaction, or they relate to two entirely distinct occurrences. It would be only if the second F.I.R. relates to the same incident or where it can be demonstrated that its substratum is the same as that the first F.I.R., an argument with regard to the criminal proceedings initiated pursuant thereto being vitiated, may be entertained. (Para 13, 15)

In order to constitute the 'same transaction', the series of acts alleged against the accused must be connected together in some way by proximity of time, unity of place, purpose or design, and continuity of action. What would be necessary is to find out whether the offences alleged against the accused could be stated to be committed during the same transaction. (Para 14)

In the present case, the two F.I.Rs. relate to different incidents having occurred at different points of time and the same cannot be said to be parts of the same transaction. There is no material to suggest that the substratum of the second F.I.R. is the same as that of the first F.I.R. (Para 16, 17)

Application dismissed. (E-3)

Precedent followed:

1. Babubhai Vs St. of Guj. & ors., (2010) 12 SCC 254 (Para 6)

2. Nirmal Singh Kahlon Vs St. of Pun., (2009) 1 SCC 441 (Para 7)

3. Ram Lal Narang Vs State (Delhi Admn.), (1979) 2 SCC 322 (Para 7)

4. Anju Chaudhary Vs St. of U.P. & anr., (2013) 6 SCC 384 (Para 8)

5. T.T. Antony Vs St. of Kerala, (2001) 6 SCC 181 (Para 8)

6. Rameshchandra Nandlal Parikh Vs St. of Guj. & anr., (2006) 1 SCC 732 (Para 9)

7. Awadesh Kumar Jha & ors. Vs St. of Bihar, (2016) 3 SCC 8 (Para 10)

8. Pattu Rajan Vs St. of T.N., (2019) 4 SCC 771 (Para 11)

9. Prem Chand Singh Vs St. of U.P. & anr., (2020) 3 SCC 54 (Para 12)

Present application has been filed seeking quashing of charge sheet no. 1 dated 28.08.2018 and summoning order dated 06.01.2020 as well as entire proceedings u/Ss 41, 411, 413 IPC pending in the court of Chief Judicial Magistrate, Ghazipur.

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

1. Sri Rajendra Kumar, learned counsel for the applicant and Sri Vinod Kant, learned Additional Advocate General alongwith Sri Ratnendu Kumar Singh, learned Additional Government Advocate appearing for the State-opposite party.

2. The present application under Section 482 Cr.P.C. has been filed seeking to quash the charge sheet no. 01 dated 28.8.2018 and summoning order dated 6.1.2020 as well as entire proceedings of Case No. 58 of 2020 (State vs. Beekki) arising out of Case Crime No. 256 of 2018, under Sections 41, 411, 413 IPC, P.S. Kotwali, District Ghazipur, pending in the court of Chief Judicial Magistrate, Ghazipur.

3. Counsel for the applicant has sought to contend that in respect of the same incident, an earlier FIR dated 29.3.2018 was lodged under Section 392 IPC, P.S. Kotwali, District Ghazipur, which was registered as Case Crime No. 120 of 2018. It is submitted that the present criminal proceedings having been initiated pursuant to a subsequent FIR relating to the same incident, the proceedings are vitiated and the applicant has been falsely

implicated by showing false recovery against him.

4. Learned Additional Advocate General appearing for the State-opposite party, has controverted the aforesaid assertion by pointing out that the earlier FIR dated 29.3.2018 was lodged under Section 392 I.P.C. by one Krishnawati Devi-first informant against unnamed accused. The allegations in the FIR are in respect of an incident stated to have occurred on 29.3.2018 which relate to chain snatching.

5. It is submitted that the FIR, which forms the genesis of the present criminal case is of 26.6.2018, lodged under Sections 41, 411 and 413 I.P.C., P.S. Kotwali, District Ghazipur. The first informant in the present FIR is one Divya Prakash Singh, Sub-inspector, Police Station- Kotwali, District Ghazipur, and it relates to an incident dated 25.6.2018, wherein the applicant and one other person have been named as accused. The FIR version relates to recovery of certain stolen property said to have been found in the possession of the accused which is stated to have been retained by the said persons by theft. It is submitted that the incident dated 29.3.2018, regarding which, the earlier FIR had been lodged, is referred to as one of the several acts of theft relating to which the stolen property had been recovered from the accused.

6. The aforementioned question as to when a second FIR was permissible, was subject matter of consideration in **Babubhai vs. State of Gujarat and others**1, wherein it was held that in case of a subsequent FIR, 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 same occurrence or in regard to the incident which are two or more parts of the same transaction, and in case where the version in the second FIR is different and they are in respect of two different incidents, the second FIR is permissible. It was held as follows :-

"21. In such a case 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 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 the two different incidents/crimes, the second FIR is permissible. In case in respect of the same incident the accused in the first FIR comes forward with a different version or counterclaim, investigation on both the FIRs has to be conducted. "

7. The permissibility of second second FIR was subject matter of consideration in **Nirmal Singh Kahlon vs. State of Punjab**2, wherein referring to an earlier decision in **Ram Lal Narang vs. State (Delhi Admn.)**3, it was opined that the second FIR would be maintainable where new discovery is made on factual foundations about a larger conspiracy. It was stated thus :-

"67. The second FIR, in our opinion, would be maintainable not only because there were different versions but when new discovery is made on factual

foundations. Discoveries may be made by the police authorities at a subsequent stage. Discovery about a larger conspiracy can also surface in another proceeding, as for example, in a case of this nature. If the police authorities did not make a fair investigation and left out conspiracy aspect of the matter from the purview of its investigation, in our opinion, as and when the same surfaced, it was open to the State and/or the High Court to direct investigation in respect of an offence which is distinct and separate from the one for which the FIR had already been lodged."

8. The question as to when registration of more than one FIR was permissible, again came up for consideration in the decision in **Anju Chaudhary vs. State of Uttar Pradesh and another**4, and it was held that the said question would be a mixed question of law and facts and the test of 'sameness' would have to be applied. Referring to the earlier decision in **T.T. Antony vs. State of Kerala**5 and reiterating that second FIR in respect of same offence or incident forming part of same transaction as contained in the first FIR, is not permissible, it was held that where the offence does not fall within the ambit of the first FIR, the second FIR would be permissible. The observations made in this regard in the decision of **Anju Chaudhary** *(supra)* are as follows :-

"15. It has to be examined on the merits of each case whether a subsequently registered FIR is a second FIR about the same incident or offence or is based upon distinct and different facts and whether its scope of inquiry is entirely different or not. It will not be appropriate for the court to lay down one straitjacket formula uniformly applicable to all cases. This will always be a mixed question of law and facts depending upon the merits of a given case."

9. A similar view was taken in an earlier decision in **Rameshchandra Nandlal Parikh vs. State of Gujarat and another**6, wherein the judgement of the High Court declining to exercise its powers under Section 482 Cr.P.C. and refusing to quash the subsequent complaints-FIRs for the reason that the subsequent complaints were not in relation to same offence or occurrence, was upheld, and it was stated as follows :-

"14. There is a further distinction in that while First C.R. No. 67 of 2001 pertained to cases concerning one Ketan Parikh and entities associated with him in the crime, the subsequent complaints pertained to other parties. Further, the FIR being investigated pertained only to criminal acts relating to the Mandvi Branch (Mumbai), while the subsequent complaints being investigated by the State Police pertained to criminal acts at the Shahibaug (Ahmedabad) branch of the Bank. In our view, the distinctions drawn by the High Court are fully justified. The High Court was right in observing that the FIRs, which were under challenge before it, were regarding independent and distinct offences. Hence, the FIRs could not be prohibited on the ground that some other FIR had been filed against the petitioner in respect of other allegations made against the petitioner.

15. Moreover, the High Court was correctly cognizant of limitations while exercising its powers under Section 482 CrPC, which should not in any event, be exercised lightly. Reading the impugned judgment of the High Court as a whole, we are satisfied that there is no scope for interference by us. The High Court was

justified in declining to exercise its powers under Section 482 CrPC and in refusing to interfere with the orders passed by the learned Chief Metropolitan Magistrate. Finally, considering the nature of the allegations involved and the facts and circumstances of the present case, we too are not inclined to exercise our extraordinary powers under Article 136 of the Constitution to interfere."

10. In **Awadesh Kumar Jha and others vs. State of Bihar**7, while again reiterating that there can be no second FIR in respect of same offence or occurrence or same transaction giving rise to one or more offences, it was held that where the substance of the allegation in the second FIR is different from the first FIR and the same is related to a different transaction, the second FIR would be permissible.

11. A view that a second FIR in respect of an offence which was different and distinct was permissible has again been reiterated in **Pattu Rajan vs. State of Tamil Nadu**8.

12. In a recent decision in **Prem Chand Singh vs. State of Uttar Pradesh and another**9 , it has been held that if the sub-stratum of the two FIRs is common, the proceedings consequent to the second FIR would be unsustainable.

13. In order to examine the impact of more than one FIRs, the Court would be required to look into the facts and circumstances of each case and then apply the 'test of sameness' to find out whether both the FIRs relate to the same incident and to the same occurrence and whether they are in regard to the incidents which are two or more parts of the same transaction, or they relate to two entirely distinct occurrences. It would be only if the second FIR relates to the same incident or where it can be demonstrated that its sub-stratum is the same as that the first FIR, an argument with regard to the criminal proceedings initiated pursuant thereto being vitiated, may be entertained.

14. It is, therefore, seen that lodging of two FIRs would not be permissible in respect of one and the same incident. This would not, however, encompass filing of counter FIR relating to the same and connected cognizable offence. What would be within the scope of prohibition is any further complaint against the same accused subsequent to registration of the case under the Code, for an investigation in that regard would have already commenced, and allowing registration of further complaints, would amount to an improvement of the facts as stated in the original complaint. In order to constitute the 'same transaction', the series of acts alleged against the accused must be connected together in some way by proximity of time, unity of place, purpose or design, and continuity of action. What would be necessary is to find out whether the offences alleged against the accused could be stated to be committed during the same transaction.

15. The question as to whether the subsequently registered FIR is the second FIR relating to the same incident or offence or is based upon distinct and different facts and whether its scope of enquiry is entirely different or not, would have to be examined on the facts and circumstances giving rise to the two FIRs.

16. In the facts of the present case, as pointed out by the learned Additional Advocate General, the two FIRs relate to different incidents having occurred at

different points of time and the same cannot be said to be parts of the same transaction. There is no material to suggest that the sub stratum of the second FIR is the same as that of the first FIR.

17. Counsel for the applicant has not been able to demonstrate that the two FIRs can be said to be related to the same incident or to the same transaction, as was sought to be contended by him. He has not been able to dispute the factual and the legal position pointed out by the learned Additional Advocate General, and has also not been able to point out any other ground which may warrant interference at this stage. He makes a prayer for withdrawal of the present application.

18. The present application under Section 482 Cr.P.C. stands dismissed, accordingly.

(2021)03ILR A480
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.02.2021

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Matter Under Article 227 No. 485 of 2021

Rajesh Kumar Gupta ...Petitioner
Versus
Smt. Poonam Devi ...Respondent

Counsel for the Petitioner:
Sri Abu Bakht, Sri Nitin Jain, Sri Pramod Kumar Jain (Senior Adv.)

Counsel for the Respondent:
C.S.C., Sri Siddharth Nandan

A. Constitution of India,1950-Article 227-application-Consolidation of suits and proceedings-rejection-the petitioner filed two suits against the respondent for seeking relief in the court having different jurisdiction-In previously instituted suit(Original Suit), he claimed relief for permanent injunction for restraining the tenant from obstructing the light and air facilities of the plaintiffs-the Subsequent Suit (SCC suit) pending before the Small Cause Court for eviction of the defendant/tenant for arrears of rent and constructions raised without the consent of the landlords-the judge, court of Small Causes cannot grant the relief claimed in the Original Suit-Section 10 C.P.C. would not apply, both the proceedings should be in suits between the same parties and it would not apply to proceedings initiated under any other Statute-Hence, no interference requires.(Para 3 to 12)

The Petition is dismissed. (E-5)

List of Cases cited: -

1. Anandan Gupta Vs Narain Agarwal & ors., (1984) 2 ARC 447

2. Chandra Swaroop Sinha Vs Smt. Manorama Singh, (1981) AIR Alld. 230

3. Ram Narain Gupta (Since deceased) & ors.Vs Hari Om Agarwal & anr.(2012) 1 ARC 664

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

1. Heard Sri Pramod Kumar Jain, learned Senior Counsel assisted by Sri Abu Bakht, learned counsel for the petitioner-tenant and Sri Siddharth Nandan, learned counsl for the respondent-landlord and perused the record.

2. Present petition has been filed challenging the impugned order dated 17.2.2020 passed by J.S.C.C./Civil Judge (S.D.), Deoria and the order dated 13.11.2020 passed by the District Judge, Deoria.

3. By the impugned order dated 17.2.2020 application being paper no.

110Ga filed by the petitioner-tenant herein for consolidation of two suits, being Original Suit No. 107 of 2013 (Rajesh vs. Poonam) filed by the petitioner for permanent injunction with SCC Suit No. 06 of 2017, has been rejected on the ground that the Courts are different and the parties are also different and the subject matter of the suit is also different. It was also noticed that SCC suit can be heard by Judge Small Causes Court only and therefore, consolidation cannot be permitted and accordingly, the said application was rejected. Revision filed against the same was also dismissed.

4. Challenging the impugned orders, submission of learned Senior Counsel is that subject matter of the suit is same and raising of wall A and B as indicated in the suit for injunction is substantial in nature and involved in both the cases. He has placed reliance on a judgement of this Court in *Anandan Gupta vs. Navin Agarwal and others,* 1984 (2) ARC 447.

5. Per contra, learned counsel for the respondents submits that both the courts are having different jurisdictions and both the suits cannot be tried together and the parties are also different. It is further submitted that subject matter of the suit is also different as in the original suit prayer for permanent injunction has been made and the SCC suit has been filed for rent and eviction, therefore, application filed in SCC suit for consolidation of suits has rightly been rejected by the courts below. He has placed reliance on a judgement of Hon'ble Division Bench of this Court in *Chandra Swaroop Sinha vs. Smt. Manorama Singh*, AIR 1981 Alld. 230 and on a judgement of Hon'ble Single Judge in *Ram Narain Gupta (since deceased) and others vs. Hari Om Agarwal and another*, 2012 (1) ARC 664.

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

7. It is not in dispute that previously instituted suit is the Original Suit No. 107 of 2013 seeking relief of permanent injunction and subsequently instituted suit is the SCC suit No. 6 of 2017 filed by the respondent-landlord herein rent and eviction.

8. Order IV-A inserted in State of UP vide UP Act 57 of 1976, Section 5 with effect form 1.1.1977 provides as under:

"1. Consolidation of suits and proceedings- When two or more suits or proceedings are pending in the same court, and the court is of opinion that it is expedient in the interest of justice, it may by order direct their joint trial, whereupon all such suits and proceedings may be decided upon the evidence in all or any such suits or proceedings."

9. The distinction between an original suit and SCC suit has been taken note in paragraph 10, 11, 15, 16 and 21 of Ram Narain Gupta (supra), which are quoted as under:

10. It will also be appropriate to refer to the provisions of Sections 15 as amended in the State and 16 of the Act which are as follows:-

"15. Cognizance of suits by Courts of Small Causes.--(1) A Court of Small Causes shall not take cognizance of the suits specified in the Second Schedule as suits expected from the cognizance of a Court of Small Causes.

(2) Subject to the exceptions specified in that Schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value

does not exceed five thousand rupees shall be cognizable by a Court of Small Causes:

Provided that in relation to suits by the lessor for the eviction of a lessee from a building after the determination of his lease or for recovery from him of rent in respect of the period of occupation thereof during the continuance of the lease, or of compensation for use and occupation thereof after the determination of the lease, the reference in this sub-section to five thousand rupees shall be construed as a reference of twenty-five thousand rupees.

Explanation.--For the purposes of this sub-section, the expression "building' has the same meaning as in Art. (4) in the Second Schedule.

16. Exclusive jurisdiction of Courts of Small Causes.-- Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable."

11. In the present, case the previously instituted suit is Original Suit No.197 of 2008. The relief claimed in this suit is for permanent injunction and for restraining the defendant-tenant from obstructing the light and air facilities of the plaintiffs. The subsequent suit is SCC Suit No.169 of 2008 pending before the Judge, Court of Small Causes for eviction of the defendant as he was in arrears of rent and had raised constructions without the consent of the landlords. The subsequent suit is required to be decided in a summary manner provided under the Act and the reliefs in the two suits is different.

15. The same is the position in the present case. The Judge, Court of Small Causes cannot grant the relief claimed in the Original Suit. It is for this reason that the application filed by the defendant for stay of the proceedings in the subsequent suit had been rejected.

16. The matter can also be examined from another aspect as to whether Section 10 CPC would be applicable to proceedings before the Judge, Court of Small Causes.

21. The aforesaid decisions clearly hold that for Section 10 CPC to apply, both the proceedings should be in suits between the same parties and it will not apply to proceedings initiated under any other Statute. In the present case SCC Suit has been filed under the provisions of the Act. It has, therefore, to be held that Section 10 CPC will not apply to proceedings initiated under the Act.

(Emphasis supplied)

10. It cannot, therefore, be disputed that both the suits are pending in different courts seeking different reliefs. The application was filed before the Judge Small Causes Court, which has no jurisdiction to decide the original suit for injunction.

11. For the discussions made hereinabove, I find that the case relied by the learned counsel for the petitioner in Anandan Gupta (supra) is of no help to him.

12. In such view of the matter, I do not find any good ground to interfere in the impugned orders.

13. Present petition lacks merits and is accordingly dismissed. No order as to costs.

(2021)03ILR A482
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.02.2021

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Matter Under Article 227 No. 1008 of 2021
(Civil)

Shyam Sunder Verma ...Petitioner
Versus
Jagat & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shashi Prakash Misra, Sri H.N. Singh Sr. Advocate

Counsel for the Respondents:
C.S.C., Sri Kshitij Shalendra

A. Constitution of India, 1950-Article 227 & U.P. Municipalities Act,1916-Section 19-desposition of election petition-after interim orders passed on 31.07.2020, various dates were fixed in the matter but at no point of time, any prayer has been made for extension of the interim order-in absence of a speaking stay order after a lapse of six months from the date of judgment or from the date of the stay order whichever is later would not bind the trial court-the aggrieved litigating party is bound to obtain a fresh speaking stay order in terms of the Supreme Court judgment and not wait until the trial resumes after six months-non-speaking order extending the stay, though being an order of Superior Court, would not bind the trial court in view of the law declared in Asian Resurfacing-all interim orders staying the trial would stand automatically vacated after lapse of six months unless extended by a speaking order in exceptional case-order passed is only interlocutory in nature-the proceedings before the Election Tribunal is continuing-the order passed by Election Tribunal requires no interference.(Para 1 to 15)

The Petition is dismissed. (E-5)

List of Cases cited: -

1. Asian Resurfacing of Road Agency Pvt. Ltd. & anr. Vs C.B.I. (2018) AIR SC 2039

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

1. An amendment application supported by an affidavit has been filed today in the Court by the counsel for the petitioner and the same is taken on record.

2. By way of the aforesaid learned counsel for the petitioner prays for amendment in the body of the petition by adding Paragraph Nos.13-A, 13-B & 13-C after paragraph 13 and 20-A after paragraph No.20 and grounds Nos V(A) and V(B) after ground No.V and prayer clause of the petition by adding prayer No.(i)(a) and (1)(b) after prayer No.(i).

3. Learned counsel for respondent has no objection if the amendment application is allowed as the amendments are formal in nature.

In view of the above, Amendment Application is allowed.

4. Counsel for the petitioner is directed to carry out necessary amendments in the body of the petition and prayer clause of the petition during the course of the day.

Order on the Petition

1. Heard Sri H.N. Singh, learned Senior Counsel assisted by Sri Shashi Prakash Misra, learned counsel for the petitioner and Sri Kshitij Shailendra, learned counsel for the respondent.

2. The petitioner has preferred the present petition under Article 227 of the Constitution of India with the following prayers:-

"(i) Issue a suitable order or direction setting aside the impugned judgement and order dated 02.02.2021 passed by the Additional District & Sessions Judge(POCSO Act-1) Sant Kabir Nagar in Misc. Case No.37 of 2020 arising out of Election Petition No.01 of 2017 (Jagat Vs. Shyam Sundar and others).

(i)(a) Issue a suitable order or direction setting aside the impugned order dated 05.02.2021 passed by the District Election Officer/District Magistrate, Sant Kabir Nagar and all further proceedings consequent thereupon including the result of recounting.

(i)(b) Issue a suitable order or direction directing the respondents not to give effect to the impugned order dated 05.02.2021 referred to above and stay all further proceedings consequent thereupon including the effect of recounting during the pendency of the petition before this Hon'ble Court.

(ii) Issue a suitable order or direction directing the respondents not to give effect to the impugned judgement and order referred to above and stay all further proceedings consequent threreupon during the pendency of the petition before this Hon'ble Court.

(iii) Issue any other order or direction which this Hon'ble Court may deem fitand proper in the facts and circumstances of the case.

(iv) Award the costs of the petition."

3. Facts in brief as contained in the petition are that the present petitioner contested the election for the post of President of the Nagar Panchayat, Khalilabad, District Sant Kabir Nagar which was held on 26.11.2017. The petitioner was elected as President to the aforesaid Nagar Panchayat. The rival of the petitioner namely Jagat son of Sri Dhoop Chandra/respondent No.1 has preferred an Election Petition being Election Petition No.01 of 2017 (Jagat Vs. Shyam Sundar and others). The Election Tribunal/Additional Sessions Judge (POSCO Act-1) Sant Kabir Nagar has finally allowed the aforesaid Election Petition vide its judgement and order dated 07.03.2020. By the aforesaid order, directions were given to the Returning Officer to re-count the votes and declare the result. Further directions were given that the results of the election which was already declared, will be subject to final result declared by the returning officer after recounting of votes and the Election Tribunal further directed the Prescribed Authority/Election Officer/District Magistrate Sant Kabir Nagar to implement the aforesaid order within ten days. It is further directed that till the aforesaid result is declared, petition will continue to hold the post of President, Nagar Panchayat.

4. Aggrieved against the aforesaid order, a petition under Article 227 No.2270 of 2020 was filed by the petitioner before this Court. This Court after hearing arguments of learned counsel for the petitioner an respondent No.1 in that petition stayed the effect and operation of the order dated 07.03.2020 passed by the Election Tribunal till further orders of this Court. After passing the aforesaid order of this Court, various dates were fixed in the matter by the Election Tribunal in the aforesaid petition and ultimately, on 02.02.2021, an order was passed by the Election Tribunal which is under challenge in this petition.

5. It is argued by Sri H.N. Singh, learned Senior Counsel that the order passed by the Election Tribunal is arbitrary, unjust and illegal and is liable to be set aside. It is argued that once the order passed by the Election Tribunal dated 07.03.2020 was stayed by this Court, there is no rhyme and reason to the Election Tribunal, to pass any fresh order. It is further argued that findings recorded by the Election Tribunal that the interim order dated 31.07.2020 passed by this Court in the Petition No.2270 of 2020 came to an

end after expiry of the period of six months is absolutely illegal. It is further argued that paragraph 35 of the judgment of the Supreme Court in the case of ***Asian Resurfacing of Road Agency Pvt. Ltd. & Anr. Vs. Central Bureau of Investigation reported in AIR 2018 SC 2039*** will not apply in the facts and circumstances of the case. It is argued that the paragraph 35 of the ***Asian Resurfacing of Road (supra)*** which was relied upon by the Election Tribunal will apply only in those cases where proceedings are pending but insofar as the present case is concerned, proceedings of the Election Petition has already been came to an end on 07.03.2020. Hence there is no occasion for the Election Tribunal to pass the order impugned. It is further argued that in view of the fact that an interim order was granted in favour of the petitioner in the Petition No.220 of 2020, the order impugned dated 02.02.2021 is liable to be set aside.

6. On the other hand, it is argued by Sri Kshitish Shalendra lerned counsel appearing for the contesting respondent that the order passed by the Election Tribunal is absolutely perfect and valid and does not call for any intereference by this Court. A preliminary objection has also been raised by him that the present petition filed by the petitioner in not at all maintainable and only appropriate remedy available to the petitioner is to file a stay extension application in his earlier petition. It is argued that the earlier petition filed by the petitioner was listed on various occasions but neither any stay extension application was moved nor any prayer has been made by the counsel for the petitioner in that petition for extension of the interim order. It is further argued that after the judgment was delivered by the Hon'ble Supreme Court in the case of ***Asian Resurfacing of Road (supra)***, certain more directions were given by a three Judges Bench of Hon'ble Apex Court on October 145 2020 in Misc. Application No.1577 of 2020 filed in ***Asian Resurfacing of Road (supra).***

7. It is further argued that the Election Petition is still pending consideration and no final decision has been taken on the same more specially in view of the fact that after the order dated 7.3.2020 was passed by the Election Tribunal, various dates were fixed in the matter from time to time but at no point of time, any objection was raised by the counsel appearing on behalf of the petitioner that the proceedings could not be continued due to the fact that the Election Tribunal has become functus offico after the judgment and order dated 07.03.2020 has been passed.

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

9. From perusal of the order dated 07.03.2020 passed by the Election Tribunal by which the directions were issued to the Returning Officer to recount the votes and declare the result accordingly. Aggrieved with the aforesaid order, a petition under Article 227 No.2270 of 2020 was filed by the present petitioner. In the said petition, an interim order was granted by a Co-ordinate Bench of this Court on 31.07.202 which is quoted below:-

"Heard Sri H.N. Singh, Senior Advocate assisted by Sri Shashi Prakash Mishra, learned counsel for the petitioner.

The petitioner is aggrieved by an order dated 07.03.2020 passed by the learned Additional District Judge/District & Sessions Judge (POCSO) Act-1, Sant Kabir Nagar in Election Petition No. 1 of 2017, whereby he has ordered that the Election Petition stands decided in terms that the Chief Election Officer (Local Body/Prescribed Authority), Sant Kabir Nagar shall undertake under his personal

supervision, a recount of votes and declare the result thereof. According to the directions carried in the order, some eight directions in the matter of recount have been issued, that read as follows:

"1. मतगणना परिणाम में नगर पालिका परिषद् खलीलाबाद के चुनाव दिनांकित 26.11.2017 में नगर निकाय खलीलाबाद में कितने मतादाता थे,उनका स्पष्ट उल्लेख किया जायेगा, एवं

2. मतगणना परिणाम में यह भी उल्लेख किया जायेगा की नगर निकाय चुनाव में कितने मतदातागण ने अपने मत का प्रयोग किया तथा कितने मतदातागण ने मताधिकार का प्रयोग नहीं किया तथा कितने मतदातागण ने मताधिकार का प्रयोग नहीं किया, एवं

3. मतगणना परिणाम में यह भी उल्लेख किया जायेगा की चुनाव में प्रत्येक बूथ पर कितने मतो को उपयोग में नहीं लाया गया है, एवं

4. पीठासीन अधिकारी द्वारा मतगणना के समय प्रयोग में लाये गये अभिलेखों से प्रयुक्त एवं अप्रयुक्त मतों का मिलान किया जायेगा, एवं

5. प्रत्येक अवैध मत का पृथक-पृथक वर्णन किया जायगा कि अमुख क्रम संख्या का अवैध मत किस आधार पर अवैध घोषित किया गया है, एवं

6. यह प्रयास किया जायेगा कि विहित प्राधिकारी एक विस्तृत आदेश पारित करे, जिससे स्पष्ट परिलक्षित हो एवं पक्षकार यह जान सके कि कौन सा मत किस आधार पर अवैध घोषित किया गया है, एवं

7. समस्त कार्यवाही सी0 सी0 टी0 वी0 कैमरे की निगरानी में संपन्न की जावेगी मतगणना की समस्त कार्यवाही की विडियोग्राफी भी की जाएगी एवं अवैध मतों की विशेष रुप से वीडियोग्राफी की जाएगी ताकि उनके अवैध घोषित होने का कारण जाना जा सके, वीडियोग्राफी में संकलित वीडियो की एक प्रति सील बंद होकर पत्रावली में दाखिल की जाएगी, एवं

8. उपरोक्त घोषित परिणाम पूर्व के मतगणना परिणामों पर प्रभावी होगा तद्नुसार नगर पालिका परिषद्, खलीलाबाद के अध्यक्ष पद के निर्वाचन का परिणाम पुनः घोषित किया जायेगा। तब तक वर्तमान व्यवस्था जारी रहेगी।"

"The submission of Sri H.N. Singh, learned Senior Counsel is that the disposition of the Election Petition by the Additional District Judge sitting as the Election Tribunal under Section 19 of the U.P. Municipalities Act, 1916 is manifestly illegal. The orders that can be passed by the Additional District Judge, sitting as the Election Tribunal, are specified by the Act of 1916, under Section 25 of the Act, as also Section 26. It is submitted by learned Senior Advocate that a reading of Section 25 of the Act shows that the District Judge may, after hearing parties and holding inquiry, dismiss the petition and under Sub-section (2) of Section 25 declare a casual vacancy to have been created or grant recriminatory relief under Sub clause (b) of sub Section (2) of Section 25 of the Act, declaring another person elected. However, an order of the kind impunged, in the submission of learned Senior Advocate, cannot be passed where no order has been passed by the learned District Judge in terms of Section 25 of the Act but he has delegated all his powers of determination to the Chief Election Officer, requiring him to do a recount and declare the result of the elections afresh. It is also submitted that one of the directions made by the District Judge that recount is to be done under the eye of a C.C.T.V. Camera, violates the principle of secrecy of ballet, and that on that count also, the impunged order is manifestly illegal.

Sri Markanday Rai, learned counsel appearing on behalf of respondent no. 1 submits that the impugned order is not a final order. Even though he accepts that the the learned Additional District Judge says that the Election Petition stands decided, he says that when a final order is passed a writ petition would lie to this Court. But, for the present, only a Review petition can be moved by the petitioner. A prima facie case is made out.

Admit.

Issue notice.

Sri Markanday Rai, Advocate accepts notice on behalf of respondent no. 1. He is granted three weeks' time to file a counter affidavit.

Steps be taken to serve the other respondents within a week by RPAD.

List for orders on 24.08.2020 in the additional cause list alaong with a report regarding service and status of pleadings.

Civil Misc. Stay Application No. 1 of 2020

Issue notice.

Sri Markanday Rai, Advocate accepts notice on behalf of respondent no. 1.

Until further orders, operation of the impugned order dated 07.03.2020 passed by the Election Tribunal/ Additional District & Sessions Judge (POCSO Act)-1, Sant Kabir Nagar in Election Petition No. 01 of 2017 Jagat vs. Shyam Sunder Verma and others shall remain suspended."

10. Vide order dated 10.02.2021, entire records of the aforesaid petition was called for by this Court for perusal. From perusal of the same, it is clear that after interim order dated 31.07.2020, various dates were fixed in the matter but at no point of time, any prayer has been made for extension of the interim order. It further reveals that the lastly, the aforesaid petition was listed on 11.1.2020. On the said date, matter was fixed in the week commencing from 22.03.2021 but even on the said date, no prayer was made by the counsel for the petitioner for extension of the interim order dated 31.07.2020. It further reveals from perusal of the record that no application whatsoever has been filed by the petitioner in that petition for extension of interim order specially in view of the law laid down by the Hon'ble Supreme Court in the case of Asian Resurfacing of Road (supra). Paragraph 35 of the aforesaid judgement which was relied upon by the Court below is reproduced below:-

35. In view of above, situation of proceedings remaining pending for long on account of stay needs to be remedied. Remedy is required not only for corruption cases but for all civil and criminal cases where on account of stay, civil and criminal proceedings are held up. At times, proceedings are adjourned sine die on account of stay. Even after stay is vacated, intimation is not received and proceedings are not taken up. In an attempt to remedy this, situation, we consider it appropriate to direct that in all pending cases where stay against proceedings of a civil or criminal trial is operating, the same will come to an end on expiry of six months from today unless in an exceptional case by a speaking order such stay is extended. In cases where stay is granted in future, the same will end on expiry of six months from the date of such order unless similar extension is granted by a speaking order. The speaking order must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalized. The trial Court where order of stay of civil or criminal proceedings is produced, may fix a date not beyond six months of the order of stay so that on expiry of period of stay,

proceedings can commence unless order of extension of stay is produced.

11. He further relied upon the order dated October 15, 2020 The three Judges Bench of Hon'ble Apex Court made following observations in Misc. Application No. 1577 of 2020:-

"We must remind the Magistrates all over the country that in our pyramidical structure under the Constitution of India, the Supreme Court is at the Apex, and the High Courts, though not subordinate administratively, are certainly subordinate judicially. This kind of orders fly in the face of para 35 of our judgment. We expect that the Magistrates all over the country will follow our order in letter and spirit. Whatever stay has been granted by any court including the High Court automatically expires within a period of six months, and unless extension is granted for good reason, as per our judgment, within the next six months, the trial Court is, on the expiry of the first period of six months, to set a date for the trial and go ahead with the same.

12. He further relied upon an order dated 14.01.2020 passed in Contempt Application (Civil) No.204 of 2020 (Syed Raees Ahmad Vs. Om Prakash, Special Judge, S.C./S.T. Act. In the aforesaid judgement following principles were laid down in view of the judgement of Hon'ble Apex Court in the case of Asian Resurfacing of Road (supra) :-

(i) The trial court and the Superior Court is bound by the law declared by the Supreme Court in Asian Resurfacing;

(ii) It is incumbent upon the party in whose favour the stay order is operating to approach the Superior Court/High Court, as the case may be, and obtain a speaking order in terms of Asian Resurfacing;

(iii) In absence of a speaking stay order after a lapse of six months from the date of judgment rendered in Asian Resurfacing or from the date of the stay order whichever is later would not bind the trial court;

(iv) Asian Resurfacing is judgment in rem; the aggrieved litigating party is bound to obtain a fresh speaking stay order in terms of the Supreme Court judgment and not wait until the trial resumes after six months;

(v) Non speaking order extending the stay, though being an order of the Superior Court/High Court, would not bind the trial court in view of the law declared in Asian Resurfacing;

(vi) All interim orders staying the trial would stand automatically vacated after lapse of six months unless extended by a speaking order in exceptional case;

(vii) Where the trial court has proceeded with the trial following Asian Resurfacing/High Court Circular, that would not preclude the aggrieved party to the trial to obtain a fresh speaking stay order from the Superior Court/High Court.

13. It further reveals from perusal of the record that after the interim order was granted by this Court on 31.07.2020, various dates were fixed in the Election Petition by the Election Tribunal but at no point of time any objection was raised by the counsel for the petitioner that the proceedings should not be permitted to go ahead in view of the order dated 31.07.2020 by which the proceedings were stayed. From perusal of the record, this Court is of the opinion that the proceedings before the Tribunal is continuing even today and the order dated 07.03.2020 is only inter-locatory in nature.

14. In this view of the matter, I am of the opinion that the order passed by this Election Tribunal dated 02.02.2020 is absolutely perfect and does not call for any interference by this Court.

15. The petition has no merit and liable to be dismissed and the same is hereby dismissed. No order as to costs.

(2021)03ILR A489
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.02.2021

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Matter Under Article 227 No. 1646 of 2020

Hafeez & Ors. ...Petitioners
Versus
Digvijay Singh & Ors. ...Respondents

Counsel for the Petitioners:
Smt. Rama Goel Bansal

Counsel for the Respondents:
Sri Rishikesh Tripathi

A. Constitution of India,1950,-Article 227 & Provincial Small Cause Court Act, 1887-Section 15(1) -maintainability of suit-suit was contested by the tenant mainly on the ground that the house was very old and in the last rains substantial part of the house had fallen down and was not left in liveable condition-therefore, tenant sought permission from the landlord to raise construction-such permission could not be proved by the tenant-no notice was given to the landlord u/s 29(2) of the Act 13 of 1972-perusal of definition of building given in Section 3(i) of the Act and Article 4 of 2nd Schedule of Section 15 of the PSCC Act 1887 (UP Amendment) clearly shows that the building means roofed structure and includes land including any garden, garage, outhouse and land appurtenant to such building-In the present case, building includes fo land beneath i.e. over which the construction/ structure was existing was under tenancy-It is not even the case of petitioner that the plaintiff is not the owner of the land and the building existing thereon of which he was the tenant-the suit is maintainable and court below committed no jurisdictional error-the tenant shall handover the peaceful possession of the premises in question to the landlord and shall pay entire decretal amount within a period of two months.(Para 1 to 19)

The Petition is dismissed. (E-5)

List of Cases cited: -

1. Munnu Yadav Vs Ram Kumar Yadav & anr.,(2020) 1 ALJ 316

2. Hindustan Petroleum Corp. Ltd. Vs Dilbahar Singh (2014) 9 SCC 78

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

1. Heard learned counsel for the petitioners and learned counsel appearing for the respondents.

2. Present petition has been filed for setting aside the judgment and decree dated 22.1.2020 passed by the Additional District Judge, Court No. 3, Jhansi in SCC Revision No. 17 of 2019 as well as judgment and decree dated 8.4.2019 passed by the Judge Small Causes Court, Jhansi in SCC Suit No. 10 of 2009.

3. Shorn of details, the facts of the case in brief are that the suit was filed by the plaintiff on the ground that they are the owner of House No. 646, Mohalla Thakuryana, Puliya No. 9, Jhansi. Reference was made to earlier litigation in regard to the same property. It is alleged that the house was very old, which

consisted four rooms, one kitchen, latrine and courtyard. The default in making payment of rent was also claimed. It was alleged that the house was demolished by the tenant on 20.11.2008 and when the defendants tried to raise constructions, injunction suit was filed by the plaintiff, wherein interim order was granted in favour of the plaintiff. A notice was issued to the tenant, which was replied by the tenant. Thereafter, when the rent was not paid and the property was not vacated the suit was filed. The suit was contested by the tenant mainly on the ground that the house was very old and in the last rains substantial part of the house had fallen down and was not left in liveable condition. Therefore, he obtained oral permission from the plaintiffs and Mahendra Singh, who permitted tenants to raise construction and with this permission two khaprail roofed rooms were made at the same place and no demolition or material alteration was done by the tenant and that no rent is due.

4. The trial court framed five issues. (1) whether the notices given to the defendant is valid; (2) whether the defendant has raised constructions and has materially altered the premises in question without permission of the landlord; (3) whether any default in payment of rent was committed; (4) whether the defendants are entitled for benefit of Section 20(4) of the UP Act 13 of 1972 (hereinafter referred to as the Act) and; (5) relief, if any.

5. On the issue of notice it was found that the notice was duly received by the tenant and was also replied; on the issue of material alteration it was found that the case of the defendant himself is that the house had fallen down due to excessive rains and was not in liveable condition and therefore, oral permission was sought from the plaintiffs and Mahendra Singh s/o Dwarika Prasad, which was granted by them and thereafter two khaprail rooms were constructed. In view of this it was found that the defendant has raised construction without written permission of the plaintiff and has materially changed the tenanted accommodation; on the issue regarding default in payment of rent and extension of benefit of Section 20(4) of the Act it was found that the tenant failed to prove that he had paid the rent and therefore, the benefit of Section 20(4) of the Act was refused and accordingly, the relief was granted in favour of the plaintiff by directing the eviction, payment of arrears of rent, payment of damages @ Rs. 100/- per day. The revision filed by the tenant was also dismissed by the court below by recording finding that there is no error in the judgment of trial court, therefore, no interference is warranted.

6. Challenging the impugned orders submission of learned counsel for the petitioners is that it was alleged that the building was demolished by the tenant-petitioner herein whereas notice was given to vacate the building, therefore, the Act would not apply and notice is not valid. Attention was drawn to the plaint allegation that building has been demolished and now exist a plot, therefore, the suit itself before Judge, Small Causes Court was not maintainable. It is further asserted that since a declaration was sought that the plaintiff be declared as a tres-passer the suit itself before the Judge, Small Causes Court was not maintainable as the civil court alone would have the jurisdiction to make such declaration. It was further submitted that now the property is in the shape of plot, therefore, material alteration also could not be seen. It is further submitted

that concurrent findings by both the courts below are perverse and suffers from material irregularities and illegalities. Attention was drawn to Article 4 of 2nd Schedule of Section 15(1) of the Provincial Small Causes Court Act, 1887.

7. Per contra, learned counsel appearing for the landlord-respondent submits that the suit was perfectly maintainable. He submits that it is an admitted fact that constructions were raised by the tenant-petitioner without taking written permission of the landlord and that even if the building has fallen down due to excessive rainfall, no notice was given to the landlord as required under Section 29 (2) of the Act 13 of 1972. He further submits that the record clearly reflects that the fact that the accommodation was a building, which was demolished by the tenant, is admitted to the tenant-petitioner and the only case put forward by the tenant-petitioner in the written statement is that the construction was raised with the oral permission of the landlord. He submits that such oral permission will not help the tenant-petitioner, moreso, it was specifically stated that no such oral permission was granted.

8. I have considered the submissions and have perused the record.

9. Before proceeding further it would be relevant to take note of relevant provisions of Sections 3(i) and 29 of the UP Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 and Section 15 of the U.P. Provincial Small Causes Court Act, 1887 and Article 4 of 2nd Schedule of Section 15 of Provincial Small Causes Court Act, 1887 (UP Amendment by Act No. 37 of 1972) (w.e.f. 20.9.1972), which are quoted as under:-

"Sections 3 (i) and 29 of the Act of 1972

3. (i) "building", means a residential or non-residential roofed structure and includes-

(i) any land (including any garden), garages and out-houses, appurtenant to such building;

(ii) and furniture supplied by the landlord for use in such building;

(iii) any fittings and fixtures affixed to such building for the more beneficial enjoyment thereof;

29. Special Protection to tenants of buildings destroyed by collective disturbances etc. - (1) Where in consequence of the commission of mischief or any other offence in the course of collective disturbances, any building under tenancy is wholly or partly destroyed, the tenant shall have the right to re-erect it wholly or partly, as the case may be, at his own expenses within a period of six months from such injury :

Provided that if such injury was occasioned by the wrongful act or default of the tenant he shall not be entitled to avail himself of the benefit of this provision.

(2) Where in consequence of fire, tempest, flood or excessive rainfall, any building under tenancy is wholly or partly destroyed the tenant shall have the right to re-erect or repair it wholly or partly, as the case may be, at his own expense after giving a notice in writing to the landlord within a period of one month from such injury :

Provided that the tenant shall not be entitled to avail himself of the benefit of this provision-

(a) if such injury was occasioned by his own wrongful act or default ; or

(b) in respect of any re-erection of repair made before he has given a notice as aforesaid to the landlord or before the

expiration of a period of fifteen days after such notice, or if the landlord in the meantime makes an application under section 21, before the disposal of such application ; or

(c) in respect of any re-erection or repair made after the expiration of a period of six months from such injury or, if the landlord has made any application as aforesaid, from the disposal thereof.

(3) Where the tenant, before the commencement of this Act, has made any re-erection or repair in exercise of his rights under section 19 of the old Act, or after the commencement of this Act makes any re-erection in the exercise of his right under sub-section (1) or sub-section (2) ,-

(a) the property so re-erected or repaired shall be comprised in the tenancy ;

(b) the tenant shall not be entitled, whether during the tenancy or after its determination, to demolish the property or parts so erected or repaired or to remove any material used therein other than any fixtures of a movable nature ;

(c) Notwithstanding, anything contained in sub-section (2) of section 2, the provisions of this Act shall apply to the building so re-erected :

Provided that no application shall be maintainable under section 21 in respect of any such building on the ground mentioned in clause (b) of sub-section (1) thereof within a period of three years from the completion of such re-erection."

Section 15 of PSCC Act, 1887 (UP Amendment)

15. Cognizance of suits by Courts of Small Causes.--(1) A Court of Small Causes shall not take cognizance of the suits specified in the second schedule as suits excepted from the cognizance of a Court of Small Causes.

(2) .....

(3) .....

Second Schedule (Section 15) (UP Amendment)

Article 4. a suit for the possession of immovable property or for the recovery of an interest in such property, but not including a suit by a lessor for the eviction of a lessee from a building after the determination of his lease and for the recovery from him of compensation for the use and occupation of that building after such determination of lease.

Explanation.- For the purposes of this Article, the expression "building" means a residential or non-residential roofed structure, and include any land (including any garden), garages, out-houses, appurtenant to such building, and also includes any fittings and fixtures affixed to the building for the more beneficial enjoyment thereof."

10. On perusal of record I find that paragraph nos. 1, 2 and 3 of the plaint have been admitted in the written statement by the tenant. Insofar as existence of building is concerned, it has been categorically admitted in written statement that there had been some litigation earlier also and in paragraph nos. 23 to 25 of the written statement it was asserted that the house was very old and roof was made of khaprail and ballis were used and that a considerable portion of the accommodation had fallen down due to rain and the house was beyond repair and could not have been brought in liveable condition even after repairs, therefore, permission was sought from the landlord, which was granted orally and it is only thereafter room were constructed on the same place where the earlier accommodation was existing. It is further asserted in the written statement that the house was more than 100 years old and the defendant has not demolished any part deliberately. Thus, in the written statement

it has been admitted that the tenancy was of an accommodation, which was demolished or as alleged fallen down in the rains, however, as per the assertions made in the plaint, at the time of filing of the suit the same was in the shape of a plot and therefore, since status of the petitioner was that of a tenant when the suit was filed before the Court of Judge Small Causes.

11. It is settled law that the land is included as a part of tenancy. Although it is alleged that the accommodation was not demolished but had fallen down but even if the accommodation had fallen down, admittedly, no notice under Section 29 (2) of the Act was given. Admitted case of the petitioner was that the house got damaged due to rains and was beyond repairs and was constructed with the oral permission of the landlord, however, even such permission could not be proved by the tenant.

12. Perusal of definition of building given in Section 3(i) of the Act and Article 4 of 2nd Schedule of Section 15 of the PSCC Act (UP Amendment) clearly shows that the building means roofed structure and includes land including any garden, garage, outhouse and land appurtenant to such building. In the present case, building includes of land beneath i.e. over which the construction / structure / building was existing was under tenancy. It is not even the case of the petitioner that the plaintiff is not the owner of the land and the building existing thereon of which he was the tenant. Even from this point of view the suit in the circumstances as stated in the plaint and as admitted in the written statement was clearly maintainable and there had been no jurisdictional error on the part of the courts below to entertain and decide the same, moreso, no such objection was taken before the courts below.

13. A reference may also be made to judgment of this Court in the case of **Munnu Yadav vs. Ram Kumar Yadav and another 2020 (1) ALJ 316**. Paragraphs 14 to 18 whereof are quoted as under:-

"14. The word "means" and "includes" used in Section 3(i) of the Act implies that the definition is exhaustive with respect to "residential or non residential roofed structure" unless the context otherwise requires but it is illustrative with respect to the inclusion part given in sub clauses i, ii and iii. The phrase "unless the context otherwise requires" indicates that while construing, interpreting and applying the definition clause, the Court has to keep in view the legislative mandate and intent and to consider whether the context requires otherwise. Where the definition is preceded with the phrase "unless the context otherwise requires" the connotation is that normally the definition as given in Section should be applied and given effect to but it may be departed from if the context otherwise requires.

15. From bare perusal of the definition of "building" in Section 3(i) of the U.P. Act 13 of 1972, it is clear that unless the context otherwise requires, "building" means a residential or non residential roofed structure and includes any land (including any garden), garages and out-houses, appurtenant to such building; any furniture supplied by the landlord for use in such building and any fittings and fixtures affixed to such building for the more beneficial enjoyment thereof. As held by Hon'ble Supreme Court in Ashok Kapil (supra) a structure or edifice enclosing a space within its walls, and usually, but not necessarily, covered with a roof is a building. Roof is not necessary and indispensable adjunct for a building because there can be roofless buildings.

The "Building" as defined in Section 3 (i) is a residential or non-residential roofed structure and includes any land (including any garden), garages and out-houses, appurtenant to such building. Therefore, an open land including any garden, garages and out-houses, appurtenant to a roofed structure for its beneficial engagement shall be a building within the meaning of Section 3(i) of U.P. Act 13 of 1972.

16. In the present set of facts the small accommodation let out by the landlord-respondent to the defendant-revisionist is an integral part of the building bearing municipal No.76/184, Sabji Mandi, Kanpur Nagar. Therefore, the disputed accommodation, even though is roofless; is part of the house in question. Consequently, the disputed accommodation let out by landlord-respondent to the tenant-revisionist is "building" as defined under Section 3(i) of the U.P. Act 13 of 1972. Question no. (a) is answered accordingly.

17. In view of my answer to the question (a) there is no need to decide question (b) yet it would be suffice to observe that admittedly the competence of the court below to decide the SCC Suit in question was not raised by the tenant-revisionist before the court below. Therefore, in view of the provisions of Section 21 of the Civil Procedure Code and the law settled by Hon'ble Supreme Court in the case of Om Prakash Agarawal (supra), such an objection can not be raised at this stage in Revision under Section 25 of the Act, 1887, inasmuch as such an objection could have been taken by the tenant-revisionist in the Court of first instance at the earliest possible opportunity.

18. For all the reasons aforestated, it is held that the disputed accommodation is a building within the meaning of Section 3(i) of the U.P. Act 13 of 1972 which was let out by the landlord-respondent to the tenant-revisionist and the tenant-revisionist defaulted in payment of rent resulting in determination of tenancy. Therefore, the SCC Suit for eviction has been lawfully decreed by the impugned judgment. The findings recorded by the court below on the issues before it are the findings of fact which do not suffer from any perversity. Therefore, these findings of fact can not be interfered with."

14. Insofar as jurisdictional error or the defect in the notice is concerned, suffice to note that no such ground was taken before the trial court or even before the revisional court as it is reflected from perusal of the memo of revision annexed with the paper book. Therefore, the argument of learned counsel for the tenant-petitioner raised before this Court for the first time that the suit itself was not maintainable and the judgments suffers from jurisdictional error has no substance and is liable to be rejected.

15. Therefore, I do not find any good ground to entertain such objection taken for the first time before this Court filed under Article 227 of the Constitution of India.

16. In any view of the matter, I do not find any jurisdictional error in the judgments of the courts below so as to interfere in the concurrent findings recorded by the courts below in exercising powers under Article 227 of the Constitution of India.

17. Insofar as findings of facts are concerned, a reference may also be made in this regard to the Constitutional Bench judgment of the Hon'ble Apex Court in the case of **Hindustan Petroleum Corporation Ltd. Vs. Dilbahar Singh**

(2014) 9 SCC 78 according to which no interference is warranted in such findings of fact. It is also settled law that jurisdiction under Article 227 of the Constitution of India is akin to revisional jurisdiction and the scope of interference in the findings of fact is also very limited.

18. In such view of the matter, I do not find any jurisdictional error or perversity in the findings recorded and the conclusion drawn by the courts below. Present petition is devoid of merits and is accordingly dismissed.

19. Having considered the facts and circumstances of the case, subject to filing of an undertaking by the petitioner-tenant before the Court below, it is provided that:

(1) The tenant-petitioner shall handover the peaceful possession of the premises in question to the landlord-opposite party on or before 31.8.2021;

(2) The tenant-petitioner shall file the undertaking before the Court below to the said effect within one month from today;

(3) The tenant-petitioner shall pay entire decretal amount within a period of two months from the date of receipt of copy of this order.

(4) The tenant-petitioner shall pay damages as held by the court below per month by 07th day of every succeeding month and continue to deposit the same in the Court below till 31.8.2021 or till the date he vacates the premises, whichever is earlier and the landlord is at liberty to withdraw the said amount;

(5) In the undertaking the tenant-petitioner shall also state that he will not create any interest in favour of the third party in the premises in dispute;

(6) Subject to filing of the said undertaking, the tenant-petitioner shall not be evicted from the premises in question till the aforesaid period;

(7) It is made clear that in case of default of any of the conditions mentioned herein-above, the protection granted by this Court shall stand vacated automatically.

(8) In case the premises is not vacated as per the undertaking given by the petitioner, he shall also be liable for contempt.

20. There shall be no order as to costs.

(2021)03ILR A495
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Matter Under Article 227 No. 3175 of 2020(Crl.)

Sanjay Sharma & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Mohd. Kalim, Sri Abrar Ahmad Siddiqui, Sri Narendra Kumar Pandey

Counsel for the Respondents:
G.A., Sri Prashant Sharma

A. Constitution of India, 1950-Article 227 & Indian Penal Code,1860-Sections 376,120-B, 354,323,504,506-quashing of summoning order and revisional order-accused committed rape-also she was harassed for dowry by other accused-statement of Doctor and statement of PW-1 and PW-2 supported the averments of the complaint of commission of rape-petitioners contended their dispute as family dispute/civil dispute-at the stage of summoning it cannot be adjudicated nor it cannot be determined in the exercise of jurisdiction under Article 227-it is well settled law that 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-the same principle shall apply when challenge is made to the summoning order even in petition under Article 227 of the Constitution of India-the order passed by the Magistrate is in conformity with the settled law-Magistrate was satisfied that a case for summoning order is made out, prima facie- in exercise of revisional jurisdiction on the basis of material placed before him u/s 200 and 202 Cr.P.C., the court will not consider new material nor it could consider whether material laid before the revisional court was credible or not-Order passed by revisional court is also perfectly in accordance with law.(Para 1 to 26)

The Petition is dismissed. (E-5)

List of Cases cited: -

1. Bhushan Kumar Vs St. of NCT of Delhi, (2012) AIR SC 1747

2. R.R. Kapur Vs St. of Punj., (1960) AIR SC 866

3. St. of Har.Vs Bhajan Lal, (1992) AIR SCC 604

4. Sonu Gupta Vs Deepak Gupta & ors., (2015) 3 SCC 424

5. Harshendra Kumar Vs Rebatilata Koley & ors., (2011) 3 SCC 351

6. Prasoon Kumar Srivastava Vs St. of U.P., (1999) Cri.L.J. 3375

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

1. Heard Shri N.K. Pandey, learned counsel for the petitioners; Shri Prashant Sharma, learned counsel for opposite party no. 2 and the learned A.G.A. for the State.

2. The petitioners/applicants have challenged the order dated 13.10.2020 passed by Additional Sessions Judge, Room No. 4, Saharanpur in Criminal Revision No. 128 of 2020 (Sanjay Sharma and other versus State of U.P. and another) and the summoning order dated 23.06.2020 passed by the Chief Judicial Magistrate, Saharanpur in Complaint Case No. 1657 of 2020 against applicant no. 1 under Sections 376, 354, 323, 504, 506 I.P.C. and against other applicants under Sections 376/120B, 323, 504 and 506 I.P.C. at Police Station-Sadar Bazar, District-Saharanpur.

3. Briefly stated facts of the case are that the opposite party no. 2 filed a complaint under Sections 376, 120B, 354, 323, 504, 506 I.P.C., Police Station Sadar Bazar, District Saharanpur against the applicants alleging that the applicant no. 1 committed rape and all the accused persons harassed her for dowry. The Magistrate recorded the statement of opposite party no. 2 under Section 200 Cr.P.C. and the statements of the witnesses P.W. 1, P.W. 2 and P.W. 3 under Section 202 Cr.P.C. Thereafter, the Magistrate summoned the applicants by order dated 23.06.2020. The applicants filed Criminal Revision No. 128 of 2020 which was rejected on 13.10.2020.

4. Learned counsel for the petitioners submits that the orders under challenge have been passed without application of judicial mind and mechanically. He submits that after filing the complaint, the Magistrate called for police report and as per that report filed on 10.06.2020 the matter pertained to property dispute between the parties and all the allegations were levelled, falsely, only to create pressure. He further submits that the opposite party no. 2 took A.T.M. Card of the applicant no. 1 and had withdrawn Rs. 1,09,000/- on different dates regarding which a complaint was made to the S.S.P. Saharanpur on 30.01.2020 as well as on I.G.R.S. Portal. Thereafter, the application under Section 156(3) Cr.P.C., was also

filed on 11.03.2020 upon which an F.I.R. was lodged in Case Crime No. 356 of 2020 under Sections 379, 406 I.P.C. on 25.07.2020 at Police Station Sadar Bazar, District-Saharanpur. He further submits that the opposite party no. 2 had filed another complaint against the applicants and others on 11.03.2020 almost with the same allegations to cause the harassment of the applicant and extract money. Learned counsel for the applicants further submits that the summoning order as well as the revisional order are based on the recorded conversation in C.D. which was made part of the complaint case, but even from the hearing of the C.D. it would appear that the applicants have been falsely implicated.

5. The further submission of the learned counsel for the petitioners is that the statement of the Doctor, P.W. 3 did not support the complaint case, in as much as his submission is that complainant did not state the commission of rape to the said doctor.

6. Learned counsel for the opposite party no. 2 submits that the averments of the complaint are supported by the material on record and do make out case of commission of cognizable offence against the applicants. The Magistrate has passed the order of summoning of applicants satisfying prima facie that a cognizable offence is made out and such satisfaction being based on material on record which finds consideration by the Magistrate, including the material in the form of C.D. filed by the complainant which was also heard by the said Magistrate, the order of summoning is perfectly justified. At this stage, the Magistrate has to satisfy, only prima facie, for the purposes of summoning the accused persons. So far as the submission of the learned counsel for the applicants, in the nature of the defence of the applicants is concerned learned counsel for the opposite party no. 2 submits that at the stage of summoning, the defense of the accused persons cannot be considered, particularly which defense is in the nature of disputed facts and require evidence for adjudication which can be done only during trial. He has placed reliance on the judgment of Hon'ble the Supreme Court in the case of ***Bhushan Kumar versus State (NCT of Delhi)*** reported in ***AIR 2012 SC 1747.***

7. Learned counsel for the opposite party no. 2 further submits that the order passed in revision does not suffer from any illegality and calls for no interference in as much as the revisional court has passed the order on correct appreciation of the legal principles as laid down in the judgments upon which reliance has been placed by the revisional court in the facts of the present case.

8. Learned A.G.A. has supported the stand taken by the learned counsel for the opposite party no. 2 and has submitted that the orders under challenge do not suffer from any illegality and call for no interference in the exercise of jurisdiction under Article 227 of the Constitution of India.

9. I have considered the submissions advanced by the learned counsel for the petitioners; for opposite party no. 2 and learned A.G.A. and has perused the material on record.

10. It has been well settled by now, that 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 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 ***AIR 1992 SCC 604***. 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.

11. In the case of ***Bhushan Kumar (supra),*** the Hon'ble Supreme Court has reiterated the above principles. It has been further held that the summoning order under Section 204 of the code requires no explicit reasons to be stated because it is imperative that the Magistrate must have taken notice of the accusations and applied his mind to the allegations made in the police report and the material filed therewith. Paragraph nos. 13 to 15 of Bhushan Kumar (supra), read as follows:

"13) In Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi & Ors. (1976) 3 SCC 736, this Court held that it is not the province of the Magistrate to enter into a detailed discussion on the merits or demerits of the case. It was further held that in deciding whether a process should be issued, the Magistrate can take into consideration improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. It was further held that once the Magistrate has exercised his discretion, it is not for the High Court, or even this Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused.

14) In Dy. Chief Controller of Imports & Exports vs. Roshanlal Agarwal & Ors. (2003) 4 SCC 139, this Court, in para 9, held as under:

9. In determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is 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. This question was considered recently in U.P. Pollution Control Board v. Mohan Meakins Ltd.(2000) 3 SCC 745 and after noticing the law laid down in Kanti Bhadra Shah v. State of W.B. (2000) 1 SCC 722, it was held as follows: (SCC p. 749, para 6)

"The legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process. There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons. The process issued to accused cannot be quashed merely on the ground that the Magistrate had not passed a speaking order."

15) In U.P. Pollution Control Board vs. Dr. Bhupendra Kumar Modi & Anr.,

(2009) 2 SCC 147, this Court, in paragraph 23, held as under:

"It is a settled legal position that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused."

12. In **Sonu Gupta versus Deepak Gupta and others (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."

13. This Court on perusal of the complaint finds that the averments thereof make out a case of commission of cogniable offence, prima facie for summoning of the accused persons. Those averments are duly supported by the statement of the complaint under Section 200 Cr.P.C. and of the witness examined under Section 202 Cr.P.C.

14. The Magistrate, as is evident from the order of summoning, heard conversation as recorded in the C.D. On consideration of the material before the Magistrate, in its totality, the Magistrate by a reasoned and speaking order and after hearing the applicants has passed the summoning order being satisfied that prima facie case for summoning was made out. Such satisfaction is also reflected in the order.

15. Learned counsel for the petitioners could not demonstrate as to how the summoning order suffers from illegality or perversity or improper exercise or that any case for summoning the accused persons, was not made out, even prima facie, on the basis of the averments in the complaint and the material on record.

16. So far as the submission of learned counsel for the petitioners, that there is contradiction in the statement of the witnesses as from the statement of the doctor P.W. 3, it is evident that the complainant did not state about the commission of rape to the doctor, is concerned, the said submission deserves rejection.

17. I have perused the statement of the doctor P.W.-3, which shows that the complainant was taken to the hospital, SBD Hospital Saharanpur, where the Doctor P.W. 3 attended the complainant on emergency call from the Hospital and she was brought in a semi conscious condition and her condition was not good. Under the circumstances, if no disclosure of commission of rape was made to the Doctor as alleged, the same cannot be considered as the contradiction in the statement of the witnesses, when read along with the statement of P.W. 1 and P.W. 2. who have categorically supported the averments of the complaint of commission of rape.

18. So far as the submission of the learned counsel for the petitioners that the petitioners have been falsely implicated due to some civil dispute/family dispute/matrimonial dispute, the same is in the nature of their defense, which require adjudication on the basis of evidence and cannot be determined at this stage of summoning in the exercise of jurisdiction under Article 227 of the Constitution of India. The disputed defense cannot be looked at this stage nor can be the basis for interference with the summoning order.

19. 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.

20. The same principles shall apply when challenge is made to the summoning order even in a petition under Article 227 of the Constitution of India.

21. The order passed by the Magistrate is in conformity with the settled law.

22. So far as the revisional order is concerned the same is also passed on consideration of the legal principles and applying the same correctly to the facts of the case before the revisional court.

23. In the case of ***Prasoon Kumar Srivastava versus State of U.P. 1999 CriLJ 3375*** this Court has held that the revision against the summoning order has to be disposed of considering whether there was anything illegal in the summoning order passed by the Magistrate on the basis of material placed before him under Sections 200 and 202 Cr.P.C. and if the Court finds that there was material before the Magistrate and on the said material the Magistrate was satisfied that a case for summoning is made out, prima facie, in the exercise of revisional jurisdiction the Court will not interfere in such discretion by the Magistrate. Neither new material could be considered nor the revisional court could consider whether the material laid before the Magistrate under Sections 200 and 202 Cr.P.C. was credible or reliable or not. In Prasoon (supra) this Court has held as under in paragraph nos. 7, 8 and 11:-

"7. I may also refer a single Judge authority of this Court in the case of Riyasat Ali v. State of U. P., reported in 1992 Cri LJ 1217 wherein it was said:

...When the allegations contained in the complaint disclose an offence and the same allegations have been substantiated by the evidence of the witnesses examined under Section. 200 and 202 and the Magistrate is satisfied that there are reasons to proceed against the accused persons, the order of the Magistrate should not be interfered with lightly. It is the subjective satisfaction of the Magistrate after taking an objective view of the allegations made in the complaint and in the evidence of the witnesses examined by the complaint. The Sessions Judge while exercising revisional power is not expected to find discrepancy in the case of the complainant. The allegations in the complaint and evidence of the witnesses are to be taken at their face value, as the Magistrate can himself discharge or acquit the accused if the accused after appearing

before him satisfied the Magistrate in this regard.

8. It has been held by the Apex Court in the case of Chandra Deo Singh v. Prokash Chandra Bose alias Chabi Bose, reported in AIR 1963 SC 1430 : (1963 (2) Cri LJ 397):

...Whether the complaint is frivolous or not has, at that stage, necessarily to be determined on the basis of the material placed before him by the complainant. Whatever defence the accused may have can only be enquired at the trial.

The Apex Court further said :-

...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.

11. The plain position is that the revision against the summoning order has to be disposed of considering whether there was anything illegal in the summoning order passed by the learned Magistrate on the basis of the material placed before him under Sections 200 and 202, Cr. P. C. If there is such prima facie material, as obviously is present on the record in this case, then it is not open for this Court to take into consideration the extraneous material filed from the side of the accused-revisionists along with the revision petition. There is no provision for placing on record additional material in the revision against the summoning order and the Court would be traveling beyond its jurisdiction if it relied on any extraneous material other than the material led before the learned Magistrate under Sections 200 and 202, Cr. P. C. It is always open to the accused to place material before the learned Magistrate at the trial which may knock the bottom out of the prosecution case. Any such material cannot be looked into at this stage to Judge whether the material led before the learned Magistrate under Sections 200 and 202, Cr. P. C. was credible or reliable or not."

24. The order passed by the revisional Court is also perfectly in accordance with law.

25. This Court does not find any illegality in the orders under challenge.

26. The petition under Article 227 of the Constitution of India is devoid of merit. The prayer for quashing the summoning order and the revisional order, along with the proceedings of the complaint case, is hereby refused. This petition is dismissed.

27. No orders as to cost.

(2021)03ILR A501
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.02.2021

BEFORE

THE HON'BLE RAJEEV MISRA, J.

Application U/S 482 No. 1325 of 2021

Chandra Pal ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Sunil Kumar Yadav

Counsel for the Respondents:

A.G.A.

(A) Criminal Law - U.P. Excise Act,1910 - Sections 60 - Penalty for unlawful, export, transport,manufacture,possession,sale, etc,. - Sections 62 - Penalty for rendering denatured spirit fit for human consumption , Sections 63 - penalty for unlawful import and transport or possession of unlawfully imported intoxicant etc. , Sections 72 - what things are liable to confiscation - Code of criminal procedure, 1973 - Section 396 - Disposal of case according to decision of High court , Section 451 - order for custody and disposal of property pending trial in certain cases , Section 452 - order for disposal of property at conclusion of trial - Section 457- Procedure by police upon seizure of property - courts below proceeded to refuse release of seized vehicle of applicant by placing reliance upon judgement of Apex Court in State (NCT of Delhi) Vs Narender - without deciding their jurisdiction to entertain the release application - filed by applicant seeking release of seized vehicle in terms of section 457 of Code - orders impugned in present application - cannot be sustained on account of erroneous reasoning - liable to be quashed. (Para - 25)

Police seized a vehicle - huge quantity of Indian made Foreign Liquor was recovered from vehicle - applicant (registered owner of seized vehicle) filed a release application - release application rejected by concerned Magistrate - Magistrate concluded that Apex Court in State (NCT of Delhi) Vs Narender 2014 (13) SCC 100 has observed that where confiscation proceedings (in this case under Delhi Excise Act) are pending then courts have no jurisdiction to direct release of seized vehicle - Order passed by Magistrate challenged by filing a criminal revision before Sessions Judge - revision dismissed .(Para - 3,4,5,6,7)

HELD:- Magistrate as well as Revisional Court ought to have decided the issue regarding their own jurisdiction for releasing seized vehicle in exercise of powers under the Code in respect of vehicle which has been seized and confiscation proceedings in respect of which are pending consideration before District Magistrate under Section 72 of Act, 1910. Matter remitted to concerned Magistrate to decide release application of applicant afresh. (Para - 24)

Application u/s 482 Cr.P.C. allowed. (E-6)

List of Cases Cited:-

1. State (NCT of Delhi) Vs Narender, (2014) 13 SCC 100

2. Krishna Mohan Sharma Vs St. of U.P. ,(1999) 2 JIC 270 Alld

3. Sunderbhai Ambalal Desai Vs St.of Guj., (2002) 10 SCC 283

4. Virendra Gupta Vs St. of U.P., 2019(6) ADJ 432

5. Ved Prakash Vs St. of U.P., 1982 A.W.C. 167

6. Virendra Gupta Vs St. of U.P., 2018 (105) ACC 518

7. Mustfa Vs St. of U.P. & ors., Civil Appeal No. 6438 of 2019

8. Ved Prakash Vs St. of U.P , 1982 (19) ACC 183/1982 AWC 167

9. Mohd. Hanif Vs St. of U.P. , 1984 ACrR 23

10. Kamaljeet Singh Vs St. of U.P , 1986 U.P Cri Rullings 50 (Alld)

11. Jagat Singh Vs St. of U.P. ,1991 (28) ACC 561

12. Jai Prakash Sharma VsSt. of U. P. , (1993) 30 ACC 6/1992 (3)AWC 1744

13. Sri Nand Vs St. of U.P , (1997) 34 ACC 32

14. Virender Pal Singh Vs St . of U.P. ,(2008) 60 ACC 481

15. Rama Shankar Yada Vs St. of U.P ,(2010) 68 ACC 16

16. Ramesh Chandra Junwal Vs St. of U.P , 2015 (8) ADJ 138

17. Raji Kumar Singh Vs St. of U.P. & ors. , 2017 (99) ACC 260

18. Harish Chandra Singh Vs St. of U.P , Cr Rev No. 3831/2017 (AHC)

19. Mustafa & ors. Vs St. of U.P. & ors. , 2018 (3) ALJ 351

20. Vikas Kumar Vs St. of U.P,2020 (7) ADJ 656

21. Karmvir Vs St. of U.P, Matter Under Article 227 No. 3401/2020 (A.H.C)

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

1. Heard Mr. Sunil Kumar Yadav, learned counsel for applicant and learned A.G.A. for State.

2. This application under Section 482 Cr.P.C. has been filed challenging order dated 18.09.2020 passed by Additional Chief Judicial Magistrate/Additional Civil Judge (Sr. Div.) Court No.3, Aligarh in Case Crime No. 338 of 2019 under Sections 62, 63, 72 U.P. Excise Act, Police Station- Akbarabad, District-Aligarh as well as order dated 31.10.2020 passed by Additional Sessions Judge/POCSO Act, Court No.02, Aligarh in Criminal Revision No. 136 of 2020 (Chandra Pal Vs. State of U.P.) under Sections-396, 397 Cr.P.C., arising out of order dated 18.9.2020, whereby above-mentioned criminal revision has been dismissed.

3. Record shows that in respect of an incident which occurred on 29.12.2019, an F.I.R. dated 29.12.2019 was lodged and was registered as Case Crime No.0338 of 2019 under Section 62, 63, 72 of U.P. Excise Act, Police Station- Akbarabad, District-Aligarh. In the aforesaid F.I.R., two unknown persons who were sitting in vehicle No. DL. 1 VB 8839 but fled away from spot were nominated as accused.

4. As per prosecution story as unfolded in above-mentioned F.I.R., it is alleged that police of concerned police station in routine check for ensuing peace laid check point near Bamba Pulia crossing to check vehicles. A Vehicle bearing registration number DL 1 VB 8839 of TATA Sumo Gold Make was detained for search and huge quantity of Indian made Foreign Liquor was recovered from aforesaid vehicle. However, driver and passenger of aforesaid vehicle managed to escape but the vehicle was seized.

5. Subsequently, applicant- Chandra Pal, registered owner of seized vehicle No. DL. 1 VB 8839 filed a release application seeking release of same. The release application was rejected by concerned Magistrate vide order date 18.09.2020. Magistrate concluded that Apex Court in **State (NCT of Delhi) Vs. Narender 2014 (13) SCC 100** has observed that where confiscation proceedings (in this case under Delhi Excise Act) are pending then courts have no jurisdiction to direct release of seized vehicle.

6. Order dated 18.09.2020 passed by Magistrate was challenged by applicant by filing a criminal revision before Sessions Judge, Aligarh. Same was registered as Criminal Revision No.136 of 2020, (Chandrapal Vs. State of U.P.). This revision also came to be dismissed by Additional Sessions Judge/ POCSO Act Court No.2, Aligarh vide order dated 31.10.2020.

7. Additional Sessions Judge concluded that since proceedings under Section 72 of U.P. Excise Act, 1910

(hereinafter referred to as 'Act 1910') are pending, therefore no directions can be issued for release of disputed vehicle. Revisional court referred to **Krishna Mohan Sharma Vs. State of U.P. 1999 (2) JIC 270 Alld**, but observed that judgement therein has been rendered by a learned Single Judge. Reference was also made to the decision of Apex Court in **Sunderbhai Ambalal Desai Vs. State of Gujarat 2002 (10) SCC 283**. However, revisional court observed that in aforesaid case Court has considered Sections 451, 452, 457 Cr.P.C and not the provisions of Act 1910. Revisional Court further referred to the Division Bench Judgement of this Court in **Virendra Gupta Vs. State of U.P. 2019(6) ADJ 432** wherein law laid down in **Ved Prakash Vs. State of U.P. 1982 A.W.C. 167** has been affirmed. It was held by division bench that during pendency of confiscation proceedings under section 72 of Act, 1910, Magistrate has no jurisdiction under Section 457 Cr. P. C. to direct release of vehicle seized under the provsisions of Act, 1910 However, irrespective of above, Revisional Court instead of deciding jurisdiction of criminal courts regarding release of seized vehicle under section 457 Cr.P.C. even during pendency of confiscation proceedings under section 72 of Act 1910 rejected the revision filed by applicant by placing reliance upon **State (NCT OF DELHI) Vs. Narender (supra).**

8. Thus, feeling aggrieved by orders dated 31.10.2020 and 18.09.2020, referred to above, applicant has now approached this Court by means of present application under Section 482 Cr.P.C.

9. Learned counsel for applicant submitted that applicant is registered owner of disputed vehicle bearing registration No. DL 1 VB 8839 of Tata Sumo Gold Make. Aforesaid vehicle was seized on 29.12.2019 and is lying unattended at Police Station-Akbarbad, District- Aligarh since then. No useful purpose shall be served by detaining the disputed vehicle under custody. Furthermore, as seized vehicle is lying unattended in open at concerned police station, same shall get rusted and its value shall also diminish. As such interest of justice demands that seized vehicle of applicant be released forthwith.

10. On aforesaid premise, it is submitted that in view of law laid down by Apex Court in **Sunderbhai Ambalal Desai Vs. State of Gujarat, (supra)**, concerned Magistrate committed an illegality in rejecting release application filed by applicant. Additional Sessions Judge, Aligarh ought to have allowed the revision and directed release of seized vehicle of revisionist in view of various authoritative pronouncements of this Court, after taking recourse to any of the safeguards mentioned in **Sunderbhai Ambalal Desai (Supra)**. Reliance is placed upon paragraphs 6, 7 and 14 of above noted judgement which are reproduced herein below:-

"6. In our view, the powers under Section 451 Cr.P.C. should be exercised expeditiously and judiciously. It would serve various purposes, namely:-

1. Owner of the article would not suffer because of its remaining unused or by its misappropriation;

2. Court or the police would not be required to keep the article in safe custody;

3. If the proper panchanama before handing over possession of article is prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail; and

4. This jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles.

7. The question of proper custody of the seized article is raised in number of matters. In Smt. Basawa Kom Dyanmangouda Patil v. State of Mysore and another, [1977] 4 SCC 358, this Court dealt with a case where the seized articles were not available for being returned to the complainant. In that case, the recovered ornaments were kept in a trunk in the police station and later it was found missing, the question was with regard to payment of those articles. In that context, the Court observed as under:-

"4. The object and scheme of the various provisions of the Code appear to be that where the property which has been the subject-matter of an offence is seized by the police, it ought not to be retained in the custody of the Court or of the police for any time longer than what is absolutely necessary. As the seizure of the property by the police amounts to a clear entrustment of the property to a Government servant, the idea is that the property should be restored to the original owner after the necessity to retain it ceases. It is manifest that there may be two stages when the property may be returned to the owner. In the first place it may be returned during any inquiry or trial. This may particularly be necessary where the property concerned is subject to speedy or natural decay. There may be other compelling reasons also which may justify the disposal of the property to the owner or otherwise in the interest of justice. The High Court and the Sessions Judge proceeded on the footing that one of the essential requirements of the Code is that the articles concerned must be produced before the Court or should be in its custody. The object of the Code seems to be that any property which is in the control of the Court either directly or indirectly should be disposed of by the Court and a just and proper order should be passed by the Court regarding its disposal. In a criminal case, the police always acts under the direct control of the Court and has to take orders from it at every stage of an inquiry or trial. In this broad sense, therefore, the Court exercises an overall control on the actions of the police officers in every case where it has taken cognizance."

The Court further observed that where the property is stolen, lost or destroyed and there is no prima facie defence made out that the State or its officers had taken due care and caution to protect the property, the Magistrate may, in an appropriate case, where the ends of justice so require, order payment of the value of the property.

To avoid such a situation, in our view, powers under Section 451 Cr.P.C. should be exercised promptly and at the earliest.

Valuable Articles and Currency Notes

14.In our view, whatever be the situation, it is of no use to keep such-seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles."

11. He has then referred to the judgement of a learned Single Judge of this Court in Criminal Revision No. 3831 of 2017 (Harish Chandra Singh Vs. State of U.P.), wherein, while dealing with almost a similar issue regarding release of minor mineral Court allowed the revision by placing reliance upon Sunderbhai Ambalal Desai (supra).

Following was ultimately observed by the Court:-

"Having considered the rival submissions raised by the parties as well as the law on the subject as crystallized in the above quoted judgements, this Court is of the considered opinion that the Magistrate has erred in refusing to entertain the release application on the grounds as mentioned in the order dated 09.10.2017. From the discussions made herein above, it is clear that the offence alleged against the revisionist is compoundable and such power is with the District Magistrate. In spite of the time having been granted to the learned A.G.A., nothing has been brought on record to show the action taken by the D.M. Kaushambi in this regard. However, it may be noted that the Court does not find any legal impediment in compounding the offence complained against the revisionist. Secondly, the power to release the seized mineral, tool, vehicle etc., is with the Court as settled by the Division Bench judgement of this Court in the case of Rajendra Singh (supra). Lastly, the Apex Court in the case of Sunderbhai Ambalal Desai (supra) had already issued a general mandamus that the seized items should not be retained unnecessarily. In the light of the settled legal position, the Court finds that the C.J.M., Kaushambi has dealt with the matter in a very casual manner. He has not at all adverted to the proposition laid down by the Apex Court in the case of Sunderbhjai Ambalal Desai (supra) nor has he recorded a finding as to why it is not congenial in the facts and circumstances of the case to deny the release of the seized mooram."

12. On the aforesaid premise, it is urged that seized vehicle of applicant is liable to be released.

13. Learned counsel for applicant further contended that mere pendency of confiscation proceedings before District Magistrate, under section 72 of Act, 1910, shall not operate as a bar regarding jurisdiction of Magistrate under section 457 Cr.P.C. in respect of release of such vehicle which has been seized under section 60 of Act, 1910. In continuation of aforesaid submission, it is urged that the issue as to whether seized vehicle cannot be released by Magistrate on account of pendency of confiscation proceedings under Section 72 of Act, 1910 is no longer res-integra.

14. To lend legal support to aforesaid submission, he has referred to following judgements and contends that view expressed in **Ved Prakash (Supra)** has not been followed in subsequent judgements. He, therefore, contends that courts below have committed a jurisdictional error in rejecting the release application filed by applicant by recording an erroenous finding that on account of judgement of Apex Court in **State (NCT of Delhi) (Supra)** the seized vehicle cannot be released.

S. No.	Judgement Name	
1	Ved Prakash V State of U.P	1982 (19) ACC 183/1982 AWC 167
2	Mohd. Hanif Vs. State of U.P.	1984 ACrR 23
3	Kamaljeet Singh V State of U.P	1986 U.P Cri Rullings 50 (Alld)
4	Jagat Singh Vs. State of U.P.	1991 (28) ACC 561
5	Jai Prakash Sharma V State of Uttar Pradesh	(1993) 30 ACC 6/1992

		(3)AWC 1744
6	Sri Nand V State of U.P	(1997) 34 ACC 32
7	Virender Pal Singh V State of Uttar Pradesh	(2008) 60 ACC 481
8	Rama Shankar Yadav V State of U.P	(2010) 68 ACC 16
9	Ramesh Chandra Junwal V State of U.P	2015 (8) ADJ 138
10	Rajiv Kumar Singh Vs. State of U.P. and others	2017 (99) ACC 260
11	Harish Chandra Singh V State of U.P	Cr Rev No. 3831/2017 (AHC) decided on 10..08.2018
12	Mustafa and others Vs. State of U.P. and others	2018 (3) ALJ 351
13	Vikas Kumar V State of U.P	2020 (7) ADJ 656
14	Karmvir v State of U.P	Matter Under Article 227 No. 3401/2020 (A.H.C) decided 22.01.2021.

15. Per contra, learned A.G.A. has opposed this application. He contends that transport of illicit liquor is not only a crime against State but also against society. According to learned A.G.A. Section 72 of Act, 1910 is a penal provision and therefore, requires to be strictly construed. On a plain reading of Section 72 of Act, 1910 it cannot be inferred even remotely that aforesaid provision provides for a mechanisam for release of a seized vehicle by Magistrate in exercise of powers under section 457 Cr.P.C. regarding which, confiscation proceedings under section 72 of Act, 1910 are pending. It is also urged that Magistrate cannot usurp jurisdiction in this case by placing reliance upon Section 5 Cr. P. C. He further submits that since vehicle of applicant has been used for transporting illicit liquor and no proceedings having been initiated by applicant regarding theft or otherwise of seized vehcle before seizure of same, equity demands that disputed vehicle be not released in favour of applicant.

16. Learned A.G.A. has relied upon a Division Bench judgement of this Court in **Virendra Gupta Vs. State of U.P. (supra)**, wherein Court has considered the law laid down in some of above mentioned cases and ultimately held that ratio laid down in **Ved Prakash (Supra)** is the correct law. Following has been observed by Division Bench in paragraphs 19 and 20:-

"19. The aforesaid argument of the learned counsel for the applicant at the first instance may appear to be attractive but upon a perusal of Section 72 of the 'Act' and Section 23 of the Delhi Excise Act, the aforesaid argument is liable to be rejected. Section 23 of the Delhi Excise Act expressly excludes the power of a Magistrate to release anything seized or detained u/s 457 Cr.P.C. if confiscation proceedings in respect of such seized articles are pending before the Collector. Section 72 of the 'Act' which is admittedly a local act does not contain any provision for release of anything seized or detained in connection with an offence committed under the Act in respect of which confiscation proceedings are pending. In fact the sub-section (1) to sub-section (4) of Section 72 of the 'Act'

prescribe the manner in which anything seized in connection with an offence committed under the 'Act' and in respect of which confiscation proceedings u/s 72 of the 'Act' are pending, shall be dealt with. Section 72 of the 'Act' does not contain any provision indicating that such seized property may be released by the Magistrate in the exercise of his power u/s 457 Cr.P.C. The provisions contained in sub-sections (1) to (4) of Section 72 of the 'Act', clearly denudes the Magistrate of his power to pass any order u/s 457 Cr.P.C. for release of anything seized in connection with an offence purporting to have been committed under the 'Act'.

20. In view of the foregoing discussion, we find that the case of Ved Prakash (supra) lays down the correct law on the subject matter of this reference and neither Nand vs. State of U.P., 1997 (1) AWC 41 or Rajiv Kumar Singh vs. State of U.P. and others, 2017 (5) ADJ 351 nor Sunderbhai Ambalal Desai vs. State of Gujarat, 2002 (10) SCC 283 can be said to be authorities on the power of the Magistrate to release anything seized or detained in connection with an offence committed under the 'Act' in respect of which confiscation proceedings u/s 72 of the U.P. Excise Act are pending before the Collector. "

On the basis of above, learned A.G.A. contends that release application filed by applicant seeking release of seized vehicle before Magistrate was itself not maintainable. Therefore, no illegality has been committed by Courts below in refusing to release the disputed vehicle.

17. I have considered the rival submissions. The issue that emerges for consideration in this application is whether courts below committed a jurisdictional error by rejecting the release application filed by applicant by placing reliance upon **STATE (NCT of DELHI) Vs. NARENDER (supra)** without deciding their own jurisdiction under Section 457 Cr. P. C. to adjudicate upon an application seeking release of sezied vehicle in respect of which, confiscation proceedings under section 72 of Act, 1910 are pending before District Magistrate.

18. Apex Court in **STATE (NCT of DELHI) Vs. NARENDER (supra)** dealt with provisions of Sections 33, 58 and 61 of Delhi Excise Act. On basis of aforesaid, Court concluded that jurisdiction of Courts to pass orders of release under Sections 451, 452 and 457 Cr. P. C. relating to such property which is subject matter of confiscation proceedings under aforesaid provisions of Delhi Excise Act is clearly ousted. Following has been observed by Apex Court in paragrapshs 12, 13, 14, 15 and 16:-

"12. It is relevant here to state that in the present case, the High Court, while releasing the vehicle on security has exercised its power under Section 451 of the Code. True it is that where any property is produced by an officer before a criminal court during an inquiry or trial under this section, the court may make any direction as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, as the case may be. At the conclusion of the inquiry or trial, the court may also, under Section 452 of the Code, make an order for the disposal of the property produced before it and make such other direction as it may think necessary. Further, where the property is not produced before a criminal court in an inquiry or trial, the Magistrate is empowered under Section 457 of the Code to make such order as it thinks fit.

13. In our opinion, the general provision of Section 451 of the Code with regard to the custody and disposal of the property or for that matter by destruction, confiscation or delivery to any person entitled to possession thereof underSection 452 of the Code or that of Section 457 authorising a Magistrate to make an order for disposal of property, if seized by an officer and not produced before a criminal court during an inquiry or trial, however, has to yield where a statute makes a special provision with regard to its confiscation and disposal.

14. We have referred to the scheme of the Act and from that it is evident that the vehicle seized has to be produced before the Deputy Commissioner, who in turn has been conferred with the power of its confiscation or release to its rightful owner. The requirement of production of seized property before the Deputy Commissioner under Section 59(1) of the Act is, notwithstanding anything contained in any other law, and, so also is the power of confiscation. Not only this, notwithstanding anything to the contrary contained in any other law for the time being in force, no court, in terms of Section 61 of the Act, has jurisdiction to make any order with regard to the property used in commission of any offence under the Act.

15. In the present case, the Legislature has used a non-obstante clause not only in Section 59 but also in Section 61 of the Act. As is well settled, a non-obstante clause is a legislative device to give effect to the enacting part of the section in case of conflict over the provisions mentioned in the non-obstante clause. Hence, Section 451, 452 and 457 of the Code must yield to the provisions of the Act and there is no escape from the conclusion that the Magistrate or for that matter the High Court, while dealing with the case of seizure of vehicle under the Act, has any power to pass an order dealing with the interim custody of the vehicle on security or its release thereof.

16. The view which we have taken finds support from a judgment of this Court in the case of State of Karnataka v. K.A. Kunchindammed, (2002) 9 SCC 90, which while dealing with somewhat similar provisions under the Karnataka Forest Act held as follows:-

"23.....The position is made clear by the non obstante clause in the relevant provisions giving overriding effect to the provisions in the Act over other statutes and laws. The necessary corollary of such provisions is that in a case where the Authorized Officer is empowered to confiscate the seized forest produce on being satisfied that an offence under the Act has been committed thereof the general power vested in the Magistrate for dealing with interim custody/release of the seized materials under CrPC has to give way. The Magistrate while dealing with a case of any seizure of forest produce under the Act should examine whether the power to confiscate the seized forest produce is vested in the Authorized Officer under the Act and if he finds that such power is vested in the Authorized Officer then he has no power to pass an order dealing with interim custody/release of the seized material. This, in our view, will help in proper implementation of provisions of the special Act and will help in advancing the purpose and object of the statute. If in such cases power to grant interim custody/release of the seized forest produce is vested in the Magistrate then it will be defeating the very scheme of the Act. Such a consequence is to be avoided.

24. From the statutory provisions and the analysis made in the foregoing paragraphs the position that emerges is

that the learned Magistrate and the learned Sessions Judge were right in holding that on facts and in the circumstances of the case, it is the Authorized Officer who is vested with the power to pass order of interim custody of the vehicle and not the Magistrate. The High Court was in error in taking a view to the contrary and in setting aside the orders passed by the Magistrate and the Sessions Judge on that basis."

19. In order to appreciate the above, reference be made to the observations made by a learned Single Judge of this Court in **Virendra Gupta Vs. State of U.P. 2018 (105) ACC 518** wherein Court has observed as under in paragraphs 16 and 17:-

"16. The view which we have taken finds support from a judgment of this Court in the case of State of Karnataka v. K.A. Kunchindammed (2002) 9 SCC 90, which while dealing with somewhat similar provisions under the Karnataka Forest Act held as follows:

23. ..... The position is made clear by the non obstante clause in the relevant provisions giving overriding effect to the provisions in the Act over other statutes and laws. The necessary corollary of such provisions is that in a case where the Authorized Officer is empowered to confiscate the seized forest produce on being satisfied that an offence under the Act has been committed thereof the general power vested in the Magistrate for dealing with interim custody/release of the seized materials under Cr.P.C. has to give way. The Magistrate while dealing with a case of any seizure of forest produce under the Act should examine whether the power to confiscate the seized forest produce is vested in the Authorized Officer under the Act and if he finds that such power is vested in the Authorized Officer then he has no power to pass an order dealing with interim custody/release of the seized material. This, in our view, will help in proper implementation of provisions of the special Act and will help in advancing the purpose and object of the statute. If in such cases power to grant interim custody/release of the seized forest produce is vested in the Magistrate then it will be defeating the very scheme of the Act. Such a consequence is to be avoided.

24. From the statutory provisions and the analysis made in the foregoing paragraphs the position that emerges is that the learned Magistrate and the learned Sessions Judge were right in holding that on facts and in the circumstances of the case, it is the Authorized Officer who is vested with the power to pass order of interim custody of the vehicle and not the Magistrate. The High Court was in error in taking a view to the contrary and in setting aside the orders passed by the Magistrate and the Sessions Judge on that basis.

17. From a conspectus of what we have observed above, the impugned order of the High Court is found to be vulnerable and, therefore, the same cannot be allowed to stand."

17. It must be mentioned here that in the Delhi Excise Act, there is a provision expressly excluding the jurisdiction of the Court in the matter of release of anything seized or detained under that Act, embodied in Section 61, and, quoted in paragraph 11 of the report in State (GNCT of Delhi) (supra). "

21. Power of Distirct Magistrate to order confiscation in respect of seized vehicle / goods under Section 72 of Act, 1910, came up for consideration recently before Apex Court in **Civil Appeal No. 6438 of 2019 Mustfa Vs. State of U.P. and**

others reported in SCC online Web Edition, Page1.

21. Court elaborately dealt with the scheme contained in Section 72 of Act, 1910. Earlier judgement in **State (NCT of Delhi) Vs. Narender (supra) and** others and also issue regarding release of seized vehicle in respect of which proceedings under Section 72 of Act, 1910 are pending were also considered.

22. Court meticulously considered the above and upon evaluation observed as follows in paragraphs 14, 15, 16, 17, 18, 19 , 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29:-

" 14) Section 72(1) of the Act confers power of confiscation of animal, cart, vessel or other conveyance used by means of which an offence has been committed. Sub-section (2) of Section 72 of the Act confers power upon the Collector to order confiscation of such thing or animal "whether or not a prosecution for such offence has been instituted". Therefore, the power of the Collector to confiscate the seized thing or animal is independent of prosecution. This Court in Yogendra Kumar Jaiswal was dealing with the confiscation of property under the Orissa Special Courts Act, 2006 and the Bihar Special Courts Act, 2009. It was held that such confiscation is independent of result of prosecution under the Prevention of Corruption Act, 1988. The Court held as under:

"146. In the case at hand, the entire proceeding is meant to arrive at the conclusion whether on the basis of the application preferred by the Public Prosecutor and the material brought on record, the whole or any other money or some of the property in question has been acquired illegally and further any money or property or both have been acquired by the means of the offence. After arriving at the said conclusion, the order of confiscation is passed. The order of confiscation is subject to appeal under Section 17 of the Orissa Act.

That apart, it is provided under Section 19 where an order of confiscation made under Section 15 is modified or annulled by the High Court in appeal or where the person affected is acquitted by the Special Court, the money or property or both shall be returned to the person affected. Thus, it is basically a confiscationwhich is interim in nature. Therefore, it is not a punishment as envisaged in law and hence, it is difficult to accept the submission that it is a pre-trial punishment and, accordingly, we repel the said submission.

xx xx xx

149. We have already held that confiscation is not a punishment and hence, Article 20(1) is not violated. The learned counsel for the State would lay stress on the decision in State of A.P. v. Gandhi [State of A.P. v. Gandhi, (2013) 5 SCC 111: (2013) 2 SCC (Cri) 884]. In that case, the issue that arose for consideration was: when the disciplinary proceeding was initiated one type of punishment was imposable and when the punishment was imposed due to amendment of rule, a different punishment, which was a greater one, was imposed. The High Court opined that the punishment imposed under the amended rule amounted to imposition of two major penalties which was not there in the old rule. Dealing with the issue the Court referred to the rule that dealt with major penalties and the rule- making power. Reference was made to the decision in Pyare Lal Sharma v. J&K Industries Ltd. [Pyare Lal Sharma v. J&K Industries Ltd., (1989) 3 SCC 448 : 1989 SCC (L&S) 484] wherein it has been stated that no one can

be penalised on the ground of a conduct which was not penal on the date it was committed. Thereafter, the two-Judge Bench referred to the authority in K. Satwant Singh v. State of Punjab [K. Satwant Singh v. State of Punjab, AIR 1960 SC 266 : 1960 Cri LJ 410] wherein it has been held thus: (Gandhi case [State of A.P. v. Gandhi, (2013) 5 SCC 111 : (2013) 2 SCC (Cri) 884] , SCC pp. 133-34, para 46)

"46. ... "28. ... In the present case a sentence of imprisonment was, in fact, imposed and the total of fines imposed, whether described as "ordinary' or ''compulsory', was not less than the amount of money procured by the appellant by means of his offence. Under Section 420 of the Penal Code an unlimited amount of fine could be imposed. Article 20(1) of the Constitution is in two parts. The first part prohibits a conviction of any person for any offence except for violation of law in force at the time of the commission of the act charged as an offence. The latter part of the article prohibited the imposing of a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The offence with which the appellant had been charged was cheating punishable under Section 420 of the Penal Code which was certainly a law in force at the time of the commission of the offence. The sentence of imprisonment which was imposed upon the appellant was certainly not greater than that permitted by Section 420. The sentence of fine also was not greater than that which might have been inflicted under the law which had been in force at the time of the commission of the offence, as a fine unlimited in extent could be imposed under the section.'" (K. Satwant Singh case [K. Satwant Singh v. State of Punjab, AIR 1960 SC 266 : 1960 Cri LJ 410] , AIR p. 275, para28)"

15) Recently, this Court in Uday Singh referred to earlier judgments of this Court in State of Madhya Pradesh and Others v. Kallo Bai8 and Divisional Forest Officer and Another v. G. V. Sudhakar Rao and Others9 to approve the argument that criminal proceedings are distinct from confiscation proceedings. The Court held as under:

"22. In 2017, a similar view has been taken by another two judge Bench of this Court in Kallo Bai (supra) while construing the provisions of the Madhya Pradesh Van Upaj (Vyapar Viniyam) Adhiniyam, 1969. By virtue of the amendments made to the Adhiniyam, Sections 15-A to 15-D were introduced to provide for confiscation proceedings in line with the provisions contained in the Forest Act as amended in relation to the State of Madhya Pradesh. Relying on the earlier decisions of this 8 (2017) 14 SCC 502 9 (1985) 4 SCC 573 Court including GV Sudhakar Rao (supra), Justice NV Ramana, speaking for the two judge Bench held:

"23. Criminal prosecution is distinct from confiscation proceedings. The two proceedings are different and parallel, each having a distinct purpose. The object of confiscation proceeding is to enable speedy and effective adjudication with regard to confiscation of the produce and the means used for committing the offence while the object of the prosecution is to punish the offender. The scheme of the Adhiniyam prescribes an independent procedure for confiscation. The intention of prescribing separate proceedings is to provide a deterrent mechanism and to stop further misuse of the vehicle."

16) The proviso to sub-section (2) of Section 72 of the Act gives an option to the owner to pay such fine as the Collector thinks adequate not exceeding its market value in lieu of its confiscation.It, thus,

transpires that it is the Collector who has been conferred exclusive jurisdiction to order confiscation of a thing or animal. The Collector has been further empowered to impose fine not exceeding the market value of the thing on the date of seizure. Thus, the power of confiscation of a vehicle or a thing is absolutely vested with the Collector except in certain circumstances, instead of confiscation, the fine, not exceeding the market value, can also be imposed but by the Collector alone.

17) Sub-section (3) of Section 72 of the Act is exception to sub-section (2) wherein, on receiving report of seizure or on inspection of the seized things, including any animal, cart, vessel or otherconveyance, which are subject to speedy wear and tear or natural decay or it is expedient in public interest to do so, the Collector may order such things or animal, except an intoxicant, to be sold by auction or otherwise. Therefore, in case any seized thing is subject to speedy wear and tear or natural decay, the Collector is empowered to sell the same by public auction. The power to sell the thing or animal pending confiscation proceedings is also contemplated if it is expedient in public interest to do so. Such provision empowers the Collector to order the sale of the vehicle or animal if he is satisfied that it is expedient in public interest even before an order of confiscation is passed by him.

18) The distribution of sale proceeds after the thing or animal is sold, is contemplated by sub-section (4) of Section 72 of the Act. It deals with a situation when no order of confiscation is ultimately passed or maintained by the Collector or an order passed on appeal under sub-section (7) so requires. Similar power is conferred to distribute the sale proceeds in terms of the order of the Court in case of a prosecution instituted for the offence in respect of thing or animal seized. Thus, sub-section (4) deals with the disposal of sale proceeds of the seized thing or Animal in terms of sub-section (3) of Section 72 of the Act. In other words, the sale conducted by auction or otherwise in terms of sub-section (3) is complete but the distribution of proceeds of sale alone is to be dealt with in the manner prescribed in sub-section (4) of Section 72 of the Act including an order of the Court dealing with prosecution instituted for the offence.

19) Sub-section (5) of Section 72 of the Act deals with the procedure and the limitations on the power of the Collector to sell the seized thing including any animal, cart, vessel or other conveyance in terms of sub-section (3) of Section 72 of the Act. Sub-section (6) of Section 72 of the Act confers power of review on the Collector of an order passed under sub-section (2).

20) Sub-section (7) of Section 72 of the Act confers a right of appeal to a judicial authority, as the State Government may appoint, against an order of confiscation under sub-section (2) or sub-section (6) ofSection 72 of the Act. In other words, an order of confiscation, other than in respect of seized things which are subject to speedy wear and tear or natural decay falling in sub-section (3) of Section 72 of the Act, is subject to appeal to the judicial authority. No appeal is provided in respect of an order passed under sub-section (3) of Section 72 of the Act in respect of seized things or animal which are subject to speedy wear and tear or natural decay or otherwise expedient in the public interest.

21) We find that in terms of Section 4 of the Code, trial of offences under IPC are to be investigated, inquired into, tried, and otherwise dealt with according to the provisions contained in the Code. It further provides that all offences under any other law shall be investigated,

inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. The offences under the Act in terms of sub-section (2) of Section 4 of the Code are to be dealt with according to the provisions of the Code but subject to the provisions of the Act regulating the manner or place of investigating, inquiring into, trying or dealing with such offences. Since the procedure of confiscation of the vehicle is prescribed under the Act, it is the provision of the Act which will be applicable and not Chapter XXXIV of the Code. Section 5 of the Code saves special or local laws or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

22) However, where a prosecution is instituted for an offence in relation to which confiscation was ordered, the things or animals are to be disposed of in accordance with the order of the Court subject to provisions of sub-section (4) of Section 72 of the Act. The order passed by the Court where a prosecution is instituted for the offence, in terms of sub-section (8) of Section 72 of the Act, is subject to provisions of sub-section (4) of Section 72 of the Act. Thus, the provision again deals with distribution of the sale proceeds after confiscation on conclusion of prosecution.

23) The power of release of the property produced before any criminal court whether interim or final in terms of Sections 451, 452 or 457 of the Code will not be available to court except the order in respect of distribution of sale proceeds. Therefore, the power under Sections 451, 452 or 457 of the Codeavailable to criminal court or Magistrate is inconsistent with the provisions contained in the Act regarding disposal of the property not only in respect of pending trial but also after the conclusion of the trial.

24) The argument raised that the judgment in Narender is not applicable to the present case cannot be accepted as the criminal court before whom the prosecution is lodged, will not have jurisdiction to release anything or animal whether interim or final as the Act in question has provisions contrary to the provisions contained in the Code. This Court in Narender relied upon the judgment in State of Karnataka v. K. A. Kunchindammed 10 and held as under:

"13. In our opinion, the general provision of Section 451 of the Code with regard to the custody and disposal of the property or for that matter by destruction, confiscation or delivery to any person entitled to possession thereof under Section 452 of the Code or that of Section 457 authorising a Magistrate to make an order for disposal of property, if seized by an officer and not produced before a criminal court during an inquiry or trial, however, has to yield where a statute makes a special provision with regard to its confiscation and disposal.

14. We have referred to the scheme of the Act and from that it is evident that the vehicle seized has to be produced before the Deputy Commissioner, who in turn has been conferred with the power of its confiscation or release to its rightful owner. The requirement of production of seized property before the Deputy Commissioner under Section 59(1) of the Act is, 10 (2002) 9 SCC 90 notwithstanding anything contained in any other law, and, so also is the power of confiscation. Not only this, notwithstanding anything to the contrary contained in any other law for the time

being in force, no court, in terms of Section 61 of the Act, has jurisdiction to make any order with regard to the property used in commission of any offence under the Act.

15. In the present case, the legislature has used a non obstante clause not only in Section 59 but also inSection 61 of the Act. As is well settled, a non obstante clause is a legislative device to give effect to the enacting part of the section in case of conflict over the provisions mentioned in the non obstante clause. Hence, Sections 451, 452 and 457 of the Code must yield to the provisions of the Act and there is no escape from the conclusion that the Magistrate or for that matter the High Court, while dealing with the case of seizure of vehicle under the Act, has any power to pass an order dealing with the interim custody of the vehicle on security or its release thereof."

25) Though, Section 61 of the Delhi Excise Act, 2009 bars the jurisdiction of all Courts but, even in the absence of similar provisions in the Act, the principle laid down is applicable in the present case as the Act is inconsistent with the provisions of the Code.

26) The confiscation of a vehicle found in illicit transportation of the liquor is an offence which can be investigated by an Excise Officer as well as by a Police Officer. But the exclusive power of confiscation is vested with the Collector in terms of sub-section (2) of Section 72 of the Act. The sale proceeds of seized things or Animal which are subject to speedy wear and tear or natural decay, if sold, are required to be paid to the person found entitled thereto in terms of sub-sections (4) and (8) ofSection 72 of the Act.

27) Sub-section (9) of Section 72 of the Act clarifies that no order of confiscation made by the Collector shall prevent the infliction of any punishment to which the person affected thereby may be liable under this Act. Thus, the punishment consequent to the prosecution is distinct from the order of confiscation passed by the Collector.

28) In Madhukar Rao's case, the provisions of the Code and that of the Wild Life (Protection) Act, 1972 were examined. The Court found that the use of a vehicle in the commission of an offence under the Act, without anything else would bar its interim release appears to be quite unreasonable. The Court held that the provisions of Section 50 of the Wild Life (Protection) Act, 1972 and the amendments made thereunder do not in any way affect the Magistrate's power to make an order of interim release of the vehicle under Section 451 of the Code. The Court held as under:

"16. We are unable to accept the submissions. To contend that the use of a vehicle in the commission of an offence under the Act, without anything else would bar its interim release appears to us to be quite unreasonable. There may be a case where a vehicle was undeniably used for commission of an offence under the Act but the vehicle's owner is in a position to show that it was used for committing the offence only after it was stolen from his possession. In that situation, we are unable to see why the vehicle should not be released in the owner's favour during the pendency of the trial."

29) We find that sub-section (3) of Section 72 of the Act confers power on the Collector for release of the vehicle if it is considered expedient in public interest apart from the fact, when anything or animal is subject to speedy wear and tear or natural decay. Therefore, the basis of the order in Madhukar Rao are not applicable in the case in hand."

23. Upon comparison of provisions contained in Delhi Excise Act 2009 as well

as Act, 1910, the Court finds that there is no provision in Act, 1910 similar to the provisions contained in Section 61 of Delhi Excise Act. Accordingly, ratio laid down in State (NCT of Delhi) Vs. Narender (supra) is confined to matters arising out of the Delhi Excise Act. As such, aforesaid judgement is distinguishable and the ratio laid down therein cannot be applied ipso facto for deciding release application in respect of seized vehicles regarding which confiscation proceedings are pending in terms of Section 72 of Act, 1910. As such, concerned Magistrate, as well as revisional court erred in law in rejecting the release application/ revision filed by applicant seeking release of seized vehicle by relying upon aforesaid judgement.

24. In view of law laid down by Apex Court as well as this Court as noted herein above, Magistrate as well as Revisional Court ought to have decided the issue regarding their own jurisdiction for releasing seized vehicle in exercise of powers under the Code in respect of vehicle which has been seized and confiscation proceedings in respect of which are pending consideration before District Magistrate under Section 72 of Act, 1910. However, the said issue remains unanswered by both the courts below.

25. As courts below have proceeded to refuse release of seized vehicle of applicant by placing reliance upon judgement of Apex Court in **State (NCT of Delhi) Vs. Narender (supra)** without decideing their jurisdiction to entertain the release application, filed by applicant seeking release of seized vehicle in terms of section 457 of Code, the orders impugned in present application cannot be sustained on account of erroneous reasoning and therefore, liable to be quashed.

26. Accordingly, present application succeeds and is allowed. Impugned orders dated 18.09.2020 passed by Additional Chief Judicial Magistrate/Additional Civil Judge (Sr. Div.) Court No.3, Aligarh in Case Crime No. 338 of 2019 under Section 62, 63, 72 U.P. Excise Act, Police Station- Akbarabad, District-Aligarh as well as order dated 31.10.2020 passed by Additional Sessions Judge/POCSO Act, Court No.02, Aligarh in Criminal Revision No. 136 of 2020 (Chandra Pal Vs. State of U.P.) under Sections-396, 397 Cr.P.C. are hereby quashed. Matter is remitted to concerned Magistrate to decide release application of applicant afresh in the light of observations made herein above within a period of one month from the date of production of a certified copy/ computer generated copy of this order which shall be filed by applicant before Court below by means of an affidavit.

(2021)03ILR A516
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.03.2021

BEFORE

THE HON'BLE DINESH KUMAR SINGH-I, J.

Election Petition No. 01 of 2018

Seema Sachan ...Petitioner
Versus
Ajeet Singh Pal & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vijay Bahadur Singh, Sri Jietendra Kumar, Sri Prashant Rai, Smt. Seema Sachan (In Person)

Counsel for the Respondents:
Sri Prabhakar Tripathi, Sri Bharat Singh Pal, Sri Neeraj Tripathi, Sri Shyam Sundar, Sri Bharat Singh Pal

(A) Civil Law - Election - Representation of People's Act 1951 - Section 33-

Presentation of nomination paper and requirements for a valid nomination , Section 38 - Publishing of list of contesting candidates, Section 61-Special procedure for preventing personation of electors , Sections 64 - Counting of votes , Sections 66 - Declaration of results , Conduct of Election Rules, 1961 - Rule 49-A - Design of Electronic Voting Machine , Rules 49-S, 55-C, 56-C, 56-D and 66-A - Indian Evidence Act, 1872 - Section 101, 102 and 103 - burden of proof lies on the election petitioner to prove its case to the hilt just like a criminal case - it is not an ordinary proceedings as election proceedings are statutory proceedings - every ground has to be pleaded specifically in the plaint on the basis of which the relief is being sought to be claimed. (Para -73,89)

Election Petition filed by Petitioner seeking election of respondent no. 1/returned candidate as member of legislative assembly to be declared as void and also get herself declared successful in his place - election of the returned candidate assailed - grounds - non-compliance by the Returning Officer of mandatory provision of Sections 64 and 66 of the Act and Rules 49-S, 55-C, 56-C, 56-D and 66-A of the Rules of 1961 - improper reception of votes of Electronic Voting Machines, seals of which were found tampered with and broken at the time of counting - presiding officer did not give true copy of the entries made in Form 17-C .(Para - 2,4)

HELD: - Petitioner failed to prove the issue related to tampering of EVM, the said issued is decided in negative holding that seals of EVMs were not found tampered with or broken. It was bounden duty of the petitioner's counsel to plead in the pleadings that the said Form 17C was never prepared by the Presiding Officer because of which copy of the same was not provided to the polling agent. Merely mentioning that copy of Form 17C was not given to the polling agent would not suffice to conclude that copy of the same was never prepared. Neither there appears to be any specific pleading on record in that regard nor clear evidence has come on record in this regard, therefore, it is apparent that only on the basis of presumption, the violation of Section 66 and 64 and Rules 49S, 55C, 56C, 56D and 66-A cannot be held proved. This issue is decided accordingly against the petitioner. (Para - 49,80,89)

Election Petition dismissed. (E-6)

List of Cases cited: -

1. KT Kosalram Vs Dr. Santhosham & ors., AIR 1969, Madras 116

2. Sushil Kumar Vs Rakesh Kumar, (2003) 8 SCC 673

3. Virender Nath Gautam Vs Satpal Singh & ors., (2007) 3 SCC 617

4. Sushil Kumar Vs Rakesh Kumar, (2003) 8 SCC 673

5. Arabinda Dhali Vs Nimai Chandra Sarkar & ors. , AIR 2008 (NOC) 2561 (ORI.)

6. S. Prasanna Kumar Vs Dr. Y. Nagappa & ors., IIR 2007 KAR 4491

7. R.M. Seshadri Vs G. Vasantha Pai, (1969) 1 SCC 27

8. Kalyan Kumar Gogoi Vs Ashutosh Agnihotri & anr., AIR 2011 SCC 760

9. Uma Ballav Rath Vs Maheshwar Mohanty & ors., AIR 1999 SC 1322

10. Kashi Nath (dead) through L.Rs. Vs Jaganath, (2003) 8 SCC page 740

11. Gajanan Krishnaji Bapat & anr. Vs Dattaji Raghobaji Meghe & ors., AIR 1995 SCW 3407

12. Mangani Lal Mandal Vs Bishnu Deo Bhandari, AIR 2012 SC 1094

13. Akhtar Chooriwala Vs Smt. Pooja Pal, 2017 (2) ADJ 612

(Delivered by Hon'ble Dinesh Kumar Singh-I, J.)

1. Heard Sri Vijay Bahadur Singh, learned Sr. Advocate assisted by Sri

Jitendra Kumar, learned counsel for the petitioner and Sri Bharat Singh Pal, learned counsel for the Respondent No. 1.

2. This Election Petition has been filed by Ms. Seema Sachan seeking election of Ajeet Pal Singh, respondent no. 1/returned candidate as member of legislative assembly from 207, Sinkandra Legislative Assembly Constituency, Kanpur Dehat, U.P. to be declared as void and also get herself declared successful in his place. Uttar Pradesh Vidhan Sabha, By-Election, 2017 of 207, Sinkandra Legislative Constituency, Kanpur Dehat was notified on 27.11.2017 and the schedule of election was as follows: (1) Date of notification of election 27.11.2017; (2) last date for filing of nomination paper 4.12.2017: (3) date of scrutiny of nomination paper 5.12.2017: (4) date of withdrawal of candidature 7.12.2017: (5) date of poll 21.12.2017: (6) date of counting 24.12.2017: (7) date before which election shall be completed 26.12.2017; and (8) hours of poll 08:00 a.m. to 05:00 p.m.

3. The Election Commission of India, in exercise of its power conferred under Section 61-A of the Representation of People's Act 1951 (in short to be referred hereafter as "The Act') read with Rule 49-A of the Conduct of Election Rules, 1961 (in short to be referred hereafter as "Rules of 1961') issued a direction on 14.12.2017 that the current by- Election of State Legislative Assembly including 207, Sikandara Legislative Assembly, Kanpur Dehat, U.P., notified on 27.11.2017, shall be held as per the schedule mentioned above in para 1 and votes would be recorded by means of Electronic Voting Machine (E.V.M.) and Voters Verifiable Paper Audit Trail (V.V.P.A.T.) printers under Rules of 1961 and Supplementary instructions issued from time to time by the Election Commission of India. The said direction dated 14.12.2017 was published in Official Gazette of the States including the State of Uttar Pradesh.

4. As per the schedule, the candidates filled up the nomination form in terms of Section 33 of the Act. The present Election Petitioner has also filled up her nomination form as a candidate of Samajwadi Party and was allotted a symbol of Cycle. The returned candidate (respondent No. 1), Ajit Singh Pal submitted his nomination form as a candidate of Bhartiya Janata Party (B.J.P.) and was allotted symbol of "Kamal Ka Phool' (lotus). Similarly the other candidates who have been impleaded as respondent nos. 2 to 10 are of different parties and were also allotted other symbols, details of which are mentioned in para 4 of the petition. The Returning Officer after scrutinizing all the nomination papers of all the candidates of the constituency, published a list of contesting candidates in terms of Section 38 of the Act whose names are given in tabular form in para 5 of the Petition. The counting of votes took place on 14.12.2017 and on the same day, result was announced by the Returning Officer wherein respondent no. 1-returned candidate was illegally declared elected from the constituency in question. The election of the returned candidate is being assailed on the following grounds: (a) the election of the respondent no. 2-returned candidate has been materially affected on account of non-compliance by the Returning Officer of mandatory provision of Sections 64 and 66 of the Act and Rules 49-S, 55-C, 56-C, 56-D and 66-A of the Rules of 1961, who has acted against the said provisions; (b) The election of returned candidate has been materially

affected on account of improper reception of votes of Electronic Voting Machines, seals of which were found tampered with and broken at the time of counting; (c) the election of the returned candidate has been materially affected on account of the fact that the presiding officer did not give true copy of the entries made in Form 17-C after obtaining receipts from the polling agents at the closing of poll to the polling agents of the Election Petition and other candidates (this during the arguments was argued to be the main ground on which the learned counsel for the petitioner wanted the election of the elected candidate to be declared null and void and did not lay much emphasis on other grounds which were mentioned in the petition); (d) the election of the returned candidate has been materially affected on account of the fact that there were two rooms in strong room and on the date of counting, the election petitioner and their representatives were present at the counting premises on time but one room out of two strong rooms was opened by the Returning Officer in absence of the election petitioner and her representatives without calling them to remain present at the time of opening of the strong room. After opening of one of the strong rooms, an announcement was made by the Returning officer asking the candidates and representatives to come for opening of the strong room and then only the second room of the strong room was opened in presence of the candidates and their representatives. The election petitioner and her representatives were not permitted to inspect the seals of one of the strong rooms, where, the E.V.Ms. were also kept and were brought for counting; (e) the election of the returned candidate has been materially affected on account of the fact that Returning officer permitted only 14 counting agents to be appointed by the petitioner and other candidates and she (Returning officer) did not permit the petitioner and other candidates to appoint 15th counting agent for central table/Returning officer's table during counting. There was no access of the election petitioner, her election agents and her counting agents to the central table/Returning officer's table during counting. The computation and compilation of data from each table, at the conclusion of a round was done at the Returning officer's table/central table, in absence of election petitioner, her election agents and her counting agents; (f) The Election of the returned candidate has been materially affected on account of the fact that seals of E.V.Ms. were continuously being found tampered with and broken from the very first round of counting till completion of counting. The complaints were made to the Returning Officer by the counting agents of the election petitioner. During counting, complaints were made to the effect that the seals of E.V.Ms. were found broken and tampered with and that E.V.Ms. had been manipulated in favour of the returned candidate. However, the returned candidate was adamant to ignore the complaints and illegally kept counting continued. Even the announcement of votes obtained by each candidate in the counting from 10th to 17th round of counting, were not announced. On protest being made by the election petitioner, her election agents and counting agents, they were forcibly ousted from the counting campus. During this period, the seals of the EVMs were also found broken. The election petitioner and her election and counting agents were permitted in, only from 18th round of counting onwards, however, the seals of the E.V.Ms. were also found broken and tampered with from the 18th round till the completion of 28th round of counting which too was reported

by the counting agents of the election petitioner to the Returning officer; (g) the election of the returned candidate has been materially affected on account of the fact that after the completion of counting and after entries made in the result-sheets, but before signature of the Returning Officer on the result-sheet, the election petitioner made application in writing complaining about the seals having been found tampered with and seals being found broken of the E.V.Ms. of the several polling booths during counting, with the request to the Returning officer to count the V.V.P.A.T. print paper slips in drop box of the printer in respect of 391 polling booths, but Returning Officer illegally rejected the application of the Election Petitioner without examination in violation of the direction of Election Commission of India with a false recording that no complaints were ever made by any agent during all rounds of counting and that V.V.P.A.T. print slips were counted of booth no. 135 of table no. 4 in 11th round; (h) the election of the returned candidate has been materially affected on account of the fact that EVMs were manipulated to benefit the returned candidate and accordingly, the seals were tampered with and broken. However in spite of the fact that the Returning officer illegally counted votes of tampered EVMs of booth no. 135 of table no. 4 in 11th round of counting, without recording reasons in writing, to conceal manipulation and benefit given to the returned candidate-respondent no.1; (i) the election of the returned candidate has been materially affected on account of the fact that provisions of Constitution, Act and Rules framed thereunder as well as the orders and instructions issued under the Constitution by the Election Commission of India have not been complied with in counting of votes.

5. Further it is submitted that concise statement of material facts regarding grounds (a) to (i) is that there was improper reception and counting of votes of E.V.Ms., seals of which were tampered with and broken on the date and time of counting i.e. on 24.12.2017 and also there was non-compliance of the mandatory provisions of the Act and Rules stated above. Further it is mentioned that on the date of polling i.e. 21.12.2017, the presiding officer did not give true copies of Form No. 17-C to polling agents containing the details of counted votes on the end of counting. There were total 391 polling booths and true copy of account of votes in Form 17-C was not given to any of the polling agents of the election petitioner nor was it given to any of the polling agents of any contesting candidates of the said constituency. Further it is mentioned that counting agents of the Election Petitioner made complaint in writing about the tampered seals to the Returning officer in different rounds. The election petitioners' counting agent, Mahendra made written complaint of broken seals of EVMs of booth no. 1 (counting table no. 1), counting agent, Ram Naresh made complaint of broken seals of EVMs of booth no. 126 (counting table no. 8), counting-agent, Anoop Kumar made complaint of broken seals of EVMs of booth no. 16 (counting table no. 2), counting agent, Arvind Kumar made complaint of broken seals of EVMs of booth no. 254 (counting table no. 5) etc. Further it is submitted that the Returning officer did not make announcement of the vote counted and obtained by different candidate from 10th round to 17th round of counting. The election petitioner, her election agents and counting agents made protest with respect to this non announcement and then they were forcibly ousted from counting premises by the

Returning officer during the period of counting from 10th round to 17th round. The seals of the EVMs were being continuously found tampered with and broken from 10th round to 17th round. Announcement of the counting of votes resumed from the 18th round of counting and then only the election petitioner and her election and counting agents were permitted to enter counting premises and participate in counting. The other contesting candidates and their election and counting agents were also continuously making complaints of non announcement of votes. They were also forcibly ousted from the counting premises during the 10th to 17th round of counting. However, the returned candidate, respondent no. 1's agents remained present during the said round of counting from 10th to 17th round. Further it is submitted that seals of EVMs (control unit) were again continuously found tampered with and broken from 18th round till the completion of 28th round of counting. The election petitioner's counting agent, Arvind Kumar made a complaint in writing of broken seals of EVMs of booth no. 254 at table no. 5 in 28th round of counting. Further it is mentioned that after completion of 28th round of counting and after entries had been made in the result sheet but before the signature of Returning officer on final result sheet, Form No. 20, the election petitioner immediately made application in writing to the Returning officer to count the VVPAT printed paper slips and drop-box printer with respect to the EVMs of all polling stations from booth nos. 1 to 391 on account of tampering and broken seals of several EVMs found at the time of counting as well as announcement of the votes obtained by the candidates. From 10th round to 17th round, the protest were made by election petitioner and her agents but they were forcibly ousted from the counting premises. The election petitioner also made an application in writing to the District Election Officer, Kanpur Dehat/Chief Election Officer, Uttar Pradesh that the announcement of counting were not made from 10th round to 17th round and on protest being made, they were forcibly ousted from the counting premises and that the seals of the E.V.Ms. were found tampered with and broken at the time of counting. The Returning Officer duly received election petitioner's complaint addressed to the District Election Officer, Kanpur Dehat/Chief Election Officer, Uttar Pradesh on their behalf, before signing the sheet but she did not examine the request for re-counting of printed paper slips, made by the petitioner which was required to be done as per the direction of the Election Commission of India and rejected her request recording that counting was completed in presence of the agents and that no agent had made any complaint in any round of counting and that there was no reason for V.V.P.A.T. paper slips to be counted. The Returning officer, however, has recorded that the VVPAT printed slips were counted of booth no. 135 in the eleventh round of counting on doubt being raised, in which, result of the control unit and the VVPAT were found equal. The Returning Officer had passed this order on the complaints made by the election petitioner to the Returning officer as well as the District Election Officer, Kanpur Dehat/Chief Election Officer. Further it is mentioned that the Returning officer recorded a false and vague reason for rejecting the petitioner's request for recounting of VVPAT slips because the counting agents of the election petitioner had made continuous and repeated complaints of tampering and seal being found broken of the EVMs from the very first round till the completion of 28th round

of counting. The Returning officer was under statutory obligation to re-count the VVPAT slips of EVMs of all polling booths on the application of the Election Petitioner when the seals of EVMs were found tampered and broken on several booths on different tables in different rounds of counting. Election petitioner had minor difference of votes from the winning candidate in different round of counting which was only due to manipulation and counting of votes of tampered EVMs. Further it is mentioned that the Returning Officer, Deepali Kaushik, S.D.M., Sikandara, Kanpur Dehat deliberately favoured the returned candidate who belonged to ruling party (BJP) by manipulating the EVMs and getting the counting conducted in a manner so that it would benefit the returned candidate. The petitioner has secured 61455 votes while the returned candidate has secured 73325 votes, therefore the result stands vitiated due to illegal manipulation of EVMs and counting of votes and non-compliance of mandatory provision of Act and Rules and directions issued by Election Commission from time to time regarding counting. The election of the returned candidate has been materially affected by the facts narrated above, which has breached the purity of election. Certified copy of the Form No.-20 "final result-sheet' [Rule 56-C (2)] of Vidhan Sabha By-Election of 2007, Sikandara, Kanpur Dehat has been appended as Schedule-1. The Election Petitioner has obtained majority of valid votes higher than the returned candidate which would be clear on re-counting of VVPAT slips. The Election Petitioner has also deposited requisite amount of Rs. 2,000/- in the treasury towards security of the Election Petitioner and the receipt of depositing of the said amount, is annexed with the Election Petition.

6. From the side of returned candidate, Written Statement has been filed refuting the allegations made in the petition, averring therein that without having concise statement of material facts regarding corrupt practice, on which the petitioner relies, this Election Petition has been filed and also the petitioner has failed to provide any documentary evidence of the persons involved in alleged corrupt practice and as such, Election Petition is not maintainable under the provision of Section 83 of the Act which has been reproduced in para 3 of the Written-Statement. Further it is submitted that all the allegations made in the petition are against the Returning Officer appointed for the constituency in question but Returning Officer has not been arrayed as respondent and as such Election Petition is not maintainable as mandatory provisions of Section 82 of the Act has been breached. The said provision has been quoted in para 5 of the Written Statement. Further it is mentioned that in ***KT Kosalram Vs. Dr. Santhosham and Others AIR 1969, Madras 116*** (High Court has specifically held that whenever there are allegations of bad faith, misconduct and propriety and not merely illegality against the Returning Officer in an Election Petition, the Returning Officer is a proper party, though not necessary party. In proper cases, the Returning Officer may be a proper party to the Election Petition, even though Section 82 of the Act does not make him a necessary party. Section 90 of the Act enables the Tribunal to implead the Returning Officer as a party as per the Civil Procedure Code which are expressly made applicable to the trial of Election Petition subject to the provisions contained in the Act and the Rules made thereunder. Further it is mentioned that petitioner has not enclosed any documentary material with

the Election Petition in support of her allegations made with regard to corrupt practice, from opening of the strong room up to the declaration of final result, hence the petition deserves to be dismissed ab-initio. Petitioner has lost the election with a margin of 11870 votes and was never satisfied with the result and somehow wanted to raise hurdles in smooth working of the returned candidate. Grounds to seek election to be declared void are solely based on alleged misconduct, illegality and impropriety on the part of the Returning Officer and not against the returned candidate. Allegations are only to the extent of tampering of EVMs and about their seals being found broken but not with regard to machines itself or manipulations regarding data released by the machines. The Election Petitioner was supposed to produce all documents in her possession upon which she relies, to fortify her claim, but in the present case, the Election Petitioner has failed to do so which was in violation of mandatory provision of Order 7, Rule 14 C.P.C. It is further mentioned that Election Petitioner has sworn her petition relating to paragraph nos. 9, 10, 13, 19, 22 and 29 as "derived from the record and from information received from my supporters, election agents and other persons" but she has neither disclosed the specific particulars about her sources nor has she produced any document in support of other pleadings. Election Petition is defective one because para 20 of the petition could not be sworn by petitioner and further non-existing para 29 has been sworn by Election Petitioner. Entire petition does not contain any ground as provided under the Act for getting the Election set-aside, of the returned candidate/respondent no. 1. Pleadings are totally bereft of the material facts and do not amount to stating any ground for getting the Election set-aside, of returned candidate. Pleadings as they stand, do not disclose the cause of action for the trial, therefore, Election Petition is liable to be dismissed under provisions of Order 7 Rule 11 of CPC read with Section 81 of the Act. The petitioner has referred to a number of documents which form basis of the allegations but copies of none of them has been filed nor supplied to the answering respondent, therefore, there is non-compliance of Section 81 (3) of the Act, hence Petition is liable to be dismissed.

7. With respect to the averments of the Para 7 of the Petition, it is submitted that the contents of the said para are erroneous, hence denied. All the allegations of misconduct, illegality and impropriety on the part of the Returning Officer for getting the election result of winning candidate to be declared void, are bogus and non existing, because neither the returned candidate nor his agents or other contesting candidates or their agents had made any complaint during entire counting proceedings which had been witnessed by them all. Contents of para 8 of the Petition are also stated to be erroneous and denied and it is submitted with respect to that opening of both the rooms in the strong room had been witnessed by all the contesting candidates and their agents and none of them had made any complaint in this regard before Returning Officer or any authority concerned.

8. With respect to para 9 of the petition which relates to the averment that Presiding Officers did not give true copy of the entries made of the count of votes recorded in Form-17-C to the polling agents and the Election Petitioner present, at the close of poll at all polling booths, is stated to be erroneous and has been denied.

Regarding this, it was much emphasised by the learned counsel for the petitioner that such kind of cryptic denial would amount to admission of the contents of the said paragraph as there is no specific denial that the copies of Form-17-C were not provided to the polling agents of the Election Petitioner as per the mandatory provision of law and it was also stated by him that non providing of copies of Form-17-C would also mean that the same was not prepared at all by the presiding officers/concerned authority which would render the election void. Reliance was also placed by learned counsel for the petitioner upon **Sushil Kumar Vs. Rakesh Kumar 2003 (8) SCC 673** in which it was held that an evasive denial would amount to admission of allegations made in the statements and no evidence contrary thereto or inconsistent therewith would be permissible.

9. With regard to averments in para 10 of the Petition, it is submitted that the same are erroneous and hence denied. Petitioner never provided true/certified copy of the complaint allegedly made by her counting agents i.e. Mahendra, Ram Naresh, Anoop Kumar and Arvind Kumar before the High Court.

10. With respect to contents of Para 11 of the petition, the same are stated to be erroneous and hence denied and it is further stated that agents of the petitioner were never absent from the counting proceedings as alleged that they were ousted forcibly after the conclusion of 17th round of counting. The same is absolutely false.

11. With regard to averments in para 12 of the Petition, it is stated to be erroneous and hence denied and it is further submitted in this regard that from the statement of petitioner herself all her counting agents again appeared in the counting proceedings prior to the starting of 18th round of counting.

12. With regard to contents of para 13 of the Petition, the same are denied as erroneous and further submitted that none of the contesting candidates or their agents came forward with any complaint about broken seals of EVMs nor the petitioner provided true/certified copies of the complaint made by Arvind Kumar as claimed.

13. Contents of para 14 which contains the details of lapses in counting, are stated to be erroneous and, hence denied.

14. Contents of para 15 which relates to Returning Officer having duly received the Election Petitioner's complaint addressed to her, District Election Officer and Chief Election Commissioner, U.P., has been stated to be erroneous and hence denied.

15. With regard to contents of para 16 of the Petition which is related to non examination of request of recounting of VVPAT printed paper slips, the same is said to be erroneous and denied and it is further submitted that the allegation of tampered and broken seals of EVMs were found false by the Returning Officer as admitted by the petitioner herself and, therefore, there was no occasion to count the VVPAT printed paper slips of the Drop Box of EVMs concerned. Further it is submitted that petitioner never produced true/certified copy of the application and its rejection by the Returning Officer.

16. Contents of para 11 (it appears to be wrongly mentioned as 11 as it appears to be para 17 because para 11 has already been dealt with) are stated to be erroneous and denied which too relates to the

Returning Officer having recorded the false and vague reason for rejecting the petitioner's request for recounting of VVPAT slips.

17. The contents of para 18 of the petition which is related to the counting of VVPAT slips and because of the allegation of the EVMs found tampered with, by which it was said that Returning Officer was under statutory obligation to recount the VVPAT slips, the same is stated to be erroneous and hence denied and it is submitted that the Returning Officer could not be compelled to count the VVPAT printed paper slips under undue influence on the basis of bald allegations only to scandalize the election proceedings with ulterior motive. Further it is submitted that the petitioner has contested the election, who is an MLA of outgoing ruling party having lost mass support because of previous misdeeds and anarchy and, therefore there was little probability of her to win and the returned candidate has been made victorious by huge margin of 11870 votes.

18. Allegation with respect to para 20 relating to Returning Officer having favoured the Returned Candidate, has been stated to be erroneous and, hence denied.

19. Averments made in para 21 of the Petition which is wrongly mentioned as para 11, which pertains to vitiation of election due to illegal manipulation of EVMs and non compliance of mandatory provisions of Act and Rules and the benefit being given by the Returning Officer to returned candidate are denied and it is stated that retuned candidate has good record of public service and his credibility and reputation is well established in the area.

20. The averments of para 22 of the Petition relating to the claim of the petitioner of having obtained valid votes of majority, is also stated to be erroneous and denied and further submitted that there was a wave in favour of BJP in whole country including U.P. and the petitioner has contested from Samajwadi Party who had lost his credibility due to misdeeds and anarchy, therefore, it is mentioned that in the interest of justice, the Election Petition of petitioner deserves to be dismissed to meet the ends of justice.

21. On the basis of pleadings of respective parties, the Court has framed following issues vide order dated 26.04.2019 which are as follows:-

"(i) Whether E.V.M. machines are found tampered with and their seals broken of the booths as alleged in para 10 of the plaint?

(ii) Whether provisions of Section 64 and 66 of Representation of People's Act, 1951 and Rule 49-S, 55-C, 56-C, 56-D and 66-A of Conduct of Election Rule 1961 have been violated. If yes, its effect?

(iii) To what relief, if any, plaintiff is entitled?

(iv) Whether Election Petition is not maintainable due to being bereft of material fact as stated in para 16 of the Written Statement?"

22. In order to prove the claim in the Petition, from the side of petitioner, following documentary evidence has been presented which are Paper No. A-17/1, A-18/1, A-19/1, A-20/1, A-21/1, A-22/1, A-23/1, A-24/1, which are copies of complaints moved from the side of Election Petitioner and her agents during the election proceedings. In oral evidence, the petitioner has examined herself as P.W. 1,

Anoop Kumar as P.W.2, Arvind Kumar as P.W. 3, Shamshul Kamar as P.W. 4, Virendra Kumar as P.W. 5, Siddhartha Katiyar as P.W. 6 and Md. Imran as P.W. 7, thereafter the evidence of petitioner was closed and opportunity was given to the respondent.

23. From the side of respondent, Deepali Bhargawa (Kaushik), SDM, Bhognipur, Kanpur Dehat who was the then Returning Officer of the constituency in question has been examined as D.W.-1.

23.A The arguments were heard of the learned counsel for both the parties and perused the record.

24. **Finding on Issue No. 1:-**

This issue relates to the fact as to whether EVMs are found tampered with and their seals broken of the booths as alleged in para 10 of the complaint. The said para contains the fact that seals of EVMs (control unit) were found tampered with and broken right from the beginning of the counting which remained continued till the completion of last round of counting. Counting agents of the Election Petitioner had made complaints in respect of the EVMs' seals having been found broken and tampered with during the counting, continuously and repeatedly to the Returning Officer.

25. Counting agents of the election petition made complaint in writing of the tampered seals to the Returning Officer in different rounds, the petitioner's counting agent, Mahendra made written complaint of broken seals of EVMs of booth no. 1 (counting table no. 1), counting agent, Ram Naresh made complaint of broken seals of EVMs of Booth No. 126 (counting table no. 8), counting-agent, Anoop Kumar made complaint of broken seals of EVMs of Booth No. 16 (counting table no. 2) and counting-agent, Arvind Kumar made complaint of broken seals of EVMs of Booth No. 254 (counting table no. 5) etc.

26. From the side of respondent, the said allegation has been denied and it is submitted that the petitioner never provided true/certified copy of the said complaints allegedly made by her counting agents, Mahendra, Ram Naresh, Anoop Kumar and Arvind Kumar.

27. In order to prove this issue, from the side of petitioner, she herself has been examined besides the two complainants i.e. Ram Kumar as P.W.2 and Arvind Kumar as P.W. 3. besides that some other witnesses who have been named above, therefore, an assessment has to be made about truthfulness of the allegations on the basis of evidence which has been adduced from the side of petitioner mentioned above.

28. The petitioner herself has repeated the same version in her examination-in-chief as mentioned in election petition and in cross-examination, she has stated that the name of the election agent appointed by her was Virendra Sharma. The election was held on 21.2.20217. She cannot tell the number of polling agents appointed by her. On the basis of conjecture, she stated that approximately 300 polling agents might have been appointed by her. On the date of voting, she was out side of the Mandi Samiti. She cannot tell as to how many polling booths, she had visited on the date of polling. On the date of polling, her agents were on the round. There were in all three blocks, out of which, on one block she herself was present and on the

remaining two blocks, her agents were present. The name of the said three blocks are Sikandra, Derapur, the name of third block she does not recollect. When she was on the round, she met polling agents. A question was put to her as to whether any polling agent had disclosed to her about any EVMs to be defective, to which, she answered that she was on the round and she herself had seen that there was tampering in the EVMs. She has also stated that the people who were there, had said that these peoples were going who would get the EVMs changed. She had not made any complaint either orally or written. When she had reached the polling booth, regarding mischief, nothing was disclosed to her by her polling agents but regarding it, public had told her. She did not stay at the said polling booth for long so as to see whether EVMs had been changed or not. The counting was held on 24.12.2017. She had appointed 14 counting agents. The counting was held in Akbarpur Mandi Samiti. She had not gone earlier to the place where counting was held at the time of counting but subsequent to that, she had gone there when her agents had disclosed to her that there was mischief being done in the counting. She had asked her agents that they should make a complaint regarding mischief going on. Regarding mischief in counting, orally counting agents had told her. The counting agents had come to her and then had told her that there was mischief being done in counting. When a question was put to her as to when she had approached the counting centre, she replied that when her agents had been driven away from the counting centre, thereafter she had gone there. Further, she had stated that she had gone at the counting centre when 19th round of counting was going on. Her counting agents had gone since morning at the counting centre and from 7.00A.M. till 5.00 p.m. the counting process was going on. On 24.12.2017 she had given an application to the Returning Officer, 207 Sikandra Constituency, Kanpur Dehat, which was written in her handwriting and was signed by her. Mahendra, Ram Naresh, Anoop Kumar and Arvind Kumar, who were her agents, had given applications to the Returning Officer on 24.12.2017. The reference of the document which has come in para-10 of her examination-in-chief, the said document has not been annexed by her with the petition (The said reference in paragraph-10 is related to Form No.17-C) but she cannot tell as to why the said document had not been annexed with the petition. The election petition was presented by her before the Registrar General but she had no knowledge as to what papers were annexed with her petition. When she had gone at the counting centre in the 19th round, she had talked to her counting agents there. She had not gone near the table at the counting centre because permission was not granted nor did she apply to seek permission to go there from anyone although she had told her agents that they should go there but she had no knowledge as to whether counting agents had made any effort to go there or not. Her agent Vinod Sharma had told her that permission was not granted to him to go there. Approximately, seals of 125 EVMs were found broken thereafter she said that the seals of all the EVMs were found broken but she had not mentioned the said fact in her petition. When it was asked from her as to whether the said fact was right or wrong, she replied that regarding few EVMs, she had come to know that their seals were found broken. She was again put a question as to why at four voting centre, her agents had made complaint for mischief and not at the other centres, she replied that her agents at other

counting centres had also moved complaints but the same have not been filed by her with the petition. The examination-in-chief has been submitted by her on the affidavit which has been prepared by her advocate after having obtained information from her. She had narrated the facts relating to the petition in Hindi which were translated by her counsel in English. She admitted that at booth no. 135 vote count of VVPAT was done and the number of votes was found correct at the said booth. Later on, she said that she cannot tell as to how it has been written because she was not present at the counting. When she was put a question as to whether her counting agents were driven out from the counting premises between 10th-17th rounds, she answered in the affirmative. Then a question was put to her as to how she came to know that seals of the EVMs were found broken during the counting of 10th-17th rounds, she replied that she and her men had been driven away but others were inside the premises from whom she had come to know about this fact.

29. After having drawn attention to the said statement of this witness, it was argued by the learned counsel for the respondent that the statement of this witness appears to have been given in a general way about mischief having been done in the counting because she was not present on the place, where counting was going on and she has also admitted that at booth no. 135 count of VVPAT was done and number of votes were found correct and from 10th to 17th round when her agents were not allowed to remain inside the premises, how could they come to know that EVMs from which the votes were counted in between, were found with broken seals, it has not been clarified. She has also not disclosed the names of such persons from whom her agents came to know about the seals of the EVMs being found broken which were counted between 10th-17th round, therefore it is argued by the learned counsel for respondent that her statement in this regard should be discarded and if cannot be held that EVMs were found defective and that there were errors in counting process.

30. Anoop Kumar PW-2 has stated in examination-in-chief that the EVMs of broken seals of booth nos. 16, 30, 57, 71, 121, 251, 264, 304, 330 and 358 were brought to his table for counting and finding the seals of EVMs broken of booth no. 16, Banipara, Meharaj, in second round of counting, he made a written complaint of the same to the Returning Officer. In the 10th round of the counting, the seals of 10-11 EVMs were found broken, consequently the agents present in the counting premises, made serious protest and thereafter all the agents of the petitioner were threatened and forcibly ousted by lathi charge from counting premises and they were not permitted to enter the counting premises. The result of the counting of 10th to 17th round was also not announced. When a complaint was made in this regard to higher authority, only then they could be permitted to enter into the counting premises in the middle of 18th round of counting. Further, it is stated by him that the seals of the EVMs, which were brought for counting between 19th to 28th rounds, were also found tampered and broken and when protest was made by him and other agents, the Returning Officer did not take any action and ultimately Seema Chauhan, petitioner made an application for recounting, to the Returning Officer and the District Election Officer, which was not considered and rejected and the result was declared.

31. This witness had been cross-examined by the counsel for the respondent and it is stated by him that he had reached at the place where the counting was going on between 6.30 A.M. to 7.00 A.M. He was counting agent at table no. 2 and with whom there were other counting agents of the other parties as well. He had made a complaint regarding mischief in counting. He had given an application, in writing that the seals of EVMs were found broken. The seals of machines were found broken from which votes were counted. This application was given by him to the Returning Officer, Ms. Dipali Kaushik. The counting began at 8.00 A.M. and he was thrown out three hours thereafter and thereafter he stated that all of them were driven out of the counting premises. Then he stated that all the counting agents of the petitioner were driven out. On his own, he has further stated that the EVMs with broken seals were brought for counting, then people were protesting in that regard but no altercation took place with any authority and when he made a complaint, he was thrown out of the premises. He had given written complaint to the Returning Officer himself but he does not recollect whether receiving was obtained by him or not. He himself had gone near the Returning Officer.

32. Citing the above statement of this witness, it was argued by the learned counsel for the respondent that he has also given general sort of statement that mischief in counting was going on and that the seals of the EVMs were being found broken at the time when they were brought for counting and when a protest was made, initially he stated that all the agents of all the parties were threatened and thereafter he had modified his statement saying that only he and all the agents of the petitioner had been driven away from there. Special attention is drawn of the Court that if any application/complaint had been made by him, a receiving of the same ought to have been taken but this witness has stated that he does not recollect as to whether any receiving was taken or not which creates doubt about any such written application having been moved by him.

33. Arvind Kumar has been examined as PW-3, who has stated in examination-in-chief that he was counting agent of the petitioner and that the EVMs of tampered and broken seals were coming on his table right from beginning of the counting which was protested to the Returning Officer but the same was over looked. Seals of EVMs of booth nos. 33, 123, 240, 254, 307 and 361 were brought on the table of this witness (Table No.5), seals of which were found broken and tampered. Further, he has stated that in the 10th round of counting, seals of around 10 to 11 EVMs were found broken, consequently, the agents present in the counting premises made serious protest thereafter all the agents of the petitioner were threatened and forcibly ousted from the premises by lathi charge. Counting result of 10th-17th round was not announced nor was this witness permitted to enter into counting premises. When complaint was made to the higher authority then only he was permitted to enter into the counting premises in the middle of 18th round of counting. He had made a serious complaint to the Returning Officer in 20th round of counting but the same was over looked by the Returning Officer. The EVMs with tampered and broken seals were brought between 19th-28th rounds which was also protested but the Returning Officer did not take any action, ultimately the petitioner made an application for recounting to the Returning Officer and the

District Election Officer which was not considered and rejected and the result was declared.

34. In cross-examination, this witness has stated that at a time only one machine used to be brought and it used to be checked by him as to whether its seal was broken or not. The checking of the machine used to be done by the officer which was witnessed by him. He is not a politician and is a farmer and earlier also he had participated in the counting of votes, however, he has never contested any election. One seal was affixed on thread, which was found broken. The machine was brought in a cover/box/attachee. The seal was affixed at the box and also at the voting machine. Both the seals were found broken before him. In front of him, 28 EVMs were counted, out of which seals of 10 to 12 EVMs were found broken and the seals of both cover as well as machine kept inside were found broken. Besides himself, others who were present there had also made a complaint in this regard. He himself had given written complaint to the Returning Officer but he does not recollect whether he had taken receiving of the same or not. During counting process, he often used to have a talk with the agents of the petitioner who were present on other counting tables. During the counting of 9th round, it was brought to the notice of the authorities that seal was found broken, then authorities told him that he may either leave or may continue to stay there. He had made only one complaint. In the 18th round of counting, he and all other agents had returned. He had told all these facts to his counsel, thereafter his affidavit has been prepared.

35. After having drawn attention to the statement of this witness, it is argued by the learned counsel for the respondent that he had also given general sort of statement that the seals of 10 to 12 EVMs were found broken. It is pointed out that had he made a complaint, he would certainly have got a receipt of the complaint made by him regarding which he has clearly stated that he does not recollect.

36. Shamshul Qamar has been examined as PW-4, who has stated in examination-in-chief that the EVMs with tampered and broken seals of booth nos. 27, 54, 118, 131, 275, 288, 301, 313, 341 and 355 were brought on the counting table no. 13 of which he was the counting agent of the petitioner, regarding which a complaint was made to the Returning Officer but EVMs of tampered and broken seals were continuously being brought on the counting table right from beginning and when the complaint was made, no action w as taken by the Returning Officer. In the 10th round of counting, the seals of approximately all the EVMs were found broken, consequently the agents present in the counting premises made serious protest. Thereafter, all the agents of the petitioner were threatened and forcibly ousted by lathi charge. The result of the counting from 10th to 17th round was also not announced and he was not permitted to enter the counting premises. When complaint was made to higher authority, then only he was permitted to be present in counting premises in the middle of 18th round of counting. Further, it is stated that EVMs with tampered and broken seals were brought for counting in between 19th to 28th round and when protest was made by him and other agents, no action was taken by the Returning Officer, thereafter the petitioner had made a complaint for recounting before the Returning Officer and District Election Officer, but the same was rejected and result was declared.

37. In cross-examination, this witness has stated that he was on counting table no. 13 and about 28th rounds of counting had happened at his table but out of those rounds, he was present during 18th round of counting and for the rest of the rounds of counting, he was thrown out. Thereafter, he has stated that in the 10th round of counting, he was thrown out and returned in the middle of the 18th round of counting. When he was protesting there at the beginning of 10th round of counting, force was called and it was asked by the force that if he wanted to stay, he could stay otherwise he could leave and thereafter he was thrown out by force from the counting premises because he was protesting counting to proceed. He returned in the middle of 18th round of counting because the petitioner had held talk with higher authorities. Virendra Sharma election agent, who was inside, had told him that he should come in. In voting machine, there was strip of paper on which seal was affixed which was found broken. The said machine was kept in a box and on that box seal was affixed with thread which was found broken but he cannot tell as to of how many machines as well as boxes the seals were found broken but most of them were found broken. A complaint was made about the seals being found broken by the agents but all of them were driven away from the counting centre. Even after having been driven away, there were some agents of other parties left inside the counting premises before whom the counting was held. He too has stated that an affidavit was prepared by his counsel at his dictation of this occurrence.

38. Virendra Kumar has been examined as PW-5, who has stated in examination-in-chief that EVMs with tampered and broken seals were continuously brought to his table from the beginning and the same continued till the end of the counting of 28th round which was protested by him and other counting agents but no action was taken on their complaint by the Returning Officer. The Returning Officer did not verify and match the counting result by counting of VVPAT slips. When about 12 EVMs were brought for counting in the 10th round, this witness and other counting agents had vehemently opposed and then they were forcibly ousted from the counting premises by lathi charge. Between 10th to 17th rounds of counting, he was not permitted to stay inside and then a complaint was made by the petitioner to the higher authorities, thereafter, in the middle of 18th round of counting he was permitted to enter the counting premises and thereafter between 19th to 28th round, he continued to protest, when he found that EVMs with tampered and broken seals were brought for counting but his complaint was ignored by the Returning Officer. After 28th round of counting, the petitioner made a complaint to the Returning Officer and the District Election Officer but that was not considered and rejected. The Returning Officer hurriedly had obtained signature of Ajit Pal, the winner of this election. The petitioner's application for recounting was arbitrarily rejected by the Returning Officer recording that on objection of the counting of booth no. 135 at table no. 4 in 11th round, VVPAT slips were counted in the presence of the agents in which control unit and VVPAT results were found the same. He has recorded the details of EVMs with tampered and broken seals brought for counting table-wise and round-wise in his diary. There were 111 EVMs with broken seals which were brought for counting, details of which were recorded by him, which are given in tabular form, which is

annexed at page-5 of his examination-in-chief.

39. This witness in cross-examination has stated that at 91 polling booths, the polling agents were appointed by him and at 300 polling booths, polling agents were made by the petitioner. He had reached at the place of counting at 6.00 A.M. at Akbarpur Mandi Samiti as election agent of the petitioner. He had asked for 15 counting agents to be permitted but only 14 agents were allowed. There were 14 counting tables and at all the 14 counting tables, his counting agents were present at the counting centre. The counting had began at 8.00 A.M. and on each table, he used to come and ask from the counting agent with respect to number of votes cast in favour of the petitioner. Counting had begun at all the 14 tables simultaneously and during counting process, he had made a complaint to the Returning Officer in his own handwriting and correct version was given of the fact. He had complained that seals of EVMs were found broken. This complaint was given by him to the Returning Officer but he admitted that there is no such complaint in the file but he cannot tell its reason as to why copy of any such complaint made by him, has not been given by the petitioner in Court. Later on, he has stated that its reason could be that he did not have any receiving of the said complaint. After 10th round and in the middle of 18th round, he had returned, where-after he remained present there. During that period, the agents of the other parties like Congress etc. had also made a complaint regarding broken seals. He is also a voter of Sikandra Constituency and had exercised franchise also but cannot tell on which booth he had cast his vote. He had exercised franchise between 8.00 to 8.30 A.M and thereafter he had gone in his area from the booth where he had cast vote. At the booth where he had cast the vote, he had gone again there at 1.00 P.M. and having stayed there for about 10 minutes and having seen that everything was all right, he returned to his area. He had gone to Derapur block and Sandalpur Block. He had also gone to the place where EVMs were stored after polling was closed. These EVMs were kept in two strong rooms and seals of the EVMs as well as strong rooms were affixed in his presence. During polling, he had gone to all the polling stations and had met the polling agents and they told him that everything was going on all right. He had not prepared any such index wherein he may have entered as to which places he had visited and to whom he had met there. The EVMs, after polling, when they were kept in Mandi Samit, till then he had not made any complaint. Prior to starting of counting, he had made a complaint regarding one polling booth in respect of EVMs being in defective condition, which was later on got corrected/rectified. The officials were bringing EVMs at all the 14 tables. All of them (including this witness) had reached the place of counting at about 6.30 A.M. where they were informed that all should come near strong room because strong room was to be opened. At about 7.00 A.M., he had reached the strong room. When he reached there, besides him, BJP candidate and one or two other persons were present. There was no one else present from other party. The lock of one strong room had already been opened before he reached there but the lock of other strong room was opened in front of him but he was not allowed opportunity to check the seals. The seal of the second strong room which was opened before him, was found broken. Two other persons, who were present in strong room, he does not

know them. He had made a complaint that one strong room was opened prior to his reaching there while the seal of the other strong room was found broken. This complaint was made to the Returning Officer and in that regard, he had also given information to the petitioner. Thereafter, he went to counting table. The Returning Officer remained present throughout the counting. He and his counting agent used to give complaint to the Returning Officer after meeting her. He had gone away from there prior to starting of 10th round of counting and returned in the middle of 18th round of counting. From middle of 18th round of counting, all the agents had returned and remained present there till the completion of the counting. During the counting, he had made no other complaint except that the seals were found broken. He had no dispute with the Election Officer or any official. He had disclosed all the facts to his advocate in Hindi, who had prepared his affidavit in English.

40. The statement of PW-5 is on the same line which has been given by PW-4. As regard the statement of PW-5, it is argued by the learned counsel for respondent that the statement of this witness clearly shows that he was absolutely satisfied with the polling as no complaint was ever made during the polling and he had remained on the place of polling throughout till the EVMs were kept in the strong room. As regard complaint having been made by him with respect to seal of one of the strong rooms being found broken at the time when he reached there and regarding the other room having been opened already before his reaching there, there was no such complaint, in writing, made. No reason has been shown as to why such a complaint was not made with him and why the same has not been made a part of the record.

41. Shaurabh Katiyar has been examined as PW-6, who has given similar statement in examination-in-chief as has been given by PW-4 and PW-5 but in cross-examination, this witness has stated that this was his first experience as a counting agent. He was supposed to see the seals of EVMs first and thereafter he was supposed to note down as to how many votes were cast in favour of the petitioner. Whatever number of votes were cast, after being told about it, he used to note it on a paper. How many votes were cast in favour of the petitioner and other candidates, were disclosed through EVMs. He could tally up all the facts i.e. votes cast in favour of the candidates with whatever he saw in the EVMs and it used to be noted by him. The counting was held in Mati Cricket Stadium which was situated by the side of the Police Line. He had reached there at about 6.00 A.M. and table no. 10 was allotted to him. He was given identity card. On the basis of which, he had gone to the said table at about 7.30 A.M. At his table, agents of other parties were also present but how many agents were there, he cannot tell because he did not know them from before. During counting, he never went to other tables leaving his own. He does not recollect as to of how many booths, the counting was being held at his table. He had gone alone at the place of counting and during counting, his candidate was winning or loosing, he does not recollect nor does he recollect whether he had noted it on any paper. The counting had started at 8.30 A.M. and continued till3.30 p.m. He remained present outside the counting premises for two hours after closing of the counting. When it was asked as to counting of votes cast at how many booths, was held

at his table, he replied that he had gone out, therefore, he cannot give reply. He had also failed to tell as to what announcement was being made in between. Later on, he stated that it was being announced as to who got how many votes. It is further stated by him that his counsel had prepared his affidavit on the basis of his statement made to his counsel in Hindi. He does not know English. Hence whatever was written in affidavit, might have been correctly written. At the time of counting, he had not gone to the strong room. The thread used to put seal on the EVMs, was found broken and on that basis, he had stated that the seal of the same was found broken. He does not recollect whether other agents had also made any complaint or not regarding seal being found broken. He was not present between 10th to 17th round of counting at his table because he was thrown out by the Returning Officer after having been given threat by the police, but others were not thrown out. Thereafter, he has said that there were many people on the table. When he and other agents told that seals of EVMs were found broken, the Returning Officer had got him thrown out by the police. At his table, at 10th round of counting, only one EVM was counted and when the said machine was brought there, he was present. The votes which were appearing on the display of EVM, some of them were noted by him and then he could not note because of him having been thrown out. He could not note the entire figures. When complaint was made regarding seals being found broken to the Returning Officer, the Returning Officer called the police and he was thrown out of the counting centre. He went to the petitioner after being thrown out of the counting centre. He had made a complaint to the Returning Officer, in writing, but its receiving is not with him. When the Returning Officer came at his table during counting, he had complained that the seal of the EVMs was found broken. He had made complaint on a plain paper in writing, specifically mentioning therein that the seals of the EVMs were found broken therefore the same should be got investigated and the counting be got done of VVPAT slips. He does not recollect in which round the said complaint was made. In between 18th round of counting, he had reached at his table and during the said counting, how many votes were cast, he did not note. When he made a complaint about it to the petitioner, she talked to higher authorities and thereafter only he was allowed to go to the place of counting in between 18th round. At his table, the counting was done of 28th round however between 10th to 17th round, he remained with the petitioner but during this period the other counting agents, who were on the other tables, stayed there and some of them might have not remained there. After completion of the counting, he went out of the place of counting. When it was put to him as to whether he was present when the petitioner had made a complaint to the Returning Officer, he stated that he was at his table and it was told by the petitioner that she was going to make a complaint to the Returning Officer, in writing. He does not recollect as to whether he met the petitioner after coming out of the counting premises. After completion of 28th round of counting, he had met the petitioner and after about 1½ to 2.00 hours, he received information that the petitioner had lost the election.

42. Submission made by the learned counsel for the respondent relating this statement is that his statement does not inspire confidence because he is giving discrepant statement as regards the timing of the counting because this witness has

stated the counting to have been done between 8.00 A.M. to 3.30 P.M. while the PW-1 has stated that the counting started at 8.00 A.M. and concluded at 5.00 A.M.. Narration of the seal having been found broken also does not inspire confidence because he has stated that he was saying so because of the thread being found broken which was tied around the EVMs. This witness has stated the place of counting to be Mati Cricket Stadium while the other witnesses, whose statements have been dealt with above, have stated that the counting happened at Akbarpur Mandi Samiti, therefore, it appears that he is stating only on the basis of conjectures and was not present on the place where counting was taking place.

43. Mohd. Imran who has been examined as PW-7, has stated in cross-examination that he had reached the place of counting and had seen the EVMs prior to beginning of the voting and was satisfied with the EVMs. The EVM mock poll had also been done prior to the counting. At the booth of his candidate/petitioner, he was the single agent. Because of being local, he knew most of the voters and only on the suspicion, he used to ask for voter I.D. In his knowledge, the voters who were coming to cast their vote, were right persons. He knows the names of only three candidates but he cannot tell about the total number of candidates. Further, it is stated that it is correct to say that prior to beginning of polling till the EVMs having been sealed, he remained present at the said place. At his polling booth, voting happened in appropriate manner. No complaint of any type was made by him. He knows polling agents but their names he does not know, although he was of their village. The voting was closed at 5.00 p.m. There was no such index which included the name of all the voters. He did not have voter list in order to verify the bogus voter because he knew most of them, being local person. For becoming a booth agent, one form is required to be filled up which was taken by him from the Presiding Officer. He was present at the time of EVMs being sealed and besides him there were also agents of other parties. Four agents were present. He cannot tell as to when polling party had returned. During the polling, neither the petitioner nor Virendra Sharma came there. When polling party went away from the booth, he had gone to Virendra Sharma. He cannot tell as to how many votes were cast at his booth. He had not objected to any voter casting his vote at his booth. Total 498 votes had been cast at his booth, which was told to him by the Presiding Officer orally but had not noted the number. No difficulty was felt at the time when EVMs were sealed as they were sealed properly. Further, it is stated that the Presiding Officer had obtained his signature on one paper but what was written thereon he cannot tell as he had not read it. A small piece of paper was given to him on which he had signed thereafter it was tied with thread in the EVMs.

44. After having drawn attention to the statement of this witness, it is argued by the learned counsel for the respondent that this witness has clearly stated that he had remained present on the place where polling happened and till the time EVMs had been sealed. He did not note any mischief at the time when the EVMs were sealed after the polling was concluded and this witness has given truthful statement which blasts the case of the petitioner that there was any bungling in the election process.

45. With regard to the same issue, from the side of the respondent, DW-1, Deepali Bhargav (Kaushik) has been

examined, who was the Returning Officer of the constituency in question. She has stated in examination-in-chief that one hand book for Returning Officer was issued by the Election Commission for this election, which she had studied and also had studied the circulars/orders issued by the Election Commission from time to time. Election in question was held without any bias or undue favour to any candidate. Counting was decided to be held at Mati Headquarter in a Stadium. Prior to the starting of counting of votes, all the candidates and their agents were given information regarding opening of the strong room. The said room was got opened by her in the presence of all the candidates present along with agents and video recording of the same was also got done as the same was essential under the Rules. Prior to the start of counting, she had ensured that no seal of either strong room or any EVM's container was broken. During the entire election process, no complaint from any candidate or his agent was made in this regard. After having perused the paper no. A-23/1 and A-24/1, she stated that the said paper was presented before her by the petitioner Seema Sachan whereon she had passed order. Paper No. A-17/1 is a carbon copy of the application moved by Mahendra S/o Sambhu (not readable), whereon a seal of Returning Officer 207, Kanpur Dehat, Sikandara, Vidhansabha, is affixed on which her initial (short signature) is not made. The said application was never presented before her. paper No. A-18/1 is a carbon copy of the application moved by Ram Naresh S/o Raja Ram on which there is seal of Returning Officer 207, Sikandara, Kanpur Dehat on which too, there is no initial made by her. The said application was never presented before her. Paper No. A-19/1 is a carbon copy of the application moved by Anoop Kumar S/o Ujagarlal, which too has seal of Returning Officer, 2007, Sikandara, Kanpur Dehat which also does not carry her initial nor the said application was ever presented before her. A-20/1 is a carbon copy of the application given by Arvindra S/o Lt. Shivadhar, bearing seal of Returning Officer, 207 Sikandara, Kanpur Dehat which also does not bear her signature nor the same was ever presented before her. During the entire counting process, neither any counting supervisor nor counting assistant had made any complaint to her. After the counting was over, two applications were moved by the petitioner Seema Sachan. In paragraph no. 20 of the petition, it has been mentioned that she had deliberately made favour of B.J.P. candidate by indulging in manipulations.

46. The said witness has been cross-examined by the learned counsel for the petitioner in which she has stated that in this by-election, how many candidates had filled up nomination, she does not have knowledge as the same cannot be disclosed by her without perusal of the record nor does she recollect the date of election. She was also put a question on how many booths, election was held in this by-election, to which she responded that these factual questions cannot be replied without perusal of record. Similar was the statement given by her stating that how many votes were cast, she could not reveal without perusal of the record and did say that she knew all the directions issued regarding conducting the election proceedings. Then she was put a question as to what is the Form 17-C to which she responded that without perusal of the record she would not be able to give answer to that question. Then she said that it is correct to say that at each booth, how many votes were polled,

in this regard, Presiding Officer had disclosed to the agents. The said information is always given orally which is noted down by the agents and on her own, she has further stated that after closure of the polling, Presiding Officer sent a written information as to how many votes were polled in the election, to the Election Office, in writing and the information regarding total votes polled was also given to the agents of the candidates orally. Polling was held on 24.12.2017 and for counting 14 tables were set up and a separate table known as Zero table was also set up and at this counting table also, similar procedure was adopted. At each table where counting is held, one agent is permitted to remain present and further stated that one candidate, at the most, can nominate 14 agents or even less than that. At zero table candidates themselves go, not their agents. There was no separate pass required for approaching zero table and at that table, the postal ballets are counted. Further it was put to her as to, during counting, at each booth, how many votes were received by each candidate and the ultimate calculation regarding this is done where, to which it was responded by her that in the counting hall, after every round, at a board, the figure is noted and mic is also used for announcement about the number of votes cast and the said number is also got noted at each table to the agents of the candidates. The EVMs were kept in strong room comprising two rooms. Strong room was got opened at about 8:00 AM. The written information regarding opening the same, was sent to candidates as well their agents. There is no announcement required to be made from the strong room and on her own she has stated that whosoever remains present in the premises, is called there and videography is also got done of the said proceedings. Strong room is adjacent to the place of counting as the place of counting is visible from the strong room. At few polling stations EVMs had gone out of order which were about less than one percent. At the time of polling, for the help of Returning Officer, two Assistant ARO are also deputed and they also have their own separate clerical staff present at the place. There is no definite assignment given to the ARO. They are always issued instructions from time to time and they comply with the instructions of the Returning Officer at the place of counting. Thereafter the question was put to her whether at the time of counting, officials involved in counting also make compliance of the orders issued by the Returning Officer apart from their Assistant Returning Officer also, to which it was replied that no work can be performed by the ARO without the same having been brought to the knowledge of the Returning Officer. Further she has stated that during counting whatever written complaints are made by the agents, they are kept on record.

47. On the file, paper no. A-17/1, A-18/1, A-19/1 and A-20/1 bear signature and seal but whose signature or seal are there, she cannot tell. She recognizes only her own signature. When it was put to her whether the said signature could be of ARO, she denied any knowledge about that. She stated that all these four applications were taken by her ARO or not, she could not give any information about this. Counting had been closed between 4:00 and 5:00 PM and does not recollect as to for how many rounds, counting was done. After closure of the counting within 15-20 minutes thereof, result was declared. After closure of the counting and before declaration of the result, no pressure of any kind was exerted upon her by anyone. Further she was put a question as to why

paper No. A-22/1, which is application addressed to District Election Officer/Chief Election Officer, U.P., was disposed of by her, she replied that any complaint with respect to constituency falling in the jurisdiction of the Returning Officer, the same are supposed to be disposed of by the Returning Officer only, because of that reason, she had disposed of that complaint also. A carbon copy of Paper No. A-20/1 and A-21/1 were not received by her. There was no endorsement made by her on Paper No. A-21/1 but she cannot give any information with regard to the fact as to who had received the said application. Whether it was received by her Assistant or not, she cannot tell. At paper No. A-20/1 and A-21/1, the seal which they bear, the similar seal is brought in use by her. Further she has stated that during counting process, no complaint regarding seals of EVMs having been found broken was made by any agent and stated on her own that an oral prayer was made for counting of the VVPAT slips for the purposes of tallying the result. Whatever oral prayer was made in this regard, the same was allowed. The comparison was made after counting done with VVPAT slips. It cannot be stated by her without perusing the record as to during which count, such kind of complaint and prayer was made for comparison of the result with VVPAT slips. She also does not recollect as to whether comparison with VVPAT slips was done after the closure of the counting or prior to that. As per the rule, comparison with VVPAT slips is done only after concluding of the counting, provided some prayer is made in that regard. As per the Rules issued by the Election Commission, comparison with VVPAT sips is not mandatory. Initially there was permission for comparison with VVPAT slips only at one booth but presently it can be done up to at 5 booths. Thereafter she was put a question as to, during polling, at how many booths, she had got the result compared with VVPAT slips, she replied that during counting, comparison was made in respect of only one booth with VVPAT slips which was in consonance with the then prevalent Rules. She had done comparison with VVPAT slips at the instance of Seema Sachan/petitioner for which the petitioner had made oral prayer. She cannot tell without seeing record as to during which round this prayer was made. Prayer was made only with respect to comparison of only one booth and not for every booth. When it was put to her as to whether petitioner and her agents had made complaint after tenth round that the seals of the EVMs were found broken, it was replied that no such complaint was ever made. It is further stated by her that from 10th to 17th round, agents of the petitioner were present on the place of counting and at the end of each round of counting, the agents were getting their satisfaction recorded and the agents of the petitioner had also got their satisfactions recorded in writing. The agents of Seema Sachan were present all along the counting process. The winning candidate Ajeet Pal Singh had moved no complaint at any stage. Further she stated that there is guideline issued in RO handbook regarding comparison with VVPAT slips and as per the said guidelines, the resolution of the complaint was done with respect to comparison with VVPAT slips in this case. She was Returning Officer in 2017. Earlier at Chaprauli, Vidhansabha, Baghpat, she had earned award of best Returning Officer but she further stated that she does not recollect as to what was the rule contained in RO handbook regarding comparison with VVPAT slips. Next she has stated that at about 8:00 pm, when the strong room was

opened and the counting had been started, the same continued up to between 4:00 PM to 5 PM. She cannot disclose exact time when the counting began. Then she was put a question as to after having taken to how much distance from the strong room, counting had been started from EVMs, she replied that strong room was about 15 meters away from the place, where counting was being done and continuously machines were being brought from the strong room and throughout the counting period, she remained present. During the counting, election observer was also present and apart from him, D.M. and A.D.M. and other Magistrates kept coming and going. No one was allowed permission to enter into the counting center. She has appeared today at the summons received from Court. She is not giving statement from the side of the winning candidate Ajeet Pal nor was she ever asked by him to depose before court. It was wrong to say that in order to give benefit to the winning candidate and his father, she has given statement before this Court today and has misused her post and it is also wrong to say that she has not done comparison at any booth with VVPAT slips.

48. After having drawn attention to this statement, it is argued by the learned counsel for the respondent no. 1 that this witness has very clearly stated that no complaint was made ever by any of the agents of the petitioner with respect to any mischief during the counting process. All the applications A-17/1 to A-20/1, allegedly moved by Mahesh, Ram Naresh and Anoop Kumar and Arvindra have been denied to have been received by her. She has also denied her initial to be there on any of these applications which have been produced from the side of the petitioner. She has gone to the extent of saying that the purity of the election was maintained as at the time when the strong room was being opened, prior information was given to all the candidates and their agents to remain present and videography was also done of the process.

49. From the side of the learned counsel for the petitioner, it is vehemently argued that seven witnesses have been examined from the side of the petitioner who prove that complaints were made form their side to the Returning Officer but she has given wrong replies that no such complaint was made and has deliberately refused to have her signatures on those complaints. This is being done deliberately. A perusal of her admitted signature and disputed signature would indicate that the said initials which she is denying before this court, were actually hers and deliberately she has not acted upon those complaints in order to reach benefit to the respondent no. 1 because she was under influence of respondent no. 1 and she has misused her position. Several replies which she has given, are indicative of fact that she is evasive in giving clear replies and at most of the times, she has given replies that she cannot not give reply to the question put unless she is allowed to peruse the record. So much so that even regarding important Form 17-C, she has stated that she does not know as to what does it mean. Such an Officer who is claiming to have been awarded, award of best Returning Officer, it is un-believable that she would not know as to what does Form 17-C mean and entire evidence has been given only with a view to benefiting the respondent no. 1 and the same should be discarded and the statements made by PW-1 to PW-7 should be believed and on that basis the court should arrive on a conclusion that petitioner has been able to prove Issue No.

1 that seals of EVMs' were found tampered with and broken which has been averred in paragraph no. 10.

50. This Court is not in agreement with the view of the learned counsel for the petitioner because it has in detail analyzed the statement of PW-1 to PW-7 examined from the side of the petitioner and on that basis, this Court comes to the conclusion that merely because seven witnesses are saying that they had made complaints before the Returning Officer which were ignored, it cannot be held proved because none of the witnesses has been able to prove that they had any receiving of the complaints made by them and the signatures which are being stated of the Returning Officer, the said officer by appearing before this Court has clearly denied as hers and she has emphatically stated that no such complaints were received, therefore, this Court is of the view that the petitioner has failed to prove the said issue and, accordingly, the said issued is decided in negative holding that seals of EVMs were not found tampered with or broken as stated in paragraph no. 10.

Finding on Issue no. 2.

51. As per this issue, this Court has to decide as to whether provisions of Sections 64 and 66 of the Act and Rule 49S, 55C, 56C, 56D and 66A of the Rules of 1961 have been violated? if yes, its effect.

52. Submission made by the learned counsel for the petitioner is that Returning Officer has acted against the mandatory provisions of the Act provided under Sections 64, 66 and also of the Rules 49S, 55C, 56C, 56D and 56-d and 66-A. The election of the returned candidate has also been materially affected on account of improper reception of votes of the Electronic Voting Machines, seals of which were found tampered or broken at the time of counting. The election of returned candidate has also been materially affected on account of the Presiding Officer not having given true copy of the entries made in Form 17-C obtaining receipt thereof from the polling agents at the close of the polling. The election is also materially affected of the returned candidate on the ground of fact that after completion of the counting and after entries made in the result sheet, result was announced but before the signatures of the Returning Officer on the result-sheet, election petitioner had made an application in writing complaining about the tampered and broken seals of EVMs of several polling booths during counting. The election of the returned candidate has been materially affected on account of the fact that EVMs were manipulated to benefit the returned candidate and in spite of the objection raised, the Returning Officer has illegally counted votes of tampered EVMs of booth no. 135 of table no. 4 in the 11th round of counting and has given benefit to the returned candidate/respondent no. 1. It is further argued that election of returned candidate has been materially affected on account of the fact that provisions of Constitution, Act and Rules framed thereunder as well as orders and instructions issued under the Constitution by the Election Commission of India, have not been complied with in counting of votes. Attention was also drawn by the learned counsel for the petitioner that while deciding the application under Order VII Rule 11 of CPC, wherein prayer was made for rejection of the plaint on the ground of insufficient material facts, the same was disposed of vide order dated 12.4.2019 wherein following was observed by this Court:-

"I find that the said description would be sufficient to be taken to be cause of action which has arisen to the petitioner to file this petition and this Court does not find any substance in the argument of the learned counsel for the respondent no.1 that no cause of action and sufficient details have been given by the petitioner because of which the application under Order VII Rule 11 deserves to be allowed

It was also pointed out by the learned counsel for the petitioner that Schedule-I attached to the petition contains list of all the documents which are found by the petitioner to be necessary for disposal of this petition and rest of the evidence which may be thought proper to be brought on record, would be adduced in course of the proceedings, which is not barred under law. I am also convinced by the argument made by the learned counsel for the petitioner that she has given all the documents which are found by her to be in support of her case."

53. Therefore, it is apparent that this Court has held that there was sufficient material and the cause of action stood established and therefore this matter cannot be raised again. It is further clarified by the learned counsel for the petitioner that sufficient material is available on record in accordance with the requirement of Section 83, Section 100(1)(d)(iii) and (iv) of the Act and that the petitioner was not claiming the relief in the present petition on the ground of corrupt practice as contemplated under Section 123 of the Act. It is further argued that due to non-compliance of the Rule 49S and 56C(2) read with Form 17C, declaration of the result has been materially affected, rather could not have been prepared and, therefore, non-compliance of Form 17C results automatically in declaration of the result to be void. It is further argued that seal of large number of EVMs were found tampered and broken and in spite of oral and written objections and request, issue was not addressed by the Returning Officer and the votes were counted of these machines wrongly in contravention of Rule 55C, 58 and 64A. There was sufficient material on record to show that Returning Officer failed to discharge his duty in accordance with the Section 64 of the Act as ultimately it was responsibility of the Returning Officer in the matter of counting of votes and consequent declaration of result which was carried out under her supervision. It is further argued that Returning Officer was biased, prejudicial, partial and unfair from the very beginning and to establish that it has been pointed out that when a question was put to her during her cross-examination about Form 17C, she pleaded ignorance. Further in Paper No. A-24/1, there was an order dated 24.12.2017 in which she stated that during the counting of round no. 11, at table no. 4, booth no. 135, she got it opened and counting of VVPAT slips was made. It is illegal to count the VVPAT slips in the mid of counting. She being an experienced Officer, she should not have done so. Moreover, she has stated that she was well acquainted and aware of Rules. Further it is argued that under Rules 56D which relates to scrutiny of papers, the opening and counting of VVPAT can only be done after completion of all the rounds, at the end of the counting and that too, on a written complaint made by an agent or the candidate and after passing of order by Returning Officer in writing giving reasons for its opening. The mere look at the order dated 24.12.2017 would show that relevant rules of counting have not been followed as in the middle of counting, VVPAT machine was opened illegally as the Returning Officer has admitted in cross-examination

that it was opened on oral request. It is further argued that in **Virender Nath Gautam Vs. Satpal Singh and Ors., 2007(3)SCC 617**, which pertains to election petition, it has been laid down that election petition must contain a concise statements of "material facts" on which the petitioner relies. All the "material facts", therefore, in accordance with the provisions of the Act, have to be set out in the election petition. If "material facts" are not stated in a petition, it is liable to be dismissed on that ground as the case would be covered by Section 83(1)(a) of the Act read with clause (a) of Order VII Rule 11 CPC. What facts would be said to be "material facts" would depend upon the facts of each case and no rule of universal application can be laid down. It is, however, absolutely essential that all basic and primary facts which need to be proved at the trial by the party to establish existence of cause of action or defence are "material facts" and must be stated in the pleading by the party. There is distinction between facta Probanda (facts required to be proved i.e. material facts) and facta probentia (facts by means of which they are proved i.e. particulars or evidence). It is settled law that pleadings must contain only facta probanda and not facta probentia. The material facts on which the party relies for his claim are called facta probanda and they must be stated in the pleadings. But the facts by means of which facta prbenda (material facts) are proved and which are in the nature of facta probentia (particulars or evidence) need not be set out in the pleadings. They are not facts in issue, but only relevant facts required to be proved at the trial in order to establish the fact in issue.

54. In the light of above position of law, all the relevant facts in the present case have been mentioned. It is argued that it is evident from the evidence and pleadings that there is total non-compliance of requirement of Rule 49S " Accounts of Votes Recorded". Form 17C is most important document for compliance of Rule 49S and 56C (counting of votes) in the recording of votes.

55. For the sake of convenience Rule 49S is being quoted herein below:-

*"49S. **Account of votes recorded**.--(1) The presiding officer shall at the close of the poll prepare an account of votes recorded in Form 17C and enclose it in a separate cover with the words "Account of Votes Recorded' superscribed thereon.*

(2) The presiding officer shall furnish to every polling agent present at the close of the poll a true copy of the entries made in Form 17C after obtaining a receipt from the said polling agent therefor and shall attest it as a true copy. "

56. For the sake of convenience Form 17-C is being quoted herein below:-

"Election to House of the People/Legislative Assembly of the State/Union territory.....from.....Constituency.

Number and Name of Polling Station. .....

Identification Number of Voting Control Unit.....

Machine used at the Polling Station balloting Unit.....

Printer (if used).....

1. Total number of electors assigned to the Polling Station

2. Total number of voters as entered in the Register for Voters (Form 17A)

3. Number of voters deciding not to record votes under rule 49-O

4. Number of voters not allowed to vote under rule 49M

5. Test votes recorded under rule 49-MA (d) required to be deducted-

(a) total number of test votes

to be deducted: Total No. SI. No. (s) of elector (s) in Form 17A

.....

.....

(b) candidate(s) for whom S.I. No. Name of candidate No. of votes

test vote (s) cast:

....

....

6. Total number of votes recorded as per voting machine:.....

7. Whether the total number of votes as shown against item 6 tallies with the total number of voters as shown against item 2 minus numbers of voters deciding not to record votes as against item 3 minus number of votes as against item 4 (i.e. 2-3-4) or any discrepancy noticed:.....

8. Number of voters to whom tendered ballot papers were issued under rule 49P.:.....

9. Number of tendered ballot papers. S.I. No.

Total

Form To

(a) received for use.....

(b) issued to electors.....

(c) not used and returned.....

10. Account of papers seals

.....

Signature of Polling agents

1. Paper seals supplied for use Total No..... 1.....

S.I. No. from.....

to.....

2. paper seals used: Total No..... 2.....

S.I. No. (s).....

3. Unused paper seals returned Total No..... 3.....

to Returning Officer S.I. No. (s).....

4. Damage paper seal, if any: Total No..... 4.....

S.I. No. (s) 5.....

6.....

Date.....

Place.....

.....

Signature of Presiding Officer

Polling Station No.... No.....

Part-II

Result of Counting

Sl. No. of candidate	Name of Candidate	Number of votes as displayed on control unit	Number of test votes to be deducted as per item 5 of part I	Number of valid votes. (3-4)
1	2	3	4	5

1

2

3

4

5

6

Total

Whether the total number of votes shown above tallies with the total number of votes

shown against item 6 of Part I or any discrepancy noticed between the two totals.

Place.....
Date.....
.....

Signature of Counting Supervisor
Full signature
Name of Candidate/election agent/counting agent
1.
2.
3.
4.
5.
6.
7.
Place.....
Date.....
.....
Signature of Returning Officer

57. For the sake of convenience Section 66-A is being quoted herein below:-

"66A. Counting of votes where electronic voting machines have been used.--In relation to the counting of votes at a polling station, where voting machine has been used,--

(i) the provisions of rules 50 to 54 and in lieu of rules 55, 56 and 57, the following rules shall respectively apply, namely:--

'"55C. Scrutiny and inspection of voting machines.--(1) The Returning officer may have the control units of the voting machines used at more than one polling station taken up for scrutiny and inspection and votes recorded in such units counted simultaneously.

(2) Before the votes recorded in any control unit of voting machine are counted under sub-rule (1), the candidate or his election agent or his counting agent present at the counting table shall be allowed to inspect the paper seal and such other vital seals as might have been affixed on the unit and to satisfy themselves that the seals are intact.

(3) The Returning officer shall satisfy himself that none of the voting machines has in fact been tampered with.

(4) If the Returning officer is satisfied that any voting machine has in fact been tampered with, he shall not count the votes recorded in that machine and shall follow the procedure laid down in section 58, or section 58A or section 64A, as may be applicable in respect of the polling station or stations where that machine was used.

56C. Counting of votes.--(1) After the Returning officer is satisfied that a voting machine has in fact not been tampered with, he shall have the votes recorded therein counted by pressing the appropriate button marked "Result" provided in the control unit whereby the total votes polled and votes polled by each candidate shall be displayed in respect of each such candidate on the display panel provided for the purpose in the unit.

(2) As the votes polled by each candidate are displayed on the control unit, the Returning officer shall have,--

(a) the number of such votes recorded separately in respect of each candidate in Part II on Form 17C;

(b) Part II of Form 17C completed in other respects and signed by the counting supervisor and also by the candidates or their election agents or their counting agents present; and

(c) corresponding entries made in a result sheet in Form 20 and the particulars so entered in the result sheet announced.

56D. Scrutiny of paper trial.-(1) Where printer for paper trial is used, after the entries made in the result sheet are

announced, any candidate, or in his absence, his election agent or any of his counting agents may apply in writing to the Returning Officer to count the printed paper slips in the drop box of the printer in respect of any polling station or polling stations.

(2) On such application being made, the Returning officer shall, subject to such general or special guidelines, as may be issued by the Election Commission, decide the matter and may if it appears to him to be frivolous or unreasonable.

(3) Every decision of the Returning officer under sub-rule (2) shall be in writing and shall contain the reasons therefor.

(4) If the Returning officer decides under sub-rule (2) to allow counting of the paper slips either wholly or in part or parts, he shall-

(a) do the counting in the manner as may be directed by the Election Commission;

(b) If there is discrepancy between the votes displayed on the control unit and the counting of the paper slips, amend the result sheet in Form 20 as per the paper slips count;

(c) announce the amendments so made by him; and

(d) complete and sign the result sheet.

57C. Sealing of voting machines.--(1) After the result of voting recorded in a control unit has been ascertained candidate-wise and entered in Part II of Form 17C and Form 20 under rule 56C, the Returning officer shall reseal the unit with his seal and the seals of such of the candidates or their election agents present who may desire to affix the seals thereon so however that the result of voting recorded in the unit is not obliterated and the unit retains the memory of such result.

(2) The control unit so sealed shall be kept in specially prepared boxes on which the Returning officer shall record the following particulars, namely:--

(a) the name of the constituency;

(b) the particulars of polling station or stations where the control unit has been used;

(c) serial number of the control unit;

(d) date of poll; and

(e) date of counting.';

(ii) the provisions of rules 60 to 66 shall, so far as may be, apply in relation to voting by voting machine and any reference in those rules to,--

(a) ballot paper shall be construed as including a reference to such voting machine;

(b) any rule shall be construed as a reference to the corresponding rule in Chapter II of Part IV or, as the case may be, to rule 55C or 56C or 57C. "

58. Having cited above provisions of law, it is argued that Form 17-C and Rule 49S and 66-A are foundation stone of the voting accounts. Even a small mistake in Form 17C will vitiate the election result which would be evident from a mere look at it. It is method of check and cross check of votes. Form 17C is the only document which deals with the votes polled and counted. If there is any mistake in the said form, votes cannot be recorded. Form 17C has been brought through Rule 49S and 56C(2) of the Rules. The said Form 17C (supra) would show that there are many details required to be filled up and then they have to be tallied.

59. In the case in hand, there is total non compliance of Form 17C because as per Rule 49S, Presiding Officer at the close of poll, shall prepare an account of votes recorded in Form 17C and enclose it in a

separate cover and a true copy of the entries made in Form 17C shall be furnished to every polling agent at the close of the poll and a receipt thereof shall be obtained from the said polling agent. A copy of the said Form 17Chas not been provided to any of the polling agents nor receipts thereof has been obtained, hence it would be treated that there was complete non compliance of the said provision of Form 17-C and it was also argued vehemently that even if it has not been averred in the pleadings that the Form 17C was never prepared, it would be deemed that since a copy of the same has not been provided to any of the polling agents, therefore, the same was never prepared and, therefore, election result would stand vitiated. It was also argued that if it was stated by the petitioner in the petition that copy of Form 17C was not provided, the burden would be shifted upon the respondent to prove that the same was prepared and a copy of the same was provided for which reliance has been placed on ***Sushil Kumar Vs. Rakesh Kumar, (2003) 8 SCC 673***, in which, it was held that initial burden of proof that nomination paper of an elected candidate had wrongly been accepted as he was disqualified on the date of nomination, is on election petitioner. However, question as to whether the burden to prove a particular matter is on the plaintiff or the defendant would depend upon the nature of the dispute. In relation to certain matters, the fact being within the special knowledge of the respondent, the burden to prove the same would be on him in terms of Section 106 of the Indian Evidence Act and after having heavily relied upon this ruling, it is argued that once it has been alleged by the petitioner that the polling agents were not provided copy of Form 17C, thereafter the burden would shift upon the respondent to prove by adducing evidence that the said form was in fact prepared and copy of the same was provided to the petitioner's agents, thereafter, it was further argued that once it is proved that compliance of Rule 49S which made providing copy of Form 17C mandatory to be given to the polling agents at the time of closure of counting is violated, the election of the winning candidate shall stand vitiated as the same was a mandatory provision.

60. Petitioner's counsel has also drawn attention to the reply of averment made in paragraph no. 7(c) and paragraph no. 9, wherein it is averred that returned candidate's election had been materially affected on account of the fact that Presiding Officer did not give true copy of the entries made in Form-17C after obtaining a receipt thereof from the polling agents at the close of the counting, reply of which was given in paragraph no. 26 of written statements saying therein that contents of paragraph no. 9 of the petition are erroneous and hence denied and, therefore, it is argued that the same is evasive reply which would amount to accepting the version given by the petitioner in the above paragraph in view of the law laid down in Sushil Kumar's case (supra). Paragraph nos. 71 to 73 of the said judgment are as follows:-

"71. In paragraph 15 of the written statement, the respondent has not specifically contended that the statements made in paragraph 18 of the election petition are incorrect or how they are so. Merely the said allegations have been denied as being imagination of the election petitioner without making a statement of fact that Rohit Kumar is not the elder brother of the respondent or is in fact younger to him. Such an evasive denial

attracts Order VIII, Rule 5 of the Code of Civil Procedure. The statements made in paragraph 18 of the election petition must, therefore, be deemed to have been admitted. The Birla Institute of Technology, Mesra, has produced the Application for Under-graduate Admission for Rohit Kumar, wherein his date of birth has been shown as 1.3.1979. Even in the inquiry made by the Chief Electoral Officer, the respondent had not specifically denied the said fact. The Governor of the State of Bihar in his order (Ext.4) observed :

"Sri Rakesh Kumar has not denied that his elder brother is a student of Birla Institute of Technology. Documents furnished by Birla Institute of Technology about the age of his elder brother are extremely significant and relevant to determine Shri Rakesh Kumar's likely age. The documents furnished by the Institute reveal that the date of birth of the elder brother of Sri Rakesh Kumar is 1.3.1979. Hence, on 19.5.1999 Sri Rakesh Kumar's elder brother was 20 years, 2 months and 18 days old. So, it can be safely and conclusively assumed that on 19.5.1999 Sri Rakesh Kumar, when he was sworn in as a minister, was less than 20 years, and definitely much less than 25 years, the qualifying age to become a member of the State Legislative Assembly."

72. The High Court, on the other hand, observed :

"...It is true that it has not been specifically stated in the reply to paragraph 18 of the election petition that Rajesh Kumar happens to be younger brother of Rakesh Kumar but making him an elder brother has been totally denied. In that way, it cannot be said that only evasive reply is there and when this fact could not be proved by any cogent evidence from the side of the election petitioner that Rajesh Kumar happens to be the elder brother of the respondent Rakesh Kumar, rather when contrary evidence is there from the side of the respondent then the age group of Rohit Kumar @ Rajesh Kumar does not come in aid to the election petitioner to prove the underage of Rakesh Kumar the respondent."

73. In our opinion, the approach of the High Court was not correct. It failed to apply the legal principles as contained in Order VIII, Rules 3 and 5 of the Code of Civil Procedure. The High Court had also not analyzed the evidences adduced on behalf of the appellant in this behalf in details but merely rejected the same summarily stating that the vague statements had been made by some witnesses. Once it is held that the statements made in paragraph 18 of the election petition have not been specifically denied or disputed in the written statement, the allegations made therein would be deemed to have been admitted, and, thus, no evidence contrary thereto or inconsistent therewith could have been permitted to be laid."

61. Learned counsel for the petitioner has further drawn attention to the statements of PW-1 Seema Sachan, PW-5 Virendra Kumar and PW-7 Imran, Polling Agents and that of DW-1, Deepali Bhargawa (Kaushik), the Returning Officer and has specifically pointed out the question put to the DW-1 as to what is Form 17C, to which she had replied that the same is a factual question which cannot be answered without looking at the record. Her statement has also been pointed out wherein she has stated that at each booth how many votes were cast, in this regard the Presiding Officer used to tell to the agents orally and the agents used to note it down. Thereafter she further stated on her own that after closure of the election how many votes were cast, information

regarding that was sent in writing to the Election Office. The number of votes cast in this election, information regarding it was given to the agents by Presiding Officer orally and then she was again put a question as to how many votes were got by each candidate at each booth during counting and where the final counting was made, reply was given by her that after each round of counting, the result of the counting was written at the Board and was also announced by mic and was also got noted to agents and candidates of each table.

62. Having drawn attention to these pieces of evidence, it is argued that reply of the Retuning Officer is very evasive which would go against returned candidate as the Returning Officer has not made it clear as to whether the Form 17-C which contains the votes cast and other details of each round was actually prepared or not.

63. Reliance has also been placed by the learned counsel for the petitioner on ***Arabinda Dhali Vs. Nimai Chandra Sarkar and Ors., AIR 2008 (NOC) 2561 (ORI.)***, which relates to discrepancy in votes polled and votes counted vis-a-vis maintenance of Form No.17C prescribed under the conduct of the Elections Rules, 1961 and it was held that filling up of the said form is mandatory requirement under Rules 49S and 56 of 1961 Rules and, therefore, non compliance of the said requirement would affect the result of the election and that the such infirmities in the election process would fall within the infirmities specified under Section 100(1)(d)(iv) and in such a case election can be declared void.

64. In the light of above law, it was argued that in the present case, it is admitted position of fact that Form 17C was not filled up, therefore, present election of the returned candidate should be declared null and void.

65. Next he has placed reliance on ***S. Prasanna Kumar Vs. Dr. Y. Nagappa and Others, IlR 2007 KAR 4491***. It was argued that in this case the Karnataka High Court found that Form 17C was not available in respect of certain polling stations and the Returning Officer does not manage the record properly which was mandatory duty under the Act and Rules, it was found that there was something fishy and election was found to be illegal because of there being some collusion of the R.O. with the winning candidate and the same was not allowed to be sustained and Disciplinary Authority was directed to make entry in service record of the Returning Officer regarding lack of honesty and integrity.

66. Attention is also drawn by the learned counsel for the petitioner to Rule 55C(4) which has been cited above, which states that in the event of tampering of EVMs, Returning Officer has no option but to follow the command of Section 58, 58A and 64A of the Act which deal with the fresh votes as the result of polling station cannot be ascertained and matter should also be reported to the Election Commissioner by the Returning Officer.

67. It is further argued that all the six witnesses of petitioner have reiterated about broken seals of the EVMs which fact was also brought on record through complaint in writing made to Returning Officer during counting by the counting agents but no heed was paid which clearly proves that EVMs had broken seals and the complaint was mechanically rejected by the Returning Officer. It is further argued that paper no. A-

24/1 is an application signed by the petitioner on 24.12.2017 addressed to RO for recount of votes on the issue of broken seal of EVMs and the R.O. passed order dated 14.12.2017 observing that no agent had objected that EVMs' seals were found broken and that in the 11th round, objection was raised by the agents and on rechecking, there was no difference found in the result of the control unit and the result of VVPAT slips. There is statement of Seema Sachan that on 24.12.2017, an application Vide Paper No. A/24-1 signed by her was given stating that the seals of EVMs were found broken in the 11th round of counting. R.O. has admitted in her statement that in the presence of agents, VVPAT slips were got checked and result was found similar, which is also on record as paper no. A-24/1, which is an application of Seema Sachan dated 24.12.2017 and that under existing Rules R.O. had no power to recount VVPAT during counting on oral request. The same can be done after completion of the round of counting on written request by passing an order in writing by R.O. The justification given by Returning Officer for rejecting the application, is false and after having drawn attention to all this, it is argued that this is a classic case wherein averments of the petitioner have not been denied, rather evasive replies have been given. In fact important facts have not been controverted, therefore, they stand proved. It is also an important fact that winning candidate has not appeared before the court and has not denied the allegations and only one witness has been produced i.e. R.O. who too has not given a single documentary evidence. In view of this, the stand of the petitioner should be accepted and the election of the returned candidate should be set aside.

68. When the arguments were nearing completion, from the side of the petitioner it was vehemently stressed that he would like to press solely on the ground of non-compliance of the provisions of Rule 49S of the Rules of 1961 which mandates that copy of the Form 17C would be provided to the polling agents and receipt thereof shall be obtained by Presiding Officer, therefore, in the present case, in view of its default, election of the respondent no. 1 stands vitiated and other grounds he would not like to press much.

69. Learned counsel for the petitioner has relied upon ***R.M. Seshadri Vs. G. Vasantha Pai, 1969 (1) SCC 27***, which relates to summoning of a witness by court. Relevant paragraph of the said judgment is quoted herein below:-

"The power of a Civil Court to summon court witnesses is contained in Order XVI Rule 14 of the Code of Civil Procedure. Now the representation of People Act enjoins that all the powers under the Code can be exercised and all the procedure as far as may be, applicable to the trial of civil suits may be followed in the trial of election petitions. It would appear therefore that in the absence of any prohibition contained in the law, the court has the power to summon a court witness if it thinks that the ends of justice require or that the case before it needs that kind of evidence. It must be remembered that an election petition is not an action at law or a suit in equity. It is a special proceeding. The law even requires that an election petitioner should not be allowed to withdraw an election petition which he had once maid and that the election petition may be continued by another person, so long as another person is available. The policy of election law seem to be that for the establishment of purity of elections, investigation into all allegations of mal practises including corrupt practices at

elections should be thoroughly investigated. Here was a case where a large number of cars were used presumably for the purpose of carrying voters to the booth. "

70. After having drawn attention to above citation, it is argued that since Form 17C has not been prepared by the Returning Officer nor copy of the same has been provided to the polling agents, which was mandatory as per Rule 49S of the Rules. The court is also well within its power to direct summoning of the same i.e. Form No. 17C.

71. From the side of the learned counsel for the respondent, submission is made that number of votes polled are tallied with the number of votes counted. It is not the case of the election petitioner that there was any difference of votes polled and counted. If there is no difference in the number of votes polled and counted, then the election will not be taken to have been materially affected. Next, he has argued that neither the petitioner has annexed copy of Form 17C relating to the election nor has she made any averments that she had applied for the same under Rule 93 of the Rules or under Right to Information Act and that the same was denied to her. Next, he has argued that the petitioner has not alleged any discrepancy in part-I or part-II of the Form 17C and in absence of such allegation it cannot be said that election had been materially affected. The petitioner has not alleged any discrepancy in Form 17-C and Form 20 in relation to Election. He has not set up a case pleading that her polling agents gave different number of votes polled and the counting of votes showed different number of votes. There was no pleading/averments that the petitioner had appointed polling agents in the said election. She has also not pleaded as to who was the Presiding Officer or polling agent at the polling booths. She has also not arrayed the Returning Officer as respondent nor any Presiding Officer as respondent in the election petition. It is not a case of the petitioner that Form 17-C was not prepared. Her allegation is that Presiding Officer did not give true copy of the counting of votes to the polling agent of the petitioner, which is a vague allegation. There is no complaint made by anyone to any of the officials that Form 17-C was not given to the polling agent of the petitioner. There is also no pleading with regard to Rule 49T(3), 49U(2) and 57C(1) which have been cited by him in the written arguments. The said rules are reproduced herein below:-

*"**Rule 49-T (3).-** The polling agents present at the polling station, who desire to affix their seals, shall also be permitted to do so."*

*"**Rule 49 U(2)**- (2) Each packet shall be sealed with the seal of the presiding officer and with the seal either of the candidate or of his election agent or of his polling agent who may be present at the polling station and may desire to affix his seal thereon."*

72. Rule 57C(1) has already been reproduced above, hence the same is not being quoted again.

73. It is further argued that in terms of provisions of Section 101, 102 and 103 of the Indian Evidence Act, burden of proof lies on the election petitioner. It must firstly be shown that there had been non-compliance with provisions of Constitution or of the Act or any Rules or orders made thereunder. It must further be shown that as a consequence thereof, the result of election had been materially affected. The two

conditions are cumulative and both must be established and burden of establishing the same is upon the petitioner which has not been discharged. It is further argued that there is no pleading made by the petitioner that Rule 49S is mandatory, therefore, any evidence in that regard would not be admissible as the same was not pleaded. It has been laid down in **Kalyan Kumar Gogoi Vs. Ashutosh Agnihotri and another, AIR 2011 SCC 760**, that the grounds set-up in the pleading for setting aside the election must be proved beyond reasonable doubt. No presumption or any inference of fact can be raised that the result of the election of the returned candidate must have been materially affected and the fact that such infraction had materially affected result of the election, must be proved by adducing cogent and reliable evidence. He has relied upon paragraph no. 14 which is quoted herein below:-

14. It may be mentioned that here in this case non- compliance with the provisions of the Representation of People Act, 1951 and the Election Rules of 1961 was by the officers, who were in- charge of the conduct of the election and not by the elected candidate. It is true that if clause (iv) is read in isolation, then one may be tempted to come to the conclusion that any non-compliance with the provisions of the Constitution or of the Act of 1951 or any Rules of 1961 Rules or orders made under the Act would render the election of the returned candidate void, but one cannot forget the important fact that clause (d) begins with a rider, namely, that the result of the election, insofar as it concerns a returned candidate, must have been materially affected. This means that if it is not proved to the satisfaction of the Court that the result of the election insofar as it concerns a returned candidate has been materially affected, the election of the returned candidate would not be liable to be declared void notwithstanding non-compliance with the provisions of the Constitution or of the Act or of any Rules of 1961 Rules or orders made thereunder. It is well to remember that this Court has laid down in several reported decisions that the election of a returned candidate should not normally be set aside unless there are cogent and convincing reasons. The success of a winning candidate at an election cannot be lightly interfered with. This is all the more so when the election of a successful candidate is sought to be set aside for no fault of his but of someone else. That is why the scheme of Section 100 of the Act, especially clause (d) of sub-Section (1) thereof clearly prescribes that in spite of the availability of grounds contemplated by sub-clauses (i) to (iv) of clause (d), the election of a returned candidate shall not be voided unless and until it is proved that the result of the election insofar as it concerns a returned candidate is materially affected. The volume of opinion expressed in judicial pronouncements, preponderates in favour of the view that the burden of proving that the votes not cast would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate lies upon one who objects to the validity of the election. Therefore, the standard of proof to be adopted, while judging the question whether the result of the election insofar as it concerns a returned candidate is materially affected, would be proof beyond reasonable doubt or beyond pale of doubt and not the test of proof as suggested by the learned counsel for the appellant.

This part of the case depends upon the ruling of this Court in Vashisht Narain Sharma Vs. Dev Chandra (1955) 1 SCR 509 : AIR 1954 SC 513. In that case, there

was a difference of 111 votes between the returned candidate and the candidate who had secured the next higher number of votes. One candidate by name of Dudh Nath Singh was found not competent to stand election and the question arose whether the votes wasted on Dudh Nath Singh, if they had been polled in favour of remaining candidates, would have materially affected the fate of the election. Certain principles were stated as to how the probable effect upon the election of the successful candidate, of votes which were wasted (in this case effect of votes not cast) must be worked out. Two witnesses were brought to depose that if Dudh Nath Singh had not been a candidate for whom no voting had to be done, the voters would have voted for the next successful candidate. Ghulam Hasan, J. did not accept this kind of evidence. It is observed as follows: -

"It is impossible to accept the ipse dixit of witnesses coming for one side or the other to say that all or some of the votes would have gone to one or the other on some supposed or imaginary ground. The question is one of fact and has to be proved by positive evidence. If the petitioner is unable to adduce evidence in a case such as the present, the only inescapable conclusion to which the Tribunal can come is that the burden is not discharged and the election must stand."

While interpreting the words "the result of the election has been materially affected" occurring in Section 100(1)(c), this Court in the said case notified that these words have been the subject of much controversy before the Election Tribunals and the opinions expressed were not uniform or consistent. While putting the controversy at rest, it was observed as under: -

"These words seem to us to indicate that the result should not be judged by the mere increase or decrease in the total number of votes secured by the returned candidate but by proof of the fact that the wasted votes would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate."

In another para in the said decision it is observed: -

"It will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate. The casting of votes at an election depends upon a variety of factors and it is not possible for any one to predicate how many or which proportion of the votes will go to one or the other of the candidates. While it must be recognized that the petitioner in such a case is confronted with a difficult situation, it is not possible to relieve him of the duty imposed upon him by Section 100(1)(c) and hold without evidence that the duty has been discharged."

74. It is further argued that for the petitioner to succeed in the election petition, under Section 100(1)(d)(iv) of the Act, he has to establish that the result of the election in so far as it concerns, the returned candidate had been materially affected by non compliance of any of the provisions of Constitution or of the Act or any Rules and order made thereunder. Indeed there has been no non-compliance of the above provisions but the evidence led by the appellant at the stage of the trial of the petition falls absolutely short of establishing that the result of the election in so far as returned candidate is concerned, had been materially affected. Regarding this he has relied upon the law laid down in **Uma Ballav Rath Vs. Maheshwar Mohanty and others, AIR 1999 SC 1322**, Paragraph no. 6 of which is quoted herein below:-

"6. The above finding, however, does not end the matter. For the appellant to succeed in the election petition, under Section 100(1) (d) (iv) of the Act, he had to establish that the result of the election, in so far as it concerns the returned candidate, had been materially affected by non-compliance with any of the provisions of the Constitution or of the Act or of any rules or orders made under the Act. Indeed, there has been non-compliance with the provisions of the Constitution, and of the Act, and the rules and orders made under the Act but the evidence led by the appellant at the trial of the election petition falls absolutely short of establishing that the result of the election in so far as it concerns the returned candidate had been materially affected thereby. The evidence on the record does not show that the result of the election had been materially affected by allotment of symbol "Wheel" to respondent No.1. The appellant, failed to establish, the allegation that the result of the election had been materially effected in so far as the returned candidate is concerned by action of the Election Commission and the Returning Officer. The learned single Judge found that the statements of the witnesses were vague, general and conjectural in nature and did not establish the charge made by the appellant. We have been taken through the evidence of the witnesses by learned counsel for the parties and we are not persuaded to take a different view than the one taken by the High Court either. To avoid an election, it is necessary that cogent evidence is led in support of the charge. An election cannot be set aside on "presumptions", surmises or conjectures. Clear and cogent proof in support of the allegations is essential. In the instant case, the evidence led by the appellant runs hopelessly short of establishing the charge under Section 100(1)(d)(iv) of the Act. In this view of the matter, the finding recorded by the learned single Judge of the High Court on Issue No.1 against the appellant cannot be found fault with. We, therefore, do not find any merit in this appeal. The appeal consequently fails and is hereby dismissed but without any order as to costs."

75. He has further relied upon **Kashi Nath (dead) through L.Rs. Vs. Jaganath, 2003 (8) SCC page 740**, wherein it is laid down that where evidence is not in line with the pleadings and is at variance with it, such evidence cannot be looked into or relied upon.

76. Further he has relied upon ***Gajanan Krishnaji Bapat and another Vs. Dattaji Raghobaji Meghe and others, AIR 1995 SCW 3407*** which is on the same point that the court cannot consider any fact which is beyond pleadings of the parties. It is further argued that it is well settled that in absence of the pleadings, the evidence, if any, produced by the parties cannot be considered. It is also a settled law that no party should be permitted to travel beyond its pleadings and that all necessary and material facts should be pleaded by the parties in support of their case. The object and purpose of pleading is to enable the adversary party to know the case, it has to meet. In such a case, it is the duty of the court to ascertain the substance of the pleadings to determine the disputed question involved. It is not open to the tribunals to fly off at a tangent disregarding the pleadings, to reach any conclusion that they think, are just and proper.

77. After having heard both the sides this Court is of the view that on this issue, the main thrust is being laid by the

petitioner on the non-compliance of Rule 49S of the Rules 1961, which provides that Presiding Officer at the close of the poll shall prepare an account of votes recorded in the form 17-C and enclose it in a separate cover with the words "accounts of votes recorded" subscribed thereon and that Presiding Officer shall furnish to every polling agent present at the close of the polling, a true copy of the entries made in Form 17-C after obtaining a receipt from the said polling agent and shall attest it as a true copy. The said provision in Sub-clause (2) has clearly used the expression "shall furnish" and having laid stress on this, it is vehemently argued that there was no option before the Presiding Officer not to give polling agent a copy of Form 17-C and because of the same not having been done, it shall also be presumed that the same was not prepared at all and hence the entire election process stands vitiated.

78. From the side of respondent no. 1, it is being vehemently argued that there is no pleading made in the petition to the effect that Form 17C was never prepared and that copy of the same was also not given to the polling agent as provided under Rule 49S, hence the entire election process should stand vitiated.

79. I do find substance in the argument made by the learned counsel for the respondent no. 1 that this fact ought to have been pleaded by the learned counsel for the petitioner that Form 17C was never prepared because it is apparent that declaration of result would not be possible without preparation of Form17C, because only after comparison has been made between Form 17C and Form 20, when the figure of votes are found similar then only the result is declared. Moreover, both the parties have repeatedly drawn attention of this Court to the contents of Form 17C which includes detailed information with respect to the polling such as total number of electors assigned to the polling station; total number of votes entered in register for voters (Form-17A); number of voters deciding not to record votes under Rule 49O; number of voters not allowed to vote under Rule 49-M etc. It further includes information with respect to the test votes recorded under Rule 49MA(d) required to be deducted and below the column 10 of this, there is also a provision that polling agents would put their signatures after the entire information is filled up in this form and part-II of this form includes result of the counting and that too has to include names of the candidate/election agents/counting agents and it has to be signed by counting supervisor with full signature. This form was never filled up, has nowhere been mentioned by the learned counsel for the petitioner nor has it been stated by any of the polling agents that he had not put any signature on any such form provided to them. First of all, it was required to be pleaded in great detail from the side of the petitioner that this form was never filled up by the Presiding Officer nor its copy was given on being demanded and also if the same was not filled up and when demanded, copy of it was not given, whether any compliant with regard to its non-preparation was made to the Returning Officer or the District Election Officer or Higher Authority, the same has also not been clarified but only this much has been pleaded in the plaint that a copy of the 17-C which contains votes cast and other details, had not been provided to the polling agents of the petitioner. It is also argued by the learned counsel for the respondent that it was bounden duty of the petitioner to obtain copy of this Form-17-C from the

Election Officer under Rule 93 of the Rule of 1961 which provides as under:-

"93. Production and inspection of election papers.-- (1) While in the custody of the district election officer or, as the case may be, the Returning officer--

(a) the packets of unused ballot papers with counterfoils attached thereto;

(b) the packets of used ballot papers whether valid, tendered or rejected;

(c) the packets of the counterfoils of used ballot papers;

(d) the packets of the marked copy of the electoral roll or, as the case may be, the list maintained under sub-section (1) or sub-section (2) of section 152; and

2[(dd) the packets containing registers of voters in form 17-A;]

(e) the packets of the declarations by electors and the attestation of their signatures; shall not be opened and their contents shall not be inspected by, or produced before, any person or authority except under the order of a competent court.

2[1A) The control units sealed under the provisions of rule 57C and kept in the custody of the district election officer shall not be opened and shall not be inspected by, or produced before, any person or authority except under the orders of a competent court.]

(2) Subject to such conditions and to the payment of such fee as the Election Commission may direct, --

(a) all other papers relating to the election shall be open to public inspection; and

(b) copies thereof shall on application be furnished.

(3) copies of the returns by the Returning officer forwarded under rule 64, or as the case may be, under clause(b) of sub-rule (1) of rule 84 shall be furnished by the Returning officer, district election officer, chief electoral officer or the Election Commission on payment of a fee of two rupees for each copy.]"

For the sake of convenience, Rule 94 of the Act is as follows:-

"94. Disposal of election papers.-- Subject to any direction to the contrary given by the Election Commission or by a competent court or tribunal--

1[(a) the packets of unused ballot papers shall be retained for a period of six months and shall thereafter be destroyed in such manner as the Election Commission may direct;]

2[(aa) the voting machines kept in the custody of the district election officer under sub-rule (1A) of rule 92 shall be retained intact for such period as the Election Commission may direct and shall not be used at any subsequent election without the previous approval of the Election Commission;]

(b) the other packets referred to in sub-rule (1) of rule 93 shall be retained for a period of one year and shall thereafter be destroyed:

3[Provided that packets containing the counterfoils of used ballot papers shall not be destroyed except with the previous approval of the Election Commission;]

(c) all other papers relating to the election shall be retained for such period as the Election Commission may direct.

94A. Form of affidavit to be filed with election petition.--The affidavit referred to in the proviso to subsection (1) of section 83 shall be sworn before a magistrate of the first class or a notary or a commissioner of oaths and shall be in Form 25.]"

80. He has also drawn attention to the Provisions of Rule 94 of Rules of 1961 and it was argued that it is evident from the

above rules that petitioner could have obtained a copy under the above mentioned Rule 93. There is no pleading in the petition to the effect that petitioner had tried to obtain copy of the Form 17C from the District Election Officer and the same was denied, nor has there been extended any evidence to that effect and the burden to prove that Form 17C was never prepared lay upon the petitioner to prove this case to the hilt because in an election petition, burden is on the petitioner, who seeks relief of getting the elected candidate's election quashed/set aside, to strictly prove the ground taken, then only relief could be granted which is apparent from the legal position cited in various rulings above.

81. During argument, this point had also come to be raised from the side of petitioner that the court if now desires, may call for the document/Form 17C from the Election Office to which, learned counsel for the respondent no. 1 has drawn attention to Rule 94 of the Rule of 1961 which says that only certain type of papers mentioned therein pertaining to the election are retained for specific period which are mentioned in the above Rule. As regards voting machine, the same shall be kept in custody of District Election Officer under Sub Rule 1(A) of Rule 92 for a period as the Election Commissioner may direct. The packets referred in Rule 93(1) may be retained only for one year and thereafter would be destroyed and in view of these provisions, it was argued that since there was no court order for retaining the said record pertaining to this election, the maximum period for which the record could have been retained, was one year which has already expired, hence even if court would make any attempt to seek any document, it would be futile exercise.

82. The said argument is rebutted by the learned counsel for the petitioner saying that the document which have been mentioned in sub-clauses a to c of Rule 94 as well as in 93 sub-clause (1), they do not include Form 17C because he has read out each and every document which were mentioned therein, therefore, it was stated by him that the court if requires, can summon the said document i.e. Form No. 17-C.

83. In the alternative, learned counsel for the respondent no. 1 has further argued that even if the court is found to be well within its power to summon the said document, it would serve no purpose because the burden lies upon the petitioner to prove its case to the hilt and for that petitioner had to first plead in its pleading that the Form 17C was never prepared and that its copy was not provided to the polling agent when the same was demanded and since no such pleading has been made, therefore, the evidence in that regard that the Form 17C was never prepared, cannot be allowed to be led and hence, if this evidence cannot be led from the side of the petitioner, there is no question to summon the said document for court's perusal.

84. I find substance in the argument made from the side of respondent no. 1 and I find that the pleadings are very much clear and they do not contain any fact to the effect that Form 17C was never prepared and that polling agents who were appointed, had not put their signatures on the said form after counting and, therefore now there is no point in summoning the said document.

85. Learned counsel for the respondent no. 1 has further relied upon **Mangani Lal Mandal vs. Bishnu Deo Bhandari, AIR 2012 SC 1094**. Paragraph

no. 9 of the said judgment is quoted herein below:-

"9. A reading of the above provision with Section 83 of the 1951 Act leaves no manner of doubt that where a returned candidate is alleged to be guilty of non-compliance of the provisions of the Constitution or the 1951 Act or any rules or orders made thereunder and his election is sought to be declared void on such ground, it is essential for the election petitioner to aver by pleading material facts that the result of the election insofar as it concerned the returned candidate has been materially affected by such breach or non-observance. If the election petition goes to trial then the election petitioner has also to prove the charge of breach or non-compliance as well as establish that the result of the election has been materially affected. It is only on the basis of such pleading and proof that the Court may be in a position to form opinion and record a finding that breach or non-compliance of the provisions of the Constitution or the 1951 Act or any rules or orders made thereunder has materially affected the result of the election before the election of the returned candidate could be declared void. A mere non-compliance or breach of the Constitution or the statutory provisions noticed above, by itself, does not result in invalidating the election of a returned candidate under Section 100(1)(d)(iv). The sine qua non for declaring election of a returned candidate to be void on the ground under clause (iv) of Section 100 (1)(d) is further proof of the fact that such breach or non-observance has resulted in materially affecting the result of the returned candidate. In other words, the violation or breach or non-observation or non-compliance of the provisions of the Constitution or the 1951 Act or the rules or the orders made thereunder, by itself, does not render the election of a returned candidate void under Section 100 (1)(d)(iv). For the election petitioner to succeed on such ground viz., Section 100 (1)(d)(iv), he has not only to plead and prove the ground but also that the result of the election insofar as it concerned the returned candidate has been materially affected. The view that we have taken finds support from the three decisions of this Court in (1) Jabar Singh Vs. Genda Lal; (2) L.R. Shivaramagowda and Others Vs. T.M. Chandrashekhar (dead) by LRs. and Others. and (3) Uma Ballav Rath (Smt.) Vs. Maheshwar Mohanty (Smt) and others."

86. After having drawn attention to this, he has vehemently argued that in the present case in the light of above position of law, the petitioner was required to not only prove that there was non-compliance of mandatory provisions of law but he was also required to prove that the said breach of compliance of the mandatory rule has materially affected the result of the election of the returned candidate, then only the election of the returned candidate could be declared to be void.

87. It is apparent from the pleadings as well as the evidence led from the side of the petitioner that though it has tried to prove unsuccessfully that copy of the Form 17C was never prepared and hence the same was not provided to the polling agents by the Presiding Officer but even if that be treated to be correct allegation, learned counsel for the petitioner has miserably failed in proving as to how the said non-providing of the copy of the Form 17C has resulted in materially affecting the election result of the returned candidate. It has also come on record that the margin of defeat is very huge as the returned candidate has

won this election by securing 73325 votes while the petitioner has just secured 61455 votes and, therefore, it shows difference of more than 10,000 votes.

88. In above regard, respondent no. 1 has also placed reliance on **Akhtar Chooriwala Vs. Smt. Pooja Pal, 2017 (2) ADJ 612**. Paragraph nos. 12, 14, 15, 16, 23 and 25 of the said judgment are as follows:-

"12. A plain and simple reading of the above provision reveals that where the High Court is of opinion that the result of the election, in so far as it concerns a returned candidate has been materially affected by non compliance of the provisions of the Constitution, Act, Rules or Orders made under the Act it shall declare the election of the returned candidate to be void. Thus, for getting the election of a returned candidate to be declared void, the petitioner has to plead and prove not only non compliance of the provisions of the Constitution, Act or any Rules or Orders made under the Act but also that the result of the election in so far as the returned candidate is concerned has been materially affected by such non compliance.

In view of the above provision two things have to be specifically pleaded and proved for succeeding in an election petition for getting the election of the returned candidate declared as void. The first is the non compliance with the provisions of the Constitution or of the Act or any Rules or Orders made under the Act and secondly that the result of the election of the returned candidate has been materially affected due to aforesaid non compliance.

14. Rule 2 of Order VI of the Code provides that the pleadings shall contain a statement in concise form of material facts on which party relies for his claim or defence as the case may be.

Section 83 of the Act specifically provides that an election petition shall contain a concise statement of "material facts" on which the petitioner relies.

15. A combined reading of Section 83 of the Act and Rule 2 of Order VI CPC makes it mandatory to state consciously by way of pleadings in the election petition, the "material facts" on which the petitioner relies upon in assailing the election of the returned candidate.

16. A complete reading of the pleadings of the election petition would reveal that the emphasis of the petitioner all through had been to state that he had actively pursued the authorities to supply him with the nomination Form in Urdu; he had made an application to this effect to the Returning Officer on 20.1.2012 a day prior to the commencement of the nomination; he had deposited a sum of Rs. 10,000/- in the State Bank of India on 23.1.2012 and had again approached the Returning Officer and the District Election Officer for supply of the nomination paper in Urdu; and he had approached them on 28.1.2012 which was last date for filing the nomination paper but he was not supplied with the same in breach of Rule 4 read with Rule 2 (1) (g) of the Conduct of Election Rules, 1961 & the Order of the Chief Election Commissioner U.P, dated 4.5.2001 and some other similar Orders which is sufficient under Section 100 (1) (d) (iv) of the Act for challenging the election of the returned candidate. However, there appears to be no averment or pleading that the breach of any Rule or Order has materially affected the result of the election of the returned candidate.

In order to prove that there is violation of the provisions of the Act, Rules and Orders issued under the Act, the petitioner has

brought on record exhibit P-2, a letter dated 20.1.2012 addressed to the District Election Officer stating that under the Order of the Chief Election Officer U.P., dated 4.5.2001 he is entitled to nomination Form in Urdu and that he would be coming and asking for it for contesting election to the 261 Legislative Assembly Allahabad West. Exhibit P-3 is his letter dated 23.1.2012 addressed to the Returning Officer wherein he has stated that according to Rule 2 (1) (g) the word Form in respect of any election in a State includes a translation thereof in the languages used for official purposes of the State and he is entitled to the nomination Form in Urdu language. Exhibit P-4 is again a letter of the petitioner dated 24.1.2012 addressed to the District Election Officer informing that Urdu is the second official language of the State of U.P., and that the translation of the nomination Form in prescribed Form is supposed to be in Urdu language which is used for official purposes in the State. Since nomination Form is not available in Urdu, the date of submitting nomination be extended. The petitioner again submitted a representation to the same very effect to the Chief Election Officer U.P., and District Election Officer on 28.1.2012 which is Exhibit P-5."

23. In view of the above, non supply of nomination paper to the petitioner in Urdu for the purposes of election to the State Legislative Assembly attracts the provisions of Section 100 (1) (d) (iv) of the Act for setting aside the election of the returned candidate.

But before any decision to set aside the election of the returned candidate is taken, it is incumbent for me to deal with the second aspect of the matter ie., if the election of the returned candidate was materially affected due to non compliance of the above Circular Order.

25. In the entire election petition there is not a single averment that the result of the election was materially affected in any manner whatsoever by non compliance of the aforesaid Rules and Orders.

The petitioner was asked to point out any such pleadings if contained in the election petition but he could only point out to paragraphs 18, 19 and 20 which are reproduced herein below for the sake of convenience:-

18."That petitioner is filing present Election petition for challenging the 2012 U.P. Assembly Election of 261 Assembly Segment Allahabad West for non compliance of Rules/Regulations as laid down in Representation of People Act, 1950, Registration of electors Rules 1960, election Rules 1961 and numerous directions passed by Election Commission of India, exercising its power under Article 324 (1) of the Constitution of India by the officers and officials ie. District Election Officer, Dy. District Election Officer, Returning Officer of 261 Assembly Constituency of District Office, Allahabad because of their mala fide action the petitioner could not be nominated as valid nominated candidate due to the fact that the nomination paper in U.P., official language Urdu was not provided/given to the petitioner by the District Election Officer. Thus the present election Petition is being filed herewith as Election Petition on behalf of Elector as well as claimed to be candidate as per provisions of Section 79 of the Representation of People Act, 1951.

19.That as per provision of numerous Section of Representation of People Act, 1950 registration of People Act, 1950, Registration of Electors Rules 1960, Representation of People Act, 1951 and Conduct of Election Rules, 1961 the following malafide action was done by the

offices and officials of District Election Office, Allahabad.

a. As per provision of Section 31 of Registration of People Act, 1951 and Rule 2 (1) (g) of Conduct of Election Rules, 1961, the Returning Officer concerned did not published put on notice board for public notice for 2012 Assembly election for 261 Assembly Constituency in Form 1 in Urdu Official Language, whereas same was done in English and Hindi Language. Such type of action is against Rule 2 (1) (g) of Conduct of Election Rules, 1961.

b. That as per provision of Section 33 of the Representation of People Act, 1951 and Rule 2 (1) (g) and 4 of Conduct of Election Rules, 1961 and direction of Chief Election Officer Uttar Pradesh dated 04.05.2001 the complete set of Nomination Forms should have been provided by the Returning Officer concerned in Urdu Official Language also. Whereas the Returning Officer provided complete set of nomination form in Hindi while incomplete set of nomination forms in Urdu was not provided.

c. That there was clear cut discrimination between both official Language of this State (Hindi and Urdu) which was malafide action done by Officers and Officials of District Election Officer, Allahabad. In this regard it is clarified by the petitioner that as per provision of rule 2 (1) (g) of Conduct of Election Rules, 1961 Secretary of the Election Commission of India has given an undertaking to this Hon'ble Court in writ petition no. 20847 of 1999 and 32992 of 2001 in the sense that an specific direction has been issued by Election Commission of India under its exclusive power under Article 324 (1) of the Constitution of India to Chief Electoral Officer, Uttar Pradesh for strict compliance of Rule 2 (1) (g) for future general election/bye election. Under afore mention direction of Election Commission of India, the Chief Election Officer, U.P. Dr. Noor Mohammad issued two successive directions vide its letter dated 04.05.2001and 08.11.2001 directing all District Election Officer of Uttar Pradesh for its strict compliance in future general election/bye election. Therefore, it is submitted that officers and officials of District Election Office concerned has flouted the aforementioned direction wilfully, deliberately and intentionally, the said conduct of aforementioned officers/officials are malafide in nature.

d. That as per provision of "U.P. Officials Language (Amendment) Act 1989" Section 3 have been inserted which says that "In the insert of Urdu Speaking People Urdu Language shall be used as Second Official Language for such purposes as may be notified by the Government from time to time. In this regard the State Government issued several government Orders dated 16.3.1999 and 06.10.2005 is being filed herewith and marked as Annexure No. 12 to this petition.

20. That the petitioner is challenging the Election of the Respondent who has been declared as a returned candidate from 261 Allahabad West Assembly Constituency on the ground of 100 (1) (d) (iv) of the Representation of People Act, 1951."

In none of the above paragraphs, the petitioner has made any averment that the election of the returned candidate was materially affected by non compliance of the aforesaid Rules or Orders or by non supply of the nomination papers to him in Urdu."

89. As regards the burden of proof, the law which have been cited above is quite clear that initial burden would lie upon the petitioner to prove its case to the hilt just like a criminal

case because it is not an ordinary proceedings as election proceedings are statutory proceedings and every ground has to be pleaded specifically in the plaint on the basis of which the relief is being sought to be claimed and it is apparent that learned counsel for the petitioner has ultimately reduced the controversies down to non supply of the Form 17C to the polling agents of the petitioner by the Presiding Officer which was mandatory provision, therefore, it was bounden duty of the petitioner's counsel to plead in the pleadings that the said Form 17C was never prepared by the Presiding Officer because of which copy of the same was not provided to the polling agent. Merely mentioning that copy of Form 17C was not given to the polling agent would not suffice to conclude that copy of the same was never prepared. Moreover, it is also apparent that the petitioner had full opportunity to obtain a copy of Form 17C from Election Office under Rule 93 of the 1961 which has not been done nor any evidence has been shown that any effort was made to obtain the same and his request was refused. The petitioner cannot be allowed liberty to shift this burden upon the respondent that he should have obtained a copy of Form 17C in order to defend that the returned candidate had won the election in accordance with the law and Rules. From the evidence which has been adduced from the side of the respondent no. 1, it is true that DW-1 has been evasive with respect to questions, which were asked, pertaining to Form 17C as she had answered that she cannot reply regarding these factual aspects unless she sees the record and it cannot be believed that she might not be knowing about the Form 17C but even if it be taken to be true that copy of Form 17C was not provided, the other condition which was required to be proved by the petitioner, is that the said breach of mandatory Rule actually materially affected the election of the respondent no. 1. Neither there appears to be any specific pleading on record in that regard nor clear evidence has come on record in this regard, therefore, it is apparent that only on the basis of presumption, the violation of Section 66 and 64 and Rules 49S, 55C, 56C, 56D and 66-A cannot be held proved. This issue is decided accordingly against the petitioner.

Finding on Issue no. 4.

90. According to this issue, this Court has to decide whether election petition is not maintenable due to being bereft of material facts as stated in paragraph no. 16 of the written statement.

91. Since this court has already rejected the application of the Respondent No.1 moved under Order VII Rule 11 C.P.C. vide order dated 12.4.2019, this issue does not require any separate finding to be given and stands answered accordingly.

Finding on Issue No. 3:- This issue relates to relief.

92. After having given finding on all the three issues mentioned above, this election petition deserves to be **dismissed** and is accordingly, dismissed, with cost easy.

(2021)03ILR A561
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.02.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

First Appeal From Order No. 2974 of 2017

Smt. Munni Devi & Ors. ...Appellants
Versus
Heera Lal & Ors. ...Opp. Parties

Counsel for the Appellants:
Sri Ram Singh, Sri Amit Kumar Singh

Counsel for the Respondents:
Sri Jagadish Prasad Yadav, Sri Komal Mehrotra

Deceased was 19 years -50 % be added towards future prospects-and 16 as multiplier on IInd Schedule of the Act-Appeal partly allowed . (E-7)

Cases cited:

1.United India Insurance Co. Ltd. Vs U.C. Thakur & ors., 2006 ACJ 2759

2. Laxmi Devi & ors. Vs Mohd. Tambar & ors., 2008 (2) T.A.C. 394 (SC)

3.Munna Lal Jain & ors. Vs Bipin Kumar Sharma & ors., 2015 (3) T.A.C. (SC)

4. Rajesh & ors. Vs Rajveer Singh & ors., 2013 ACJ 1403

5. Sarla Verma Vs Delhi Transport Corporation, (2009) 6 SCC 121

6.National Insurance Company Limited Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

7. Kirti Vs Oriental Insurance Co. Ltd., 2021 (1) TAC (1) S.C.

8.Anita Sharma & ors. Vs New India Assurance Co. Ltd. & anr., (2021) 1 SCC 171

9.Sarla Verma Vs Delhi Transport Corporation, (2009) 6 SCC 121

10. United India Insurance Co. Ltd. Vs Satinder Kaur @ Satwinder Kaur, 2020 (0) AIJEL-SC 66336

11. Magma General Insurance Co. Ltd. Vs Nanu Ram Alias Chuhru Ram & Ors (2018) 18 SCC 130

12. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

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

1. Heard learned counsel for the appellant and Sri Komal Mehrotra, learned counsel for the respondent.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 23.5.2017 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.9, Allahabad now Prayagraj (hereinafter referred to as 'Tribunal') in M.A.C.No.356 of 2016 awarding a sum of Rs.4,47,000/- with interest at the rate of 7% as compensation.

3. Facts, in nutshell, as culled out from the record, are that a First Information Report came to be filed being No.046 of 2016 and in the said F.I.R. it is mentioned that on 14.3.2016 at about 8.00 p.m. when the deceased was going to his home from Sahason (name of place) and when he reached Balipur Service Road, a tractor registered as UP 70 DE 8939 which was being driven at an exorbitant speed, dashed with the motorcycle bearing No.UP 70 BZ 5893 driven by deceased which came below the tyres of the said tractor and the deceased died on the spot. The claimants filed the claim petition contending that the deceased was doing carpentry work and was earning Rs.22,000/- per month. The parents of the deceased were aged 39 and 38 years respectively. The deceased was looking after his minor brothers and sisters who were in the age group of 5 to 14 years.

4. The claimants had claimed sum of Rs.91,50,000/-. On service of notice, the owner and driver of the vehicle filed their replies and the owner accepted that he was the owner of the vehicle but denied most of the averments made in the claim petition. The vehicle was insured with National Insurance Company Limited. The documents were produced and were

proved. The Tribunal framed about five issues and held all of them in favour of the claimants holding that there was no breach of policy conditions. The license was valid license and in issue No.5, the Tribunal has granted compensation. It is this compensation which has aggrieved the appellants.

5. The owner and the Insurance Company have accepted the findings as far as their liability is concerned. The Tribunal even held that strict trappings of criminal and civil proceedings could not be made applicable to the proceedings under the Motor Vehicles Act, 1988 and relied on the decisions in **United India Insurance Co. Ltd. Vs. U.C. Thakur and others, 2006 ACJ 2759 and National Insurance Co. Ltd. Vs. Mahfuja Begum and others, 2002 ACJ 214**. There is no dispute as far as the said issue is concerned.

6. The appellants examined witnesses. We do not delve into the same on all other aspects except the aspect of compensation. The deceased was considered to be 19 years of age. Kamal Singh, father of the deceased, has testified that the deceased was a student of B.Sc. Ist year and was also carrying on the business of carpentry. The testimony of P.W.3, Radhey Shyam, revealed that he knew the deceased and the deceased had prepared certain items of furniture for him and the deceased was being paid Rs.600/- as daily labour charges. Unfortunately, no documentary evidence was produced to prove the same. The learned Tribunal has returned the finding of negligence of the driver of the tractor and has also returned the finding that the deceased had proper driving license. The Tribunal, as far as policy is concerned, returned the finding in favour of the claimants and the owner. All those findings have attained finality. The Insurance Company has neither led any evidence nor orally submitted that there was breach of policy condition.

7. The claimants have claimed a sum of Rs.91,50,000/- contending that the deceased was earning Rs.22,000/- per month and have claimed 18% rate of interest. Kamal Singh, P.W.2, has accepted the fact that he does not have any proof about the income of the deceased. He has accepted that the deceased was student but was also doing work during his free time. The learned Tribunal has therefore not accepted the fact that the deceased was earning Rs.22,000/-. If the deceased was earning Rs. 22,000/-, he would be a tax payee. The learned Tribunal has relied on the decision in **Laxmi Devi and others Vs. Mohd. Tambar and others, 2008 (2) T.A.C. 394 (SC).** According to learned Tribunal the decision in **Munna Lal Jain and others Vs. Bipin Kumar Sharma and others, 2015 (3) T.A.C. (SC)** which was relied by the claimants would not be applicable to the facts of this case. Learned Tribunal has heavily relied on the decision in **Rajesh and others Vs. Rajveer Singh and others, 2013 ACJ 1403** for granting future loss of income.

8. The appellants are the legal heirs of the deceased who are six in number. They are the parents and minor brothers and sisters of the deceased who met with the accident on 14.3.2016. It is not in dispute that he was engaged in work of carpentry namely his employment. The accident is not in dispute. The Insurance Company has not challenged the award and have accepted their liability as no appeal has been preferred by them whereby their liability has been fixed by the Tribunal. The owner, though served with the notice,

has absented himself as it appears that the Tribunal had mulcted the liability on the Insurance Company.

9. The Tribunal considered the age of the deceased to be 19 years, considered the income of the deceased to be Rs.3,000/- per month, added 50% of the income as future prospects and deducted half of the amount towards personal expenses of the deceased. The Tribunal has granted multiplier of 16 and a sum of Rs.15,000/- under the head of non pecuniary damages and thereby awarded compensation of Rs.4,47,000/- to the legal heirs of the deceased along with interest at the rate of 7%.

10. Learned counsel for the appellant has submitted that minimum wages in the state of Uttar Pradesh would come to Rs.250/- per day and as the deceased was carpenter by profession, his income should have been considered to be Rs.6,000/- per month. It is further submitted that the deceased was in the age bracket of 15-20 years, hence, the multiplier would be 18 in view of the decision of the Apex Court in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121.**

11. It is further submitted that the amount awarded by the Tribunal under non-pecuniary heads is on the lower side and requires enhancement in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050**. According to learned counsel for the appellants Rs.50,000/- should be paid for filial consortium and Rs.30,000/- for loss of estate of pecuniary expenses. It is submitted that the interest should be 18%.

12. Per contra, Sri Komal Mehrotra, learned counsel for respondent-Insurance Company has vehemently submitted that the claimants have not proved that the deceased was earning member and was doing carpentry work as he was 20 years of age.

13. It is further submitted by learned counsel for Insurance Company that the addition towards future prospects should be 40% and not 50% as awarded by the Tribunal and he has relied on the decision of the Apex Court in **Pranay Sethi and Others (Supra)** as far as grant of future prospects is concerned.

14. The learned Tribunal while granting interest has relied on the decisions of the Apex Court in **Rajesh and others (Supra)**. The learned Tribunal as far as grant of interest is concerned in the year 2017 is justified is the submission of learned Counsel for the Insurance Company.

15. In recent judgment titled **Kirti Vs. Oriental Insurance Co. Ltd., 2021 (1) TAC (1) S.C**., principle of assessment even for home maker has been narrated. We can even fall back on the decision of the Apex Court in the case of **Anita Sharma and Others Vs. New India Assurance Co. Ltd. and another, (2021) 1 SCC 171**.

16. The principles for determining the compensation rather the criteria for assessment of compensation in death cases are: (i) Age of the deceased at the relevant time, (ii) Number of dependants left behind by deceased and (iii) Income of the deceased at the time of death, (iv) Selection of multiplier shall be as indicated in the Table in Sarla Verma's case and (v) Grant of future prospects shall be in view of the decision in **Pranay Sethi (Supra).**

17. We would not have burdened the judgment with authoritative

pronouncements but it appears that the learned Tribunal has not followed the decisions of the Apex Court in **Sarla Verma and Pranay Sethi (Supra)** while adding 50% towards future prospects and granting '16' as multiplier based on IInd Schedule of the Act, 1988.

18. In that view of the matter, without delving into the factual scenario, as it was proved by P.W.3 that the deceased had undertaken carpentry work and even if we consider him to be a person not being in work, recently the apex court has held that minimum wage would be made applicable which we are considering to be Rs.6,000/- per month.

19. Unfortunately, the Tribunal relied on the IInd Schedule of the Act, 1988 and did not consider the judgment of the Apex Court in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** which would be applicable now as far as multiplier is concerned.

20. We are constrained to hold that after the decisions on **Sarla Verma (Supra)** and Pranay Sethi (Supra), the learned Tribunal was under an obligation to follow the said dicta and not the IInd Schedule of the Act, 1988 if the claim petition filed under Section 166 of the Act, 1988. Hence, we are hasten to hold that multiplier of 18 would be just multiplier.

21. As a general rule as held by the Apex Court in catena of decisions, if deceased was a bachelor, the deduction would be 1/2. However, in Pranay Sethi (Supra) it has been held that the Tribunals and the Appellate Court can take different view if there are more persons depending on the deceased. In our case, the deceased had two minor sisters and two minor brothers. According to the evidences led and the depositions of P.W.1 and 2, after the father of the deceased who was earning Rs.4,000/- per month as an attendant, the young boy had to undertake carpentry work so that he could meet with the family needs. Hence, we deduct 1/3rd towards his personal expenses as he would be giving more to the family instead of being extravagant of expending 1/2 on him.

22. We have deducted 1/3rd instead of 1/2 as the deceased was the only major son. The father, no doubt, was having his own income but younger brothers and sisters were also being fed by him which has come in evidence. In that view of the matter, we have placed reliance on the decision in **United India Insurance Co. Ltd. Vs. Satinder Kaur @ Satwinder Kaur, 2020 (0) AIJEL-SC 66336**.

23. As far as addition of future prospects is concerned, it would be 40% in view of the decision of the Apex Court in **Pranay Sethi (Supra)** as the deceased was below 40 years of age and was engaged in carpentry work.

24. The parents have lost their son at a very young age, the Tribunal has awarded meagre amount under the head of filial consortium. The Apex Court while awarding filial consortium in **Magma General Insurance Co. Ltd. Vs. Nanu Ram Alias Chuhru Ram & Ors (2018) 18 SCC 130** has held as under:

"8.7 A Constitution Bench of this Court in Pranay Sethi (Supra) dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is Loss of Consortium.

In legal parlance, "consortium" is a compendious term which encompasses

'spousal consortium', 'parental consortium', and 'filial consortium'.

The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse.3

Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, co-operation, affection, and aid of the other in every conjugal relation."4

Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training."

Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

Consortium is a special prism reflecting changing norms about the status and worth of actual relationship. Modern jurisdictions world over have recognized that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdiction therefore permit parents to be awarded compensation under the loss of consortium on the death of a child. The amount awarded to the parent is a compensation for loss of the love, affection, care and companionship of the child.

The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of filial consortium.

Parental consortium is awarded to children who loss their parents in motor vehicle accidents under the Act.

A few High Courts have awarded compensation on this count5. However, there was no clarity with respect to the principles on which compensation could be awarded on loss of consortium filial consortium.

The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under 'Loss of Consortium' as laid down in Prany Sethi (Supra).

In the present case, we deem it appropriate to award the father and the sister of the deceased, an amount of Rs.40,000/- each for loss of filial consortium." (Emphasis Added)

25. Hence, we award Rs.50,000/- towards filial consortium and Rs.30,000/- under other non-pecuniary heads.

26. Hence, the total compensation payable to the appellants as discussed herein above would be:

i. Income Rs.6,000/-

ii. Percentage towards future prospects : 40% namely Rs.2400/-

iii. Total income : Rs. 6,000 + 2400 = Rs.8,400/-

iv. Income after deduction of 1/3rd : Rs.5600/-

v. Annual income : Rs.5600 x 12 = Rs.67,200/-

vi. Multiplier applicable : 18

vii. Loss of dependency: Rs.67,200 x 18 = Rs.12,09,600/-

viii. Amount towards filial consortium : Rs.50,000/-

ix. Amount towards loss of estate : Rs.30,000/-

x. Total compensation : 12,89,600/-

27. This takes us to the vexed question of grant of interest. The repo rate is declining day in day out. The Rule 220 (6) of Uttar Pradesh Motor Vehicles Rules (11th Amendment), 2011 prescribes 7% rate of interest. We cannot grant interest less than 7% and, therefore, in view of the decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)**, we consider it just and proper to award 7.5% rate of interest. The interest has to be from the date of filing of the claim petition and we confirm the same.

28. No other grounds are urged orally when the matter was heard.

29. 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.

30. The learned Registrar General is requested to circulate this judgment to the Tribunals so that proper multiplier be awarded by the Tribunals.

(2021)03ILR A567
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2021

BEFORE

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

Habeas Corpus Writ Petition No. 746 of 2020

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

Counsel for the Petitioners:
Sri R.B. Singh, Sri Kamlesh Kumar Yadav, Sri Ajay Pandey, Sri Ghanshyam Yadav

Counsel for the Respondents:
A.G.A., Sri Ajay Pandey

Husband claims wife to be in illegal custody-wife stated to living on free will - matrimonial discord-Writ of habeas corpus-writ of right and not of course-W.P. dismissed. (E-7)

Cases cited:

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

2. Kanu Sanyal Vs District Magistrate Darjeeling, (1973) 2 SCC 674

3. Soniya & anr. Vs St. of U.P. & ors. Habeas Corpus Writ Petition No. 283 of 2020, decided on 18.02.2021

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

1. Heard Sri Ghanshyam Yadav holding brief of Sri Kamlesh Kumar Yadav, learned counsel for the petitioners, Sri Ajay Pandey, learned counsel appearing for the respondent no. 3 and Sri Vinod Kant, learned Additional Advocate General appearing alongwith Sri Pankaj Saxena, learned Additional Government Advocate-I for the State-respondents.

2. Pursuant to the rule nisi issued earlier, the petitioner no. 1 is present in

Court who has been identified by Sri Ajay Pandey, learned counsel.

3. Learned A.G.A.-I, on the basis of enquiry made from the petitioner no. 1, submits that she has stated that she is presently living with some of her relatives on account of a matrimonial discord. On a specific query, she has submitted that she is staying with her relatives on her own sweet will and without there being any threat or coercion. She has also stated that she does not wish to go back to her husband, i.e. petitioner no. 2, and that she desires to go back to her relatives from where she has come.

4. The writ of habeas corpus is a prerogative writ and an extraordinary remedy. It is writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown, as held in Mohammad Ikram Hussain vs. State of U.P. and others1 and Kanu Sanyal vs. District Magistrate Darjeeling2.

5. The necessary jurisdictional fact to be established for the exercise of the extraordinary jurisdiction for issuance of a writ of habeas corpus would be dependent on the applicant establishing a prima facie case that the detention is unlawful.

6. In a recent decision of this Court in Soniya and another vs. State of U.P. and others3, this Court has held that the remedy of a writ of habeas corpus at the instance of a person seeking to obtain possession of someone whom he claims to be his wife would not be available as a matter of course and the power in this regard may be exercised only when a clear case is made out.

7. Having regard to the aforesaid, rule nisi issued earlier is not required to be made absolute. It is accordingly discharged.

8. The writ petition stands accordingly dismissed.

9. The petitioner no. 1 would be at liberty to go back to the place from where she has come or wherever she desires.

10. The amount deposited pursuant to the earlier order may be released to the petitioner no. 1 upon due verification.

(2021)03ILR A568
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.03.2021

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.
THE HON'BLE MANISH MATHUR, J.

P.I.L. Civil No. 6929 of 2021

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

Counsel for the Petitioner:
Mohd. Altaf Mansoor, Nitin Kapoor, Tanay Chaudhary

Counsel for the Respondents:
C.S.C., Anurag Kumar Singh

A. Constitution of India, 1950-Article 226 & Uttar Pradesh Panchayat Raj(Reservation and Allotment of Seats and Offices) Rules, 1994 and Uttar Pradesh Kshetra Panchayats and Zila Panchayats(Reservation and allotment of seats and offices) Rules,1994-challenge to-base year for reservation-opposite parties were ignoring the government order dated 16.09.2015 for the purpose of allotment of seats-they are proceeding to reserve the seats in terms of Rule 4 of 1994 by taking 1995 as the base year instead of 2015-Even, previous election were held in accordance with the G.O. 16.09.2015-In view of the Census 2001

and 2011, it is no longer conducive to have 1995 as the base year for the purpose of applying reservation as per Rule 4 of Rules 1994-due to changed demographic situation base year must be taken as 2015-the quantum of reservation for OBCs ought to be local body specific and be so provisioned to ensure that it does not exceed the quantitative limitation of 50 percent of vertical reservation of seats for SCs/STs/OBCs taken together.(Para 1 to 15)

The petition is allowed. (E-5)

List of Cases cited: -

1. Vikas Kishanrao Gawali Vs St. of Mah. & ors.(2021) SCC OnLine SC 170

2. K. Krishna Murthy (Dr.) Vs U.O.I., (2010) 7 SCC 202

3. Vinod Upadhyay Vs St. of U.P. & anr. (Writ C No. 23377 of 2020)

(Delivered by Hon'ble Ritu Raj Awasthi, J. & Hon'ble Manish Mathur, J.)

1. Heard Mr. Mohd. Altaf Mansoor, learned counsel for petitioner as well as learned Advocate General assisted by Mr. H.P. Srivastava, learned Additional Chief Standing Counsel on behalf of opposite parties no. 1 and 2 and Mr. Anurag Singh, learned counsel for opposite party no.3.

2. In this Public Interest Litigation, the petitioner has come before this Court seeking following reliefs:

"a) Issue a writ, order or direction in the nature of certiorari quashing the impugned government order dated 11.02.2021 (contained in Annexure No. 1).

b) Issue a writ, order or direction in the nature of mandamus directing the respondents to issue fresh guidelines in accordance with the procedure provided under the Uttar Pradesh Panchayat Raj (Reservation and Allotment of Seats and Offices) Rules, 1994 and the Uttar Pradesh Kshetra Panchayats and Zila Panchayats (Reservation and allotment of seats and offices) Rules, 1994.

c) Issue a writ order or direction in the nature of mandamus directing the respondents not to proceed and finalize the reservation of seats of the gram panchayats, Kshetra Panchayats or Zila Panchayat in pursuance to the impugned government order dated 11.02.2021.

d) Award costs in favour of the petitioner against the opposite parties.

e) Pass such further or other orders as may be considered expedient in the interest of justice."

3. Learned counsel for petitioner submits that provisions for reservations in the aforesaid elections are to be determined as per the Uttar Pradesh Panchayat Raj (Reservation and Allotment of Seats and Offices) Rules, 1994 [hereinafter referred to as Rules of 1994] with Rule 4 providing allotment of seats for reservation on rotational basis. It has been submitted that pursuant to amendment in Article 243D of Constitution of India, the aforesaid Rules were notified and for the purposes of allotment of seats as per reservation under Rule 4 of Rules of 1994, the base year was taken as 1995. It is submitted that subsequent elections in 1995, 2000, 2005 and 2010 were held in accordance with the aforesaid Rules of 1994.

4. Learned counsel has thereafter drawn attention to the Government Order dated 16.09.2015 in which it has been indicated that due to substantial demographic changes in the Districts of the State in the Gram Panchayat and Khetra Panchayat territories in view of the census

of 2001 and 2011, it is no longer conducive to have 1995 as the base year for purposes of applying reservation as per Rule 4 of Rules of 1994. As such, the base year in view of the changed demographic situation was required to be taken as 2015.

5. It is submitted that vide impugned order and ignoring the Government Order dated 16.09.2015, the opposite parties are proceeding to reserve the seats in terms of Rule 4 of Rules of 1994 by taking 1995 as the base year instead of 2015. It is further submitted that Government Order dated 16.09.2015 is still in existence and the previous elections held in the year 2015 were also in accordance with the aforesaid Government Order.

6. It is further submitted that even otherwise in view of the changed demographic situation as noticed by the State Government itself in the Government Order dated 16.09.2015, it does not stand to reason that the base year for purposes of reserving seats in terms of Rule 4 of Rules of 1994 should be taken as 1995.

7. It has also been submitted by learned counsel for petitioner that even otherwise the provisions for reservation as contemplated by the impugned Government Order would result in more than 60 per cent seats in a district being reserved, which would be violative of various judgments of Hon'ble the Supreme Court and that it would also violate the maximum cap fixed with respect to reservation of Backward Class of 27 per cent.

8. With regard to aforesaid, learned counsel for petitioner has submitted that similarly worded provisions in Clause 12(2)(c) of the Maharashtra Zilla Parishads and Panchyat Samitis Act, 1961 was held to be non est by a recent judgment of Hon'ble the Supreme Court in the case of ***Vikas Kishanrao Gawali vs. State of Maharashtra and others; 2021 SCC OnLine SC 170***. It is submitted that Hon'ble the Supreme Court while following the Constitution Bench judgment in the case of ***K. Krishna Murthy (Dr.) vs. Union of India; (2010) 7 SCC 202*** has held that the quantum of reservation ought to be local bodies specific and be so provisioned to ensure that it does not exceed the quantitative limit of 50 per cent (aggregate) of vertical reservation of seats for SCs/STs/OBCs taken together. The offending provision of the Act of 1961 was quashed to the extent it provided reservation of seats for OBC. Relevant paragraphs of the said judgment are as follows:

"8. On a fair reading of the exposition in the reported decision, what follows is that the reservation for OBCs is only a "statutory" dispensation to be provided by the State legislations unlike the "constitutional" reservation regarding SCs/STs which is linked to the proportion of population. As regards the State legislations providing for reservation of seats in respect of OBCs, it must ensure that in no case the aggregate vertical reservation in respect of SCs/STs/OBCs taken together should exceed 50 per cent of the seats in the concerned local bodies. In case, constitutional reservation provided for SCs and STs were to consume the entire 50 per cent of seats in the concerned local bodies and in some cases in scheduled area even beyond 50 per cent, in respect of such local bodies, the question of providing further reservation to OBCs would not arise at all. To put it differently, the quantum of reservation for OBCs ought to

be local body specific and be so provisioned to ensure that it does not exceed the quantitative limitation of 50 per cent (aggregate) of vertical reservation of seats for SCs/STs/OBCs taken together.

9. Besides this inviolable quantitative limitation, the State Authorities are obliged to fulfil other pre-conditions before reserving seats for OBCs in the local bodies. The foremost requirement is to collate adequate materials or documents that could help in identification of backward classes for the purpose of reservation by conducting a contemporaneous rigorous empirical inquiry into the nature and implications of backwardness in the concerned local bodies through an independent dedicated Commission established for that purpose. Thus, the State legislations cannot simply provide uniform and rigid quantum of reservation of seats for OBCs in the local bodies across the State that too without a proper enquiry into the nature and implications of backwardness by an independent Commission about the imperativeness of such reservation. Further, it cannot be a static arrangement. It must be reviewed from time to time so as not to violate the principle of overbreadth of such reservation (which in itself is a relative concept and is dynamic). Besides, it must be confined only to the extent it is proportionate and within the quantitative limitation as is predicated by the Constitution Bench of this Court.

12. As a matter of fact, no material is forthcoming as to on what basis the quantum of reservation for OBCs was fixed at 27 per cent, when it was inserted by way of amendment in 1994. Indeed, when the amendment was effected in 1994, there was no guideline in existence regarding the modality of fixing the limits of reserved seats for OBCs as noted in the decision of the Constitution Bench in K. Krishna Murthy (supra). After that decision, however, it was imperative for the State to set up a dedicated Commission to conduct contemporaneous rigorous empirical inquiry into the nature and implications of backwardness and on the basis of recommendations of that Commission take follow up steps including to amend the existing statutory dispensation, such as to amend Section 12(2)(c) of the 1961 Act. There is nothing on record that such a dedicated Commission had been set up until now. On the other hand, the stand taken by the State Government on affidavit, before this Court, would reveal that requisite information for undertaking such empirical inquiry has not been made available to it by the Union of India. In light of that stand of the State Government, it is unfathomable as to how the Respondents can justify the notifications issued by the State Election Commission to reserve seats for OBCs in the concerned local bodies in respect of which elections have been held in the year December 2019/January 2020, which notifications have been challenged by way of present writ petitions. This Court had allowed the elections to proceed subject to the outcome of the present writ petitions.

13. Be that as it may, it is indisputable that the triple test/conditions required to be complied by the State before reserving seats in the local bodies for OBCs has not been done so far. To wit, (1) to set up a dedicated Commission to conduct contemporaneous rigorous empirical inquiry into the nature and implications of the backwardness qua local bodies, within the State; (2) to specify the proportion of reservation required to be provisioned local body wise in light of recommendations of the Commission, so as not to fall foul of overbreadth; and (3) in any case such reservation shall not exceed

aggregate of 50 per cent of the total seats reserved in favour of SCs/STs/OBCs taken together. In a given local body, the space for providing such reservation in favour of OBCs may be available at the time of issuing election programme (notifications). However, that could be notified only upon fulfilling the aforementioned pre-conditions. Admittedly, the first step of establishing dedicated Commission to undertake rigorous empirical inquiry itself remains a mirage. To put it differently, it will not be open to Respondents to justify the reservation for OBCs without fulfilling the triple test, referred to above.

14. As regards Section 12(2)(c) of the 1961 Act inserted in 1994, the plain language does give an impression that uniform and rigid quantum of 27 per cent of the total seats across the State need to be set apart by way of reservation in favour of OBCs. In light of the dictum of the Constitution Bench, such a rigid provision cannot be sustained much less having uniform application to all the local bodies within the State. Instead, contemporaneous empirical inquiry must be undertaken to identify the quantum qua local body or local body specific.

26. The State Election Commission had invited our attention to the fact that, provision similar to Section 12(2)(c) of the 1961 Act regarding reservation for OBCs finds place in other State enactments concerning the establishment of Village Panchayat, Municipal Council, Nagar Panchayat, Corporation, etc. Needless to observe that the view taken in this judgment would apply with full force to the interpretation and application of the provisions of the stated Act(s) and the State Authorities must immediately move into action to take corrective and follow up measures in right earnest including to ensure that future elections to the concerned local bodies are conducted strictly in conformity with the exposition of this Court in K. Krishna Murthy (supra), for providing reservation in favour of OBCs.

27. In conclusion, we hold that Section 12(2)(c) of the 1961 Act is an enabling provision and needs to be read down to mean that it may be invoked only upon complying with the triple conditions (mentioned in paragraph 12 above) as specified by the Constitution Bench of this Court, before notifying the seats as reserved for OBC category in the concerned local bodies. Further, we quash and set aside the impugned notifications to the extent they provide for reservation of seats for OBCs being void and non est in law including the follow up actions taken on that basis. In other words, election results of OBC candidates which had been made subject to the outcome of these writ petitions including so notified in the concerned election programme issued by the State Election Commission, are declared as non est in law and the vacancy of seat(s) caused on account of this declaration be forthwith filled up by the State Election Commission with general/open candidate(s) for the remainder term of the concerned local bodies, by issuing notification in that regard.

28. As a consequence of this declaration and direction, all acts done and decisions taken by the concerned local bodies due to participation of members (OBC candidates) who have vacated seats in terms of this decision, shall not be affected in any manner. For, they be deemed to have vacated their seat upon pronouncement of this judgment, prospectively. This direction is being issued in exercise of plenary power Under Article 142 of the Constitution of India to do complete justice.

29. It was urged that this Court ought not to exercise plenary power Under Article 142 and abjure from disturbing the completed elections. However, we are not

impressed with this contention because participation in the elections conducted since December 2019 to the concerned local bodies across the State of Maharashtra was on clear understanding that the results of the reserved seats for OBCs would be subject to the outcome of these writ petitions. That was clearly notified by the State Election Commission in the election programme published by it at the relevant time, in consonance with the directions given by this Court vide interim orders. Therefore, the reliefs as claimed and being granted in terms of this judgment, are in consonance with liberty given by this Court.

30. Accordingly, these writ petitions must partly succeed. The challenge to the validity of Section 12(2)(c) of the 1961 Act is negatived. Instead, that provision is being read down to mean that reservation in favour of OBCs in the concerned local bodies can be notified to the extent that it does not exceed aggregate 50 per cent of the total seats reserved in favour of SCs/STs/OBCs taken together. In other words, the expression "shall be" preceding 27 per cent occurring in Section 12(2)(c), be construed as "may be" including to mean that reservation for OBCs may be up to 27 per cent but subject to the outer limit of 50 per cent aggregate in favour of SCs/STs/OBCs taken together, as enunciated by the Constitution Bench of this Court. However, the impugned notifications/orders dated 27.7.2018 and 14.2.2020 and all other similar notifications issued by the State Election Commission during the pendency of these writ petitions mentioning that the elections to the concerned local bodies were being held subject to the outcome of these writ petitions, are quashed and set aside to the extent of providing reservation of seats in the concerned local bodies for OBCs. As a consequence, follow up steps taken on the basis of such notifications including the declaration of results of the candidates against the reserved OBC seats in the concerned local bodies, are declared non est in law; and the seats are deemed to have been vacated forthwith prospectively by the concerned candidate(s) in terms of this judgment. The State Election Commission shall take immediate steps to announce elections in respect of such vacated seats, of the concerned local bodies, not later than two weeks from today, to be filled by general/open category candidates for the remainder term of the Panchayat/Samitis. Ordered accordingly."

9. Upon applicability of the judgment rendered by Hon'ble the Supreme Court in the case of ***Vikas Kishanrao Gawali vs. State of Maharashtra and others (supra),*** it is clear that the provisions of the impugned Government Order dated 11.02.2021 would have the effect of exceeding the prescribed vertical limit of reservation of 50 per cent, which cannot be permitted.

10. The Court vide order dated 12.3.2021 had granted time to opposite parties to seek instructions with regard to aforesaid submissions.

11. Learned Advocate General appearing for the opposite parties no. 1 and 2, on the basis of written instructions, copy of which has been placed before the Court and the same is taken on record, submits that the State Government has no objection to implement the reservation and allotment of seats of constituencies in Panchayats elections taking 2015 as the base year as first round of reservation and allotments for determining the reservations as per decision taken vide Government Order dated 16.9.2015.

12. We are conscious of the fact that this Court vide order dated 4.2.2021 passed in ***Writ-C No. 23377 of 2020; Vinod Upadhyay vs. State of U.P. and another*** has issued directions to the opposite parties to complete the reservation of constituencies latest by 17.3.2021 and thereupon complete the elections of all the Panchayats by 30th April, 2021 and indirection elections to be completed thereafter within fifteen days i.e., by 15th May, 2021.

13. It is submitted by the learned Advocate General that the entire exercise for providing reservation in the Panchayat Elections has to be done a fresh taking 2015 as the base year, as such, it would not be possible that the reservation of constituencies to be finalized by 17.3.2021. It is stated that they will complete the entire exercise in this regard by 27.3.2021 and hold the elections by 10.5.2021. Indirect election would be completed by 25.5.2021.

14. We have passed this order considering the changed circumstances, with the consent of parties' counsel and without calling for counter affidavit as well as taking note of the fact that ***Writ-C No. 23377 of 2020; Vinod Upadhyay vs. State of U.P. and another*** has been disposed of vide order dated 4.2.2021.

15. Considering the submissions of learned Advocate General, the impugned order dated 11.2.2021 is hereby quashed. The writ petition is ***allowed.***

(2021)03ILR A574
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.03.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

THE HON'BLE RAJENDRA KUMAR-IV, J.

Matter Under Article 227 No. 58596 of 2017

Pradeep Kumar Dwivedi ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
In Person

Counsel for the Respondent:
A.S.G.I., Sri Ajeet Kumar Singh, Sri Jayant Prakash Singh, Sri Neeraj Tripathi, Sri Vinod Kumar Shukla

A. Constitution of India, 1950-Article 226-Petitioner challenged the appointment-earlier he came to the court in PIL -petitioner did not seek any liberty to file a fresh writ petition but made a statement that he may be allowed to pursue appropriate remedy for redressal of his grievance-appropriate remedy in respect of decision of University is by invoking jurisdiction of the Chancellor u/s 10 of University of Allahabad Act, 2005-Since, earlier petition was not dismissed as withdrawn with liberty to file second writ petition, this writ petition for the same cause of action is not maintainable.(Para 1 to 6)

The Petition is dismissed. (E-5)

List of Cases cited: -

1. Sarguja Transport Service Vs S.T.A.T., (1987) 1 SCC 5

2. Mahendra & Ors. Vs St. of U.K. & anr. (2007) 10 SCC 158

3. Manubhai J. Patel Vs B.O.B., (2000) 10 SCC 253

4. U.O.I. Vs Ranbir Singh Rathaur,(2006) 11 SCC 696

5. Ishwar Dutt Vs Land Acquisition Collector, (2005) AIR SC 3165

(Delivered by Hon'ble Sudhir Agarwal, J. & Hon'ble Rajendra Kumar-IV, J.)

1. Heard petitioner-Pradeep Kumar Dwivedi, in person, and perused the record.

2. Petitioner, challenging appointment of Respondent-6 earlier came to this Court in Public Interest Litigation No. 55547 of 2017 which was dismissed as withdrawn vide order dated 22.11.2017 as under:

"The petitioner in person prays for withdrawal of the writ petition with liberty to take appropriate remedy for redressal of his grievance. Petition is accordingly disposed of, as withdrawn, with liberty as prayed."

3. Petitioner did not seek any liberty to file a fresh writ petition but made a statement that he may be allowed to pursue appropriate remedy for redressal of his grievance. Appropriate remedy in respect of decision of University is by invoking jurisdiction of Chancellor under Section 10 of University of Allahabad Act, 2005. Since earlier writ petition was not dismissed as withdrawn with liberty to file second writ petition, this writ petition for the same cause of action is not maintainable. The law in this regard has been settled by Apex Court in **Sarguja Transport Service v. S.T.A.T., (1987) 1 SCC 5**. In paragraph 9 of judgment, apex Court held as under :-

"9. The point for consideration is whether a petitioner after withdrawing a writ petition filed by him in the High Court under Article 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that article. On this point the decision in Daryao case AIR 1961 SC 1457 : (1962) 1 SCR 574 is of no assistance. But we are of the view that the principle underlying Rule 1 of Order XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in a High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission. In the instant case the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ petition had been withdrawn without permission to file a fresh petition. We, however, make it clear that whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental rignt guaranteed under Article 21 of the Constitution since such a case stands on a different footing altogether. We, however leave this question open."

4. In **Mahendra and others v. State of Uttaranchal and another, (2007) 10 SCC 158**, Court while considering the said

issue issued guidelines to the High Court to make provision in the relevant rules. In para 9 of judgment, Court held as under:-

"9. Before we part with the case, it has to be noted that several instances have come to our notice that several writ petitions of similar nature are being filed without disclosing that earlier a petition had been filed. It would be therefore appropriate for the High Courts to make provision in the relevant rules that in every petition it shall be clearly stated as to whether any earlier petition had been filed and/or is pending in respect of the same cause of action. It shall also be indicated as to what was the result of the earlier petition. If this procedure is followed, the confusion of the kind which has surfaced in this case can be ruled out."

5. Similar controversy has also been decided by Supreme Court in **Manubhai J. Patel v. Bank of Baroda, 2000 (10) SCC 253; Union of India v. Ranbir Singh Rathaur, 2006 (11) SCC 696; and, Ishwar Dutt v. Land Acquisition Collector, AIR 2005 SC 3165**.

6. Considering the proposition of law propounded by Apex Court in aforesaid cases, we hold that present writ petition filed by petitioner is not maintainable. Dismissed accordingly.

(2021)03ILR A576
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.02.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Transfer Application (Civil) No. 70 of 2021

M/S Bold Leasing & Fin. Pvt. Ltd. Ghaziabad ...Applicant
Versus
Smt. Dimpal Kohali ...Respondent

Counsel for the Applicant:
Sri Rajiv Kumar Mishra, Sri Ved Byas Mishra

Counsel for the Respondents:
-

A. Code of Civil Procedure, 1908-Section 24-applicant was heard on the application under Order 7, Rule 11 CPC –the court fixed date for delivery of orders- First ground taken by the applicant that he demanded file from the reader of the court who did not supply him on the pretext that the same is with the Stenographer is not sufficient ground for transfer of a case- Second, ground that the opposite party is propagating in the court campus that he will get injunction from the court cannot be said to form bonafide and reasonable apprehension in the mind of the applicant that he would not get justice-the said propaganda is also hearsay and there is no material on record to corroborate the said apprehension. (Para 2 to 16)

The Transfer Application is dismissed. (E-5)

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

1. Heard learned counsel for the applicant.

2. The present transfer application has been filed by the defendant in Original Suit No. 689 of 2020 (Smt. Dimpal Kohali Vs. M/s Bold Leasing and Finance Pvt. Ltd.) pending before the court of Civil Judge (Sr. Division), Ghazibad. The transfer application has been filed on the ground that there is apprehension in the mind of the applicant that he may not get justice from the court of Civil Judge (Sr. Division), Ghazibad. The said apprehension is based upon the fact that in

the aforesaid case, application under Order 7 Rule 11 CPC was filed by the applicant and the Civil Judge (Sr. Division), Ghazibad without hearing the application of the applicant under Order 7 Rule 11 CPC asked the defendant counsel not to evict the plaintiff from the property in question.

3. The further ground is that the application under Order 7 Rule 11 CPC was heard by the court of Civil Judge (Sr. Division), Ghazibad on 21.12.2020 and the case was fixed for hearing on application under Order 39 Rule 1 CPC on 22.12.2020. The counsel for the applicant when demanded the file of the case from the Reader of the court of Civil Judge (Sr. Division), Ghazibad to inspect the file, he denied the same stating that the file is with the Steno and 22.12.2020 is fixed. This conduct of Reader of the court created apprehension in the mind of applicant.

4. It is also alleged in the application that the opposite party is propagating in the compound of the court that he will get injunction in respect of whole property. The apprehension that the applicant shall not get justice cropped up in the mind of applicant on the basis of aforesaid pleadings.

5. Learned District Judge, Ghaziabad issued notices to the opposite party and has also sought report from the concerned court as there was allegation against the court on which transfer was sought. In the report, it was stated that application under Order 7 Rule 11 CPC was heard and order on the application under Order 7 Rule 11 CPC was uploaded on the website of the court.

6. After perusing the report of the concerned court and appreciating the facts on record, the District Judge came to the conclusion that no ground of transfer is made out.

7. The relevant extract of the order dated 18.1.2021 passed by the District Judge, Ghaziabad in Transfer Application No. 341 of 2020 is extracted herein below:-

".....पत्रावली का अवलोकन किया। पत्रावली के अवलोकन से विदित होता है कि प्रार्थी/प्रतिवादी द्वारा स्थानातंरण प्रार्थना पत्र न्यायालय सिविल जज (सी०डि०) के पीठासीन अधिकारी पर आक्षेप लगाते हुए प्रस्तुत किया गया है। प्रार्थी/प्रतिवादी ने अपने स्थानातंरण प्रार्थनापत्र में कथन किया गया है कि विपक्षी/वादी द्वारा खुलेआम यह कहा जा रहा कि उसने प्रश्नगत भवन का केवल भूतल व प्रथम तल किराये पर लिया था परन्तु वह प्रार्थी/प्रतिवादी की पूरे भवन पर स्टे प्राप्त कर लेगा और उसकी इस संबंध में संबंधित अधिकारी से बात हो चुकी है। इस सम्बन्ध में यह उल्लेखनीय है कि प्रार्थी/प्रतिवादी द्वारा केवल शोहरत के आधार पर उक्त अन्तरण प्रार्थनापत्र प्रस्तुत किया गया है परन्तु इस सम्बन्ध में कोई साक्ष्य प्रस्तुत नहीं किया गया है। संबंधित पीठासीन अधिकारी द्वारा भी अपनी आख्या में प्रार्थी/प्रतिवादी द्वारा लगाये गये आरोपों से इंकार किया है तथा यह भी कथन किया गया है कि प्रार्थना पत्र अंतर्गत आदेश 7 नियम 11 सहपठित धारा 151 सी०पी०सी० दिनांक 21.12.2020 को गुण-दोष के आधार पर निर्णित किया गया था तथा उसी दिन बेवसाईट पर अपलोड कर दिया गया था।

मामले की उपरोक्त परिस्थितियों को दृष्टिगत रखते हुए उक्त मूलवाद अन्तरित किये जाने का कोई पर्याप्त आधार प्रतीत नहीं होता है। तदनुसार अन्तरण प्रार्थनापत्र निरस्त किये जाने योग्य है।

आदेश

अन्तरण प्रार्थनापत्र 3ग निरस्त किया जाता हैं। मूल अभिलेख अविलम्ब सम्बन्धित न्यायालय को अग्रिम कार्यवाही हेतु प्रतिप्रेषित किया जावे।

(नीरज निगम)
सत्र न्यायाधीश,
गाजियाबाद
JO CODE: UP05282
दि 18.01.2021"

8. I have heard learned counsel for the applicant and perused the record.

9. Learned counsel for the applicant submitted that from the averments made in the transfer application, it is evident that the applicant shall not get justice from the court of Civil Judge (Sr. Division), Ghazibad which led the applicant to file the present transfer application under Section 24 CPC. He submits that the Apex Court in **Kulwinder Kaur @ Kulwinder Gurcharan Singh Vs. Kandi Friends Education Trust and others, 2008 AIR (SC) 1333** has held that if there is a reasonable apprehension in the mind of applicant that he would not get justice from the court that is a sufficient ground for transfer of a case from that court.

10. The paragraph-14 of the of Apex Court judgement relied upon by the counsel for the applicant in the case of **Kulwinder Kaur @ Kulwinder Gurcharan Singh (supra)**, is extracted herein below:-

".....14. Although the discretionary power of transfer of cases cannot be imprisoned within a strait-jacket of any cast-iron formula unanimously applicable to all situations, it cannot be gainsaid that the power to transfer a case must be exercised with due care, caution and circumspection. Reading Sections 24 and 25 of the Code together and keeping in view various judicial pronouncements, certain broad propositions as to what may constitute a ground for transfer have been laid down by Courts. They are balance of convenience or inconvenience to plaintiff or defendant or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues raised by the parties; reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending; important questions of law involved or a considerable section of public interested in the litigation; interest of justice demanding for transfer of suit, appeal or other proceeding, etc. Above are some of the instances which are germane in considering the question of transfer of a suit, appeal or other proceeding. They are, however, illustrative in nature and by no means be treated as exhaustive. If on the above or other relevant considerations, the Court feels that the plaintiff or the defendant is not likely to have a fair trial in the Court from which he seeks to transfer a case, it is not only the power, but the duty of the Court to make such order."

11. Be that as it may, from the averments made in the application, it is evident that the applicant was heard on the application under Order 7 Rule 11 CPC on 21.12.2020 and after hearing the applicant, the court fixed 22.12.2020 for delivery of orders. The basis for apprehension in the mind of applicant was that the counsel for the applicant demanded the file from the Reader of the court who did not supply him on the pretext that the same is with the Steno.

12. The counsel for the applicant cannot demand as a matter of right to inspect the file and if he wanted to inspect the file, there was a procedure prescribed in the Rule 231 of The General Rules (Civil), 1957 for filing proper application for inspecting the same.

13. Further ground on which transfer of case was sought was that the opposite party is propagating in the court campus that he will get injunction from the court in respect of whole property, this ground also cannot be said to form bonafide and reasonable apprehension in the mind of the applicant that he would not get justice from the court inasmuch as the said propoganda is also hearsay and there is no material on record to corroborate the said apprehension.

14. In view of the aforesaid fact, this Court finds that the judgement of the Apex Court relied upon by counsel for the applicant is not applicable in the facts of the present case inasmuch as the pleadings in the transfer application does not make out ground which can be said to be sufficient for forming reasonable apprehension in the mind of the applicant that he will not get justice from the court.

15. In view of the aforesaid discussion, this Court does not find any error in the order of the District Judge rejecting the transfer application.

16. Accordingly, the transfer application is **dismissed** without any order as to costs.

(2021)03ILR A579
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2021

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Writ -A (Rent Control) No. 15008 of 2020

Farukh @ Faruk ...Petitioner
Versus
Appellate Authority/A.D.J. Khurja & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dushyant Singh, Sri M.C. Singh

Counsel for the Respondents:
C.S.C., Sri Mohd. Saleem Khan, Sri Swetashwa Agarwal, Sri P.K. Jain

A. Civil Law - UP Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 – S. 21 (1) (a) – Eviction suit – Bona fide need – Landlord's need to expand his business – Held, landlord has got every right to expand his business and in case he requires additional space for it, the need cannot be said to be mala fide. (Para 14)

C. Civil Law - UP Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 – S. 21 (1) (a) – Eviction suit – Comparative hardship – Concurrent finding – Based on cogent evidence – No perversity – Interference – Tenant-petitioner has never made any effort to search out any shop during the pendency of litigation and that the landlord offered him a shop which he denied to accept – Held, concurrent findings of fact have been recorded by the courts below, which are based on cogent evidence available before the courts below and such findings are not perverse in nature, even if it is accepted that two views are possible – High Court did not incline to interfere in the impugned orders. (Para 11 and 15)

Writ Petition dismissed. (E-1)

Cases relied on :-

1. Surendra Singh Vs A.D.J.,Court No. 11, Muzaffarnagar & 4 ors., 2019 (3) ARC 112

2. Smt. Shamim Begum & 5 ors. Vs Dinesh Kumar & 7 ors., 2019 (1) ARC 319

3. Kailash Nath Gupta Vs Smt. Asha Gupta & 3 ors., 2018 (3) ARC 451

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

1. Heard Sri M.C. Singh, learned counsel along with Sri Dushyant Singh, learned counsel for the petitioner-tenant

and Sri P. K. Jain, learned Senior Counsel assisted by Mohd. Saleem Khan, learned counsel for the respondents-landlord.

2. Learned counsel for the respondents-landlord submits that he does not want to file any counter affidavit, therefore, with the consent of parties the matter was finally heard and the judgement was reserved.

3. The Present petition has been filed challenging the impugned order dated 9.11.2020 passed by the respondent no. 1 and the impugned order dated 1.4.2019 passed by the respondent no. 2.

4. The landlord filed a release application for releasing the shop in question on the ground that the shop is needed for his doctor sons for clinic and for using the same as passage, which is required for connecting the landed property behind the shop on which the landlord wants to construct the hospital. It was asserted that no passage is available for connecting the vacant plot to the main road and therefore, present shop, being the longest one, is required for personal need. The same was contested by the petitioner-tenant herein on the ground that names of the doctor sons have not been disclosed in the plaint and in fact, the landlord is already having nursing home/hospital and therefore, the shop in question is not required. It was further asserted that the present shop whereon the tenant is carrying on barber shop, is the only source of his income.

5. After considering the issue of bona fide need, it was found by the trial Court that the shop is required as a passage for opening of the proposed hospital/nursing home to be constructed by the landlord on the main road and therefore, the need is bona fide. As per the map filed before the Court below, the approach road to the proposed hospital is on the side and is narrow and is not suitable and does not fulfil the requirement of law for sanction of the map and that the plaintiff has sufficient means to construct the hospital. It was further found that during the pendency of release application since 2017, no attempt was made by the tenant to search out any alternative accommodation. Accordingly, the release application was allowed in favour of the landlord and the release of the shop in question was ordered.

6. Appeal was filed by the petitioner-tenant. On the basis of argument and the grounds taken in appeal, 17 points of determination were framed by the lower appellate court and after considering the evidence on record and dealing with the arguments made by the tenant, lower appellate court found that the need of the landlord of the shop in question for having passage from the plot on which hospital is to be constructed connecting it to the main road, for which map has already been submitted before the development authority, was genuine and bona fide. The issues raised by the tenant were specifically dealt with and rejected. Various documents including map submitted before the development authority were considered and it was found that no evidence in rebuttal was given by the tenant. It was found that the passage which was claimed to be available to the landlord to the vacant land was in fact not the passage connecting the plot directly to the main road. It was also found that the landlord has filed an affidavit of one Irshad Mohd Khan who offered his shop to the tenant, to which no rebuttal was filed by the tenant, however, this offer was not accepted by the

petitioner-tenant herein. Therefore, the comparative hardship was found in favour of the landlord as the tenant has not made any effort to search out any alternative accommodation and on the contrary he refused to accept the shop, which was offered to him in alternative. The appeal was also dismissed by the lower appellate court.

7. Challenging the impugned orders, submission of learned counsel for the tenant-petitioner is that the landlord already has 2-3 hospitals and clinics and therefore, the need of his doctor sons without even disclosing their names, was not bona fide. It is submitted that the comparative hardship of the tenant has been brushed aside without any cogent reasons. It is submitted that the findings recorded by the courts below on the issue of bona fide and comparative hardship are absolutely perverse in nature. By drawing attention to paragraph 5 of the release application, it is submitted that the son wants to run a clinic on the shop in question and on the adjoining vacant plot proposed hospital is to be constructed for which no passage is available from the main road, therefore, simultaneous need, for establishing the clinic and passage required for the proposed hospital, is not bona fide and genuine. Drawing attention to the map, which was submitted by the landlord showing that on the one side of the property owned by the landlord a passage having width of 9½ feet is available to the landlord, which connects the open piece of land on which hospital/nursing home is proposed to be constructed, therefore, need for connecting the proposed hospital to the main road is not at all genuine and bona fide. He submits that the width of shop is, in fact, 8½ feet which is even less than to the passage available to the landlord and thus, if the width of the shop in question cannot be increased, which is even lesser than the passage available to the landlord, clearly the findings recorded by the courts below are perverse in nature. It was further submitted that enough establishment in occupation is already available with the landlord and his sons are sitting in a different clinic and that the landlord is having one ayurvedic hospital where the his sons are doing their practice and therefore, the need as shown clinic either is not bona fide. During course of argument, attention was drawn to paragraph 5 of the release application, paragraph 32 of the written statement filed by the tenant, various documents placed on record before this Court by means of supplementary affidavit filed today in Court. He further pointed out that the trial court has decided the case in a cursory manner and the lower appellate court has also decided the case in a predetermined mind. By drawing attention to paragraph 33 of the judgement of lower appellate court, it was submitted that the observations of the lower appellate court that no evidence was submitted by the tenant to contradict the documents annexed as 27A/2 and 27A/3 is incorrect. Attention was also drawn to the reply submitted by the tenant to the affidavit submitted by the landlord annexed with the supplementary affidavit filed today, to submit that the reply was submitted by the tenant. It was also submitted that the vacant plot was not a freehold plot and therefore, the release application filed on the ground that the passage is required for the proposed hospital to be constructed on the aforesaid vacant piece of land was illegally entertained.

8. Per contra, Sri P. K. Jain, learned Senior Counsel contends that concurrent findings have been recorded by the courts

below after appreciation of evidence on record. He submits that admittedly, now the plot is a freehold plot and there is no impediment in raising the construction. He pointed out that the tenant-petitioner was offered another shop whose owner is willing to let out his shop but that offer was not accepted by the tenant-petitioner and therefore, it cannot be said that he had any comparative hardship. Insofar as bona fide need is concerned, it is submitted that the running of the clinic on the said plot by the doctor sons was only during the construction of the proposed hospital and thereafter the shop is to be used as a passage to the hospital. It is submitted that insofar as the passage, which is being said to be sufficient to cater the need of the hospital is concerned, as per the laws of the development authority, 12 meter wide road is required for opening of any such hospital, otherwise the map cannot be sanctioned by the development authority. It is submitted that this is the requirement of law, therefore, direct approach to the main road is necessary before the map could be sanctioned by the development authority. He further submits that admittedly, the map of the proposed hospital is pending consideration before the development authority and nothing could be indicated by the tenant that direct approach to at least 12 meter wide road is not required for the construction of proposed hospital/nursing home. He, therefore, submits that it is very much clear that need of the landlord is bona fide in nature. He pointed out that the landlord himself is ayurvedic doctor and his sons and one daughter-in-law are allopathic/surgeon MBBS doctors and they cannot be made to sit at ayurvedic hospital of the landlord. He, therefore, submits that the side passage, which may be 9½ feet wide, is not sufficient to meet out the statutory requirement of the development authority and direct passage is required for the proposed hospital. He, however, submits that the tenant cannot dictate the terms in what manner the landlord has to run his business. In support of his arguments, he has placed reliance on a judgement of this Court in *Surendra Singh vs. Additional District Judge Court No. 11, Muzaffarnagar and 4 others*, 2019 (3) ARC 112 (Para 21). Attention was also drawn to the various documents annexed with the supplementary affidavit filed today by the tenant. He, thus, submits that the judgement and orders impugned herein do not require any interference by this Court under Article 226 of the Constitution of India.

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

10. On perusal of the record, I find that in paragraph 6 of the plaint it has been mentioned that the shop, which is in the tenancy of the present tenant-petitioner is the deepest one and this shop is required for clinic and subsequently for passage to the proposed hospital. It was the specific case of the landlord that direct passage is required for the hospital from the main road as per the law. The specific case of the tenant was that the passage of 9½ feet wide is available to the landlord was explained in paragraph 45 of the written statement wherein it was submitted that the said passage goes to the vacant plot of the landlord and to tyre factory of one Tirth Singh Mahtab Singh. This ground was specifically taken in appeal also. The concurrent findings have been recorded by the trial court on the basis of the evidence available on record. However, I find that lower appellate court had considered everything in great detail by making reference to the documentary evidence on record as and when required. The lower

appellate court had also framed as many as 17 points of determination, which were discussed in detail.Dealing with issue no.2 apart from other issues, the issue of bona fide need was also considered. The issue of relevance of depth and width of the shop in question was also considered. The trial Court after discussing the evidence on record in detail found that the need of the landlord for release of the shop for making the passage to the main road from the hospital is bona fide and genuine. It was found that dimensions of the shop are not relevant for this purpose and the need was found to be bona fide and genuine. I find that while discussing the issue of comparative hardship, which was decided along with few other issues, it was found that documentary evidence was available on record in the shape of map filed before the development authority and that a passage directly connecting the hospital to the main road of 12 meter or more is required and no document to dislodge this evidence was filed by the tenant. I find that the said requirement is a statutory requirement as per the building regulations and cannot be waived and, therefore, prima facie, need is genuine and bona fide in nature, therefore, simply because of availability of the side passage, such need, by itself, cannot be said to be mala fide need of the landlord. Insofar as the assertion of the learned counsel for the tenant that in fact, he has denied the allegations made in the affidavit as mentioned in paragraph 33 of the judgement of lower appellate court, suffice to note that the documents annexed with the supplementary affidavit indicates that although the tenant-petitioner has, in fact, filed reply to the affidavit filed by the landlord, however, in rebuttal no documentary evidence was filed to indicate that the map has not been filed before the development authority in the year 2014 itself and the same is pending consideration or that the requirement of building laws are not mandatory in nature. During course of argument, reference was made to the requirement of Khurja Master Plan that for passing map for such hospital it should be directly connected with a 12 meter wide road. The same could not be denied by the learned counsel for the tenant-petitioner. It could also not be denied that the landlord himself is a ayurvedic doctor and his two sons are allopathic doctors and his daughter-in-law is also allopathic doctor and that they are sitting in ayurvedic clinic of the landlord, also could not be dislodged by the tenant. Thus, their bona fide need is established.

11. In such view of the matter, I find that concurrent findings of fact have been recorded by the courts below, which are based on cogent evidence available before the courts below and such findings are not perverse in nature, even if, for the sake of argument, it is accepted that two views are possible.

12. A reference may be made to paragraph 28 of Surendra Singh (supra), which is quoted as under:

"28- The legal position and conclusions as stated above are briefly summarized as under:

(i) Section 21(1)(a) of U.P. Act 13 of 1972 is very widely worded. Demolition and reconstruction for occupation by landlord himself either for residential purpose or for purposes of any profession, trade or calling is permissible. The words 'profession, trade or calling' are very wide and include all activities wherein a person may usefully and/ or gainfully engage himself.

(ii) If the disputed property has acquired commercial value and, therefore, the the landlord wished to demolish the old single storey structure and to construct a multi-storeyed building which may fetch him higher rent and has applied to the competent authorities and got the plans approved, then the landlord's bonafide need is true.

(iii) It is well settled the landlord's requirement need not be a dire necessity. The Court cannot direct the landlord to do a particular business or imagine that he could profitably do a particular business rather than the business he proposes to start. It is for the landlord to decide which business he wants to do. The Court cannot advise him.

(iv) Landlord is the best judge of his need and this Court can not interfere in concurrent findings of fact regarding bonafide need establish before the Prescribed Authority and the appellate authority. This Court can interfere only when there is perversity in the findings recorded or when the courts below have acted without jurisdiction or far in excess of jurisdiction. A landlord has got a right to expand his business and in case, he requires additional space for it, the need cannot be said to be malafide. The tenant cannot dictate terms to the landlord as to how he should satisfy his need. Landlord is sole person who can take a decision as to which shop fulfils his need and the needs of his family. The tenant or for that matter even the Court can not guide the landlord as to which accommodation he should view to fulfil his need and which accommodation he shall not use.

(v) To be amenable to correction in certiorari jurisdiction, the error committed by the Court or Authority on whose judgment this Court is exercising jurisdiction, should be an error which is self-evident. An error which needs to be established by lengthy and complicated arguments or by indulging into a long-drawn process of reasoning, cannot possibly be an error available for correction by writ of certiorari. If it is reasonably possible to form two opinions on the same material, the finding arrived at one way or the other, cannot be called a patent error. As to the exercise of supervisory jurisdiction of the High Court under Article 227 of the Constitution also, it has been held in Surya Dev Rai (Supra) that the jurisdiction was not available to be exercised for indulging into re-appreciation or evaluation of evidence or correcting the errors in drawing inferences like a court of appeal.

(vi) The tenant-petitioner has not disputed the fact even before this Court that the landlord-respondents have offered him a shop on the ground-floor for vacating the disputed shop and that the commercial complex as per sanctioned map has already been constructed by the landlord-respondents over the land in question and the only shop is of the petitioner which obstructed the front portion of the newly constructed commercial complex. Under the circumstances, the bonafide need of the landlord-respondents stands proved under Section 21(1)(a) of U.P. Act 13 of 1972. Under the circumstances, the conduct of the tenant-petitioner in not vacating the shop, cannot be appreciated, inasmuch as he is the only tenant, who is obstructing better beneficial use of the commercial complex by the landlord-respondents.

(viii) Under the facts and circumstances of the case, the findings of both the courts below with regard to bonafide need of the plaintiff-landlord/respondents cannot be said to suffer from any legal infirmity. The findings recorded by the courts below are findings

of fact, which are based on relevant evidences on record."

13. A reference may also be made to a judgement of this Curt in *Smt. Shamim Begum and 5 others vs. Dinesh Kumar and 7 others*, 2019 (1) ARC 319, paragraphs 11 and 12 whereof are quoted as under:

"11. There was some dispute regarding the exact area of the shop in possession of Hemant Kumar, as according to the assertions made in the release application, the area of the said shop was 8' x 30' but the Prescribed Authority has returned a finding that the area is 9' x 34', but nothing much turns upon it, keeping in mind the nature of need. The specific case of the landlords was that after putting counter on the front side, a very narrow passage is left for ingress and egress of the customers. The business being done by Hemant Kumar, consists of sale and supply of fast food, confectionery and bakery items and it cannot be disputed that for carrying on such a business, ample space is required. The specific case of the landlords was that they were compelled to purchase the adjoining shop, being most suited to their need, for a hefty sum. A landlord has got a right to expand his business and in case he requires additional space for it, the need cannot be said to be malafide. The tenant cannot dictate terms to the landlords as to how he should satisfy his need. The court cannot act as a rationing authority and force the landlord not to expand his business or carry on in the same shop. In the above context, it is worthwhile to quote the following lines from the judgement of the Supreme Court in Sarla Ahuja Vs. United India Insurance Company Ltd, (1998) 8 SCC 119:-

".....When a landlord asserts that he requires his building for his own occupation, the Rent Controller shall not proceed on the presumption that the requirement is not bona fide. When other conditions of the clause are satisfied and when the landlord shows a prima facie case, it is open to the Rent Controller to draw a presumption that the requirement of the landlord is bona fide. It is often said by courts that it is not for the tenant to dictate terms to the landlords as to how else he can adjust himself without getting possession of the tenanted premises. While deciding the question of bona fides of the requirement of the landlord, it is quite necessary to make an endeavour as to how else the landlord could have adjusted himself."

12. The appellate court was fully justified in holding that the need of Hemant Kumar for additional space for expansion of his existing business is genuine and bonafide and he cannot be compelled to effect expansion of his business at some other place. The view taken by the Prescribed Authority that Hemant Kumar had sufficient space available with him in shop no.14/2, was based on wholly irrelevant consideration that one of his uncles is running his business in a much smaller shop measuring 8' x 16'. It was not at all germane for evaluating the need of Hemant Kumar, having regard to the nature of business being carried on by him."

14. A reference may also be made to a judgement of this Court in Kailash Nath Gupta vs. Smt. Asha Gupta and 3 others, 2018 (3) ARC 451 wherein it has been held that the need of landlord or his sons for expansion of the business cannot be said to be not bona fide.

15. Therefore, it is clear that the landlord has got every right to expand his business and in case he requires additional

space for it, the need cannot be said to be mala fide. In the present case, there are four doctors in the family of landlord and if the need is being shown for establishing the hospital/nursing home or for expansion of professions, the same cannot be said to be mala fide in nature. Insofar as the comparative hardship is concerned, it is not in dispute that the tenant-petitioner has never made any effort to search out any shop during the pendency of litigation and that the landlord offered him a shop which he denied to accept the same, therefore, the issue of comparative hardship has also been correctly decided in favour of the landlord. Therefore, I am not inclined to interfere in the impugned orders.

16. Present petition is devoid of merit and is accordingly dismissed.

17. However, having considered the facts and circumstances of the case, subject to filing of an undertaking by the petitioner-tenant before the Court below, it is provided that:

(1) The tenant-petitioner shall handover the peaceful possession of the shops in question to the landlord-respondent on or before 30.6.2021.

(2) The tenant-petitioner shall file the undertaking before the Court below to the said effect within four weeks from the date of receipt of self-verified copy of this order;

(3) In the undertaking the tenant-petitioner shall also state that he will not create any interest in favour of the third party in the premises in dispute;

(4) Subject to filing of the said undertaking, the tenant-petitioner shall not be evicted from the premises in question till the aforesaid period;

(5) It is made clear that in case of default of any of the conditions mentioned herein-above, the protection granted by this Court shall stand vacated automatically.

(6) In case the shop is not vacated as per the undertaking given by the tenant, he shall also be liable for contempt.

18. There shall be no order as to costs.

(2021)03ILR A586
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.03.2021

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Writ-A (Rent Control) No. 71464 of 2010
Connected with
Writ-A (Rent Control) No. 52191 of 2011

Km. Anshu Jain & Ors. ...Petitioners
Versus
Suresh Prakash Garg & Ors. ...Respondents

Counsel for the Petitioners:
Sri Nagendra Kumar Srivastava

Counsel for the Respondents:
Sri Sanjai Srivastava, Sri Ajit Kumar, Sri Vivek Srivastava

A. Civil Law - UP Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 – S. 21 (1) (a) – Eviction suit – Release of shop – Compromise-deed – Its execution between parties not disputed – Overriding effect of statute over compromise-deed – Doctrine of Estoppel – Applicability – Where protection under the Rent Act is available, no eviction can be ordered unless ground seeking eviction is made out, even if parties had entered into a compromise – However, a party cannot be permitted blow hot - blow cold, where he knowingly accepts the benefit of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This

rule is applied to ensure equity – Held, Compromise was continuously acted upon by the parties. Thus, now the legal heirs cannot come forward and say that they are the statutory tenant and this compromise was nullity as they were not a party or that it is contrary to law. (Para 11 and 14)

B. Civil law – Permanent injunction by Civil Court – Proceeding under the special enactment of UP Act of 1972 – Overriding effect – Held, decree of civil court granting permanent injunction cannot override the proceedings under the provisions of UP Act 13 of 1972 between the landlord and tenant – Even if the decree of the Original Suit was not challenged any further, the same would be of no consequence. (Para 15)

Writ Petition dismissed. (E-1)

Cases relied on :-

1. Ratan Lal Vs A.D.J., Bulandshahar & ors. 1979 (5) ALR 509

2. Firozi Lal Jain Vs Man Mal (1970) 3 SCC 181

3. Barkat Ali & anr. Vs Badri Narain (D) by Lrs. (2008) 4 SCC 615

4. Pancham Vs Ram Gen & ors. 2009 (3) ARC 593

5. Jagdish Lal Sah Vs A.D.J., Nainital & ors. 2006 (1) JCLR 276 (Uttaranchal)

6. Gian Devi Anand Vs Jeevan Kumar & ors. 1985 (2) SCC 683

7. Gauri Shanker: Suresh Gupta: Rajat Roy Vs U.O.I.: Rajdevsingh: Sobha Singh Private Ltd.1994 (6) SCC 349

8. Nai Bahu Vs Lal Ramnarayan 1978 (1) SCC 58

9. Srimathi Kaushalaya Devi Vs K.L. Bansal 1969 (1) SCC 59

10. Saroja Vs Chinnusamy (Dead) by LRs. & anr. 2007 (8) SCC 329

11. Smt. Kishan Pyare Vs Rent Control and Eviction Authority-cum-Prescribed Authority, Bulandshahar 2005 (1) JCLR 748

12. Ramchandra Dagdu Sonavane (D) by Lrs. & ors. Vs Vithu Hira Mahar (Dead) by Lrs. & ors. 2009 (10) SCC 273

13. Sajjadanashin Sayed Md.B.E.E. (D) By Lrs. Vs Musa Dadabhai Ummer 2000 (2) JT 352

14. Aanaimuthu Thevar (Dead) by Lrs. Vs Alagammal 2005 (6) JT 333

15. Sulochanaamma Vs Narayanan Nair 1994 (2) SCC 14

16. M/s Alagu Pharmacy & ors. Vs N. Magudeswari 2018 (8) SCC 311

17. Rakesh Shukla Vs District Magistrate / Sub Divisional Magistrate & anr. 2002 ALL. L.J. 2388

18. Saudan Singh Yadav Vs Asstt. Regional Transport Officer (ADM) Mainpuri 1994 (23) ALJ 299

19. Shree Krishna Jotish Pathshala Kanya Inter College, Bisalpur, Pilibhit & anr. Vs District Inspector of Schools, Pilibhit & ors. 1988 UPLBEC 739

20. Deepa Bhargava & anr. Vs Mahesh Bhargava & ors. 2009 (75) ALR 317

21. Sova Ray Vs Gostha Gopal Dey 1988 AIR (SC) 981

22. Suleman Noormohamed Vs Umarbhai Janubhai 1978 AIR (SC) 952

23. Mehar Jahan Vs J.S.C.C./Prescribed Authority, Meerut 1998(2) ARC 587

24. St. of W.B. Vs Hemant Kumar Bhattacharjee 1966 AIR(SC) 1061

25. Raghunath & ors. Vs Ram Khelawan & ors. 1968 RD 344

26. Chandrika Misir Vs Bhaiya Lal 1973 AIR(SC) 2391

27. Jaggan Vs Dular & ors. 1966 ALJ 1966

28. Mathura Prasad Bajoo Jaiswal Vs Dossibai N.B. Jeejeebhoyf 1971 AIR (SC) 2355

29. P. Nirathilingam Vs Annaya Nadar & ors. AIR 2002 SC 42

30. Annamreddi Bodayya Vs Lokanarapu Ramaswamy 1984 AIR (SC) 1726

31. K.Vs George Vs Secretary to Government, Water and Power Department, Trivendrum 1990 AIR (SC) 53

32. ITC Limited Vs Debts Recovery Appellate Tribunal 1998 AIR(SC) 634

33. Jagdish Chander Ghatterjee Vs Kishan 1972 (2) SCC 461.

34. Rajasthan St. Industrial Development and Investment Corporation & anr. Vs Diamond & Gem Development Corporation Limited & anr. 2013 (5) SCC 470.

35. Raghunath Prasad Pande Vs St. of Karn. & ors.2018 (5) SCC 594

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

1. Heard Sri Nagendra Kumar Srivastava, learned counsel for the petitioners-tenants and Sri Mohit Kumar along with Sri Mohit Kumar Shukla, learned counsel appearing for the respondents-landlords.

2. Leading petition has been filed challenging the impugned orders dated 1.11.1994 and 16.11.2010 passed by the Prescribed Authority/Judge Small Causes Courts, Bulandshahar.

3. The petitioners herein are the tenants of the shop no. 58, Chowk Bazar, Bulandshahar. Initially the said shop was in the tenancy of grandfather of petitioners late Jugmandar Das Jain. After his death, as per family settlement between the legal heirs of late Jugmandar Das Jain, the shop in question was given to Sri Raj Bahadur Jain by means of inheritance from his father. Thereafter, the respondents-landlords initiated the proceedings under Section 21(1)A of the Act No. 13 of 1972 against Sri Raj Bahadur Jain. In the release application, it was stated that the shop in question is required to fulfill the need of his family and the need of the landlord is bona fide and genuine. Thereafter, father of the petitioner late Raj Bahadur Jain filed his written statement in the release application stating therein that the need of the landlord is not bona fide and genuine. On 1.11.1994 one alleged compromise application was filed before the prescribed authority, on the basis whereof the prescribed authority passed the impugned order dated 1.11.1994, against which the tenants-petitioners filed a suit being Original Suit No. 380 of 2004, which was decreed vide judgement and order dated 25.10.2008 wherein it was recorded that after the death of father of the petitioners Raj Bahadur Jain the tenancy right has been inherited by the petitioners and they are the tenants of the shop in question. No appeal against the said judgement was filed by the respondents-landlords. Thereafter, the respondent-landlord Surendra Kumar Jain filed an application dated 18.11.2004 under Section 23 of the Act No. 13 of 1972 for execution of the order dated 1.11.1994, against which petitioners-tenants filed their objection on 16.3.2005. The prescribed authority allowed the application 4A filed under Section 23 of the Act No. 13 of 1972 vide impugned judgement and order dated 16.11.2010. Hence the present petition.

4. Submission of learned counsel for the tenants-petitioners is that the orders impugned herein are illegal, perverse and

suffer from manifest error of law. It is next submitted that in view of provisions of Section 21(1)A of Act No. 13 of 1972 for release of the shop in question, prescribed authority ought to record its findings in respect of the bona fide need and comparative hardship. It is further submitted that the court below in its judgement 25.10.2008 passed in original suit no. 380 of 2004 recorded a finding that after the death of Raj Bahadur Jain the tenancy right devolved to his legal heirs. It is further submitted that application filed by the respondent-landlord under Section 23 of the Act No. 13 of 1972 was not maintainable as all the legal heirs of Raj Bahadur Jain was not impleaded. He lastly submits that the respondent-landlord has already got the other shop and the same was let out to another person and as such, the need of the respondent-landlord is not at all bona fide.

5. Learned counsel for the petitioners has placed reliance on the judgements of **Ratan Lal vs. Additional District Judge, Bulandshahar and others 1979 (5) ALR 509, Firozi Lal Jain vs. Man Mal 1970 (3) SCC 181, Barkat Ali & Another vs. Badri Narain (D) by Lrs. 2008 (4) SCC 615, Pancham vs. Ram Gen and others 2009 (3) ARC 593, Jagdish Lal Sah vs. Additional District Judge, Nainital & Ors. 2006 (1) JCLR 276 (Uttaranchal), Gian Devi Anand vs. Jeevan Kumar & Ors. 1985 (2) SCC 683, Gauri Shanker:Suresh Gupta:Rajat Roy vs. Union of India:Rajdevsingh: Sobha Singh Private Limited 1994 (6) SCC 349, Nai Bahu vs. Lal Ramnarayan 1978 (1) SCC 58, Srimathi Kaushalaya Devi vs. K.L. Bansal 1969 (1) SCC 59, Saroja vs. Chinnusamy (Dead) by LRs. and Anr. 2007 (8) SCC 329, Smt. Kishan Pyare vs. Rent Control and Eviction Authority-cum-Prescribed Authority, Bulandshahar 2005 (1) JCLR 748, Ramchandra Dagdu Sonavane (D) by Lrs. & Ors. vs. Vithu Hira Mahar (Dead) by Lrs. & ors. 2009 (10) SCC 273, Sajjadanashin Sayed Md.B.E.E. (D) By Lrs. vs. Musa Dadabhai Ummer 2000 (2) JT 352, Aanaimuthu Thevar (Dead) by Lrs. vs. Alagammal 2005 (6) JT 333, Sulochanaamma vs. Narayanan Nair 1994 (2) SCC 14 and M/s Alagu Pharmacy & others vs. N. Magudeswari 2018 (8) SCC 311.**

6. Per contra, learned counsel for the landlord submitted that the property was required for personal use of landlord and family of the landlord being Surendra Prakash Garg. Consequently, an appeal under Section 21(1)(a) of the Act was filed before the prescribed authority and that since the tenant Raj Bahadur Jain could not defend against the personal need of the landlord and admittedly entered into a compromise and since the tenant was old person, therefore, taking a sympathetic view of the matter a settlement was arrived at between the landlord and the tenant and compromise to this effect was entered into and filed on 1.11.1994 in the aforesaid PA Case No. 27 of 1992. According to this, the release application was allowed in part and out of the total area of shop being 7.9 ft x 23 ft a shop having 5.6 ft x 12 ft was repaired / constructed and was left in possession of the tenant on the condition that he will remain in possession till his lifetime and thereafter there will be no succession of any right devolving tenancy on legal heirs. The tenant was barred from giving possession of the shop. It was decided that he shall continue to pay rent @ Rs. 18/- per month, which was the earlier rent of the entire accommodation, which will not be changed during his lifetime. It

was further provided that the legal heirs shall handed over possession of the shop after death of the original tenant, Raj Bahadur Jain and it was left open that if they failed to do so, the process of recovery of possession of the shop may be initiated as admittedly, compromise was entered into between the landlord and tenant. Although, petitioners herein claimed that they were not aware of such compromise and that they were only aware of this fact that the part of the shop in possession of Raj Bahadur Jain, their predecessor, was handed over to the landlord. It is submitted that this fact itself is sufficient to indicate that the petitioners were aware of this fact that the release application has been compromised on the basis of a compromise and the compromise was admittedly acted upon and the original tenant had, in fact, taken benefit of the same by avoiding the possession of the release application as well as by remaining in possession of a part of the shop. Submission is that the original tenant had, in fact, admitted the bonafide need of the landlord and agreed to release the shop in part and it is only on that basis the compromise was entered into and undisputedly, is a part of the order of the judgment of the prescribed authority. Submission, therefore, is that now the petitioners herein cannot go back on the compromise entered into by the original tenant on technical ground as the compromise was acted upon and they have enjoyed fruits of the compromise for such long years from 1994 to 2014 till the filing of the present litigation for obtaining possession of the shop under tenancy when the petitioners failed to vacate the same. He further submitted that the Original Suit No. 380 of 2014 filed by the petitioners herein for permanent injunction against the landlord was not maintainable and in any case, has no effect on the proceedings before the prescribed authority, moreso, when the landlord adopted proper procedure of law for taking back the possession. It is submitted that the said suit was barred under Section 41 (h) of the Specific Relief Act and was not maintainable. He further submitted that in any case, the tenancy right stood extinguished in view of the compromise of the year 2004 and that the status of Raj Bahadur Jain was that of a licensee thereafter till his death, which stood terminated on his death. Submission, therefore, is that the petitioners did not have any right to acquire any tenancy right in place of Raj Bahadur Jain and the present process is nothing but an abuse of process of law as the compromise was acted upon and the petitioners have enjoyed the fruits of the compromise, which was never disputed by Raj Bahadur Jain and he enjoyed the possession in pursuance of part release only till his death and even the rent was never enhanced.

7. Learned counsel for the landlord has placed reliance on judgments of in the cases of **Rakesh Shukla vs. District Magistrate / Sub Divisional Magistrate and another 2002 ALL. L.J. 2388, Saudan Singh Yadav vs. Asstt. Regional Transport Officer (ADM) Mainpuri 1994 (23) ALJ 299, Shree Krishna Jotish Pathshala Kanya Inter College, Bisalpur, Pilibhit and another vs. District Inspector of Schools, Pilibhit and others 1988 UPLBEC 739, Deepa Bhargava and another vs. Mahesh Bhargava and others 2009 (75) ALR 317, Sova Ray vs. Gostha Gopal Dey 1988 AIR (SC) 981, Suleman Noormohamed vs. Umarbhai Janubhai 1978 AIR (SC) 952, Mehar Jahan vs. J.S.C.C./Prescribed Authority, Meerut 1998(2) ARC 587, State of West Bengal**

vs. Hemant Kumar Bhattacharjee 1966 AIR(SC) 1061, Raghunath and others vs. Ram Khelawan and others 1968 RD 344, Chandrika Misir vs. Bhaiya Lal 1973 AIR(SC) 2391, Jaggan vs. Dular and others 1966 ALJ 1966, Mathura Prasad Bajoo Jaiswal vs. Dossibai N.B. Jeejeebhoyf 1971 AIR (SC) 2355, P. Nirathilingam vs. Annaya Nadar and others AIR 2002 SC 42, Annamreddi Bodayya vs. Lokanarapu Ramaswamy 1984 AIR (SC) 1726, K.V. George vs. Secretary to Government, Water and Power Department, Trivendrum 1990 AIR (SC) 53, ITC Limited vs. Debts Recovery Appellate Tribunal 1998 AIR(SC) 634 and Jagdish Chander Ghatterjee vs. Kishan 1972 (2) SCC 461.

8. I have considered the submissions and have perused the record.

9. On perusal of record I find that the crux of the argument of learned counsel for the petitioners is that if the compromise decree is contrary to statutory provisions, the same is a nullity and cannot be executed. Placing reliance on judgment already referred above crux of the submission is that since prescribed authority had not satisfied itself and that the bonafide need and comparative hardship had not examined any relevant material to find out whether the statutory provisions ground of eviction are proved, the compromise decree, purely on that basis, was a nullity. In the present case, from perusal of record it is clear that the original tenant Raj Bahadur Jain was in possession of a shop measuring 7.9 ft x 23 ft and in the release application filed on the ground of personal need of the family, he agreed to remain in possession of the shop 5.6 ft wide x 12 ft. deep only, which was to be handed over to him by the landlord after the order of the court within 15 days. The compromise further reflects that the old rent @ Rs. 18/- per month was to continue. One cannot be oblivious of the fact that this release application was filed in the year 1992 and even on that point of time Raj Bahadur Jain was old tenant on a meagre rent (old rent) of Rs. 18/- per month, which was not to be increased till he was to remain in possession. The tenant Raj Bahadur Jain clearly stated that he has only daughters and no son, he, therefore, agreed in his wisdom that he will remain in possession of the shop till his lifetime and thereafter, the tenancy shall not devolve on his legal heirs. This fact was specifically mentioned in paragraph 3 of the terms of the compromise and there was a clear understanding that neither his daughters nor their husbands shall claim any tenancy over the shop left in possession of Raj Bahadur Jain and shall hand over the possession to the landlord and if they failed to do so, the landlord will be at liberty to take possession through court. Paragraph 4 of the terms clearly indicates that the expenses for repair of the shop (after making the shop smaller to be left in occupation of the tenant) was to be borne by the landlord. This compromise is not in dispute and is an admitted document. It is also not in dispute that this compromise was acted upon and the release application was decided accordingly. For ready reference terms of the compromise are quoted as under:-

न्यायालय श्रीमान स्थित अधिकारी प्रथम अपर सिविल जज बुलन्दशहर।

वाद संख्या 27सन् 1992

सुरेन्द्र प्रकाश गर्ग बनाम राज बहादुर जैन

समझौता पत्र

श्रीमान जी,

उपरोक्त वाद मे हम फरीकेन मे निम्न शर्तो के आधार पर बाहमी फैसला हो गया हेः-

1- यह कि निजाई व दुकान इस समय 7 फीट 9 इंज चौड़ाई में व 23 फीट गहराई में है जिसमें से 5 फीट 6 इंच चाडी व 12 फीट गहरी तैयार दुकान मालिक जायदाद आदेश के बाद 15 दिन में मरम्मत कराकर विपक्षी किरायेदार को देगा तथा विपक्षी किरायेदार अधिक शेष आराजी उत्तर को पूर्व को मालिक जायदाद को छोड़ेगा जिसमें कोई ऐतराज नहीं है।

2- यह कि भविष्य में पुराना किराया 18-00 माहवार ही लिया जावेगा और भविष्य में किराया नही बढ़ेगा।

3- यह कि विपक्षी भविष्य में किसी अन्य व्यक्ति को दुकान में नही बिठायेगा तथा यदि दौरान किरायेदारी किसी भी कारणो से विपक्षी श्री राज बहादुर जैन की मृत्य हो जाती है तो उस सूरत में श्री राज बहादुर जैन की ओर से कोई उत्तराधिकारी किरायेदारी का नही होगा। श्री राज बहादुर जैन के पुत्र न होने के कारण से श्री राज बहादुर की पुत्रियों व उनके पतियों को कोई हक हकूक किरायेदारी मे नहीं पहूंचेगे ओर दुकान मे से सामान निकालकर स्वामी जायदाद को श्री राज बहादुर के वारिसान व जानशीन सौप देगें अन्यथा सक्षम अदालत से दखल ले लिया जावेगा।

4- खर्चा मरम्मत दुकान मालिक जायदाद करेगा।

5- खर्चा मुकदमा फरीकेन बजिम्मे फरीकेन होगा।

अतः उक्त फैसले के शर्तो के बाजार पर मुकदमा निर्णित फरमाया जावे।

बुलन्दशहर
दिनांक/ विपक्षी प्रार्थी
राज बहादुर जैन सुरेन्द्र प्रकाश गर्ग
(राज बहादुर जैन) सुरेन्द्र प्रकाश गर्ग
किरायेदार मालिक जायदाद

आज यह तफसीमानामा 32ए पक्षकारो द्वारा दिया गया है। सुरेन्द्र प्रकाश गर्ग को श्री अनिल जोसी ने शनाख्त किया हे तथा राज बहादुर को श्री राकेश वर्मा द्वारा ने शनाख्त किया पेश होकर आदेश हुआ कि तस्दीक हो।

स्वीकार किया जाता है।
ह० अस्पष्ट
1-11-94
एडी. सि. जज
1-11-94
सुरेन्द्र प्रकाश गर्ग राज बहादुर जैन
ह० अपठनीय
1-11-94

10. As per compromise, after carving out the shop at the expense of the landlord to be left in possession of the tenant Raj Bahadur Jain he was to be put in possession and he, admittedly, continued to remain in possession of the shop for about ten years till his death at the same old rent @ Rs. 18/- per month. It is, therefore, clear that the compromise was actively and effectively acted upon and was respected by both the landlord and the tenant Raj Bahadur Jain. The petitioners herein being daughters of the tenant were obviously beneficiary, may be indirectly, of such compromise as the tenant Raj Bahadur Jain continued in peaceful possession of the said shop till his death as the proceeding of the release application did not proceed further on the basis of such compromise. From the record it is further reflected that even after death of Raj Bahadur Jain no challenge to this compromise was raised for considerably long time, as per landlord, for about 16 years.

11. There is no quarrel with the law that in cases where protection under a Rent Act is available, no eviction can be ordered unless ground seeking eviction is made out, even if parties had entered into a compromise and that the invalidity on that count can even be raised in execution. However, whether petitioners can take shelter of such law in the facts and circumstances of the case? I am of the view

that the law is also settled that a party cannot be permitted blow hot - blow cold, where he knowingly accepts the benefit of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity. A reference may be made in this regard to a judgment of Hon'ble Supreme Court in the case of **Rajasthan State Industrial Development and Investment Corporation and another vs. Diamond & Gem Development Corporation Limited and another 2013 (5) SCC 470.**

12. The net effect of judgment rendered in the case of **Raghunath Prasad Pande vs. State of Karnataka and others 2018 (5) SCC 594** is that once the compromise decree has been acted upon, a party cannot be permitted to go back from the same and the same is not liable to be set aside.

13. In the present case, it is very much clear that release application was filed on the ground of bonafide need. It is a case where the property was released in part and therefore, it is clear that the old tenant had entered into compromise (1) that probably he was not in a position to defend the release application and (2) that he was to remain in possession over the part of the property on the front side for old rent of Rs. 18/- per month throughout his lifetime. It is also reflected that the smaller shop was carved out, out of the bigger shop and was again handed over to the tenant Raj Bahadur Jain to remain in his possession till his lifetime. It is also clear that he was the sole tenant and had every right to enter into compromise about his tenancy rights. Not only the existence of compromise but the execution thereof is still not in dispute and that arrangement under the compromise continued for about 10 years till the death of the tenant Raj Bahadur Jain and they enjoyed the benefits arising out of such compromise.

14. In such view of the matter, at present, clearly it is not a case where the original tenant is coming forward with a case that some fraud was played upon him and the compromise is contrary to statutory provisions. On the other hand, he remained in possession over the agreed part of the accommodation on old rent @ Rs. 18/- per month, which did not increase for about ten years during his lifetime. In other words, the compromise was continuously acted upon by the parties. Thus, now the legal heirs cannot come forward and say that they are the statutory tenant and this compromise was nullity as they were not a party or that it is contrary to law.

15. Insofar as the injunction suit is concerned, decree of civil court granting permanent injunction cannot override the proceedings under the provisions of UP Act 13 of 1972 between the landlord and tenant. Therefore, even if the decree of the Original Suit No. 380 of 2014 was not challenged any further, the same would be of no consequence. The petitioners herein have remained in possession all throughout and have been successfully delayed the delivery of possession, which they were supposed to deliver under the compromise entered into by the predecessor, the original tenant immediately after his death.

16. I have also gone through the judgments relied on by the learned counsel for the parties. Their facts appears to be distinguishable in nature although, as

already noticed, there is no quarrel with the settled law as noted in the preceding paragraphs of this judgment.

17. In the opinion of the court the compromise was validly entered into between the landlord and the sole tenant, who enjoyed the fruits or the benefits of the same. The issue of decree to be a nullity is being raised by the legal heirs by simply seeking relief, bye-passing the benefits enjoyed by their predecessor, the original tenant and therefore by them also through him. The terms of the compromise further indicate that the compromise was, in fact, executed at the cost of the landlord carving out a new shop out of a larger shop and handing over the same to the original tenant and by incurring loss towards rent as well as, the rent of the tenant was continued to be Rs. 18/- per month during lifetime of the original tenant Raj Bahadur Jain.

18. In such view of the matter, I do not find any good ground to interfere in the orders impugned herein in exercise of powers under Article 226 of the Constition of India.

19. Present petition is devoid of merits and is accordingly dismissed.

20. However, having considered the facts and circumstances of the case, subject to filing of an undertaking by the petitioner-tenant before the Court below, it is provided that:

(1) The tenant-petitioner shall handover the peaceful possession of the premises in question to the landlord-opposite party on or before 31.8.2021;

(2) The tenant-petitioner shall file the undertaking before the Court below to the said effect within two weeks from the date of passing of this order;

(3) The tenant-petitioner shall pay damages @ Rs. 2,000/- per month by 07th day of every succeeding month and continue to deposit the same in the Court below till 31.8.2021 or till the date he vacates the premises, whichever is earlier and the landlord is at liberty to withdraw the said amount;

(4) In the undertaking the tenant-petitioner shall also state that he will not create any interest in favour of the third party in the premises in dispute;

(5) Subject to filing of the said undertaking, the tenant-petitioner shall not be evicted from the premises in question till the aforesaid period;

(6) It is made clear that in case of default of any of the conditions mentioned herein-above, the protection granted by this Court shall stand vacated automatically.

(7) In case the premises is not vacated as per the undertaking given by the petitioner, he shall also be liable for contempt.

21. There shall be no order as to costs.

(2021)03ILR A594
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 58 of 2021

M/S Elegant Infracon Pvt. Ltd., Varanasi ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Saumitra Dwivedi, Sri Sarvesh Tiwari

Counsel for the Respondents:
C.S.C., Sri Wasim Masood

A. Civil Law – Real Estate Regulation - Real Estate (Regulation and Development) Act, 2016 - Section 30, 40(1), 43(5) - Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 - U.P. Real Estate Regulatory Authority (General) Regulation, 2019 - Rule 24(a).

Real Estate (Regulation and Development) Act, 2016 - Section 21, 29, 30 – Jurisdiction - Petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint. (Para 10)

It is not that whatever composition given u/s 21 of the Act alone can decide the complaint rather reference of S. 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. (Para 13)

It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to S. 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to S. 21 of the Act of 2016 but has to refer to other provisions, more specifically, S. 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. The resolution of the Authority has also been challenged but in the light of S. 30 of the Act of 2016, we find no ground to set aside the resolution as otherwise S. 81 saves it. (Para 12, 14)

B. Challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings. (Para 16)

Writ petition dismissed.(E-3)

Precedent followed:

1. M/s K.D.P. Build Well Pvt. Ltd. Vs St. of U.P. & 4 ors., Writ-C No. 2248 of 2020, judgment dated 04.02.2020 (Para 8)

2. Rudra Buildwell Constructions Pvt. Ltd. Vs Poonam Sood & anr., Writ-C No. 3289 of 2020, judgment dated 06.02.2020 (Para 8)

Precedent distinguished:

1. Janta Land Promoters Pvt. Ltd. Vs U.O.I. & ors., Civil Writ Petition No. 8548 of 2020 (Para 9, 13)

Present petition challenges order dated 31.10.2019, passed by Real Estate Regulatory Authority.

(Delivered by Hon'ble Munishwar Nath Bhandari, J. & Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Sarvesh Tiwari, learned counsel for the petitioner and Sri Washim Masood, learned counsel for the respondent.

2. The writ petition has been filed with the following prayers:

"(i) Issue a writ, order or direction in the nature of Certiorari quashing the order dated 30.10.2019 passed by respondent No.4 (contained as Annexure No.1)

(ii) Issue a writ, order or direction in the nature of Certiorari quashing the resolution dated 14.08.2018 and 05.12.2018 passed by respondent No.4 (contained as Annexure-4).

(iii) Issue an appropriate writ, order or direction for striking down Regulation 24(a) of the U.P. Real Estate Regulatory Authority (General) Regulation, 2019.

(iv) Issue any other suitable writ order or direction which this Hon'ble Court deems fit and proper under the facts and circumstances of the case.

(v) Award cost of the writ petition to the petitioner throughout"

3. The petitioner has challenged the order passed by Real Estate Regulatory Authority (in short "RERA") dated **31.10.2019** (*wrongly mentioned as 30.10.2019 in the prayer clause (i))* though an appeal against the said order lies under Section 43(5) of Real Estate (Regulation and Development) Act, 2016 *(in short "Act of 2016").*

4. It is a case where a complaint was filed by the non-petitioner alleging that despite payment towards unit No. **A-2101** in the scheme introduced by the petitioner, the possession of a unit has not been given. The unit (flat) was booked on **13.10.2016** and was to be delivered in the year **2018**. The prayer was made for refund of the amount of **Rs. 22,70,384/-** with interest. The Authority found that as per the agreement entered between the parties, possession of the flat in question should have been delivered by **27.08.2018**. The petitioner-Company failed to show delivery of possession of the flat in question. Thus, taking into consideration the default of the Promoter (petitioner herein) and referring to the judgment of Apex Court, an order was passed by RERA on 31.10.2019 for refund of the principal amount alongwith interest. The petitioner has filed this writ petition to challenge not only the order dated 31.10.2019 passed by RERA but also the resolutions dated 14.08.2018 and 05.12.2018. The petitioner has not challenged the recovery citation dated 31.08.2020.

5. Learned counsel for the petitioner submits that an appeal against the order passed by RERA is maintainable but this case has exceptional circumstances thus even a writ petition would be maintainable. One member of RERA has passed the order going against the Act of 2016. Section 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members. The impugned order is by one Member alone going against the mandate of Section 21 of the Act of 2016. In view of the above, there is no need to prefer an appeal as the order dated 31.10.2019 is without jurisdiction.

6. It is also stated that the order to award interest by the Authority is again going contrary to the provisions. Rules for award of interest was introduced in the year 2018. The amount deposited with the Promotor has been ordered to be returned with interest. The interest has been allowed even for the period prior to introduction of U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 *(in short "Rules of 2018").* It is even ignoring the rate of interest agreed by the parties. Challenge to the order has been made on that ground also.

7. We are first taking challenge to the order dated 31.10.2019, passed by the Authority to find out as to whether one member was competent to pass the order.

8. The issue has been raised in reference to Section 21 but it is not open for debate having been decided by this Court in ***Writ -C No.2248 of 2020 (M/s K.D.P. Build Well Pvt. Ltd. vs. State of U.P. and 4 Others) vide judgment dated 04.02.2020 and in Writ- C No.3289 of 2020 (Rudra Buildwell Constructions Pvt. Ltd. vs. Poonam Sood and Another)*** vide judgment dated 06.02.2020 holding order by one member to be legal. The issue regarding composition of RERA was considered in reference to Sections 21 and 81 of the Act of 2016. Section 81 provides for delegation of power/function and taking the aforesaid provision into consideration, the argument was not accepted.

9. At this stage, learned counsel for the petitioner has made a reference to the judgment of Punjab and Haryana High Court on the same issue in ***Civil Writ Petition No.8548 of 2020 (Janta Land Promoters Private Limited vs. Union of India and others)*** vide judgment dated 16.10.2020. It is stated that judgment of this Court has been referred by Punjab and Haryana High Court and has taken a different view.

10. What we find is binding effect of the judgment rendered by this Court than to follow the judgment of other High Court. Accordingly, we are unable to accept the first argument in reference to Section 21 of the Act of 2016. It is more so when the petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint.

11. It is further necessary to refer Sections 21, 29 and 30 of the Act of 2016 to discuss the issue independent to the earlier judgments. The provisions aforesaid are quoted hereunder :

*"**21. Composition of Authority**.- The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government."*

***29. Meeting of Authority**.- (1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.*

(2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.

(4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application.

Provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

30. Vacancies, etc., not to invalidate proceeding of Authority.- *No act or proceeding of the Authority shall be invalid merely by reason of--*

(a) any vacancy in, or any defect in the constitution of, the Authority; or

(b) any defect in the appointment of a person acting as a Member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case."

12. Section 21 of Act of 2016 speaks about composition of the Authority, which shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government. Section 29, however, talks about the meeting of Authority and perusal of sub-section (2) thereof shows that in absence of Chairperson for any reason, the other Member chosen by the Members present amongst themselves at the meeting, shall preside thereby. Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson so appointed by the appropriate Government. Thus, it is not necessary that the adjudication of the complaint has to be made by the composition of Authority, as given under Section 21 of the Act of 2016 though as per Section 29 also, it should be by two Members in absence of the Chairperson.

13. Section 30 of Act of 2016 is, however, relevant and address the issue raised in this petition. The vacancies, etc. not to invalidate proceeding of the Authority. It shows that in case of vacancy, or any defect in the constitution of the Authority or any defect in the appointment of a person acting as a Member of the Authority, the proceeding of the Authority would not be invalidated. Section 30 of the Act of 2016 give complete answer to the objection raised by the petitioner regarding composition of the Authority. It is not that whatever composition given under Section 21 of the Act alone can decide the complaint rather reference of Section 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. This aspect was not brought to the notice of Punjab and Haryana High Court in the case of **Janta Land Promoters Private Limited (supra).**

14. It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to Section 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to Section 21 of the Act of 2016 but has to be reference of other provisions, more specifically, Section 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. The challenge to the resolution would not otherwise sustain in the light of Section 30 and 81 of the Act of 2016. The resolution to authorize one member is even saved by Section 30 of the Act of 2016.

15. Accordingly, we are unable to accept the argument raised by the counsel for the petitioner. It would otherwise frustrate the very object of the Act of 2016 and would give rise to the anarchy, existing earlier, in the hands of Promoters.

16. So far as challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is concerned, the issue is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings However, as and when the Authority invokes Regulation 24 (a) of Regulation, 2019, the liberty is given to challenge the validity. Thus, issue is kept open for the aforesaid.

17. Thus, for all the reasons, we are unable to accept any of the arguments raised by the counsel for the petitioner. The writ petition is accordingly **dismissed,** however, with the liberty to avail the remedy of appeal if other than the issue decided by us remains, which may include the issue towards interest.

(2021)03ILR A599
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 60 of 2021

M/S Elegant Infracon Pvt. Ltd., Varanasi ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Saumitra Dwivedi, Sri Sarvesh Tiwari

Counsel for the Respondents:
C.S.C., Sri Wasim Masood

A. Civil Law – Real Estate Regulation - Real Estate (Regulation and Development) Act, 2016 - Section 30, 40(1), 43(5); Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018; U.P. Real Estate Regulatory Authority (General) Regulation, 2019: Rule 24(a).

Real Estate (Regulation and Development) Act, 2016 - Section 21, 29, 30 – Jurisdiction - Petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint. (Para 10)

It is not that whatever composition given u/s 21 of the Act alone can decide the complaint rather reference of S. 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. (Para 13)

It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to S. 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to S. 21 of the Act of 2016 but has to refer to other provisions, more specifically, S. 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. The resolution of the Authority has also been challenged but in the light of S. 30 of the Act of 2016, we find no ground to set aside the resolution as otherwise S. 81 saves it. (Para 12, 14)

B. Challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings. (Para 16)

Writ petition dismissed.(E-3)

Precedent followed:

1. M/s K.D.P. Build Well Pvt. Ltd. Vs St.of U.P. & 4 ors., Writ-C No. 2248 of 2020, judgment dated 04.02.2020 (Para 8)

2. Rudra Buildwell Constructions Pvt. Ltd. Vs Poonam Sood & anr., Writ-C No. 3289 of 2020, judgment dated 06.02.2020 (Para 8)

Precedent distinguished:

1. Janta Land Promoters Pvt. Ltd.Vs U.O.I. & ors., Civil Writ Petition No. 8548 of 2020 (Para 9, 13)

Present petition challenges order dated 31.10.2019, passed by Real Estate Regulatory Authority.

(Delivered by Hon'ble Munishwar Nath Bhandari, J. & Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Sarvesh Tiwari, learned counsel for the petitioner and Sri Washim Masood, learned counsel for the respondent.

2. The writ petition has been filed with the following prayers:

"(i) Issue a writ, order or direction in the nature of Certiorari quashing the order dated 30.10.2019 passed by respondent No.4 (contained as Annexure No.1)

(ii) Issue a writ, order or direction in the nature of Certiorari quashing the resolution dated 14.08.2018 and 05.12.2018 passed by respondent No.4 (contained as Annexure-4).

(iii) Issue an appropriate writ, order or direction for striking down Regulation 24(a) of the U.P. Real Estate Regulatory Authority (General) Regulation, 2019.

(iv) Issue any other suitable writ order or direction which this Hon'ble Court deems fit and proper under the facts and circumstances of the case.

(v) Award cost of the writ petition to the petitioner throughout"

3. The petitioner has challenged the order passed by Real Estate Regulatory Authority (*in short "RERA*") dated **31.10.2019** (wrongly mentioned as 30.10.2019 in the prayer clause (i)) though an appeal against the said order lies under Section 43(5) of Real Estate (Regulation and Development) Act, 2016 *(in short "Act of 2016").*

4. It is a case where a complaint was filed by the non-petitioner alleging that despite payment towards unit No. **F-1803** in the scheme introduced by the petitioner, the possession of a unit has not been given. The unit (flat) was booked on **06.05.2015** and was to be delivered in the year 2018. The prayer was made for refund of the amount of **Rs. 34,23,025/-** with interest. The Authority found that as per the agreement entered between the parties, possession of the flat in question should have been delivered by **06.04.2018**. The petitioner-Company failed to show delivery of possession of the flat in question. Thus, taking into consideration the default of the Promoter (petitioner herein) and referring to the judgment of Apex Court, an order was passed by RERA on 31.10.2019 for refund of the principal amount alongwith interest. The petitioner has filed this writ petition to challenge not only the order

dated 31.10.2019 passed by RERA but the resolutions dated 14.08.2018 and 05.12.2018. The petitioner has not challenged the recovery citation dated 07.09.2020.

5. Learned counsel for the petitioner submits that an appeal against the order passed by RERA is maintainable but this case has exceptional circumstances thus even a writ petition would be maintainable. One member of RERA has passed the order going against the Act of 2016. Section 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members. The impugned order is by one Member alone going against the mandate of Section 21 of the Act of 2016. In view of the above, there is no need to prefer an appeal as the order dated 31.10.2019 is without jurisdiction.

6. It is also stated that the order to award interest by the Authority is again going contrary to the provisions. Rules for award of interest was introduced in the year 2018. The amount deposited with the Promotor has been ordered to be returned with interest. The interest has been allowed even for the period prior to introduction of U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 *(in short "Rules of 2018")*. It is even ignoring the rate of interest agreed by the parties. Challenge to the order has been made on that ground also.

7. We are first taking challenge to the order dated 31.10.2019, passed by the Authority to find out as to whether one member was competent to pass the order.

8. The issue has been raised in reference to Section 21 but it is not open for debate having been decided by this Court in ***Writ -C No.2248 of 2020 (M/s K.D.P. Build Well Pvt. Ltd. vs. State of U.P. and 4 Others) vide judgment dated 04.02.2020 and in Writ-C No.3289 of 2020 (Rudra Buildwell Constructions Pvt. Ltd. vs. Poonam Sood and Another)*** vide judgment dated 06.02.2020 holding order by one member to be legal. The issue regarding composition of RERA was considered in reference to Sections 21 and 81 of the Act of 2016. Section 81 provides for delegation of power/function and taking the aforesaid provision into consideration, the argument was not accepted.

9. At this stage, learned counsel for the petitioner has made a reference to the judgment of Punjab and Haryana High Court on the same issue in ***Civil Writ Petition No.8548 of 2020 (Janta Land Promoters Private Limited vs. Union of India and others)*** vide judgment dated 16.10.2020. It is stated that judgment of this Court has been referred by Punjab and Haryana High Court and has taken a different view.

10. What we find is binding effect of the judgment rendered by this Court than to follow the judgment of other High Court. Accordingly, we are unable to accept the first argument in reference to Section 21 of the Act of 2016. It is more so when the petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint.

11. It is further necessary to refer Sections 21, 29 and 30 of the Act of 2016

to discuss the issue independent to the earlier judgments. The provisions aforesaid are quoted hereunder :

*"**21. Composition of Authority**.- The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government."*

***29. Meeting of Authority**.- (1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.*

(2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.

(4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application.

Provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

***30. Vacancies, etc., not to invalidate proceeding of Authority**.- No act or proceeding of the Authority shall be invalid merely by reason of--*

(a) any vacancy in, or any defect in the constitution of, the Authority; or

(b) any defect in the appointment of a person acting as a Member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case."

12. Section 21 of Act of 2016 speaks about composition of the Authority, which shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government. Section 29, however, talks about the meeting of Authority and perusal of sub-section (2) thereof shows that in absence of Chairperson for any reason, the other Member chosen by the Members present amongst themselves at the meeting, shall preside thereby. Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson so appointed by the appropriate Government. Thus, it is not necessary that the adjudication of the complaint has to be made by the composition of Authority, as given under Section 21 of the Act of 2016 though as per Section 29 also, it should be by two Members in absence of the Chairperson.

13. Section 30 of Act of 2016 is, however, relevant and address the issue raised in this petition. The vacancies, etc. not to invalidate proceeding of the Authority. It shows that in case of vacancy, or any defect in the constitution of the Authority or any defect in the appointment of a person acting as a Member of the Authority, the proceeding of the Authority would not be invalidated. Section 30 of the Act of 2016 give complete answer to the objection raised by the petitioner regarding composition of the Authority. It is not that whatever composition given under Section

21 of the Act alone can decide the complaint rather reference of Section 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. This aspect was not brought to the notice of Punjab and Haryana High Court in the case of **Janta Land Promoters Private Limited (supra).**

14. It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to Section 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to Section 21 of the Act of 2016 but has to be reference of other provisions, more specifically, Section 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. The challenge to the resolution would not otherwise sustain in the light of Section 30 and 81 of the Act of 2016. The resolution to authorize one member is even saved by Section 30 of the Act of 2016.

15. Accordingly, we are unable to accept the argument raised by the counsel for the petitioner. It would otherwise frustrate the very object of the Act of 2016 and would give rise to the anarchy, existing earlier, in the hands of Promoters.

16. So far as challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is concerned, the issue is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings However, as and when the Authority invokes Regulation 24 (a) of Regulation, 2019, the liberty is given to challenge the validity. Thus, issue is kept open for the aforesaid.

17. Thus, for all the reasons, we are unable to accept any of the arguments raised by the counsel for the petitioner. The writ petition is accordingly **dismissed**, however, with the liberty to avail the remedy of appeal if other than the issue decided by us remains, which may include the issue towards interest.

(2021)03ILR A603
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2021

BEFORE

THE HON'BLE SANJAY YADAV, J.
THE HON'BLE JAYANT BENERJI, J.

Writ-C No. 595 of 2021

M/S Nishant Traders, Basti ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Devbrat Mukherjee

Counsel for the Respondents:
C.S.C.

A. Civil Law – Uttar Pradesh Minor Minerals (Concession) Rules, 1963 - Clause (a) of sub rule (2) of Rule 23, 9(2); Mines and Minerals (Regulation and

Development) Act, 1957: Section 15, 19 - The State in exercise of its powers conferred under Section 15(1) of 1957 Act has incorporated Rule 23 through instruction which being within its competence and being not in contravention to any other existing rule cannot be faulted with. (Para 14)

1) Impugned amendment does not violate Section 15(3) and Section 19 of 1957 Act- Fair reading of Section 15(3) and the proviso indicates that it relates to payment of royalty or dead rent by the holder of a mining lease or any other mineral concession granted under any rule made u/s 15(1) of 1957 Act. The impugned amendment as apparent there from is in exercise of powers u/s 15(1) of 1957 Act and is in the domain of regulating the grant of mining permit where if for any reason it is not possible to settle the river bed mining areas for the long term, the areas can be settled through short term mining permit not exceeding 6 months by e-tender/e-auction. Petitioner's case is not that the newly substituted Rule 23(2)(a) abrogated the right of the holders of lease on concession in present, therefore, it cannot be said to be violative of S. 15(3) of 1957 Act. Similarly it does not violate S. 19 of 1957 Act, for the reason that with the advent of Rule 23(2)(a), the grant of mining permit for a short period is in accordance with the Rules, therefore the wrath of S. 19 is not attracted. (Para 9)

2) Impugned amendment does not contravene sub-rule (3) of Rule 23 of the Rules, 1963 - Evidently sub-rule (3) stipulates that on the declaration of the area under sub-rule (1) the provisions of Chapters II, III, VI and IX except Rules 10, 12, 17 and 93 shall not apply to the area or areas in respect of which the declaration has been issued. Such area or areas may be leased out according to the procedure described in this Chapter. (Para 10)

It be noted that the applicability of Rule 10 and 12 of Chapter II which provides for 'extent of area for which a mining lease may be granted' and the 'period of mining lease' is not suspended. Therefore, the empowerment of the State Government to settle river bed mining area for short term mining permit where for any reason it is not possible to settle river bed mining for the longer term does not violate the mandate as contained under sub-rule (3) of Rule 23 of the Rules, 1963. (Para 11)

3) The proviso to clause (a) of sub-rule (2) of Rules 23 does not violate the provision contained under Rule 51 which sets out the outer limit of six months for grant of mining permit. (Para 11)

Writ petition dismissed. (E-3)

Precedent distinguished:

1. Sandhur Magnese & Iron Ores Ltd. Vs St. of Karn. & ors., (2010) 13 SCC 1 (Para 13)

2. St. of Kerala & ors. Vs Kerala Rare Earth & Minerals Ltd. & ors., (2016) 6 SCC 323 (Para 15, 16)

3. Shiv Charan Vs U.O.I., 1981 Alld. LJ 641 (Para 17)

Present petition challenges the validity of clause (a) of sub-rule (2) of Rule 23 of Uttar Pradesh Minor Minerals (Concession) Rules, 1963 and prays for quashing of notice dated 20.6.2020.

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

1. Shri Devbrat Mukherjee appears for the petitioner.

2. Learned standing counsel appears for the State respondents.

3. The validity of clause (a) of sub rule (2) of Rule 23 of Uttar Pradesh Minor Minerals (Concession) Rules, 1963 is being questioned vide this petition under Article 226 of the Constitution of India. Ancillary relief sought by the petitioner is the quashment of notice dated 20.6.2020

inviting e-tender for grant of mineral lease. Petitioner also seeks mandamus to the extent that the respondents be directed to grant mining lease for five years.

4. The impugned clause (a) sub rule (2) of Rule 23 of 1963 Rules as brought in vogue vide 50th Amendment Rules 2020 w.e.f. 22.5.2020 is reproduced for ready reference:

" (2) Subject to direction issued by the State Government from time to time in this behalf-

(a) The area or areas for mining leases in respect of sand or morrum or bajari or boulder or any of these in mixed state exclusively found in the riverbed shall be leased out only by e-tender or e-auction or e-tender-cum-e-auction for the fixed period of five years at a time:

Provided that, if for any reason, it is not possible to settle the river bed mining areas for the long term, the areas may be settled through short term mining permit. Short term permit will be granted for a maximum period of 6 months by e-tender/e-auction, under terms and conditions laid down by the State Government from time to time:

Provided further that in case of grant of mining permit, the permit holder shall make payment of all due amount in advance."

5. Apparently the amendment is in exercise of the powers conferred under section 15 of the Mines and Minerals (Regulation and Development) Act, 1957, which provides that the State Government may by Notification in the official gazette make rule for regulating the grant of quality leases and mining leases or other mineral concessions in respect to minor minerals and for purpose connected therewith. Sub section (1-A) of Section 15 of 1957 Act further empowers the State Government to make Rules in respect of matters which find mention in clauses (a) to (o) thereof. That clause (a) stipulates that the Rule can be made in respect of the person by whom and the manner in which, applications for quarry leases, mining leases or other mineral concessions may be made and the fees to be paid therefor. That clause (e) stipulates that rule can be framed in respect of the procedure for obtaining quarry leases, mining leases or other mineral concession.

6. Precise submissions on behalf of the petitioner is that the Rules of 1963 there are two provisions for grant of concession under Chapter II by way of mining lease and the other under Chapter IV by way of auction lease. It is urged that both these Chapters cannot operate simultaneously. In other words it is contended that under Chapter IV of the Rules of 1963 there being a legislation that once a mining area had been declared for grant of e-tender-cum-e-auction lease other Chapters for grant of concession are inoperative.

7. It is further contended that under declaration of Rule 23(3) of the Rules of 1963, the provisions of Chapter II, III and IV does not apply to such area. It is urged that Chapter II deals with grant of mining lease on the basis of certain preferential rights and Chapter VI deals with mining permit. It is contended that the impugned amendment which facilitates short term mining permit by way of e-tender-cum-e-auction is contrary to the entire scheme of Rules of 1963. As also it contravenes the provisions contained under sub section (3) of Section 15 and Section 19 of 1957 Act. It is also borne out from the pleadings that the petitioner is a prospective applicant for

lease of mining area situated at village Manjh Sautarampur Tehsil Haraiya District Basti admeasuring 10.15 hectares having a preferential rights under Rule 9(2) of the Rules of 1963. Be that as it may the impugned amendment is challenged mainly on the ground of it being violative of Section 15(3) and 19 of 1957 Act and is contrary to the scheme of 1963 Rules.

8. As regard to contention that the impugned rule contravenes Section 15(3) and 19 of 1957 Act, it is observed that Section 15 of 1957 Act empowers the State Government may, by notification in the official gazette, make rules for regulating the grant of quality leases, mining leases and other mineral concessions in respect of minor minerals and for purposes connected therewith. Sub section (3) of Section 15 of 1957 Act which stipulates that the holder of a mining lease or any other mineral concession granted under any rule made under sub-section (1) shall pay royalty or dead rent, whichever is more in respect of minor minerals removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee at the rate prescribed for the time being in the rules framed by the State Government in respect of minor minerals. Proviso to sub rule (3) stipulates that the State Government shall not enhance the rate of royalty or dead rent in respect of any minor mineral for more than once during any period of three years.

9. Fair reading of sub section (3) and the proviso indicates that it relates to payment of royalty or dead rent by the holder of a mining lease or any other mineral concession granted under any rule made under sub section (1) of Section 15 of 1957 Act. The impugned amendment as apparent therefrom is in exercise of powers under Section 15(1) of 1957 Act and is in the domain of regulating the grant of mining permit where if for any reason it is not possible to settle the river bed mining areas for the long term, the areas can be settled through short term mining permit not exceeding 6 months by e-tender/e-auction. It being not the case of the petitioner that newly substituted Rule 23(2)(a) abrogated the right of the holders of lease on concession in praesent, we perceive no good reasons to accede to the contention that it violates section 15(3) of 1957 Act. The contention to that effect therefore fails. Similarly the contention that the impugned amendment violates section 19 of 1957 also fails for the reason that with the advent of Rule 23(2)(a) the grant of mining permit for a short period being in accordance with the Rules, the wrath of Section 19 of 1957 is not attracted.

10. As to the contention that the impugned amendment contravenes sub rule (3) of Rule 23 of the Rules, 1963. Evidently sub-rule (3) stipulates that on the declaration of the area under sub-rule (1) the provisions of Chapters II, III, VI and IX except Rules 10, 12, 17 and 93 shall not apply to the area or areas in respect of which the declaration has been issued. Such area or areas may be leased out according to the procedure described in this Chapter.

11. Thus the application of the provisions of Chapter II (which makes provision regarding grant of mining lease and includes provision as to preferential right of certain persons) Chapter III (which provides the payment of royalty and dead rent) and Chapter VI (which deals with mining permit) stand suspended once an area is declared to be leased out by auction-cum-e-tender or e-auction. It be noted that the applicability of Rule 10 and 12 of Chapter II which provides for "extent of

area for which a mining lease may be granted' and the "period of mining lease' is not suspended. In our considered opinion the empowerment of the State Government to settle river bed mining area for short term mining permit where for any reason it is not possible to settle river bed mining for the longer term does not violate the mandate as contained under sub rule (3) of Rule 23 of the Rules, 1963. Similarly the proviso to clause (a) of sub rule (2) of Rules 23 does not violate the provision contained under Rule 51 which sets out the outer limit of six months for grant of mining permit.

12. During course of hearing on admission learned counsel for the petitioner relied on various judgments.

13. In ***Sandur Magnese and Iron Ores Ltd. v. State of Karnataka and Others (2010) 13 SCC 1*** dwelling on following issues, viz,

" 6. (a) Whether the State government's recommendation dated 6-12-2004 and the proceedings of the Chief Minister are contrary to the provisions of Section 11 of the Act and rules 59 and 60 of MC Rules and not valid in law.

(b). Whether the respondent Jindal's application dated 24-10-2002 made prior to notification dated 15-03-2003 is capable of being entertained along with the applications made in pursuant to the said notification.

(c.) Whether the order of the high court of Karnataka in Ziaulla Sharieff's case permits the consideration of the respondent Jindal's application dated 24-10-2002 made prior to the notification dated 15-3-2003.

(d.) Whether Rule 35 of the MC Rules justifies the recommendation of the State Government in favour of the respondents Jindal and Kalyani.

(e.) Whether the criterion of "captive consumption" referred to in TISCO Ltd. v. Union of India (1996) 9 SCC 709, has any application in this case despite the MMDR Act and the MC Rules constituting a complete code.

(f.) Whether factors such as the past commitments by the State Government to the applicants who have already set up steel plants, matter for consideration for grant of lease despite the MMDR Act and the MC Rules constituting a complete code.

(g.) Whether the recommendation in favour of respondents Jindal and Kalyani saved by the operation of the law of equity.

(h.) Whether the learned Single Judge as well as the Division Bench are justified in arriving at such conclusion."

it was held by their Lordships as under:

" 43. It is not open to the State Government to justify grant based on criteria that are dehors the MMDR Act and the MC Rules. The exercise has to be done strictly in accordance with the statutory provisions and if there is any deviation the same cannot be sustained. It is the normal rule of construction that when an statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself. This principal has been reiterated in CIT v. Anjum M.H. Ghaswala (2002) 1 SCC 633; Captain Sube Singh v. Lt. Governor of Delhi (2004) 6 SCC 440 and State of U.P. v. Singhara Singh AIR 1964 SC 358"

14. Present is not a case where the functionaries of the State Government dehors the rules have issued instructions

rather the State in exercise of its powers conferred under section 15(1) of 1957 Act has incorporated Rule 23 through instruction which being within its competent and being not in contravention to any other existing rule cannot be faulted with.

15. As to decision in ***State of Kerala and Others Vs. Kerala Rare Earth And Minerals Limited And Others (2016) 6 SCC 323*** the issue therein was whether the ownership in the mineral resources in the land owned by the State Government is vested in the State Government and if it is, whether the State Government has the right to decline lease on the ground that the minerals on the areas where the same are found have been reserved for exploitation by Government Companies or Corporations, it was held in paragraph 17 and 19 as under:

"17. It is well settled that if the law requires a particular thing to be done in a particular manner, then, in order to be valid the act must be done in the prescribed manner alone [See: Commissioner of Income Tax, Mumbai v. Anjum M.H. Ghaswala and ors. (2002) 1 SCC 633; Captain Sube Singh and Ors. v. Lt. Governor of Delhi and Ors. (2004) 6 SCC 440; State of U.P. v. Singhara Singh AIR 1964 SC 358; and Mohinder Singh Gill v. Chief Election Commissioner (1978) 1 SCC 405]. Absence of the Central Government's approval to reservation and a notification as required by Section 17A, therefore, renders the State Government's claim of reservation untenable till such time a valid reservation is made in accordance with law. It is trite that the State Government's general executive power cannot be invoked to make a reservation dehors Section 17A.

18...

19.The upshot of the above discussion then is that while the State Government is the owner of the mineral deposits in the lands which vest in the Government as is the position in the case at hand, the Parliament has by reason of the declaration made in Section 2 of the 1957 Act acquired complete dominion over the legislative field covered by the said legislation. The Act does not denude the State of the ownership of the minerals situate within its territories but there is no manner of doubt that it regulates to the extent set out in the provisions of the Act the development of mines and minerals in the country. It follows that if the State Government proposes to reserve any area for exploitation by the State owned corporation or company, it must resort to making of such reservation in terms of Section 17A with the approval of the Central Government and by a notification specifying boundaries of the area and mineral or minerals in respect of which such areas will be reserved. Inasmuch as the State Government have not so far issued any notification in terms of Section 17A, the Industrial Policy - 2007 of the Kerala State Government does not have the effect of making a valid reservation within the comprehension of Section 17A. The High Court was, therefore, justified in holding that there is no valid reservation as at present no matter the government can make such a reservation if so advised in the manner prescribed by law. In other words, the dismissal of this appeal shall not prevent the State from invoking its right under Section 17(A)(2) of the Act by issuing notification in respect of the mineral deposits in question. There is, in that view, no reason for us to interfere with the judgment and order passed by the High Court."

16. Apparently the issue was not whether the State in exercise of its powers under section 15(1) of 1957 Act can amend the rules relating to minor mineral to regulate the mining lease and other mineral concession. Therefore the petitioner is not benefited from the decision in State of Kerala and others Vs. Kerala Rare Earth And Minerals Limited And Others (supra)

17. Even the decision in Shiv Charan vs. Union of India 1981 Alld. LJ 641 wherein it is held that the mining lease can be granted only in accordance with the procedure in Chapter II or IV and not in any way by relaxing terms and condition under section 68 of U.P. Minor Minerals (Concession) Rules 1963 is of no assistance.

18. Having this considered since we do not perceive any merit in the challenge to the 50th amendment whereby impugned Rule 23(2)(a) is substituted in the Rules of 1963, the indulgence is declined.

19. Petition fails and is **dismissed.**

20. No costs.

(2021)03ILR A609
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.03.2021

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Writ-C No. 2340 of 2021
Connected with
Writ C Nos. 3032 of 2021, 2727 of 2021, 2862 of 2021, 5508 of 2021, 5419 of 2021, 5352 of 2021, 5392 of 2021, 5170 of 2021, 5159 of 2021, 5079 of 2021,5478 of 2021 & 5080 of 2021

Baroda UP Bank Erstwhile Purvanchal Bank, Gorakhpur & Anr. ...Petitioners
Versus
Chief Labour Commissioner & Ors. ...Respondents

Counsel for the Petitioners:
Sri Gyan Prakash Shrivastava, Sri Ashok Khare

Counsel for the Respondents:
A.S.G.I., Sri Amrendra Pratap Singh, Sri Rajesh Tripathi

A. Civil Law – Service – Maintainability of writ petition - Payment of Gratuity Act, 1972 - Section 7(4), 7(7), Rule 10(i); Purvanchal Gramin Bank (Officers & Employees) Service Regulations, 2010: Regulation 72; Regional Rural Banks Act, 1976: Section 30 - The fact remains that jurisdiction of the Controlling Authority has not yet been settled and divergent views of various High Courts are available on the issue in hand. (Para 17)

While the powers the High Court may exercise under its writ jurisdiction are not subject to strict legal principles, two clear principles emerge with respect to when a High Court's writ jurisdiction may be engaged. First, the decision of the High Court to entertain or not entertain a particular action under its writ jurisdiction is fundamentally discretionary. Secondly, limitations placed on the court's decision to exercise or refuse to exercise its writ jurisdiction are self-imposed. **It is a well-settled principle that the writ jurisdiction of a High Court cannot be completely excluded by statute.** (Para 21)

Entertaining writ petition - Art. 226 is a rule of discretion and not one of compulsion and the Court may consider the pros and cons of, the case and then may interfere if it comes to the conclusion that where the petitioner seeks enforcement of any of the fundamental rights or where there is failure of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. Thus, law at

this stage is settled that the Courts in extraordinary circumstances may come to the conclusion where the Authority has assumed powers which they do not possess or where there is principle of natural justice or the proceedings themselves are of abuse of process of law. (Para 19, 22)

In the present bunch of petitions, the order of the Controlling Authority is being assailed purely on legal ground, particularly asserting that the Controlling Authority under the Act had no jurisdiction to interpret the Service Regulations and to pick up the best out of the two schemes to extend the benefit to an officer although such officer is governed by one scheme only. I find that even the provisions of Regulations regarding payment of gratuity are also in favour of the contesting respondents to the extent that the amount is to be calculated in two modes, one, as per the provisions of Payment of Gratuity Act and second, as per provisions of Service Regulations and shall be entitled to gratuity amount, whichever is higher. Thus, assuming the jurisdiction above Rs.10,00,000/- by the Controlling Authority goes to the root of the case and the issue of jurisdictional error is clearly involved in the present bunch of petitions. That apart, question whether dearness allowance can be included in term 'pay' or 'last drawn pay' is also purely legal in nature, where no finding of fact is required, power whereof, normally, is available or should be with the Appellate Authority. (Para 23)

When it is a question of interpretation of powers or jurisdiction of the Controlling Authority, the department Appellate Authority/the statutory Appellate Authority under the same Act, most likely, would not be inclined to interpret the powers or jurisdiction of the Controlling Authority in a manner so as to curtail or limit the same. (Para 24)

Present petitions were held to be maintainable and impugned order dated 31.1.2020 and Form (R) notice for payment of gratuity dated 5.2.2020 passed by the Assistant Labour Commissioner (Central)/Controlling Authority was stayed.(E-3)

Precedent followed:

1. Beed District Central Coop, Bank Ltd. Vs St. of Mah. & ors., (2006) 8 SCC 514 (Para 18)

2. U.P. State Spinning Co. Ltd. Vs R.S. Pandey & anr., (2005) 8 SCC 264 (Para 19)

3. Maharashtra Chess Association Vs U.O.I. & ors., (2020) 13 SCC 285 (Para 21)

4. Khoday Distilleries Ltd. (Now known as Khoday India Limited) & ors. Vs Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd., Kollegal (Under liquidation), (2019) 4 SCC 376 (Para 16)

Precedent cited:

1. Purvanchal Bank, Head office Mohiddipur & anr. Vs Chief Labour Commissioner & 2 ors., Writ-C No. 20437 OF 2018, Judgment dated 04.07.2018 (Para 8)

2. Chhatisgarh Rajya Gramin Bank Through the Chairman, Mahadevghat Road, Sunder Nagar, Raipur Chhatisgarh Vs Arun Phansalkar, Writ Appeals being WA No. 436 of 2020, Chhatisgarh High Court Judgment dated 28.01.2021 (Para 8)

3. Vidarbha Konkan Gramin Bank Vs The Appellate Authority & anr., 2020 SCC Online Bom. 17 (Para 8)

4. Rajasthan Marudhara Gramin Bank, Jodhpur through its Chairman, Head Office Tulsi Tower, 9th B Road, Sardarpura, Jodhpur Vs The Appellate Authority, Under Payment of Gratuity Act, 1972 and the Deputy Chief Labour Commissioner (Central), Ajmer, S.B. Civil Writ Petition No. 7359 OF 2019 (Para 9)

5. Chhatisgarh Rajya Gramin Bank through The Chairman, Mahadev Ghat Road, Sunder Nagar, Raipur Vs Meghraj Pathak & ors., Writ Petition (L) No. 55 of 2020, dated 31.08.2020 (Para 9)

6. Chinmoy Majumder & ors. Vs Paschmim Banga Gramin Bank & ors., W.P. No. 19538 (W) of 2018, Calcutta High Court, Judgment dated 05.07.2019 (Para 9)

7. Muralee Mohanan KT & ors. Vs Corporation Bank & ors., WP (C) No. 32386 of 2015 (W),

Kerala High Court, Judgment of dated 15.10.2019 (Para 9)

Precedent distinguished:

1. All India Garamin Bank Pensioners Organization Unit Rewa Vs Madhyanchal Gramin Bank & anr., WP No. 9182 of 2017, Madhya Pradesh High Court, Judgment dated 06.09.2018 (Para 9)

2. Madhyanchal Gramin Bank & anr. Vs All India Garamin Bank Pensioners Organization Unit, Rewa etc., WA No. 1318 of 2018, Madhya Pradesh High Court (Para 9)

3. Madhyanchal Gramin Bank & anr. Vs All India Garamin Bank Pensioners Organization Unit, Rewa etc., Special Leave to Appeal (C) No. 11113 -11115 of 2019, dimissed vide order dated 07.05.2019 (Para 9)

Present petition challenges order dated 31.01.2020 and form (R) notice for payment of gratuity dated 05.02.2020, passed by Assistant Labour Commissioner (Central)/Controlling Authority.

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

1. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Gyan Prakash, learned counsel for the petitioners-Bank and Sri Amrendra Pratap Singh, learned counsel for the respondent no. 3 and perused the record. Learned ASGI has accepted notice on behalf of respondents no. 1 and 2.

2. This bunch of petitions involves identical controversy and therefore, with consent of learned counsel for the parties, the petition being Writ-C No. 2340 of 2021 is being taken up as the leading case.

3. The petition has been filed challenging the impugned order dated 31.1.2020 and form (R) notice for payment of gratuity dated 5.2.2020 passed by the Assistant Labour Commissioner (Central)/Controlling Authority under the Payment of Gratuity Act, 1972 in Case No. A-48 (38) of 2018 (Shri Dilip Kumar Shukla vs. The Chairman, Purvanchal Bank and Another).

4. By the impugned order, the Controlling Authority (respondent no. 2 herein) under the Payment of Gratuity Act, 1972 (hereinafter referred to as the 'Act') allowed the claim/application filed by the contesting respondent no. 3 under Rule 10 (i) of the Act read with Section 7(4) of the Act after condoning the delay in filing the said application.

5. A preliminary objection was raised by Sri Amrendra Pratap Singh, learned counsel for the respondent no. 3 on the ground that the petitioner-Bank has efficacious alternative statutory remedy under Section 7 (7) of the Act before the appellate authority. Therefore, present petition is not maintainable. He submits that once the statutory alternative remedy is available under the aforesaid provisions, there is no occasion to entertain present petition under the Article 226 of the Constitution of India and the same is liable to be dismissed on the ground of availability of statutory alternative remedy itself.

6. Replying the preliminary objection, Sri Khare, learned Senior Counsel submits that the order passed by the Controlling Authority is wholly without jurisdiction and therefore, availability of statutory remedy would not be a bar in the present case. He submits that sending the matter from one authority, who has committed jurisdictional error, to another authority under the same Act would not, in any case, be efficacious alternative remedy and

therefore, present petition is maintainable. He submits that the preliminary objection that the order passed by the Controlling Authority is appealable under the Act, was raised in Writ-C No. 20437 of 2018 (Purvanchal Bank, Head Office Mohiddidpur and another vs. Chief Labour Commissioner and 2 others) and was rejected by Hon'ble Single Judge of this Court on the ground that any order, which is bereft of reasons or findings on the facts and circumstances brought before the statutory authority, cannot withstand the test or scrutiny and cannot be allowed to survive merely on the ground that the said order is appealable before a higher authority. He further submits that the services of the respondent no. 3 are governed by Service Regulations, namely, Purvanchal Gramin Bank (Officers & Employees) Service Regulations, 2010 (hereinafter referred to as the 'Regulations') framed under Section 30 of the Regional Rural Banks Act, 1976 (hereinafter referred to as the RRB Act). He submits that Regulation 72 of the Regulations governs the gratuity payable to an officer or an employee. Drawing attention to various provisions of the Act as well as of the Regulations, he submits that in the Regulations, a distinction has been drawn in case of an 'officer' and that of an 'employee', therefore, in the present case, the gratuity is to be calculated as per the Regulations as applicable to an officer. He pointed out that in the present litigation, all are officers of the bank. He submits that second proviso to Clause 3 of Regulation 72 of the Regulations uses the expression "last pay drawn" applicable to the 'officer' and therefore, the said provision covers the same. He submits that the third proviso as applicable to an 'employee' includes the basic pay, dearness allowance and special allowance etc., therefore, there being a clear distinction between the two and thus, interpretation of term "pay" as applicable in case of an 'employee' cannot be made applicable to an 'officer'. He further pointed out that the controlling authority has authority only to interpret the provisions of the Act and has no authority to interpret the provisions of Regulations as applicable on the bank employee. He further submits that even otherwise the maximum limit upto which gratuity can be awarded under the Act is only Rs. 10,00,000/-, therefore, the controlling authority has no jurisdiction to decide the dispute above that limitation and under no circumstances, he can direct payment of gratuity over and above Rs. 10,00,000/-. He pointed out that as per Regulation 72 of the Regulations, the amount of gratuity is to be calculated in two modes; one, in accordance with the provisions of Service Regulations and second, in accordance with the provisions of Payment of Gratuity Act and as per sub-regulation 2 of Regulation 72 of the Regulation, the amount whichever is higher. He submits that in case the amount calculated as per Regulation is less and the amount as per the Act is higher, the officers shall be entitled for the higher amount, however, with a ceiling of Rs. 10,00,000/-. He further pointed out that admittedly, the amount calculated as per the Regulation was less than Rs. 10,00,000/- and calculation of the amount as per the Act was higher, therefore, as per the ceiling, a sum of Rs. 10,00,000/- as provided under the Act had already been paid to the contesting officers, which had been accepted by them without protest.

7. Crux of the argument of Sri Khare, learned Senior Counsel is that: dearness allowance is not included in last drawn pay as per Regulation 72 of the Regulations; the controlling authority under the Act has no

jurisdiction to grant gratuity above Rs. 10,00,000/- and therefore, direction to pay amount above Rs. 10,00,000/- is without jurisdiction; 'Officer' and 'Employee' are two different categories as per Service Regulations and calculation of gratuity is governed by second and third proviso of the Regulation 72 of the Regulations; clearly the controlling authority lacks pecuniary jurisdiction; and once the amount of gratuity has been accepted as calculated under the Service Regulation without protest, if any claim is filed or dispute is raised before the controlling authority, he had no jurisdiction to condone the delay; the controlling authority had no jurisdiction to interpret the provisions of Service Regulations as he is an authority only under the Payment of Gratuity Act and therefore, the interpretation given by the controlling authority that in the term 'pay' as given in the Service Regulations, which governs the category of officers, dearness allowance is also included in the basic-pay by necessary implications, is wholly without jurisdiction; and once it is accepted that service conditions are to be governed by the Service Regulations, the officer cannot insist upon having the best out of the two schemes as scheme has to be accepted or rejected in toto. Submission, therefore, is that the order of the controlling authority is without jurisdiction and the issue involved in the present bunch of petitions goes to the root of the matter wherein interpretation of any fact or factual dispute is not required and purely jurisdictional issue is to be decided, therefore, the statutory alternative remedy is no bar and writ petition is maintainable.

8. In support of his argument to the merit of the case to contend that the order of the controlling authority is without jurisdiction and that the preliminary objection regarding availability of statutory remedy by way of appeal under the provisions of the Act has already been rejected, learned counsel for the petitioners has placed reliance on a judgement dated 4.7.2018 passed by Hon'ble Single Judge of this Court in Writ-C No. 20437 of 2018 (Purvanchal Bank, Head Office Mohiddidpur and another vs. Chief Labour Commissioner and 2 others). He has also referred to the interim orders passed by this Court in Writ-C No. 22082 of 2019, Writ-C No. 24879 of 2020, Writ-C No. 14568 of 2019 and to a recent judgement of Hon'ble Division Bench of Chhattisgarh High Court dated 28.1.2021 passed in bunch of writ appeals being WA No. 436 of 2020 (Chhattisgarh Rajya Gramin Bank Through the Chairman, Mahadevghat Road, Sunder Nagar, Raipur Chhattisgarh vs. Arun Phansalkar) and other connected writ appeals and in Vidarbha Konkan Gramin Bank vs. The Appellate Authority & another, 2020 SCC Online Bom 17, touching upon the jurisdictional error committed by the controlling authority.

9. In reply to the arguments raised by Sri Ashok Khare, learned Senior Counsel, Sri Amrendra Pratap Singh, learned counsel for the respondent no. 3, placing reliance on a judgement dated 16.10.2020 of learned Single Judge in a bunch of petitions being S.B. Civil Writ Petition No. 7359 of 2019 (Rajasthan Marudhara Gramin Bank, Jodhpur through its Chairman, Head Office Tulsi Tower, 9th B Road, Sardarpura, Jodhpur vs. The Appellate Authority, Under Payment of Grautity Act 1972 and The Deputy Chief Labor Commissioner (Central), Ajmer) along with connected matters passed by Rajasthan High Court at Jodhpur, submits that issue has been settled by the Rajasthan High Court on merits and therefore, no

such jurisdictional issue or any other issue as has been raised by Sri Khare, learned Senior Counsel is involved in the present case. He has also placed reliance on a judgement of Chhattisgarh High Court passed in Writ Petition (L) No. 55 of 2020 (Chhattisgarh Rajya Gramin Bank through The Chairman, Mahadev Ghat Road, Sunder Nagar, Raipur vs. Meghraj Pathak and others) dated 31.8.2020 and in a judgement of Calcutta High Court passed in W.P. No. 19538 (W) of 2018 (Chinmoy Majumder and others vs. Paschim Banga Gramin Bank and others) dated 5.7.2019; the judgement of Kerala High Court in WP (C) No. 32386 of 2015 (W) (Muralee Mohanan KT and others vs. Corporation Bank and others) dated 15.10.2019; and the judgement of Madhya Pradesh High Court in WP No. 9182 of 2017 (All India Gramin Bank Pensioners Organization Unit Rewa vs. Madhyanchal Gramin Bank and another) dated 6.9.2018 along with other connected petitions, which was affirmed by the Division Bench of Madhya Pradesh High Court passed in WA No. 1318 of 2018 (Madhyanchal Gramin Bank and another vs. All India Gramin Bank Pensioners Organization Unit) dated along with connected matters wherein special appeals filed were dismissed. It was pointed out that the aforesaid judgement of Hon'ble Division Bench of Madhya Pradesh High Court was taken up to Hon'ble Supreme Court by the Bank by filing Special Leave to Appeal (C) No. 11113-11115 of 2019 (Madhyanchal Gramin Bank and another vs. All India Gramin Bank Pensioners Organisation Unit, Rewa etc), which was dismissed vide order dated 7.5.2019. Submission, therefore, is that alleged jurisdictional issue involved in the present case is now, in fact, no longer available to him and the present petition is liable to be dismissed on the ground of alternative statutory remedy, in case the petitioners-bank wishes to further challenge the order of the controlling authority.

10. At this stage, learned Senior Counsel submits that the judgment of learned Single Judge of Rajasthan High Court in Rajasthan Marudhara Gramin Bank (supra) was stayed by the Division Bench in D.B. Spl. Appl. Writ No. 503 of 2020 in its order dated 15.12.2020 and therefore, the said order is of no avail to the respondents. He further pointed out that in a recent judgement of Hon'ble Division Bench of Chhattisgarh High Court dated 28.1.2021 passed in Chhattisgarh Rajya Gramin Bank (supra), all such judgements including the dismissal of the special appeal by Hon'ble Apex Court in Madhyanchal Gramin Bank (supra) has been considered and the special appeals were decided in favour of the bank. Submission, therefore, is that jurisdictional issue is involved in the present case, which is still open. He further submits that it is settled law that mere dismissal of special leave petitions does not settle the law as there is no merger.

11. I have considered the rival submissions on the issue of preliminary objection involved in the present batch of petitions.

12. Before proceeding further, it would be appropriate to take note of provisions of the Payment of Gratuity Act and of the Service Regulations as well as of the merits of the case only to the extent to satisfy that if any exceptional circumstance are present in this bunch of petitions so that it may be decided whether alternative statutory remedy is a bar in the present bunch of petitions and the petitions are

liable to be dismissed on the ground of statutory alternative remedy.

13. For ready reference, relevant Regulations of Purvanchal Gramin Bank (Officers and Employees) Service Regulations 2010 are quoted as under:

*"**2. Definitions-***

(1) .....

(a) "Act" means the Regional Rural Banks Act, 1976 (21 of 1976);

(i) "Emoluments" means the aggregate of salary and allowances, if any;

(j) "Employee" means an employee of the Bank as classified under clause (b) and (c) of sub-regulation (1) of regulation 3, and includes such employee whose services are lent to other organizations under regulation 75;

(l) "Officer" means an officer of the Bank as classified under Clause (a) of sub-regulation (1) of regulation 3;

(m) "Pay" means basic pay drawn per month by the officer or employee in a pay-scale including stagnation increments an any part of the emoluments which may specifically be classified as pay under these regulations.

(o) "Salary" means aggregate of pay and dearness allowances.

3. Classification of officers and employees

(1) The officers and employees of the Bank shall be classified as follows, namely-

Junior Management

(i) Scale I (Assistant Manager)

Middle Management

(ii) Scale II (Manager)

(iii) Scale III (Senior Manager)

Senior Management

(iv) Scale IV (Chief Manager)

(v) Scale V (Assistant General Manager)

Explanation: For the purposes of these regulations, the Chairman may designate the officer, as Branch Manager, Regional Manager or General Manager, depending on the work of functions assigned and the scale of the officer.

(b) Group 'B'- Office Assistants (Multipurpose).

(c) Group 'C'- Office Attendants (Multipurpose).

(2) Nothing in this regulation shall be construed as requiring the Bank to have at all times all the cadres or categories of the officers or employees serving the Bank.

72. Gratuity-

(1) An officer or employee shall be eligible for payment of gratuity either as per the provisions of the Payment of Gratuity Act, 1972 (39 of 1972) or as per sub-regulation (2), whichever is higher.

(2) Every officer or employee shall be eligible for gratuity on,-

(a) retirement

(b) death

(c) disablement rendering him unfit for further service as certified by a medical officer approved by the Bank, or

(d) resignation after completing 10 years of continuous service, or

(e) termination of service in any other way except by way of punishment after completion of 10 years of service

Provided that in respect of an employee there shall be no forfeiture of gratuity for dismissal on account of misconduct except in cases where such misconduct causes financial loss to the bank and in that case to that extent only.

(3) The amount of gratuity payable to an officer or employee shall be one months pay for every completed year of service or part thereof in excess of six months subject to a maximum of 15 month's pay:

Provided that where an officer or employee has completed more than 30

years of service, he shall be eligible by way of gratuity for an additional amount at the rate of one half of a month's pay for each completed year of service beyond 30 years:

Provided further that in respect of an officer the gratuity is payable based on the last pay drawn:

Provided also that in respect of an employee pay for the purposes of calculation of the gratuity shall be the average of the basic pay (100%), dearness allowance and special allowance and officiating allowance payable during the 12 months preceding death, disability, retirement, resignation or termination of service, as the case may be.

(emphasis supplied)

14. For ready reference, relevant sections of The Payment of Gratuity Act, 1972 are quoted as under:

*"**2. Definition**- In this act, unless.....*

(d) "controlling authority" means an authority appointed by the appropriate Government under Section 3;

(e) "employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work, of a factory, mine, oilfield, plantation, port, railway, company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity;

(s) "wages" means all emoluments which are earned by an employee while on duly or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance.

***3. Controlling authority** - The appropriate Government, may, by notification, appoint, any officer to be a controlling authority, who shall be responsible for the administration of this Act and different controlling authorities may be appointed for different areas.*

***4. Payment of gratuity**-*

(3) The amount of gratuity payable to an employee shall not exceed ten lakh rupees.

(5) Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer.

***7. Determination of the amount of gratuity**-*

(4) (a)...

(b) Where there is a dispute with regard to any matter or matters specified in clause (a), the employer or employee or any other person raising the dispute may make an application to the controlling authority for deciding the dispute.

(Emphasis supplied)

15. It is not in dispute that all the contesting respondents were officers of the Bank and are governed by the Service Regulations. Definition clause definitely discloses that officer and employee have been defined differently. Regulation 3 provides for classification of officers and employees. Perusal of other provisions clearly indicates that the term 'officer' and the term 'employee' have been differently referred to in most of the provisions of the Regulations. Even the Regulation 39, which provides for penalties towards the officers and employees differently by providing different major and minor penalties. More specifically Regulation 72,

draws distinction in both the terms and provides that different mode of calculation is to be adopted in case of an 'officer' and in case of an 'employee'. Reference may be made to second proviso and third proviso to the Regulation 72, which are categorical in nature. Under the Payment of Gratuity Act, a limit has been provided that amount of gratuity payable to an employee shall not exceed Rs. 10,00,000 (unamended provisions as applicable in the present bunch of petitions). Under Section 3 of the Act, the controlling authority who shall be authority as notified by the appropriate government to be controlling authority who shall be responsible for the administration of this Act and different controlling authorities may be appointed for different areas, meaning thereby, the controlling authority would have jurisdiction for the administration of this Act. As per Section 4 (3) of the Act, the amount of gratuity payable to an employee shall not exceed Rs. 10,00,000 as already noted. Therefore, prima facie, the controlling authority would not have jurisdiction over the matters above Rs. 10,00,000/- or in other words, he cannot at all direct payment over and above Rs. 10,00,000/-. In this case, the controlling authority has the responsibility of administration of the Act, but it is to be seen that to what extent it can interpret the provisions of the Regulations, which are entirely different in nature. Particularly when the term 'Officer' is not included in the Payment of Gratuity Act and even if for the sake of argument can be deemed to have been included in the term 'employee' as defined in the Act, it is, of course, with the rider as provided therein.

16. At this stage, I am not inclined to deeply go into the merits of the case of the petitioners or of the respondents on merits as at present I am concerned with the maintainability of present petitions, however, broadly speaking, although against the judgement of Madhya Pradesh High Court in Madhyanchall Gramin Bank (supra), special leave petitions were dismissed by Hon'ble Apex Court but as the law is settled that merely because special appeals were dismissed as there is no merger, the same cannot be treated as law having been settled by Hon'ble Apex Court. A reference may be made to a recent judgement of the Hon'ble Supreme Court in Khoday Distilleries Limted (Now known as Khoday India Limited) and others vs. Sri Mahadeshwara Sahakara Sakkare Karkhane Limited, Kollegal (Under liquidation) Represented by the Liquidator, (2019) 4 SCC 376, paragraphs 26, 26.1 and 26.2 whereof are quoted as under:

*"**26**. From a cumulative reading of the various judgments, we sum up the legal position as under:*

***26.1** The conclusions rendered by the three-Judge Bench of this Court in Kunhayammed and summed up in para 44 are affirmed and reiterated.*

***26.2** We reiterate the conclusions relevant for theses cases as under: (Kunhayammed vs. State of Kerala, (2002) 6 SCC 359, SCC p. 384)*

"(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the

statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of the Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger;the order may be of reversal, modification or merely affirmation.

(viii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court jurisdiction of the High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Order 47 Rule 1 CPC." (Emphasis supplied)

17. The latest judgement on the interpretation of the provisions as quoted above is the judgement of Hon'ble Chhattisgarh High Court in Chhattisgarh Rajya Gramin Bank (supra), which is dated 28.1.2021. Therefore, without speaking much on the merits of the case, the fact remains that jurisdiction of the controlling authority has not yet been settled and divergent views of various High Courts are available on the issue in hand.

18. However, on merits of preliminary objection, at this stage for the purpose of considering the exception to the alternative remedy, it would be appropriate to take note of the judgement of Hon'ble Apex Court rendered in the case of *Beed District Central Coop. Bank Ltd. vs. State of Maharashtra and others*, (2006) 8 SCC 514, paragraphs 10, 11, 13, 14 and 16 whereof are quoted as under:

*"**10**. The `doctrine of blue pencil' was evolved by the English and American Courts. In Halsbury's Laws of England (4th Edn. Vol.9), p.297, para 430, it is stated:*

"430. Severance of illegal and void provisions - A contract will rarely be totally illegal or void and certain parts of it may be entirely lawful in themselves. The question therefore arises whether the illegal or void parts may be separated or "severed" from the contract and the rest of the contract enforced without them. Nearly all the cases arise in the context of restraint of trade, but the following principles are applicable to contracts in general"

11. In P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edn. 2005, Vol. l,p.553-554, it is stated:

"Blue pencil doctrine (test). A judicial standard for deciding whether to invalidate the whole contract or only the offending words. Under this standard, only the offending words are invalidated if it would be possible to delete them simply by running a blue pencil through them, as opposed to changing, adding, or rearranging words. (Black, 7th Edn., 1999) This doctrine holds that if Courts can render an unreasonable restraint reasonable by scratching out the offensive portions of the covenant, they should do so and then enforce the remainder. Traditionally, the doctrine is applicable only if the covenant in question is

applicable, so that the unreasonable portions may be separated. E.P.I, of Cleveland, Inc. v. Basler, 12 Ohio App2d 16:230 NE2d 552, 556.

Blue pencil rule/test. - Legal theory that permits a judge to limit unreasonable aspects of a covenant not to compete.

Severance of contract. - "severance can be effected when the part severed can be removed by running a blue pencil through it without affording the remaining part. Attwood v. Lamont, (1920) 3 K 571 (Banking) A rule in contracts a Court may strike parts of a covenant not to compete in order to make the covenant reasonable. (Merriam Webster) Phrase referring to severance (q.v.) of contract. "Severance can be effected when the part severed can be removed by running a blue pencil through it" without affording the remaining part. Attwood v. Lamont, (1920) 3 KB 571. (Banking)"

13. We, however, are of the opinion that the said doctrine cannot be said to have any application whatsoever in the instant case. Undoubtedly, the Payment of Gratuity Act is a beneficial statute. When two views are possible, having regard to the purpose, the Act seeks to achieve being a social welfare legislation, it may be construed in favour of the workman. However, it is also trite that only because a statute is beneficent in nature, the same would not mean that it should be construed in favour of the workmen only although they are not entitled to benefits thereof. (See Regional Director, ESI Corpn. v. Ramanuja Match Industries, AIR (1985) SC 278).

14. Applying the `Golden Rule of Interpretation of Statute', to us it appears that the question should be considered from the point of view of the nature of the scheme as also the fact that the parties agreed to the terms thereof. When better terms are offered, a workman takes it as a part of the package. He may volunteer therefor, he may not. Sub-Section (5) of Section 4 of the 1972 Act provides for a right in favour of the workman. Such a right may be exercised by the workman concerned. He need not necessarily do it. It is the right of individual workman and not all the workmen. When the expression "terms" has been used, ordinarily it must mean "all the terms of the contract". While interpreting even a beneficent statute, like, Payment of Gratuity Act, we are of the opinion that either contract has to be given effect to or the statute. The provisions of the Act envisage for one scheme. It could not be segregated. Sub-Section (5) of Section 4 of the 1972 Act does not contemplate that the workman would be at liberty to opt for better terms of the contract, while keeping the option open in respect of a part of the statute. While reserving his right to opt for the beneficent provisions of the statute or the agreement, he has to opt for either of them and not the best of the terms of the statute as well as those of the contract. He cannot have both. If such an interpretation is given, the spirit of the Act shall be lost. Even in Shin Satellite (supra), this Court stated :

"The proper test for deciding validity or otherwise of an agreement or order is "substantial severability" and not "textual divisibility". It is the duty of the court to sever and separate trivial or technical parts by retaining the main or substantial part and by giving effect to the latter if it is legal, lawful and otherwise enforceable. In such cases, the court must consider the question whether the parties could have agreed on the valid terms of the agreement had they known that the other terms were invalid or unlawful. If the answer to the said question is in the affirmative, the doctrine of severability would apply and

the valid terms of the agreement could be enforced, ignoring invalid terms. To hold otherwise would be "to expose the covenanter to the almost inevitable risk of litigation which in nine cases out of ten he is very ill-able to afford, should he venture to act upon his own opinion as to how far the restraint upon him would be held by the court to be reasonable, while it may give the covenantee the full benefit of unreasonable provisions if the covenanter is unable to face litigation."

16. *We are, therefore, of the opinion that the workman cannot opt for both the terms. Such a construction would defeat the purpose for which Sub-Section (5) of Section 4 has been enacted. For the reasons aforementioned, the impugned judgment cannot be sustained, which is set aside accordingly. The appeal is allowed. No costs.*

(Emphasis supplied)

19. Insofar as the maintainability of present petitions on the ground of availability of alternative remedy, it would be appropriate to take note of the judgement of Hon'ble Apex Court rendered in *U.P. State Spinning Co. Ltd. vs. R.S. Pandey and another*, (2005) 8 SCC 264 wherein it was held that normally the High Courts should not entertain the writ petitions unless it is shown that there is something more in a case, something going to the root of the of the jurisdiction of the officer, something which would show that it would not be a case palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. In this case, the issue of maintainability of writ petition on the ground of availability of alternative remedy was discussed in detail.

20. It would be beneficial to refer to paragraphs 14, 15, 16, 17, 18, 19, 20 and 21 of U.P. State Spinning (supra) are quoted as under:

"14. In Harbanslal Sahnia v. Indian Oil Corpn. Ltd., (2003) 2 SCC 107, this Court held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of the compulsion and the court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the petitioner seeks enforcement of any of the fundamental rights; where there is failure of principles of natural justice or where the orders or proceeding are wholly without jurisdiction or the vires of an Act is challenged.

15. In G. Veerappa Pillai v. Raman & Raman Ltd., AIR 1952 SC 192, CCE v. Dunlop India Ltd., AIR 1985 SC 330, Ramendra Kishore Biswas v. State of Tripura, (1999) 1 SCC 472, Shivgonda Anna Patil v. State of Maharashtra, (1999) 3 SCC 5, C.A. Abraham v. ITO, AIR 1961 SC 609, Titaghur Paper Mills Co. Ltd. vs. State of Orissa, (1983) 2 SCC 433, H.B. Gandhi v. Gopi Nath and Sons, 1992 Supp (2) SCC 312, Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1, Tin Plate Co. of India Ltd. v. State of Bihar, (1998) 8 SCC 272, Sheela Devi v. Jaspal Singh, (1999) 1 SCC 209 and Punjab National Bank v. O.C. Krishnan (2001) 6 SCC 569, this Court held that where hierarchy of appeals is provided by the statue, party must exhaust the statutory remedies before resorting to writ jurisdiction.

16. If, as was noted in Ram and Shyam Co. vs. State of Haryana (1985) 3 SCC 267, the appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility. In the instant case the writ petitioners had indicated the reasons as to why they thought that the alternative

remedy would not be efficacious. Though the High Court did not go into that plea relating to bias in detail, yet it felt that alternative remedy would not be a bar to entertain the writ petition. Since the High Court has elaborately dealt with the question as to why the statutory remedy available was not efficacious, it would not be proper for this Court to consider the question again. When the High Court had entertained a writ petition notwithstanding existence of an alternative remedy this Court while dealing with the matter in an appeal should not permit the question to be raised unless the High Court's reasoning for entertaining the writ petition is found to be palpably unsound and irrational. Similar view was expressed by this Court in First ITO v. Short Bros. (P) Ltd., AIR 1967 SC 81 and State of U.P. v. Indian Hume Pipe Co. Ltd., (1977) 2 SCC 724. That being the position, we do not consider the High Court's judgement to be vulnerable on the ground that alternative remedy was not availed. There are two well-recognised exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings themselves are an abuse process of law the High Court in an appropriate case can entertain a writ petition.

17. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in L. Hirday Narain v. ITO, (1970) 2 SCC 355 that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies, unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition.

18. At this juncture, it would be appropriate to take note of the few expressions in R. v. Hillington, London Borough Council (1974) 2 WLR 805 which seems to bring out the position well. Lord Widgery, C.J. stated in this case:

"It has always been a principle that certiorari will go only where there is no other equally effective and convenient remedy.

....

The statutory system of appeals is more effective and more convenient than application for certiorari and the principal reason why it may prove itself more convenient and more effective is that an appeal to (say) the Secretary of State can be disposed of at one hearing whether the issue between them is a matter of law or fact or policy or opinion or a combination of some or all of those... whereas of course

an appeal for certiorari is limited to cases where the issue is a matter of law and then only it is a matter of law appearing on the face of the order.

....

An application for certiorari has however this advantage that it is speedier and cheaper than the other methods and in a proper case therefore it may well be right to allow it to be used ...I would, however, define a proper case as being one where the decision in question is liable to be upset as a matter of law because on its face it is clearly made without jurisdiction or in consequence of an error of law."

19. After all the above discussion, the following observations of Roskill, L.J. In Hanson v. Church Commrs. (1977) 2 WLR 848 (CA) may not be welcomed but it should not be forgotten also:

"There are a number of shoals and very little safe water in the unchartered seas which divide the line between prerogative orders and statutory appeals, and I do not propose to plunge into those seas....."

20. In a catena of decisions it has been held that writ petition under Article 226 of the Constitution should not be entertained when statutory remedy is available under the Act, unless exceptional circumstances are made out.

21. In U.P. State Bridge Corpn. Ltd. vs. U.P. Rajya Setu Nigam S. Karmachari Sangh, (2004) 4 SCC 268 it was held that when the dispute relates to enforcement of a right or obligation under the statute and specific remedy is, therefore, provided under the statute, the High Court should not deviate from the general view and interfere under Article 226 except when a very strong case is made out for making a departure. The person who insists upon such remedy can avail of the process as provided under the statute. To same effect are the decisions in Premier Automobies Ltd. vs. Kamlekar Shantaram Wadke, (1976) 1 SCC 496, Rajasthan SRTC v. Krishna Kant (1995) 5 SCC 75, Chandrakant Tukaram Nikam v. Municipal Corpn. Of Ahmedabad, (2002) 2 SCC 542 and in Scooters India v. Vijai E.V. Eldred, (1998) 6 SCC 549.

(Emphasis supplied)

21. Although, there are large number of judgements on this issue, however, a reference may be made to the latest judgement of Hon'ble Hon'ble Apex Court rendered in the case of *Maharashtra Chess Association vs. Union of India and others*, (2020) 13 SCC 285, paragraphs 11, 14, 17, 19 and 20 whereof are quoted as under:

*"**11**. Article 226(1) of the Constitution confers on High Courts the power to issue writs, and consequently, the jurisdiction to entertain actions for the issuance of writs. The text of Article 226(1) provides that a High Court may issue writs for the enforcement of the fundamental rights in Part III of the Constitution, or "for any other purpose". A citizen may seek out the writ jurisdiction of the High Court not only in cases where her fundamental right may be infringed, but a much wider array of situations. Lord Coke, commenting on the use of writs by courts in England stated:*

"The Court of King's Bench hath not only the authority to correct errors in judicial proceedings, but other errors and misdemeanours [...] tending to the breach of peace, or oppression of the subjects, or raising of faction, controversy, debate or any other manner of misgovernment; so that no wrong or injury, public or private, can be done, but that this shall be reformed or punished by due course of law...."

14. While the powers the High Court may exercise under its writ jurisdiction are

not subject to strict legal principles, two clear principles emerge with respect to when a High Court's writ jurisdiction may be engaged. First, the decision of the High Court to entertain or not entertain a particular action under its writ jurisdiction is fundamentally discretionary. Secondly, limitations placed on the court's decision to exercise or refuse to exercise its writ jurisdiction are self-imposed. It is a well-settled principle that the writ jurisdiction of a High Court cannot be completely excluded by statute. If a High Court is tasked with being the final recourse to upholding the rule of law within its territorial jurisdiction, it must necessarily have the power to examine any case before it and make a determination of whether or not its writ jurisdiction is engaged. Judicial review under Article 226 is an intrinsic feature of the basic structure of the Constitution.

17. The observation extracted above raises an important consideration with respect to the present case. If, by the self-imposed rule, the writ jurisdiction of High Courts is circumscribed by the existence of a suitable alternate remedy, whether constitutional, statutory, or contractual, then a High Court should not exercise its writ jurisdiction where such an alternate remedy exists. Thus, before we address the question of whether or not Clause 21 of the Constitution and by-laws compel the Bombay High Court to abstain from entertaining the appellant's writ petition, we must first address ourselves to whether, even in the absence of Clause 21, the existence of an alternate remedy would create a bar on the Bombay High Court entertaining the appellant's writ petition.

*19. This a*rgument of the second respondent is misconceived. *The existence of an alternate remedy, whether adequate or not, does not alter the fundamentally discretionary nature of High Court's writ jurisdiction and therefore does not create an absolute legal bar on the exercise of the writ jurisdiction by a High Court. The decision whether or not to entertain an action under its writ jurisdiction remains a decision to be taken by the High Court on an examination of the facts and circumstances of a particular case.*

20. This understanding has been laid down in several decisions of this Court. In U.P. State Spg. Co. Ltd. v. R.S. Pandey this Court held: (SCC p.270, para 11)

"11. Except for a period when Article 226 was amended by the Constitution (Forty-Second Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy." (Emphasis supplied)

22. Perusal of the aforesaid judgements would disclose that as a general rule, the High Court should not entertain the writ petition under Article 226 of the Constitution of India where alternative remedy is available, more so, when statutory alternative remedy by way of filing appeal, revision etc. is available. However, law has been settled that in fact, it is a rule of discretion and not one of compulsion and the court may consider the pros and cons of the case and then may interfere if it comes to the conclusion that

where the petitioner seeks enforcement of any of the fundamental rights or where there is failure of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. Thus, law at this stage is settled that the Courts in extraordinary circumstances may come to the conclusion where the authority has assumed powers which they do not possess or where there is principle of natural justice or the proceedings themselves are of abuse of process of law.

23. In the present bunch of petitions, the order of the controlling authority is being assailed purely on legal ground, particularly asserting that the controlling authority under the Act had no jurisdiction to interpret the Service Regulations and to pick up the best out of the two schemes to extend the benefit to an officer although such officer is governed by one scheme only. I find that even the provisions of Regulations regarding Payment of gratuity are also in favour of the contesting respondents to the extent that the amount is to be calculated in two modes, one, as per the provisions of Payment of Gratuity Act and second, as per provisions of Service Regulations and shall be entitled to gratuity amount, whichever is higher. Thus, assuming the jurisdiction above Rs. 10,00,000/- by the controlling authority goes to the root of the case and the issue of jurisdictional error is clearly involved in the present bunch of petitions. That apart, question whether dearness allowance can be included in term 'pay' or 'last drawn pay' is also purely legal in nature, where no finding of fact is required, power whereof, normally, is available or should be with the appellate authority.

24. I am not inclined to say that if matter is relegated to appellate authority, it would be a case of "from Caesar to Caesar's wife", however, I am of the prima facie opinion that when it is a question of interpretation of powers or jurisdiction of the controlling authority, the department appellate authority/ the statutory appellate authority under the same Act, most likely, would not be inclined to interpret the powers or jurisdiction of the controlling authority in a manner so as to curtail or limit the same.

25. In such view of the matter, for the discussion made hereinabove present bunch of petitions is maintainable or at least, I am inclined to entertain the same.

26. Since all the respondents are represented through their counsel, notices need not be issued.

27. All the respondents are granted four weeks time to file counter affidavit. The petitioners shall have three weeks thereafter to file rejoinder affidavit.

28. List immediately thereafter before the appropriate Court.

29. Until further order of this Court, the effect and operation of the impugned order dated 31.1.2020 and form (R) notice for payment of gratuity dated 5.2.2020 passed by the Assistant Labour Commissioner (Central)/Controlling Authority under the Payment of Gratuity Act, 1972 in Case No. A-48 (38) of 2018 (Shri Dilip Kumar Shukla vs. The Chairman, Purvanchal Bank and Another) shall remain stayed.

30. Matter shall not be treated as tied up or part heard to this Bench.

(2021)03ILR A625
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.02.2021

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE JAYANT BANERJI, J.

Writ-C No. 3209 of 2020
Along with
Writ-C Nos. 3210 of 2020, 3225 of 2020 & 3226 of 2020

PSA Impex Pvt. Ltd., Delhi ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Anubhav Singh

Counsel for the Respondents:
Sri Anil Tiwari, Sri Waseem Masood

Real Estate (Regulation and Development) Act, 2016 - Jurisdiction of Single member - Complaint filed by the aggrieved person u/s 31 of the RERA Act, can be adjudicated by Single Member of the U.P. Real Estate Regulatory Authority - Court rejected the contention that single member of the Authority had no jurisdiction to decide the complaint of the allottees & such complaint can be adjudicated by the Authority, comprising of three members including its Chairperson only

S. 21 of RERA Act, 2016 - Composition of Authority - The Authority shall consist of a Chairperson & not less than two Members - Delegation - S. 81, The Authority may, delegate to any member, officer of the Authority or any other person powers and functions under this Act - U.P. RERA in its meeting 05.12.2008 decided that Single Member Bench be created for disposal of the complaints at both the places of sitting, Lucknow & Gautam Budh Nagar - U.P. Real Estate Regulatory Authority (General) Regulations, 2019- Regulation 24(a) - For adjudication proceedings with respect to complaints filed with the Authority, the Authority may,by order, direct that specific matters or issues be heard and decided by a single bench of either the Chairperson or any Member of the Authority (Para 20)

Dismissed

List of Cases cited :

1. Janta Land Promoters Pvt. Ltd. Vs U.O.I. & ors CWP No. 8548 of 2020 (P&H)

2. M/s K.D.P. Build Well Pvt. Ltd. v. State of U.P. 2020 (3) All LJ 39

(Delivered by Hon'ble Mrs. Sunita Agarwal, J. & Hon'ble Jayant Banerji, J.)

1. Heard Sri Anubhav Singh learned counsel appearing for the petitioners and Sri Anil Tiwari learned Senior Advocate assisted by Sri Waseem Masood for respondent no. 2.

2. This bunch of writ petitions have been filed for quashing of the orders passed by respondent no. 2 namely the U.P. Real Estate Regulatory Authority, Gautam Budh Nagar, whereby the petitioners (promoters) had been directed to refund the amount deposited by the allottees alongwith interest. Sole ground pressed to challenge the orders impugned is that single member of the Authority had no jurisdiction to decide the complaint of the respondents/allottees and, as such, the order is illegal being *coram non judice*.

3. It is vehemently argued by the learned counsel for the petitioners that the Authority as conceptualised under the Real Estate (Regulation and Development) Act, 2016 (In short as "the RERA Act, 2016") is the Real Estate Regulatory Authority (In Short as "the RERA or the Authority"), established and incorporated under Section

20 of the RERA Act, 2016 by the appropriate Government.

The constitution/composition of the Authority is provided under Section 21 of the RERA Act, 2016 which states that the Authority shall consists of a Chairperson and not less than two whole-time Members to be appointed by the appropriate Government.

The complaint filed by the aggrieved person under Section 31 of the RERA Act, 2016 is, thus, can be adjudicated by the Authority, comprising of three members including its Chairperson. A Single Member of the Authority cannot constitute it so as to discharge the adjudicatory functions of the Authority or to exercise the powers under Sections 35 to 40 of the Act, 2016.

The orders impugned, therefore, are liable to be set aside being without jurisdiction.

4. The judgment of the High Court of Punjab and Haryana at Chandigarh dated 16th October, 2020 in **Janta Land Promoters Private Limited vs. Union of India and others**1 alongwith other connected writ petitions has been placed before us to submit that considering various provisions of the Act, 2016, it was held therein that the Single Member of the Authority cannot validly pass order on a complaint under the Act. Regulations 7 and 8 of the Punjab RERA (Procedure for Handling complaints and Related Matters) Regulations, 2017 by which a Single Member Bench of the Authority was entrusted to adjudicate the complaint, had been struck down as being ultra vires the Act.

5. At the outset, we may note that in the instant matter, there is no challenge to the provisions of the U.P. Real Estate Regulatory Authority (General) Regulations, 2019 (In Short as "the Regulations, 2019") framed by the U.P. Real Estate Regulatory Authority in exercise of the powers conferred on it under Section 85 of the RERA Act, 2016.

Learned counsel for the petitioner rather placed regulations 19, 20, 21 and 22 of the Regulations, 2019 to assert that if in any meeting of the Authority duly convened, the quorum is not complete, the meeting shall have to be adjourned. He submits that every meeting of the Authority to conduct its business has to be presided over by the Chairman. Only in case, where the Chairman is unable to be present in the meeting by any reason or the post itself is vacant, a Member chosen by the members present amongst themselves at the meeting shall preside. All questions before any meeting of the Authority have to be decided by a majority of votes of the Members. In any case, the quorum for the meeting of the Authority is three.

6. It is vehemently argued that in any case, under the scheme of the Act, the Authority, which has been entrusted with the powers to adjudicate on a complaint is a three Member body constituted under Section 21 of the Act. The decision of a Single Member is nothing but usurpation of power conferred upon the Authority.

7. Sri Anil Tiwari learned Senior Advocate assisted by Sri Waseem Masood appearing for respondent no. 2, on the other hand, places various provisions of the RERA Act, 2016 and relying upon Section 81 of the Act, it is submitted that the Authority has power to delegate any of its power and functions under the Act, except the powers to make regulations under

Section 85, by general or special order in writing. The delegation of power may be on any Member, Officer of the Authority or any other person, subject to such conditions if specified in the order. In accordance with the said provision, the U.P. RERA in its meeting held on 14.8.2018 under Agenda No. 1.03 had decided to make arrangement of Benches of two Members each, for hearing of the complaints at two places of its sitting, Lucknow and Gautam Budh Nagar. In another meeting held on 5.12.2018 under Agenda No. 1, it was decided that Single Member Bench be created for disposal of the complaints as and when required at both the places of sitting, Lucknow and Gautam Budh Nagar. With reference to paras 18 to 23 of Regulations 2019 framed by U.P. RERA, it is argued that the procedure for conducting the meetings of the Authority specified by the regulations makes it clear that the quorum for the meeting of the Authority of three Members as per Regulation 19, is required for transaction of its business other than the adjudicatory proceedings.

The contention is that Section 29 of the RERA Act, 2016 provides that in regard to the transaction of business at its meetings, the Authority shall follow the rules of procedure, including quorum at such meetings, as prescribed in the regulations framed by it. Section 85 empowers the Authority to make regulations consistent with the Act and rules made thereunder, on the matters as prescribed in sub-section (2) and any other matter in respect of which provision is to be made by regulations to carry out the purposes of the Act. In exercise of its power under Section 85, Regulations 2019 have been framed by U.P. RERA Authority to formulate the rules of procedure for transactions of its business. Regulations 18 to 25 have been framed to provide procedure for the meetings of the Authority, other than the adjudicatory functions of the Authority. Regulation 24 refers to conduct of adjudication proceedings and provides that with respect to the complaints filed with the Authority, the Authority may, by order, direct that specific matters or issues be heard and decided by a Single Bench of either the Chairperson or any Member of the Authority.

It is then argued that the RERA Act, 2016 has been framed with an object to provide adjudicatory mechanism for speedy redressal of the disputes. There is only one Authority for the State of U.P. By notification dated 19.9.2018, the State Government has provided two places of sitting of the RERA Authority, one at Lucknow as Headquarter and another at Greater Noida, Gautam Budh Nagar as Regional Office. More than 30,000 complaints are pending before the RERA Authority and in view of the rising numbers of complaints, arrangement has been made to create benches for hearing and speedy disposal of the complaints. The Division Benches of this Court in similar matters have taken the view that the delegation of power to a Single Member of the Authority to decide the complaints is in valid exercise of power under Section 81 of the RERA Act, 2016. Some of the decisions appended with the counter affidavit have been placed before us to substantiate the above assertions.

8. Learned counsel for the petitioner, in rejoinder, however, states that one such decision in **M/s K.D.P. Build Well Pvt. Ltd. v. State of U.P**.2 had been placed before the Division Bench of Punjab and Haryana High Court. In the above noted decision, the Division Bench of the said

Court had expressed its disagreement with the conclusion drawn therein that under Section 81 of the Act, the Authority could have delegated its adjudicatory function to a Single Member. It was observed therein that it is inconceivable that the Authority could issue a general or special written orders to entrust the adjudicatory functions of the Authority to a Single Member, contrary to the express wording of Section 21 of the Act requiring the Authority to comprise of a Chairperson and two members.

It is argued that unless there is an express provision in the Act itself permitting the Authority to sit in Benches with lesser number of members or a Single Member, it is not possible for the Authority, either in exercise of its power under Section 81 or Section 85, to entrust its adjudicatory functions in relation to complaints to a Single Member.

9. It is pertinent to note at this stage that in the matter before the Punjab and Haryana High Court, there was no order, general or special, of the Authority under Section 81 of the Act to delegate its adjudicatory power to a Single Member. In the case before the Punjab and Haryana High Court, the validity of regulations framed by the Authority therein providing for disposal of complaint by a Single Member had been challenged being ultra vires the Act.

10. In light of the above arguments, it would be apt to first go through the provisions of the Act, Rules and Regulations framed thereunder.

The Real Estate (Regulation and Development) Act, 2016 (In Short as "the RERA Act, 2016") has been enacted to establish the Real Estate Regulatory Authority (In Short "the Authority"). The long title of the Act provide the object and purpose of its establishment for regulation and promotion of the real estate sector and one of the objects is to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear the appeals from the decisions, directions or order of the Authority and the adjudicating officer. The "adjudicating officer" is defined under Section 2(a) means the officer appointed under sub-section (1) of Section 71. The "Authority" defined under Section 2(i), is the Real Estate Regulatory Authority established under sub-section (1) of Section 20. The "Appellate Tribunal" defined under Section 2(f) is the Real Estate Appellate Tribunal established under Section 43.

Section 20 of the Act provides for establishment and incorporation of Real Estate Regulatory Authority by the appropriate Government, which is the "State Government" within the meaning of Section 2(g)(iv). Section 20(1) states that the appropriate Government shall establish an Authority to be known as the Real Estate Regulatory Authority to exercise the powers conferred on it and to perform the functions assigned to it under the Act.

As per sub-section (2) of Section 20, the Authority so established shall be a body corporate having perpetual succession and a common seal, with the power, subject to the provisions of the Act, to acquire, hold and dispose of property, both movable and immovable and to contract, and shall, by the said name, sue or be sued.

The composition of the Authority is provided under Section 21, which reads as under:-

"21. Composition of Authority:- *The Authority shall consist of a Chairperson*

and not less than two whole-time Members to be appointed by the appropriate Government."

11. As we understand from the careful reading of Sections 20 and 21 of the Act, the Authority established under Section 21, as per its constitution provided therein, shall be a body which is empowered to discharge the functions assigned to it under the Act, in exercise of the powers conferred on it. The object to establish the Authority is to regulate and promote the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project in an efficient and transparent manner. It has been given power, subject to the provisions of the Act, to acquire, hold and dispose of property, both movable and immovable, and to enter into contract by its name. The adjudicatory functions of the Authority is only one of the various functions provided under Section 32 & and Section 34 of the RERA Act, 2016, relevant clauses of the Section 34 read as under:-

"(f) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder;

(g) to ensure compliance of its regulations or orders or directions made in exercise of its powers under this Act;"

Section 31 of the Act provides that the complaint, for any violation or contravention of the provisions of the Act or the rules and regulations made thereunder, against any promoter allottee or real estate agent, may be filed with the Authority or the adjudicating officer, as the case may be. Sections 35 to 40 confer powers on the Authority to pass orders, issue directions including interim orders on the complaints requiring such person who act in contravention of the Act, rules and regulations, to comply the same and to impose penalty or interest, in regard to any contravention of obligations cast upon such person. While making an inquiry on such complaint, the Authority has the powers, in respect to matters provided in sub-section (2) of Section 35, as are vested in a civil court under the Code of Civil Procedure while trying a suit. Section 38 (2) provides that in making such order or direction, the Authority shall be guided by the principles of natural justice and subject to the above provisions of this Act and the Rules made thereunder, it shall have powers to regulate its own procedure. Section 40 confers power upon the Authority to execute its own orders and make recovery from such person against whom an order of imposition of interest or penalty has been passed. Section 71 of the Act prescribes for appointment of one or more judicial officer as deemed necessary, by the Authority in consultation with the appropriate Government as an adjudicating officer for holding an inquiry in the matter of adjudging compensation under Sections 12, 14, 18 and 19 of the Act, 2016. Chapter VII deals with the establishment of the Real Estate Appellate Tribunal and its powers both administrative and adjudicatory.

12. It can, thus, be seen that three adjudicatory forums have been created under the RERA Act, 2016. The complaint filed by an aggrieved person for violation or contravention of the provisions of the Act or the rules or regulations made thereunder against any promoter, allottee or Real Estate Agent has to be dealt with by the Authority in accordance with its powers under Sections 35 to 40 contained in Chapter V of the Act. The Real Estate

Appellate Tribunal is constituted only to deal with the appeals from the decisions, directions or orders of the Real Estate Regulatory Authority or an adjudicatory officer under the Act. The administrative powers of Chairperson of the Appellate Tribunal is restricted to the powers of general superintendence and direction in the conduct of the affairs of Appellate Tribunal.

Section 81 which confers power of delegation and Section 85 conferring power to make regulations to the Authority read as under:-

*"**81. Delegation**.- The Authority may, by general or special order in writing, delegate to any member, officer of the Authority or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the power to make regulations under section 85) as it may deem necessary.*

***85. Power to make regulations.**- (1) The Authority shall, within a period of three months of its establishment, by notification, make regulations, consistent with this Act and the rules made thereunder to carry out the purposes of this Act.*

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-- 3 (a) [* *]*

(b) [* *];*

(c) such other information and documents required under clause (f) of sub-section
(1) of section 11;

(d) display of sanctioned plans, layout plans along with specifications, approved by the competent Authority, for display under clause (a) of sub-section (3) of section 11;

(e) preparation and maintenance of other details under sub-section (6) of section 11;

(f) time, places and the procedure in regard to transaction of business at the meetings of the Authority under sub-section (1) of section 29;

(g) [* *];*

(h) standard fees to be levied on the promoter, the allottees or the real estate agent under clause (e) of section 34;

(i) any other matter which is required to be, or may be, specified by regulation or in respect of which provision is to be made by regulations."

13. From a careful reading of Section 81, it is clear that the Authority can delegate such of its powers and functions under the Act (except the powers to make regulations under Section 85), as it may deem necessary, to any member, officer of the Authority or any other person subject to such conditions as may be specified in the order.

14. Looking to the plain and simple language of Section 81, it cannot be said that the power of delegation conferred upon the Authority to adjudicate on a complaint and execute its order provided under Sections 35 to 40, in discharge of its functions under Clauses (f) and (g) of Section 34, is restricted in any manner. There is no exclusion or prohibition except to delegate the power to make regulations.

Section 85 confers power on the Authority to make regulations, consistent with the Act and the rule made thereunder, to carry out the purposes of the Act. Clause (i) of Section 85 (2) says that the Authority may make regulations on any other matter

which is required to be specified by regulations, or in respect of which provision is to be made by regulations.

Section 29 of the Act, 2016 states that the Authority shall follow such rule of procedure at its meetings in regard to the transaction of its business, as may be specified by the regulations, made by the Authority.

15. It can, thus, be seen that the Authority has been given ample powers to formulate such rules of procedure, as it may require in regard to the transaction of its business, by making regulations providing the same and it shall follow such rules of procedure at its meetings. There is no mandate of the Act for collective decision of members of the Authority on any matter.

16. A reading of the regulations 18 to 22 of the Regulations, 2019 shows that the quorum (of three) for the meetings of the Authority and the provision for transaction of its business by majority of the votes of the members in such meeting, is applicable to the meetings of the Authority for performing functions other than the adjudicatory functions of the Authority. For conducting adjudicatory proceedings with respect to the complaints filed with the Authority, the rules of procedure have been made under Clause 24 of the regulations as under:-

*"**Adjudication proceedings:- 24**. (a) For adjudication proceedings with respect to complaints filed with the Authority, the Authority may, by order, direct that specific matters or issues be heard and decided by a single bench of either the Chairperson or any Member of the Authority.*

(b) The Authority, is consultation with the state government, will appoint Adjudicating Officers on the Panel of U.P. RERA for the purposes of adjudicating the matters of compensation admissible under the Act.

(c) The aggrieved persons will be required to file complaints before the Authority online in form - M. The claims of compensation will also be included in form - M itself. While the Authority will decide all the questions of breaches of the Act, Rules and Regulations, it will refer the question relating to the adjudication of compensation to one of the Adjudicating Officers on the Panel of U.P. RERA who will then decide the matter expeditiously and preferably within 60 days.

(d) The Adjudicating Officers on the Panel of U.P. RERA will hold their courts at Lucknow or Gautam Buddhnagar as decided by the Chairman. The complaints relating to the districts of NCR will be heard at Gautam Buddhnagar whereas complaints from the remaining districts of the State will be heard at Lucknow."

Even otherwise, there is no challenge here either to the resolutions passed by the Authority in the year 2018 for delegation of its power to a Single Member of the Authority under Section 81 of the Act or to the regulation 24 of the Regulations, 2019 framed by the Authority in exercise of its power under Section 85 of the Act.

17. The constitution of the Authority as prescribed in Section 21 of the Act is for the establishment of an Authority as a body corporate under Section 20 of the Act for discharge of its various functions with the power to acquire, hold and dispose of property, both movable and immovable, and to contract. This provision does not restrict power of the Authority to frame regulations to formulate rules of procedure for discharge of its statutory functions or

mandates that the decision of the Authority should be a collective decision.

18. From a comprehensive reading of the Act and the regulations made thereunder, it cannot be said that the Authority established by the State Government as a body in the name of Real Estate Regulatory Authority (RERA) cannot delegate its power or frame regulations to carry out various objects and purposes of the Act, one of which is for providing mechanism for speedy dispute redressal by disposal of the complaints. Section 21 of the Act cannot be read in the manner as has been read by the learned counsel for the petitioners.

Further, the Act does not provide for benches of the Authority for discharge of its adjudicatory functions in the manner in which it provides for benches of the Appellate Tribunal under Section 43(3) of the Act. The difference is that the adjudicatory function is only one of the functions of the Authority in exercise of its powers to ensure compliance of the obligations under the Act whereas Appellate Authority discharges only adjudicatory function of hearing appeals from the decisions of the Authority or the adjudicating officer.

19. Ample power has been given in the Act to the Authority to formulate the rules of procedure, in regard to the transaction of its business, in discharge of its functions in exercise of powers conferred on it under the Act. The power to delegate and the power to make regulations both have been given to the Authority so as to enable it to carry out the purposes of the Act. The decision of the Authority to delegate and the regulations framed by it to create benches for early disposal of the complaints, can not be said to be inconsistent with the Act.

20. For the above discussions, the orders passed by the Single Member of the Real Estate Regulatory Authority, subject matter of challenge in this bunch, cannot be said to suffer from lack of jurisdiction.

21. As far as the view expressed by the Division Bench of the Punjab and Haryana High Court is concerned, on appreciation of the legal provisions, the said view cannot be accepted. With due regards to the learned Judges holding the bench, it may be noted that certain relevant provisions of the RERA Act have escaped their attention.

Even otherwise, as noted above, there is no challenge to the provisions of the Regulations, 2019 framed by the Authority (UPRERA) in the instant case.

For the aforesaid, the writ petitions are found devoid of merits and hence **dismissed.**

(2021)03ILR A632
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2021

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Writ-C No. 5604 of 2021

Balram ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajnesh Kumar, Sri Ram Sagar Yadav

Counsel for the Respondents:

C.S.C., Sri Hari Narayan Singh, Sri Puneet Bhadauria

Essential Commodities Act (10 of 1955) , S.3 - U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order (2016) , S.13(1) - Review - Fair price shop license - Appellate authority i.e. Commissioner has power to recall/review its earlier order of restoration of fair price shop license, if order obtained by playing fraud - *Held* - every authority, which has passed the order, has also inherent power of review of his own order provided the said order has been obtained by playing fraud or misrepresentation of such a dimension as would affect the very basis of the claim or where the Court is misled by a party or the Court itself commits a mistake which prejudices a party (Para 9, 10)

Dismissed.

List of Cases cited :

1. Smt. Urmila Jaiswal vs. State of U.P. & Ors 2013(4) ADJ 205 (DB)

2. Industrial Infrastructure Development Corp (Gwalior) Vs CIT Gwalior MP (2018) 4 SCC 494

3. United India Insurance Co. Ltd. Vs Rajendra Singh AIR 2000 SC 538

4. Smt. Rambeti Vs State of U.P. And Others 2017 (1) ADJ 59

(Delivered by Hon'ble Vivek Kumar Birla)

1. Heard Sri Ram Sagar Yadav, Advocate holding brief of Sri Rajnesh Kumar, learned counsel for the petitioner and learned Standing Counsel and Sri Puneet Bhadauria, learned counsel for the respondent no.4, Rasbihari and Sri H.N. Singh, learned counsel appearing for the respondent no.5.

2. Present petition has been filed with following prayers:-

"I. Issue a writ order or direction in the nature of certiorari quashing the impugned order dated 31.12.2020, passed by respondent no. 2 i.e. Additional Commissioner (Judicial), Kanpur Region, Kanpur in Appeal No. 02089 of 2019 (Computer Case No. C2019030000002089) (Balram Vs. Sub Divisional Magistrate), under Section 13 (1) of the U.P. Essential Commodities (Supply & Distribution), whereby, the respondent no.2 allowed the recall application of the respondent no.4 and recalled his judgment and order dated 26.06.2020, passed in the aforesaid appeal (Annexure No. 5 to this writ petition).

II. Issue a writ, order or direction in the nature of mandamus permit the petitioner to carry the stock of essential commodities and to restore the order dated 26.6.2020, passed by respondent no.2."

3. By the order impugned herein dated 31.12.2020, the order passed by the appellate authority dated 26.6.2020 was recalled and the appeal was restored to its original number. Initially, the appeal of the petitioner herein was allowed by the Commissioner by the aforesaid order dated 26.6.2020 and his fair price shop license was restored. The said order was recalled on the ground that fraud has been played. Thus, the recall of the earlier order dated 26.6.2020 is on the ground that a fraud had been played in obtaining the said order.

4. Challenging the aforesaid order, placing reliance on a judgment of Hon'ble Division Bench of this Court in case of ***Smt. Urmila Jaiswal vs. State of U.P. And Others 2013(4) ADJ 205 (DB)*** submission of learned counsel for the petitioner is that the appellate authority has no power of

review and therefore, the order impugned herein is without jurisdiction. He submits that the statute does not confer any power on the appellate authority to review his own order.

5. Per contra, learned counsel appearing for the caveator- respondent has placed reliance on a judgment of Hon'ble Apex Court in case of ***Industrial Infrastructure Development Corporation (Gwalior) vs. Commissioner of Income Tax, Gwalior, Madhya Pradesh (2018) 4 SCC 494*** and submitted that in paragraph 21 of the aforesaid judgment, it has been held by the Supreme Court that a quasi-judicial order can be generally varied or reviewed when obtained by fraud.

6. Learned Standing Counsel has also supported the impugned order by submitting that any order obtained by fraud can be recalled or reviewed by the authority concerned and there is no bar to the same.

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

8. It is not in dispute that the impugned order dated 31.12.2020 recalling the earlier order dated 26.6.2020 has been passed on the ground that the same is obtained by playing fraud.

9. Insofar as power of any authority to review or recall its own order in case of fraud is too well settled. In case of ***United India Insurance Co. Ltd. vs. Rajendra Singh AIR 2000 SC 538*** the Hon'ble Supreme Court has held that no Court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wrangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim. Paragraphs 3, 14, 15, 17 of Rajendra Singh (supra) are quoted as under:-

"3. "Fraud and justice never dwell together." (Frans etjus nunquam cohabitant) is a pristine maxim which has never lost its temper over all these centuries. Lord Denning observed in a language without equivocation that "no judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for, fraud unravels everything" (Lazarus Estate Ltd. vs. Beasley, 1956 (1) QB 702.)

14. In S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagnnath (dead) by Lrs. & ors. {1994 (2) SCC 1} the two Judges Bench of this Court held:

"Fraud avoids all judicial acts, ecclesiastical or temporal- observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree- by the first court or by the highest court-has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

15. In Indian Bank Vs. Satyam fibres (India) Pvt. Ltd. {1996 (5) SCC 550} another two Judges bench, after making reference to a number of earlier decisions rendered by different High Courts in India, stated the legal position thus:

"Since fraud affects the solemnity, regularity and orderliness of the proceedings of the Court and also amounts to an abuse of the process of Court, the Courts have been held to have inherent power to set aside an order obtained by fraud practised upon that Court. Similarly, where the Court is misled by a party or the Court itself commits a mistake which

prejudices a party, the Court has the inherent power to recall its order."

17. Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim."

10. The Hon'ble Single Bench of this Court in case of ***Smt. Rambeti vs. State of U.P. And Others 2017 (1) ADJ 59*** has also held that every authority, who has passed the order has also the power to review its own judgments provided the order is obtained by playing fraud or misrepresentation. In this case, the judgment, which was referred to by the learned counsel for the petitioner, in Smt. Urmila Jaiswal (supra) has also been considered in paragraph 7 of the judgment. Paragraphs 7, 8 and 9 of Smt. Rambeti (Supra) are quoted as under:-

"7. The power of review is creation of the statute and if, under the relevant statute, the power of review has not been conferred upon the authority, may be judicial or quashi judicial or administrative. The said power cannot be exercised. In Kalabharati Advertising v. Hemant Vimalnath Narichania and others, (2010) 9 SCC 437, Hon'ble Apex court has observed as under:-

12. It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed is ultravires, illegal and without jurisdiction. (vide: Patel Chunibhai Dajibha v. Narayanrao Khanderao Jambekar & Anr., AIR 1965 SC 1457; and Harbhajan Singh v. Karam Singh & Ors., AIR 1966 SC 641).

13. In Patel Narshi Thakershi & Ors. v. Shri Pradyuman Singhji Arjunsinghji, AIR 1970 SC 1273; Maj. Chandra Bhan Singh v. Latafat Ullah Khan & Ors., AIR 1978 SC 1814; Dr. Smt. Kuntesh Gupta v. Management of Hindu Kanya Mahavidhyalaya, Sitapur (U.P.) & Ors., AIR 1987 SC 2186; State of Orissa & Ors. v. Commissioner of Land Records and Settlement, Cuttack & Ors., (1998) 7 SCC 162; and Sunita Jain v. Pawan Kumar Jain & Ors., (2008) 2 SCC 705, this Court held that the power to review is not an inherent power. It must be conferred by law either expressly/specifically or by necessary implication and in absence of any provision in the Act/Rules, review of an earlier order is impermissible as review is a creation of statute. Jurisdiction of review can be derived only from the statute and thus, any order of review in absence of any statutory provision for the same is nullity being without jurisdiction.

14. Therefore, in view of the above, the law on the point can be summarised to the effect that in absence of any statutory provision providing for review, entertaining an application for review or under the garb of clarification/ modification/correction is not permissible.

A Division Bench of this Court too in Smt. Urmila Jaiswal v. State of U.P. and others, 2013 (4) ADJ 205 (DB) has also taken the same view which read as under:-

21. From the proposition of law as laid down in the above cases, it is well established that unless the Statute/Rule permit, the review application is not maintainable in case of judicial/quasi

judicial orders. In Order 2004, no power of review has been expressly provided nor such power can be read by implication.

Although the Hon'ble Apex Court in Indian Bank v. M/s. Satyam Fibres (India) Pvt. Ltd., AIR 1996 SC 2592 has taken a different view. The observation made by the Apex Court is quoted herein below:-

22. ....."Since fraud affect the solemnity, regularly and orderliness of the proceedings of the Court and also amounts to an abuse of the process of court, the Courts have been held to have inherent power to set aside an order obtained by fraud practised upon that Court. Similarly, where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order. .....The Court has also the inherent power to set aside a sale brought about by fraud practised upon the Court (Ishwar Mahton v. Sitaram Kumar AIR 1954 Patna 450) or to set aside the order recording compromises obtained by fraud. (Bindeshwari Pd. Chaudhary v. Debendra Pal Singh, AIR 1958 Patna 618; Smt. Tara Bai v. V.S. Krishnaswaymy Rao, AIR 1985 Karnataka 270).

23 "The proposition of law laid down by the Apex Court in the aforesaid case is that every judicial or quashi judicial authority has power to set aside the order obtained by fraud practised upon that Court or where the Court is misled by the party and the Court itself commits a mistake which prejudices a party.

8. In United Industries Insurance Company Ltd. v. Rajendra Singh, AIR 2000 SC 1165 the Apex Court held that every court or Tribunal has the power to " review its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension, as would affect the very basis of the claim."

9. In view of the foregoing discussions, it is clear that every authority, which has passed the order, has also power of review his own order provided the said order has been obtained by playing fraud or misrepresentation or court itself committed a mistake which prejudices a party. Otherwise review jurisdiction cannot be involved in absence of power conferred upon the authority under the relevant statute."

11. Paragraph 21 of **Industrial Infrastructure Development Corporation (supra)** is also quoted as under:-

"21. The general power, under Section 21 of the General Clauses Act, to rescind a notification or order has to be understood in the light of the subject matter, context and the effect of the relevant provisions of the statute under which the notification or order is issued and the power is not available after an enforceable right has accrued under the notification or order. Moreover, Section 21 has no application to vary or amend or review a quasi judicial order. A quasi judicial order can be generally varied or reviewed when obtained by fraud or when such power is conferred by the Act or Rules under which it is made. (See Interpretation of Statutes, Ninth Edition by G.P. Singh page 893)."

12. In such view of the matter, I am of the opinion that the order impugned herein does not suffer from any jurisdictional error.

13. I am consciously not referring to the merits of the findings recorded by the trial court as it may prejudice rights of the parties in appeal, which has been restored to its original number.

14. Accordingly, no interference is warranted in the order impugned herein.

15. The petition is devoid of merits and is, accordingly, dismissed.

(2021)03ILR A637
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.04.2018

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE SHASHI KANT, J.

Writ-C No. 10191 of 2009

Shiv Ranshu Chhuneja ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Awadhesh Kr. Singh, Sri S.N. Singh, Sri Suresh Srivastava, Ms. Samridhi Arora

Counsel for the Respondents:
C.S.C., Sri A.K. Singh, Sri N. Misra, Sri Subhash Gosain

A. Electricity - Electrocution - Compensation - Indian Electricity Act, 2003, S 161 - Constitution of India Art. 226 - Writ petition challenging order passed u/s 161 of 2003 Act awarding compensation & for a claim of compensation on account of electrocution - maintainability of the writ petition - *Held* - order passed by the Chief Electrical Inspector u/s 161 of 2003 Act awarding compensation is *amenable under Article 226* - award of compensation in exercise of jurisdiction under Article 226 can be undertaken provided there are no serious disputed questions of fact involved (Para 11, 12)

B. Electricity - Electrocution - Quantum of Compensation - adequate, just and fair compensation - damages towards following heads - Aid for helper, minimum sustenance allowance in order to ensure survival, medical expenses, ancillary expenses, running expenses

On account of electrocution petitioner almost 100 % handicapped - accident took in year 2006 when petitioner was 14 years - in the year 2008 petitioner received compensation of Rs.50,000/ from the department - petitioner started earning in 2013 & presently engaged in private job earning Rs.39,000/- per month - petitioner was not earning for 7 years i.e. between 2006 -2013, for the said entire period petitioner held entitled to Rs.10,000/- per month for aiding him through a Helper - petitioner's full earning capacity stood diminished on account of his physical disability - Court Awarded Rs.10,000/- per month calculating the longevity of his life upto 70 years as minimum sustenance allowance in order to ensure his survival - Court awarded consolidated sum of Rs.25 lacs in lieu of medical expenses. - petitioner entitled to a total amount of Rs.86,20,000 – Court directed that any delay in payment would carry 9% simple interest per annum on the unpaid amount (Para 30, 31, 32)

Allowed

List of Cases cited :

1. Neetu Devi Vs State of U.P. & Ors. 2014 (9) ADJ 649

2. Chokhe Lal Vs State of U.P. & Ors W.P. No. 35095 of 2014 dt 10.07.2014

3. Karan Singh & Anr. Vs State of U.P. & Ors W.P. No. 6785 of 2015 dt 10.02.2015

4. The State of Tripura & Anr. Vs Sridhan Choudhury & Anr. AIR 2003 Gauhati 66

5. Chairman, Railway Boad & Ors Vs. Chandrima Das (Mrs.) & Ors (2000) 2 SCC 465

6. Yash Pal Singh (Minor) and Anr. Vs State of U.P. & Ors. 2017 (6) AllLJ 49

7. Executive Engineer, Electricity Distribution Division-II Vs. Chairman, Permanent Lok Adalat & 4 Ors. W.P. Art. 227 No. 4068 of 2015 dt 17.09.2015

(Delivered by Hon'ble Amreshwar Pratap Sahi, J. & Hon'ble Shashi Kant, J.)

1. Heard Ms. Samridhi Arora, learned counsel for the petitioner and Sri Nripendra Mishra, Advocate for U.P. Power Corporation as well as learned Standing Counsel for the State.

2. This writ petition has been pending since the year 2009 for a claim of compensation by the petitioner on having suffered substantial injury on account of electrocution as a result whereof he claims to be almost 100 per cent handicapped. The respondents 2, 3, 5, 6 and 7 which includes the Uttar Pradesh Power Corporation through its Managing Director have filed a short counter affidavit sworn by Mr. L.K.Khan, the then Executive Engineer, Electricity Urban Distribution Division-II, Vasundhara, District Ghaziabad and the affidavit has been affirmed on 15th March, 2009.

3. Paragraphs 1, 2, 3, 4, 5 and 6 of the said affidavit have been sworn on personal knowledge whereas paragraphs 7, 8, 9 and 10 of the affidavit are based on record. To the said counter affidavit a rejoinder affidavit has been filed on behalf of the petitioner denying the contents of the said counter affidavit to the extent indicated therein.

4. This permanent disability on account of the accident, which took place on 20th June, 2006 at about mid-day 12.30 P.M. was reported and a claim was set up with regard to compensation which the petitioner was entitled to receive.

5. It appears that father of the petitioner kept on moving applications reminding the authorities to award compensation as per his request and it also appears that the accident was reported to the police at the concerned Police Station. The petitioner at the time of accident was aged about 14 years.

6. Annexure 12 to the writ petition is a letter dated 6th August, 2007 dispatched by the Superintending Engineer to the Executive Engineer to submit his report with regard to award of compensation in accordance with the rules applicable so that the matter may be processed at the Divisional level and further action in this regard be taken. It appears that thereafter, the machinery was set into motion and a report was called for including that from the Chief Electrical Inspector who is the authority competent to deal with such matters, keeping in view the provisions of Section 161 of the Indian Electricity Act, 2003 (hereinafter referred to as "2003 Act"). The said report, that was processed, has been filed as Annexure 13 to the writ petition, which mentions the entire details relating to the information received, medical examination of the petitioner and the report including the findings of the Chief Electrical Inspector.

7. The said report alognwith the entire documents was dispatched to the Managing Director, Pachimanchal Vidyut Vitran Nigam Ltd.-respondent no. 6 and a copy of the same is Annexure 14 to the writ petition. The matter remained pending and since the petitioner or his father did not receive any response in spite of the matter having been processed, the petitioner was compelled to file writ petition no. 30589 of 2008 that was not entertained subject to the observation that the petitioner may file a claim before the Electrical Inspector in terms of Section 161 of 2003 Act. The judgment of the court is extracted herein under :-

"Petitioner's case is that on account of the fault of the Electricity Deptt. in maintaining the lines, the petitioner suffered serious injuries and he has filed this petition seeking a writ of mandamus commanding the respondents to award him compensation. Sri H.P. Dubey, learned counsel for Power Corporation states that the petitioner has remedy under Section 161 of the Electricity Act, 2003.

In view of the remedy available to the petitioner, we do not find it a fit case for interference in this petition, especially, as the questions of facts are involved.

The petition is, accordingly, dismissed with the observation that the petitioner may file a claim before the Electrical Inspector under the provision of Section 161 of Electricity Act, 2003 or may seek any other remedy available to him."

8. It appears that the matter was pursued by the petitioner before the Chief Electrical Inspector and upon being processed, an order was passed by the Superintending Engineer on 13th December, 2007 awarding compensation of Rs.50,000/- only on the strength of an outer limit of award of such compensation fixed in terms of the Circular dated 19.04.2006, a copy whereof has been filed as Annexure 1 to the short counter affidavit.

9. This writ petition has been filed praying for quashing the order dated 13.12.2007 and for a further mandamus commanding the respondents to award compensation of Rs.2 crores to the petitioner or such appropriate compensation on account of total disability suffered by the petitioner due to the said accidental electrocution.

10. From the pleadings on record what we find is that the main objection taken by the respondents is to the maintainability of the writ petition and secondly, about the quantum which the respondents alleged they are bound to adhere keeping in view the circular dated 19.04.2006 of the Corporation. The third argument, which has been advanced by Sri Nripendra Mishra, learned counsel for the Power Corporation is that there is a scope for adjudication on account of contributory negligence of the victim and in such circumstances neither the writ petition should be entertained nor compensation should be awarded. He has relied on three judgments to substantiate his contention on the issue of maintainability of the writ petition namely the judgment in the case of **Neetu Devi Vs. State of U.P. & Ors., 2014 (9) ADJ 649**, the judgment of the Division Bench dated 10th July, 2014 in **Writ Petition No. 35095 of 2014 - Chokhe Lal Vs. State of Uttar Pradesh and 3 Ors.** and the third judgment in the case of **Karan Singh & Anr. Vs. State of U.P. and 5 Others in Writ Petition No. 6785 of 2015** decided on 10th February, 2015. He has further invited attention of the Court to another Single Judge judgment of Gauhati High Court in the Case of **The State of Tripura & Anr. Vs. Sridhan Choudhury & Anr., AIR 2003 Gauhati 66** to buttress his submission.

11. The first issue, therefore, that we have to determine is as to whether the present writ petition can be entertained and maintained for the award of such compensation and for quashing of the order passed by the respondent - Corporation. We may put on record that the orders, which have been passed for awarding compensation is in the statutory exercise of power under Section 161 of the 2003 Act. Such an order being an order awarding compensation partakes the nature of not

only an administrative order which touches quasi judicial functions as it is an order pertaining to award of compensation to a person having suffered an injury and also that virtually affects his fundamental rights guaranteed under Article 21 of the Constitution of India. In such circumstances, the order passed by the Chief Electrical Inspector can be made amenable to the jurisdiction of this Court under Article 226 of the Constitution of India. It is not only to be tested on the principle of administrative law and reasonableness but also on the ground of protection and enforcement of fundamental rights guaranteed under Article 21 of the Constitution of India, which is one of the primary duties of this Court as enshrined under the Constitution of India. A writ petition can be maintained before this Court for which we find ample support from the judgment of the Apex Court in the case of **Chairman, Railway Boad and others Vs. Chandrima Das (Mrs.) and others, (2000) 2 SCC 465**. Paragraphs 9 to 11 that are extracted hereinunder :

"9. Various aspects of the Public Law field were considered. It was found that though initially a petition under Article 226 of the Constitution relating to contractual matters was held not to lie, the law underwent a change by subsequent decisions and it was noticed that even though the petition may relate essentially to a contractual matter, it would still be amenable to the writ jurisdiction of the High Court under Article 226. The Public Law remedies have also been extended to the realm of tort. This Court, in its various decisions, has entertained petitions under Article 32 of the Constitution on a number of occasions and has awarded compensation to the petitioners who had suffered personal injuries at the hands of the officers of the Govt. The causing of injuries, which amounted to tortious act, was compensated by this Court in many of its decisions beginning from Rudul Sah v. State of Bihar (1983) 4 SCC 141 . (See also Bhim Singh v. State of Jammu and Kashmir (1985) 4 SCC 577; Peoples' Union for Democratic Rights v. State of Bihar (1987) 1 SCC 265; Peoples' Union for Democratic Rights v. Police Commissioner, Delhi Police Headquarters (1989) 4 SCC 730; Saheli, A Women's Resources center v. Commissioner of Police, Delhi (1990) 1 SCC 422; Arvinder Singh Bagga v. State of U.P., AIR 1995 SC 117; P. Rathinam v. Union of India 1989 Supp (2) SCC 716; Death of Sawinder Singh Grower In re 1995 Supp (4) SCC 450; Inder Singh v. State of Punjab (1995) 3 SCC 702; and D.K. Basu v. State of West Bengal (1997) 1 SCC 416.

10. In cases relating to custodial deaths and those relating to medical negligence, this Court awarded compensation under Public Law domain in Nilabati Behera v. State of Orissa (1993) 2 SCC 746; State of M.P. v. Shyamsunder Trivedi (1995) 4 SCC 262; People's Union for Civil Liberties v. Union of India (1997) 3 SCC 433 and Kaushalya v. State of Punjab (1999) 6 SCC 754; Supreme Court Legal Aid Committee v. State of Bihar (1991) 3 SCC 482; Jacob George (Dr) v. State of Kerala (1994) 3 SCC 430; Paschim Banga Khet Mazdoor Samity v. State of West Bengal (1996) 4 SCC 37 and Manju Bhatia v. New Delhi Municipal Council (1997) 6 SCC 370

11. Having regard to what has been stated above, the contention that Smt. Hanuffa Khatoon should have approached the Civil Court for damages and the matter should not have been considered in a petition under Article 226 of the Constitution, cannot be accepted. Where

public functionaries are involved and the matter relates to the violation of Fundamental Rights or the enforcement of public duties, the remedy would still be available under the Public Law notwithstanding that a suit could be filed for damages under Private Law."

12. The second issue with regard to determining such a question if there are disputed questions of fact, have to be taken into account keeping in view the provisions of Fatal Accidents Act, 1855. It is correct that a suit is not barred but it is also equally correct that award of compensation in exercise of jurisdiction under Article 226 of the Constitution of India can be undertaken provided there are no serious disputed questions of fact involved which, in our opinion, is clearly the case in the present writ petition. The reason is not far to see, inasmuch as, the petitioner in the writ petition has come out with a clear case in paragraphs 3 and 4 of the writ petition that he suffered the injury on account of the respondent corporation having not maintained the standards of installation while extending a High Tension line in accordance with the measurements prescribed for laying down of such overhead transmission line at a minimum distance, as prescribed under the Rules.

13. Aforesaid, paragraphs 3 and 4 of the writ petition are extracted herein under :

"3. That this writ petition is being preferred against the order dated 13.12.2007 passed by respondent no.4 whereby a sum of Rs.50000/- was allowed to be paid to th epetitioner as compensation for the serious injury caused on account of electrocution as a result of the petitioner coming into contact with snapped live wire of the electrical transmission line of the respondents and order dated 18.11.2008 passed by respondent no.3 which was communicated by Acting Director on the aforesaid date whereby a recommendation was made to the respondent no. 2, 4 and 5 for payment of the compensation thus noting can be done by this office. A true copy of the order dated 13.12.2007 passed by respondent no.4, communication order/letter dated 18.11.2008 passed by respondent no.3, copy of the claim petition made by the petitioner before the Electrical Inspector (respondent no.6), and as per order dated 30.07.2008 passed by this Hon'ble Court and copy whereof are being filed herewith and marked as Annexure no.1, 2, 3 and 4 to this writ petition.

4. That the respondent no.2 has supplied the electricity to the citizen/ respondent to P.V.V.N. Housing society in callous and capricious manner ignoring the rules and the electric transmission line of high power was kept at a height of only 7 and 8 feet from the earth whereas according to the rules and regulations it should be kept at least at the height of 35 feet from the earth. The respondents has not adopted due precaution and safety measures in supplying the electricity to the residents of the society."

14. In response to the writ petition, a short counter affidavit has been filed without giving any specific reply to any of the paragraphs of the writ petition yet the respondents have denied their fault in any manner whatsoever in paragraph 10 of the counter affidavit, which is extracted herein under :

"10. That in this matter there is no fault on the part of the Uttar Pradesh Power Corporation Ltd. Lucknow. No staff or officer of the electricity department was responsible for this incident. It was an

incidence which occurred due to the fault petitioner only. In spite of that compensation of Rs.50,000/- as prescribed in the office order dated 19, April 2006 and Rs.2,51,000/- as contribution of staff & officers of the circle was provided to the petitioner. Therefore petitioner was given more than the prescribed compensation."

15. The petitioner has replied to the same in paragraph 9 of the rejoinder affidavit, which is extracted herein under :-

"That the contents of paragraph 10 of the counter affidavit are not admitted being incorrect and wrong. It is incorrect to state that there is no fault on the fault of U.P. Power Corporation Ltd. Lucknow. It is also incorrect to state that no staff or officer of the Electricity Department was responsible for the incident. It is also incorrect to state that the said incident occurred due to the fault of petitioner. It is further submitted that an enquiry was made by Acting Director Vidyut Suraksha U.P. Government Lucknow and a report was submitted which has been filed as Annexure 13 to the writ petition. From the enquiry report submitted by Acting Director Vidyut Suraksha U.P. Government Lucknow. It is established that there was prima facie gross negligence on the part of Electricity Department. The contents of paragraph 17, 18 and 19 of the writ petition are reaffirmed as correct."

16. In order to arrive at a conclusion as to whether any of the facts have been disputed or not, it would be apt to mention that paragraph 10 of the counter affidavit quoted above has been sworn on the basis of record. The only record, which has been filed alongwith the short counter affidavit is the communication and the award of the maximum amount to which the petitioner was found entitled. No record has been filed alongwith the short counter affidavit to controvert the contentions which have been raised in the writ petition pertaining to the liability arising out of the allegation of negligence of the respondent-department. To the contrary what we find is that the report has been made available and filed alongwith the writ petition as Annexure 13 thereto, which is the report of the Chief Electrical Inspector that categorically records the entire incident of the accident having taken place when the petitioner had climbed up on a boundary wall to retrieve a cricket ball with which he was playing alongwith his friends. The report categorically states that the petitioner climbed up the wall and the High Tension wires of 11000 KV line, that was passing overhead, had sagged, as a result whereof the petitioner came into contact with the aforesaid loosened wire and met with the accident. The report does not only mention the happening as narrated, but it further goes on to record that this accident occurred on account of the clear negligence of the officials of the department who were enjoined with the duty to maintain the said High Tension line in terms of Indian Electricity Act, 1956 and the relevant provisions in relation thereto. The findings in the report are clearly to the effect that as a matter of fact, notice was not taken of the accident but later on a pole was installed in order to lift the sagging line which in turn, in our opinion, clearly demonstrates that the factum of loosened wires hanging at a height much below than what was required, clearly establish the negligence of the officials who are named in the said report and, therefore, there is no doubt that the said report was rightly made the basis for awarding compensation by the respondents themselves.

17. We are extracting the report, which is in vernacular hereinunder to remove any doubt of the translation of the

gist of the said report indicated herein above :

''अनुसंधान एवं लिये गये बयानों से ज्ञात होता है कि 33/11 के0वी0 सब स्अेशन नीतिखण्ड–2, इन्दिरापुरम से 11 के0वी0 फीडर नं0 7 की लाइन इन्डिया मून सिटी की बाउन्ड्रीवाल से लगभग 0.602 मी0 ऊपर लटक कर झूल रही थी। दिनांक 20–06–2006 को उक्त कालोनी के पार्क में खेलते समय दोपहर लगभग 12.30 बजे कालोनी के बच्चों की गेंद बाउन्ड्री के पार चली गयी जिसे लाने के लिए कालोनी के भवन सं0 22 निवासी श्री विजय कुमार का पुत्र शिव्रांशु बाउन्ड्री पर चढ़ा और ऊपर जा रही 11के0सी0 लाइन के सम्पर्क में आ गया तथा विद्युत स्पर्शघात से दुर्घटनाग्रस्त हो गया एवम् ..... विकलांग हो गया। पश्मिांचल विद्युत वितरण निगम लि0 के सम्बन्धित अधिकारियों द्वारा दुर्घटना को संज्ञान में नहीं लिया गया अपितु लाइन के मध्य बाउन्ड्री के समीप एक पोल लगाकर लाइन को ऊँचा कर दिया गया है। यह दुर्घटना निगम के सम्बिन्धत उपखण्ड द्वारा अपनी लाइनों को नियमानुसार अनुरक्षित न किये जाने एवम् भा0वि0नि0 1956 के नियम 77 (2), नियम 90 (1), नियम 91 (1) के उलंघन के कारण त्रुटिपूर्ण अधिष्ठापन से घटित हुई जिसके लिए उपखण्ड अधिकारी श्री राजीव कुमार गुप्ता एवम् अवर अभियन्ता (वर्तमान में मृतक) तथा लाइन मैन श्री रामसिंह जिम्मेदार हैं। दुर्घटना की विधिवत सूचना न देकर तथा विस्तृत रिपोर्ट न भेज कर नियम 44क का उल्लंघन किया गया है। सम्बन्धित लाइन में नियम 29, नियम 50(1) (बी), नियम 90 (1) एवम् नियम 91 (1) के अन्तर्गत त्रुटियों के निवारण हेतु नियम 5 (4) के आदेश जारी कर दिये गये हैं तथा नियम .... के अर्न्तगत कार्यवाही करने हेतु निर्देशित भी किया गया है।"

18. The aforesaid facts therefore leave no room for doubt, that paragraph 10 of the counter affidavit, which is alleged to have been sworn on the basis of record, is clearly a false averment and is contrary to the entire record of the respondents themselves. We deprecate the act of the concerned official who had sworn the affidavit in spite of the fact that when the counter affidavit was being filed, the report was already a part of the writ petition. There is no denial that Annexure 13 to the writ petition is not the report of the respondents. In such circumstances, the only possible and prudent conclusion that can be arrived at and the only inference, which can be drawn is that there is no dispute about the fact that the negligence was entirely attributable to the employees of the respondent-corporation and there is no contributory negligence on the part of the petitioner. This fact having been established on the basis of record itself as contained in the report of the Electrical Inspector, which has nowhere been disputed by the respondents, therefore, does not give rise to any disputed question of fact which may be required to be gone into after leading any evidence for which a suit may have to be filed.

19. We, therefore, on the facts of the present case and for the reasons stated herein above reject the argument of the learned counsel for the respondents that the petitioner has to file a suit for award of damages and compensation. We are supported in our aforesaid conclusion by the judgments cited on behalf of the petitioner in the case of **Yash Pal Singh (Minor) and Anr. Vs. State of U.P. & 5 Ors. 2017 (6) AllLJ 49**, which in tern refers to various Supreme Court decisions and rules that a writ petition would be clearly maintainable in such circumstances for award of compensation. We therefore, find that there is a later decision of a Division Bench which categorically and exhaustively deals with such a situation and, therefore, as against the Division Bench judgment in the case of **Karan Singh & Anr.(supra), Chokhey Lal (supra)** and that of **Neetu Devi (supra)** we hold that in such a situation, where facts are nowhere disputed relating to the factum of accident, a writ petition can be entertained following the ratio of the judgment in the case of **Yash Pal Singh (Minor) & Anr. (supra)** as well as the judgment of the learned Single Judge in the case of

Executive Engineer, Electricity Distribution Division-II Vs. Chairman, Permanent Lok Adalat & 4 Ors. in Writ Petition under Articel 227 No. 4068 of 2015 decided on 17th September, 2015. We accordingly agree and approve of the said decisions and hold that in such a situation, a writ petition would be maintainable.

20. Having crossed the said hurdle, it is apparent that the argument on behalf of the respondents on the said count has to be rejected namely the maintainability of the writ petition on there being no dispute about the factum of the accident.

21. The next issue, which remains for adjudication, is about the award of maximum compensation as Shri Nripendra Mishra, learned counsel for the respondents contends that the Department is bound by the circular dated 19.04.2006. For this also we may refer to the same decisions that have been relied by learned counsel for the petitioner that the Corporation may have to be guided by its own circular and its authorities may have to adhere to the same, but when it comes to the matter of just and fair compensation, then the same cannot be binding on the Courts which can assess the same and proceed to award adequate compensation as has been held in the decision referred to in the case of **Yash Pal Singh (Minor) & Anr. (supra)** and the case itself.

22. Coming to the last part of the argument, which is in relation to the quantum of compensation, it is on record that the petitioner is the only child of his parents. His permanent disability is no where disputed and therefore, he has to be dependent life long on an income that may be sufficient to make his decent survival possible.

23. Sri Nripendra Mishra, learned counsel for the respondent-Corporation has invited the attention of the Court to the contents of the supplementary affidavit filed by the petitioner to contend that the petitioner having acquired the qualification of Masters in Computer Application, has indicated his own achievements and his current income. He submits that not only this, his future capabilities also cannot be ruled out and in such circumstances, keeping in view the current income of the petitioner, as disclosed in the said affidavit, he will be able to successfully meet the day-to-day expenses as well as expenses that are required for his survival.

24. We have perused the said affidavit and what we find therefrom is that on account of such disability having been suffered by the petitioner at the age of 14 years, his entire educational career was obstructed to the extent that he was unable to pursue better and higher studies of which he was capable of keeping in view the fact that the petitioner has acquired the qualification of Masters in Computer Application with Honours in First Division from the Integral University at Lucknow. Thus, the capability of the petitioner cannot be doubted and therefore, a presumption can be raised about his future career having been marred on account of the accident. It has also been highlighted that the parents have also lost income, inasmuch as, it was the income of the mother of the petitioner, who was running coaching classes and home tuition had to devote all her time with the petitioner and her permanent income was blocked substantially. He then submits that the petitioner's father is in a precarious health condition.

25. The following chart with supporting material has been given in

respect of the medical expenses of the petitioner:

Limbs Expenses (Otto Bock)	Rs.8,30,000/-
Hospital Bills (approx.) (Apollo Hospital)	RS.9,89,553/-
Hospital Bill (Sir Ganga Ram Hospital)	Rs.4,63,769/-
Physiotherapy (approx.)(Rs.200 per day, 4 years)	Rs.2,00,000/-
Other Miscellaneous Charges	Rs.65,000/-
Total	Rs.25,49,003/-

26. Not only this. it has been indicated that if the petitioner has to undergo plastic surgery, he would require an approximate amount of Rs.12 lacks in addition to the aforesaid expenses for meeting his medical expenses.

27. Lastly, he comes up with a plea that he had to take loans in order to meet the expenses including his medical expenses, which were to the tune of Rs.4 lacks, Rs.4.5 lacks and Rs.2.20 lacks. This along with interest has accumulated to Rs.15 lacks.

28. Over and above, the expenses of engaging a Helper and incurring expenses on conveyance have also been stated in the supplementary affidavit.

29. We have considered the submissions raised and in order to construe as to what should be an adequate, just and fair compensation, we may refer to the procedure that can be safely followed in such cases where the Division Bench of this Court in the case of **Yash Pal Singh (Minor) & Anr. (supra)** has evolved a method of calculation after relying on a couple of decisions of the Apex Court in paragraph 59 to 66 of the said judgment that is extracted herein under :

59. Learned counsel for the petitioners has relied upon the judgment of the High Court of Punjab and Haryana in Civil Writ Petition No. 14046 of 2012 (O&M) - Raman v. State of Haryana decided on 02.07.2017 and argued to pay the compensation in light of the above judgment. He has further relied upon another judgment i.e. Naval Kishore Kumar v. State of Himanchal Pradesh reported in in which approximately 1.25 Crores has been awarded to the petitioner in the similar matter. State of Himanchal Pradesh had preferred Civil Appeal No. 1339 of 2017 (State of Himanchal Pradesh v. Nawal Kishore) in which Hon'ble the Apex Court reduced the amount of compensation from Rs. 1.25 Crores to Rs. 90 lakhs considering the amount to be on higher side.

60. We have gone through the relevant provisions regarding assessment of compensation to be paid to the injured in the case of accident or electrocution in similar matters. As discussed, there are two formulas (1) Marginal Propensity to Save (MPS) and (2) Marginal Propensity to Consume (MPC). Meaning thereby, we can assess the income of the injured in case he is employed after a reasonable majority age and gain something in future and second formula relates to the method of calculation regarding minimum amount required to be expended to protect the life of the injured. Spending multiplier (also known as fiscal multiplier or simply the multiplier) represents the multiple by which GDP increases or decreases in response to an increase and decrease in government

expenditures and investment. It is the reciprocal of the marginal propensity to save (MPS). Higher the MPS, lower the multiplier, and lower the MPS, higher the multiplier. The spending multiplier is closely related to the multiplier effect. Assume that households consume 80% of any increase in their income and that the government increases its expenditure by $20 billion. Any government expenditure is actually income of households in the form of wages, interest, rent and profit. Since MPC is 0.8, households will consume $16 billion of the increased income (=0.8 × $20 billion). The $16 billion increase in consumption will trigger second round of increase in incomes (for people associated with production of the consumed products and services) which in turn will trigger second round of consumption amounting to $12.8 billion (=0.8 × 0.8 × $20 billion), and so on. The resulting effect is that the GDP increases by a multiple of initial increase in government expenditures. This multiple is the spending multiplier. A decrease in government expenditures decreases GDP by a multiple in the same fashion.

61. Where, MPS stands for marginal propensity to save which is the percentage of any addition in income which households are going to save and MPC stands for marginal propensity to consume and it is the percentage of any addition in income which households are expected to consume.

62. By definition, MPS + MPC = 1 and MPS = 1 - MPC.

63. We are of the view that assessment in the light of income is a presumptive method and if it is taken into account then from minimum wages to highest paid salary may be available and it would be very difficult to assess at this juncture. The calculation in the light of minimum expenditure to be incurred on the maintenance of the life of the petitioners is a reasonable amount (minimum required in our view) is about Rs. 10,000/- per month and calculating the annual expenditure, it comes to Rs. 1,20,000/- per year and expectancy of life minimum further 50 years. The multiplier for calculation of compensation to be awarded to the petitioners would be 10,000 × 12 × 50 = 60,00,000/- each.

64. The petitioners are also entitled to standard damages towards the following heads--

I. Towards loss of companionship, life amenities and loss of pleasure.

II. Pain and suffering including mental distress, trauma, discomfort and inconvenience.

III. Expenditure to be incurred towards the attendant/nursing expenses.

IV. Expenditure to be incurred for securing artificial/robotic limbs and medical expenses.

65. Since the power corporation is working as an agent of the State of U.P. for providing electricity, we are of the view that the State of U.P. is jointly and severally liable for payment of compensation and for taking safety measures. It is also necessary in furtherance of the object to provide just compensation and take security measurements by the instrumentalities of the State.

66. In light of the above submissions and keeping in view the totality of the circumstances and balance to be struck between just compensation and other compensations, we are of the view that beside payment of a reasonable monetary compensation in the form of damages and other ancillaries, incidental matters, certain directions may also be given to the respondents regarding maintenance and

safety measurements to be taken by the electricity department either to raise the height of the offending transmission line above the abadi for by means of any safety measurement, to make the high tension line safe and render them electrically harmless and take them beyond the reach of man and kids. We are of the view that following directions would sub-serve the purpose--

i. On the principle of joint and several liability, the respondents are jointly and severally liable for payment of compensation awarded in this petition.

ii. To secure the financial and monetary future of the minors Yash Pal Singh and Ankit Kumar Yadav, it is directed that the respondent U.P. Power Corporation Limited would pay 60 lakhs compensation immediately for loss of enjoyment of life, trauma suffered and to act as a guard against neglect and dependence on others, loss of future employability and the agony of future, paid and mental shock 50% of this amount will be deposited in a fixed deposit account in the name of the petitioners separately under joint guardianship of the parents with the petitioners (separately) in a nationalized bank preferably State Bank of India, Lucknow. The amount is directed to be deposited within two months from the receipt of certified copy of this order failing which the amount will carry 6% simple interest per annum till deposit in the bank. The amount awarded under this head will be available to the petitioners on attaining the age of majority.

iii. To meet out the running expenditure at present and daily expenses/attendant or family help or any labour, 50% of this amount for each petitioner is required to be invested in a nationalized bank, State Bank of India, Lucknow, to earn interest on long term fixed deposit. The interest so earned per month on this fixed deposit amount shall be credited to the Saving Bank Accounts of the petitioners with natural guardianship and credited to these accounts. The amount of interest so accrued against these fixed deposits shall automatically be transferred in the Saving Bank Accounts of the petitioners which are to be opened in the same branch in the name of the petitioners operated jointly by the parents and be paid on monthly basis to be used and expended for the care of the petitioners by the parents for educational expenses, nutritious food, cost of the attendants. Respondents are directed to pay this amount within two months from the date of receipt of a certified copy of this order failing which the amount will carry 6% per annum simple interest till it is deposited in the bank accounts.

iv. The Chairman/Managing Director of the Department, with consultation and assistance of the Director General of Health Services, U.P., Lucknow, may also consider the case for immediate medical treatment of the minor petitioners to provide them artificial/robotic limb.

v. Respondents are directed to pay compensation of Rs. 4,00,000/- (Four lakhs) immediately within two months to the natural guardians of each of the petitioners for trauma, mental shock, pain and agony caused to them.

vi. Each petitioner is entitled to have cost of litigation quantified to Rs. 50,000/- (fifty thousands) payable to the guardians of the petitioners.

vii. It would be better to provide that since the Court has awarded a reasonable monetary compensation on the principles of both strict and vicarious liability and tortuous liability based on negligence, it is directed that no civil suit would lie

claiming further compensation with regards to this incident in future in any Court.

viii. Respondents are directed to immediately make some safety measures regarding high tension lines transmitting above or near abadi to make it safe and render them electrically harmless to habitation and take them beyond the reach of man below or to device such other alternatives so as to bypass the colony like the present abadi land in the State of U.P. For the purpose, the Managing Director of the electricity department by constituting a team of experts, engineers of the department may obtain a report and take such remedial measures which are required to meet out and avoid such type of electrocution.

ix. The entitlement of compensation as provided above is individual (per petitioner) and both the petitioners are entitled for above compensation separately."

30. In the present case, the first thing that has to be addressed to is that the petitioner has received only Rs.50,000/- way back in the year 2008. The accident took place in the year 2006 when he was 14 years of age and was pursuing his educational career. In the past 12 years, by the time, this writ petition has been taken up for hearing, the petitioner has pursued his educational career and after having successfully acquired the degree of Master of Computer Application has also been engaged himself in private job. The security of such jobs, is amenable to the choice of the employer and in the aforesaid background, since the date of the accident up to the date when he started earning in 2013, it is obvious that the petitioner was not earning in those 7 years. We, therefore, for the said entire period till he obtained a job in 2013 which is currently giving him Rs.39,000/- per month, we find that the petitioner is entitled to at least Rs.10,000/- per month for aiding him through a Helper as has been provided for by the Division Bench in the case of **Yash Pal Singh (Minor) & Anr. (supra).** On a simple calculation, this would be Rs.1,20,000/- per annum for seven years which would come to Rs.8,40,000/-.

31. The petitioner's earning capacity has been disclosed but in a private job. Nonetheless, his full earning capacity stood diminished on account of his physical disability as disclosed. However, in the background that the petitioner has been able to acquire a qualification and is earning, it would be appropriate to consider the adjustment of such earning while calculating any future benefits to which he may be entitled. Coupled with this, the longevity of life of an average Indian citizen for the time being, as has been assessed in different cases by the Apex Court as well as by the Division Bench in the case of **Yash Pal Singh (Minor) & Anr. (supra)** can be safely construed to be at least 70 years. In such circumstances, the question as to whether the petitioner would continue to earn the same amount for some time keeping in view his physical disability cannot be possibly ruled out and, therefore, a minimum, just and fair compensation has to be awarded to the petitioner on the presupposition that if he looses his job altogether then a minimum sustenance allowance should be made available to him in order to ensure his survival and also in view of any loss of dependency, which may likely accrue as he has no other source of income. Consequently, we find that the ratio in the case of **Yash Pal Singh (Minor) & Anr. (supra)** can be safely allowed to operate on the facts of the

present case as well apart from his medical expenses as well as other ancillary expenses to which he may be found entitled. The medical expenses as disclosed above, indicate provisions of artificial limbs and a continuous course of physiotherapy in order to keep the petitioner physically fit apart from hospital bills and the loans taken have been indicated by the petitioner. In the above circumstances we find that a consolidated sum of Rs.25 lacs be awarded to the petitioner in lieu of medical expenses.

32. Coming to the issue of running expenses of the petitioner, since the petitioner himself is now engaged and is earning then in the said background, the minimum expenses in the event of loss of total earning has to be construed in favour of the petitioner. In the circumstances, the formula adopted in the case of **Yash Pal Singh (Minor) & Anr. (supra)** of giving at least Rs.10,000/- per month calculating the longevity of his life upto 70 years would be a just and fair calculation and we award compensation accordingly. The petitioner for the time being is approximately 26 years of age. Thus, he would have a life expectancy of 44 years and consequently a sum of Rs.1,20,000/- multiplied by 44 would be a just and fair compensation in order to enable the petitioner to meet his usual normal expenses in the light of what has been stated above. This would come to the tune of Rs.52.80 lakhs.

33. Adding all the three amounts as indicated above, the petitioner would, therefore, be entitled to a total amount of Rs.86,20,000/-.

34. Accordingly we allow the writ petition with a direction to the respondents to make available the entire amount to the petitioner as above within three months from today. The payment shall be made by the respondents accordingly and any delay in payment would carry 9% simple interest per annum on the unpaid amount.

35. We may make it clear that we have passed the order on the peculiar facts and nature of the physical disability of the petitioner in this case and also keeping in view the law referred to by the Division Bench in the case of **Yash Pal Singh (Minor) & Anr. (supra)** as well as the other decisions of the Supreme Court referred to therein.

36. There is one more direction which deserves to be given before parting with the case namely the direction already issued by the learned Single Judge in the case of **Executive Engineer, Electricity Distribution Division-II (supra).** The direction given by the learned Single Judge of this Court is as follows :

"This Court considers it desirable that this judgment be communicated to the Chief Secretary, U.P. Government, the Principal Secretary, Energy as well as the Chairman of the U.P. Power Corporation Ltd. and the Managing Director of all four Distribution Companies so that they consider issuing proper guidelines providing for payment of fair and reasonable compensation in case of death, fatal accident or injuries, in supercession of the existing Circular. The Registrar General is directed to take necessary action in that regard, by sending a copy of this order to each one of them. It is expected that all concerned shall ensure compliance of the

observations made above, in its true letter and spirit."

37. We, therefore, while allowing this petition, direct the Chairman of Uttar Pradesh Power Corporation Ltd. and Managing Director of all four Distribution Companies as well as the Principal Secretary, Energy, Government of Uttar Pradesh to issue such appropriate circular in the light of the observations made hereinabove and the judgment of learned Single Judge extracted hereinabove, within a period of three months. The Chairman of the U.P. Power Corporation Ltd. as well as Principal Secretary Energy shall file an affidavit in compliance of this direction and the matter shall be listed after three months before the appropriate Bench to ensure compliance thereof.

38. The learned Standing Counsel shall communicate this decision to the concerned Secretary for compliance.

39. The writ petition is accordingly allowed.

40. No order as to costs.

(2021)03ILR A650
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.02.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 23288 of 2020

Abdul Jalil ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Chetan Chatterjee

Counsel for the Respondents:
C.S.C., Sri Ravindra Singh

U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 - U.P. Sugarcane (Regulation of Supply and Purchase) Rules (1954), Rule 15, 22 - U.P. Sugarcane Supply and Purchase Order, 1954 Clauses 3, 4, 5 - Reservation of cane areas - Writ petition at behest of individual cane grower seeking a direction for the attachment of his village to a particular Cane Purchase Centre of his choice - *Held* - an individual cane growers have no right or locus standi to raise any challenge to reservation or assignment of cane areas in favour of a particular sugar factory and any grievance in this regard is to be espoused only through the Canegrowers' Cooperative Society which represents the cane growers of the area (Para 29)

Dismissed

List of Cases cited:-

1. Satnam Vs. State of U.P. & Ors WritC No.2075 of 2014, decided on 15.01.2014

2. Dharam Veer Singh & Ors Vs. State of U.P. & Ors PIL No.1081 of 2013, decided on 09.01.2013

3. Akram Khan & Anr Vs State of U.P. & Ors 2019 (12) ADJ 417 (DB)

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

1. Present writ petition has been filed praying for the following reliefs:-

"a. Issue a writ, order or direction in the nature of certiorari quashing the order dated 12.04.2019 passed by the respondent no.3 (Annexure No. 8 to this writ petition).

b. Issue a writ, order or direction in the nature of mandamus directing the

respondent no.2 to decide the representation dated 05.11.2019 submitted by the petitioner as per Rule 5(5) of U.P. Sugarcane Supply and Purchase Order, 1954 (Annexure No.9 to this writ petition) in accordance with law.

c. Issue a writ, order or direction in the nature of mandamus directing the respondent no.2 to assign the collection center of sugarcane of the petitioner as it was prior to year 2018-19 to 4/Islam Nagar III instead of 3/Chaparchidi, Saharanpur Cane Circle, District Saharanpur. .

d. Issue any other writ, order direction as this Hon'ble Court may deem fit to issue considering the facts and circumstances of the case."

2. The petitioner claiming himself to be a resident of Village Ambehata Peer, District Saharanpur and a sugarcane farmer having his agricultural land in Village Manakpur, has filed the present writ petition, principally seeking to raise a grievance with regard to the attachment of his cane area to Cane Purchase Centre at Chaparchidi. In this regard the petitioner claims to have submitted a representation dated 05.11.2019 before the District Sugarcane Officer, Saharanpur. He also seeks to challenge the order dated 12.04.2019 passed by the Deputy Cane Commissioner, Saharanpur whereunder an earlier representation filed by the petitioner and certain other cane growers of the area with regard to the same grievance has been decided.

3. Contention of the learned counsel for the petitioner is that the cane growers of Village Manakpur have been supplying their sugarcane in previous years at the Cane Purchase Centre Islam Nagar bearing Center Code No.4/Islam Nagar-III and only during the crushing season 2018-19 they have been shifted to the Cane Purchase Centre No.3/Chaparchidi, District Saharanpur. It is submitted that the Cane Purchase Centre at Chaparchidi is at a much greater distance than the Cane Purchase Centre, Islam Nagar causing inconvenience to the cane growers of Village Manakpur. Placing reliance on Clause 5(5) of the U.P. Sugarcane Supply and Purchase Order, 19541, it is sought to be contended that the dispute as to whether a particular system adopted for the purchase of cane is equitable or not is to be referred to the Cane Commissioner and accordingly the representation dated 05.11.2019 submitted by the petitioner may be decided in terms thereof.

4. Sri Manoj Kumar Kushwaha, learned counsel for the State-respondents and Sri Ravindra Singh, learned counsel appearing for respondent no.4 have raised an objection to the maintainability of the writ petition at the behest of an individual cane grower and they submit that any grievance in this regard can be raised through the Cane-growers' Co-operative Society of the area in question. They submit that the writ petition filed by the petitioner claiming himself to be a sugarcane grower of the area is misconceived and is liable to be dismissed.

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

6. The regulation of supply and purchase of sugarcane in the State of Uttar Pradesh is governed in terms of the provisions contained under the Uttar Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 19532 and the rules made thereunder namely the Uttar Pradesh Sugarcane (Regulation of Supply and Purchase) Rules, 19543.

7. The aforementioned Act, 1953 and the Rules, 1954 contain detailed and elaborate provisions regarding supply of the sugarcane by the cane growers, its purchase by the sugar factories and payment of price thereof. In terms of the scheme of the Act, 1953, a mechanism is provided for ensuring the required continuous supply of sugarcane to the sugar factories during the crushing season. Keeping in mind the interest of the sugarcane growers, Cane-growers' Co-operative Societies, sugar factories and also the inter se interest of the sugar factories in the area, the supply of sugarcane to the sugar factories in the quantity which may reasonably be required by them for production in a particular crushing season is regulated by the provisions of the Act, 1953.

8. A duty has been cast upon the Cane Commissioner, under Section 12 of the Act, 1953 to require the occupier of each factory to furnish in the manner and by the date specified in an order to be issued by him an estimate of the quantity of the sugarcane which would be required by a factory during such crushing season or seasons as may be specified in the order. The Cane Commissioner is obliged to examine every such estimate and is enjoined to publish the same with such modifications, if any, as he may make.

9. The publication of the estimate is made for the purpose of making it known to all sugar factories that the estimates prepared by them of the requisite quantity of sugarcane for a particular crushing season or seasons has been accepted by the Cane Commissioner with or without modification. Section 13 of the Act, 1953 enjoins upon the occupier of the factory to maintain a register of all cane growers and Cane-growers' Co-operative Society or societies that sell sugarcane to the factory. In terms of Section 14 the State Government may provide for survey of the area which is proposed to be reserved or assigned for supply of sugarcane to a factory, and in terms of Section 15 the Cane Commissioner is empowered to issue an order declaring the reserved and the assigned area for the purposes of supply of sugarcane to a factory.

10. The declaration of the reserved area and assigned area under Section 15 is to be made by the Cane Commissioner after consulting the sugar factory and the Cane-growers' Co-operative Society in the manner so prescribed.

11. The object of the declaration of the reserved area and assigned area is to minimize the conflict in claims of the sugar factories seeking supply of sugarcane which may otherwise have an adverse effect on the sugar factories as well as the cane growers of the area.

12. The guidelines which are required to be followed in reserving or assigning an area to a factory and determining the quantity of sugarcane to be purchased from the area by a factory are provided for under Rule 22 of the Rules, 1954.

13. The provision with regard to declaration of reserved and assigned areas as contained under Section 15 of the Act, 1953 is reproduced below:-

"**15. Declaration of reserved area and assigned area.--(**1) Without prejudice to any order made under Clause (d) of sub-section (2) of Section 16 of the Cane Commissioner may, after consulting the Factory and Cane-growers' Co-operative Society in the manner to be prescribed:

(a) reserve any area (hereinafter called the reserved area); and

(b) assign any area (hereinafter called an assigned area),

for the purpose of the supply of cane to a factory in accordance with the provisions of Section 16 during one or more crushing seasons as may be specified and may likewise at any time cancel such order or alter the boundaries of an area so reserved or assigned.

(2) Where an area has been declared as reserved area for a factory, the occupier of such factory shall, if so directed by the Cane Commissioner, purchase all the cane grown in that area, which is offered for sale to the factory.

(3) Where any area has been declared as assigned area for a factory, the occupier of such factory shall purchase such quantity of cane grown in that area and offered for sale to the factory as may be determined by the Cane Commissioner.

(4) An appeal shall lie to the State Government against the order of the Cane Commissioner passed under sub-section (1)."

14. The guidelines for the aforesaid purpose for reserving an area or assigning an area as provided under Rule 22 of the Rules, 1954, are being extracted below:-

"22. In reserving an area for or assigning an area to a factory or determining the quantity of cane to be purchased from an area by a factory, under Section 15, the Cane Commissioner may take into consideration--

(a) the distance of the area from the factory,

(b) facilities for transport of cane from the area,

(c) the quantity of cane supplied from the area to the factory in previous year,

(d) previous reservation and assignment orders,

(e) the quantity of cane to be crushed in factory,

(f) the arrangements made by the factory in previous years for payment of cess, cane price and commission,

(g) the views of the Cane-growers' Co-operative Society of the area,

(h) efforts made by the factory in developing the reserved or assigned area,

(i) efforts made by the factory to provide information to the farmers pertaining to survey, supply tickets, weighment, payment etc. through the use of website, Short Messaging Service (SMS), Interactive Voice Response System (IVRS), Hand Held Computer (HHC), Global Positioning System (GPS), electronic weigh-bridge etc."

15. The order passed under Section 15 containing declaration of reserved area and assigned area in respect of a sugar factory is appealable before the State Government in terms of sub-section (4) of Section 15 of the Act, 1953.

16. In the aforesaid manner it is seen that as per the terms of the scheme provided for under the Act, 1953 and the Rules, 1954 an elaborate mechanism has been provided to regulate the supply and purchase of sugarcane to sugar factories so as to secure the interest of the sugar factories, the sugarcane growers and also the cane co-operative societies of area. The provision for declaration of reserved area and assigned area by the Cane Commissioner after consulting the sugar factories, has also been made for the aforesaid purpose of regulating the supply and purchase of sugarcane, minimizing the conflict in claims of the sugar factories in the area and also for securing the interests

of the cane growers and the Cane-growers' Co-operative Societies.

17. The guidelines provided under the Rule 22 of the Rules, 1954 provide for consideration of all the relevant factors before making a declaration of the reserved area and assigned area of a particular sugar factory. The factors which are required to be considered also include ascertaining the views of Cane-growers' Co-operative Society of the area which in turn represents the cane growers of the area.

18. As regards the contention raised by the learned counsel for the petitioner based on Clause 5(5) of U.P. Sugarcane Supply and Purchase Order, 1954, it may be noticed that the aforementioned Order, 1954 has been notified by the State Government in exercise of power conferred by Section 16 of the Act, 1953. The relevant provisions with regard to purchase of cane in reserved and assigned areas as contained under Clauses 3, 4 and 5 of the Order, 1954 are being extracted below:-

"**3. Purchase of cane in reserved area.--(**1) The occupier of a factory shall estimate or cause to be estimated by the 31st day of the October or such later date in a crushing season as, on an application being made to the Cane Commissioner by the occupier of a factory, may be fixed by the Cane Commissioner, the quantity of cane with each grower enrolled in the Growers' Register and shall on demand submit the estimate to the Cane Commissioner and the Collector.

(2) A Cane-grower or a Cane-Grower's Co-operative Society may within 14 days of the issue of an order reserving an area for a factory, offer in Form A of the Appendix, to supply cane grown in the reserved area, to the occupier of the factory.

(3) The occupier of the factory for which an area has been reserved, shall, within fourteen days of the receipt of the offer enter into an agreement in Form B or Form C of the Appendix, with the Cane-grower or the Cane-grower's Co-operative Society, as the case may be. in respect of the cane offered:

Provided that any purchase of cane made before the execution of the prescribed agreement shall be deemed to have been made in accordance with such agreement.

(4) The Cane Commissioner may, for reasons to be recorded in writing, extend the date for making offers in respect of any reserved area.

4. Purchase of cane in assigned area.--(1) The occupier of a factory for which an area has been assigned, shall within fourteen days of the order of assignment of the area, enter into an agreement in Form B or C of the Appendix, as the case may be, with the Cane-grower or Cane-Grower's Co-operative Society for the purchase from the assigned area of such quantity of cane as may be fixed by Cane Commissioner:

Provided that any purchase of cane made before the execution of the prescribed agreement shall be deemed to have been made in accordance with such agreement.

5. General provisions regarding purchase of cane.--(1) Cane grown in the reserved or assigned area of a factory shall not except with the permission of the Cane Commissioner, be purchased by any person without the previous issue, at convenient centers in the said area of requisition slips and identification cards to the growers by the occupier of the factory.

(2) Notwithstanding anything in sub-clause (1) requisition slips and identification cards to members of a Cane-grower's Co-operative Society shall not be issued except by such Society.

(3) An occupier of a factory or Cane-grower's Co-operative Society shall

maintain a record of the identification cards issued and a daily account of the requisition slips issued to the growers and returned by them.

(4) Purchase of cane shall be spread over the entire crushing season in an equitable manner and due consideration shall be given to variety and maturity of sugarcane:

Provided that this restriction shall not apply where the quantity of cane purchased does not exceed one cart load from a cane grower in a crushing season.

(5) A dispute whether a particular system adopted for the purchase of cane is equitable or not, may be referred to the Cane Commissioner whose decision shall be final.

(6) No person other than a cane-grower or a Cane-grower's Co-operative Society shall sell cane to the occupier of factory.

(7) No person shall transfer or abet the transfer of a requisition slip for the cane of a grower to another person, with the object of enabling cane other than that belonging to the grower for whom the requisition slip has been issued, to be sold to a factory.

....."

19. Clause 3 of the Order, 1954 provides for purchase of cane in reserved area and Clause 4 provides for purchase of cane in assigned area. Clause 5 contains the general provisions regarding purchase of cane. In terms of Clause 5(1) it is provided that cane grown in the reserved or assigned area shall not except with the permission of the Cane Commissioner, be purchased by any person without the previous issue of requisition slips and identification cards to the growers by the occupier of the factory. Sub-clauses (2) and (3) of Clause 5 lay down that requisition slips and identification cards to members of a Cane-growers' Co-operative Society shall not be issued except by such society and the records of the same have to be maintained by the occupier of the factory and also by the Cane-growers' Co-operative Society. Clause 5(4) mandates that purchase of cane shall be spread over the entire crushing season in an equitable manner and Clause 5(7) lays down that no person shall transfer or abet the transfer of a requisition slip for the cane of a grower to another person. Any dispute as to whether a particular system adopted for the purchase of cane is equitable or not, is to be referred to the Cane Commissioner under Clause 5(5).

20. The order dated 12.04.2019 passed by the Deputy Cane Commissioner on a representation submitted by the petitioner and certain other cane growers of the area by referring to Clause 5(5) of the Order, 1954 has taken note of the factual position that the cane growers in question were residents of Village Ambehata Peer but as their cane growing areas were in Village Manakpur the sugarcane produced by them in Village Manakpur was directed to be supplied at the Islam Nagar Centre whereas the sugarcane produced in Village Ambehata Peer was directed to be supplied at the Cane Purchase Centre, Chaparchidi.

21. The Deputy Cane Commissioner, placing reliance on Section 81 of the U.P. Co-operative Societies Act, 1965, has stated in his order that the cane growers being the residents of Village Ambehata Peer would be entitled for being members of the Co-operative Society of the said village and in terms of para 5(v) of the Sugarcane Bonding and Supply Policy notified by the Cane Commissioner for the crushing season 2018-19, their agreements would be continued from the village where they were members of the co-operative

society. However, considering their difficulties, it was considered equitable to permit them to supply the sugarcane produced in Village Manakpur to the Cane Purchase Centre at Islam Nagar and the sugarcane produced in Village Ambehata Peer be supplied to the Sugarcane Purchase Centre at Chaparchidi.

22. The Order, 1954 which has been made by the State Government in exercise of power under Section 16 of the Act, 1953 provides the procedure under which the purchase of sugarcane in the reserved areas and in the assigned areas are regulated. It also lays down the general provisions regarding purchase of cane in the reserved or assigned areas.

23. In view of Clause 5 of the Order, 1954 the cane grown in the reserved or assigned area cannot be purchased by any person without the previous issue of requisition slips and identification cards to the growers by the occupier of the factory and in case of members of a Cane-growers' Co-operative Society by such society. Since the requisition slips are non-transferable and issued by the co-operative society according to the requirement of sugarcane the purchase of sugarcane from a reserved or assigned area is controlled in terms thereof.

24. The petitioner herein claiming himself to be a cane grower of the area is seeking a direction for the attachment of his village to the Cane Purchase Centre Islam Nagar in place of the Cane Purchase Centre Chaparchidi. In effect the petitioner has sought to raise a grievance against the orders whereunder the cane area, which includes the Village Manakpur, has been declared to be a reserved or assigned area in terms of the statutory provisions under the Act, 1953 and the Rules made thereunder.

25. In view of the foregoing discussion and taking into consideration the scheme for regulating the supply and purchase of sugarcane as per the provisions contained under the Act, 1953 and the Rules, 1954, it follows that an individual cane grower would not have the right to raise a challenge to the reservation or assignment of areas to sugar factories and the grievance, if any, in this regard would have to be espoused through the Cane-growers' Co-operative Society of the area in question.

26. In this regard we may refer to a judgment of this Court in **Satnam Vs. State of U.P. & Ors.**4 wherein a similar challenge sought to be raised by an individual cane grower in respect of reservation of cane areas was repelled and it was held as follows:-

"We are of the view that the petitioner even if he is representing some more farmers at village Undra does not have a right to maintain the writ petition as the Cane Commissioner or the State Government is not obliged to issue notice to all the farmers to ascertain their views. In order to pass orders for establishing Cane Centres, the Cane Commissioner is to consider the interest of majority of cane growers of the concerned Cane Cooperative Societies, and it is the Cane Cooperative Society, which may be treated to be aggrieved as it is representing all the sugarcane growers attached to the purchase centers set up by such society, to espouse the cause of its member cane growers before the Cane Commissioner, State Government or in the High Court."

27. Taking a similar view this Court in its judgment passed in the case in **Dharam Veer Singh & Ors. Vs. State of U.P. & Ors.**5 held that under Rule 22 of the Rules, 1954, the Cane Commissioner while passing an order of reservation of cane area is required to ascertain the view of the Cane-growers' Co-operative Society of the area and there is no requirement to issue notice to individual farmers or to ascertain their views. The observations made in the judgment are as follows:-

"We find no merit in this claim because under the relevant Rule-22 of the U.P. Sugarcane (Regulation of Supply and Purchase) Rules, 1954, the Cane Commissioner while passing the initial order for reservation of cane area is required to ascertain the views of the Cane Growers Cooperative Society of the area. There is no requirement even at that stage to issue notice to individual farmers or ascertain their views. Hence there can be no such responsibility or liability upon the State Government while hearing the appeal under Section 15(4) of the Act to issue notice to individual farmers like the petitioners."

28. The aforementioned legal position has been reiterated in a recent judgment of this Court in **Akram Khan and another v State of U.P. and 3 others**6 and it has been held that writ petition at the behest of an individual cane growers seeking to raise grievances with regard to reservation or assignment of cane areas is not maintainable and that their cause can be espoused only by the Cane-growers' Co-operative Society.

29. Having regard to the aforementioned facts and circumstances the position which emerges is that in terms of the provisions for under the Act, 1953 and the Rules, 1954 an elaborate mechanism is provided for reservation and assignment of cane areas to sugar factories in order to regulate the supply and purchase of sugarcane in their area. The factors which are taken into consideration include ascertaining the views of the Cane-growers' Co-operative Society of the area. The individual cane growers have therefore no right or locus standi to raise any challenge to reservation or assignment of cane areas in favour of a particular sugar factory and any grievance in this regard is to be espoused only through the Cane-growers' Co-operative Society which represents the cane growers of the area.

30. As regards the claim of the petitioner that his representation dated 05.11.2019 with regard to his grievance filed before the District Sugarcane Office, Saharanpur be decided it would be relevant to take notice of the fact that earlier representation raising the same grievance has been considered and decided by a detailed order dated 12.04.2019 passed by the Deputy Cane Commissioner, Saharanpur which is based on consideration of the factual position and also taking into account the scheme provided for under the relevant statutory provisions with regard to supply of sugarcane at the various cane centres.

31. No material error or illegality has been pointed out by the counsel for the petitioner in the aforesaid order, which may warrant interference.

32. For all the aforestated reasons, we are not inclined to entertain the present writ petition and the same is accordingly dismissed.

(2021)03ILR A658
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.02.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 23377 of 2020

Vinod Upadhyay ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pankaj Kumar Shukla, Sri Shashi Nandan

Counsel for the Respondents:
C.S.C., Sri Ajit Singh, Sri Sudhanshu Srivastava, Sri Tarun Agrawal, Sri Ravi Kant

Panchayat Elections - Constitution of India - Article 243-E - Election delayed - Due to Covid 19 - extension given by High Court

In view of Article 243-E of Constitution, entire program of the Zila Panchayat election ought to have be completed before expiry of five years i.e. date 13.01.2016 - However, in view of situation due to COVID-19 Pandemic election of Panchayat delayed - High Court directed State Government as well as State Election Commission to complete all process to hold direct election of all the Panchayats by 30.04.2021 - Indirect election to be completed thereafter within fifteen days i.e. by 15.05.2021 (Para 11)

Disposed Off

(Delivered by Hon'ble Munishwar Nath Bhandari, J. & Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Shashi Nandan, Senior Advocate assisted by Sri Pankaj Kumar Shukla for the petitioner. Sri Raghvendra Singh, learned Advocate General assisted by Sri Ajit Kumar Singh, Additional Advocate General, Sri Manish Goyal, Additional Advocate General and Sri Sudhanshu Srivastava, Additional Chief Standing Counsel have put in appearance for the State of U.P. Sri Ravi Kant, Senior Advocate assisted by Sri Tarun Agrawal is present for the State Election Commission.

2. This writ petition has been filed for the following prayers-:

"(i) issue a writ, order or direction in the nature of mandamus for commanding the respondents to issue notifications for holding the election, indicating therein the entire program of the election positively before expiry of five years of Zila Panchayat i.e. date 13.01.2016 in accordance with the provisions of Article 243-E of Constitution of India.

(ii) issue a writ, order or direction in the nature of mandamus commanding the respondents subject to the fresh election of Zila Panchayat not to interfere in peacefully functioning by elected body of Zila Panchayat.

(iii) issue any other writ, order or direction which this Hon'ble Court deems fit and proper in the circumstances."

3. Counsel for the petitioner submits that election of Zila Panchayat was to be initiated and completed on or before expiry of the term of the Panchayat. The respondents have failed to undertake the process of election to be completed before the expiry of the term of the Panchayats and thereby administrators have been appointed going against the mandate of the Constitution. A reference of Article 243 (E) of the Constitution of India for it is being quoted herein-:

243E. Duration of Panchayats, etc.

(1) Every Panchayat, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer;

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Panchayat at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in clause (1);

(3) An election to constitute a Panchayat shall be completed;

(a) before the expiry of its duration specified in clause (1);

(b) before the expiration of a period of six months from the date of its dissolution:

Provided that where the remainder of the period for which the dissolved Panchayat would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Panchayat;

(4) A Panchayat constituted upon the dissolution of a Panchayat before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Panchayat would have continued under clause (1) had it not been so dissolved.

4. As per the mandate of the Constitution, respondents were under obligation to hold the elections within the framework given therein and thereby elections should have been conducted on or before expiry of the term of Panchayats.

5. In view of the aforesaid, we call upon the State Government so as the State Election Commission to find out as to why the elections were not conducted as per the mandate of the Constitution. It is submitted that due to extraordinary situation obtaining in the year 2020 due to COVID-19, the process has been delayed. In the process of election, the electoral roll has to be prepared after conducting door to door survey and thereupon constituencies to be finalized on account of delimitation. It is due to urbanization of the areas whereby the constituency of the Panchayat has been reduced. The process of delimitation also took time and thus delay occurred.

6. Learned Senior Advocate appearing for the Election Commission submits that even after deploying 79,720 Booth Level Officers (B.L.O.), the process to finalize the electoral could be completed by 22nd January, 2021. The survey was conducted for more than one crore families. The process of delimitation and finalization thereupon also took time but it was finalized on 28.01.2021. The election needs at least forty to forty five days. It could not be initiated in absence of exercise by the State Government for reservation of the constituency. The moment reservation of the constituencies is made by the State Government with its notification. The election would immediately be conducted and completed within forty to forty five days. The delay in initiation of work for preparation of electoral was due to pandemic COVID-19.

7. Learned Advocate General appearing with the learned Additional Advocate Generals submits that the process for reservation of the constituencies has to be undertaken in reference to Section 11 (A) of U.P. Panchayat Raj Act, 1947 read with Uttar Pradesh Panchayat Raj (Reservation and Allotment of Seats and Offices) Rules, 1994. The exercise for reservation also requires compliance of U.P. Panchayat (Determination and Publication of Number of Persons

Belonging to Backward Classes) Rules, 1994, as amended in the year 2015. The exercise under the Rules of 1994 (as amended) is required due to reduction of number of Panchayats. In the election of 2016, 59074 Gram Pradhans were elected whereas now the number has been reduced to 58194. The number of Gram Pradhans has come down by 880 on account of delimitation and thereby the exercise of reservation of constituencies is going to take time. Door to door survey of backward class has to be made.

8. However, the State Government will make its best effort and on the instructions, it is stated that the process of reservation of the constituencies would be completed by 17th March, 2021 with an information to the State Election Commission.

9. Learned Senior Advocate appearing for State Election Commission submits that if the reservation of the constituencies would be completed by 17th March, 2021, the direct election of all the offices would be completed by 30th April, 2021.

10. We find that whatever schedule has been given by the State Government as well as by the State Election Commission is appropriate in the situation obtaining out to COVID-19 Pandemic. In fact, election of Panchayat and Municipalities have been delayed in many States and for that even extension was given by different High Courts and the Apex Court. The reference of it would be for the State of Andhra Pradesh as well as of Rajasthan.

11. Taking aforesaid into consideration, writ petition is disposed of with the direction to the State Government so as the State Election Commission to complete all the required process to hold the direct election of all the Panchayats by 30th April, 2021. Indirect election would be completed thereafter within fifteen days i.e. by 15th May, 2021. The schedule given by the learned Advocate General for the State and the State Election Commission would be complied and thereby reservation of constituencies would be made latest by 17th March, 2021 and thereupon direct election of Panchayats by 30th April, 2021. The indirect elections would be completed by 15th May, 2021.

12. It is made clear that no extension for holding election and any exercise for it would be given because sufficient time has been given not only for the reservation of the constituencies but even holding direct and indirect elections of all the offices of Panchayat.

13. In result of the above, the writ petition is disposed of.

(2021)03ILR A660
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 24602 of 2020

M/S Newtech Promoters & Developers Pvt. Ltd. Delhi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pratik Chandra

Counsel for the Respondents:

C.S.C., Wasim Masood

A. Civil Law – Real Estate Regulation - Real Estate (Regulation and Development) Act, 2016 - Section 30, 40(1), 43(5) - Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 - U.P. Real Estate Regulatory Authority (General) Regulation, 2019 - Rule 24(a).

Real Estate (Regulation and Development) Act, 2016 - Section 21, 29, 30 – Jurisdiction - Petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint. (Para 10)

It is not that whatever composition given u/s 21 of the Act alone can decide the complaint rather reference of S. 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. (Para 13)

It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to S. 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to S. 21 of the Act of 2016 but has to refer to other provisions, more specifically, S. 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. The resolution of the Authority has also been challenged but in the light of S. 30 of the Act of 2016, we find no ground to set aside the resolution as otherwise S. 81 saves it. (Para 12, 14)

B. Issue regarding the rate of interest has not been dealt with being a challenge on the merit of the case. (Para 15)

C. Interpretation of Section 40(2) – Sub-section (2) of Section 40 is not meant for recovery of the amount but for any other direction either to act in a particular manner or to restrain a party to do a certain act. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. S. 40 (2) covers basically the case of an order of injunction or mandatory injunction. Rules 23 and 24 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (in short "Rules of 2016") were brought for that purpose and provides the mechanism for execution of the order. (Para 19, 21)

D. The object of speedy redressal would frustrate if recovery of the amount is also sought through the civil court. It is stated that recovery of interest, penalty or compensation alone can be made as arrears of land revenue. The object of Act of 2016 is to protect the interest of consumer in real estate sector apart from others. If recovery of amount is to be sought by dividing it in two parts and by different method, it would be against the object of the Act of 2016. It has been that the purpose and object of S. 40 (1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. S. 40 (1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. (Para 18, 21)

E. Challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings. (Para 23)

Writ petition dismissed. (E-3)

Precedent followed:

1. M/s K.D.P. Build Well Pvt. Ltd. Vs State of U.P. & 4 ors., Writ-C No. 2248 of 2020, judgment dated 04.02.2020 (Para 8)

2. Rudra Buildwell Constructions Pvt. Ltd. Vs Poonam Sood & anr., Writ-C No. 3289 of 2020, judgment dated 06.02.2020 (Para 8)

Precedent distinguished:

1. Janta Land Promoters Pvt. Ltd.Vs U.O.I. & ors., Civil Writ Petition No. 8548 of 2020 (Para 9, 13)

Present petition challenges order dated 05.04.2019, passed by Real Estate Regulatory Authority.

(Delivered by Hon'ble Munishwar Nath Bhandari, J. &
Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Manish Singh with Sri Pratik Chandra and Sri Azhar Ikram, learned counsel for the petitioner. Sri Wasim Masood has put in appearance on behalf of respondents.

2. The writ petition has been filed with the following prayers:

"(i) Issue an appropriate writ, order or direction declaring the section 24(a) of the U.P. Real Estate Regulatory Authority (General) Regulation, 2019 as ultra vires and contrary to the section 21 and 85 of the RERA Act.

(ii) Issue a writ, order or direction in the nature of Certiorari quashing order dated 5.4.2019 passed Regulatory Authority / Bench No. I, U.P. RERA Regional Office, Gautam Budh Nagar, in Complaint No. 5201810264 (Arvind Kumar Goyel Vs. M/s Newtech Promoters and Developers Pvt. Ltd.).

(iii) Issue a writ, order or direction in the nature certiorari quashing the impugned Recovery Certificate dated 8.9.2020 issued by opposite party no. 4.

(iv) issue a writ, order or direction in the nature of certiorari quashing the impugned Recovery Citation dated 28.9.2020 issued by opposite party no. 5.

(v) Issue a writ, order or direction in the nature of mandamus not to give effect the impugned recovery certificate dated 8.9.2020 and recovery citation dated 28.9.2020 issued by opposite party no. 4 and 5.

(vi) Issue a writ, order or direction in the nature of mandamus directing the state respondents not to initiate coercive measures pursuant to the impugned recovery certificate dated 8.9.2020 and recovery citation dated 28.9.2020 issued by opposite party no. 4 and 5."

3. The petitioner has challenged the order passed by Real Estate Regulatory Authority (in short "RERA") dated 5.4.2019 though an appeal against the said order lies under Section 43(5) of Real Estate (Regulation and Development) Act, 2016 (in short "Act of 2016").

4. It is a case where a complaint was filed by the non-petitioner alleging that despite payment towards unit No. B-1202 in the scheme introduced by the petitioner, the possession of a unit has not been given. The unit (flat) was booked on 4.10.2012 and was to be delivered in the year 2015. The prayer was made for refund of the amount of Rs.28,21,414/- with interest. The Authority found that as per the agreement entered between the parties, possession of the flat in question should have been delivered by 2015. The petitioner-Company failed to show delivery of possession of the flat in question. Thus, taking into consideration the default of the Promoter (petitioner herein) and referring to the

judgment of Apex Court, an order was passed by RERA on 5.4.2019 for refund of the principal amount alongwith interest. In pursuance thereof, order dated 5.4.2019 was issued for its execution. The amount of Rs.28,21,414/- was shown towards the principal amount while component of interest was Rs.19,82,130.49/-. The petitioner has filed this writ petition to challenge not only the order dated 5.4.2019 passed by RERA but the recovery certificate dated 8.9.2020 as well as recovery citation dated 28.9.2020 on the execution application.

5. Learned counsel for the petitioner submits that an appeal against the order passed by RERA is maintainable but this case has exceptional circumstances thus even a writ petition would be maintainable. One member of RERA has passed the order going against the Act of 2016. Section 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members. The impugned order is by one Member alone going against the mandate of Section 21 of the Act of 2016. In view of the above, there is no need to prefer an appeal as the order dated 5.4.2019 is without jurisdiction.

6. It is also stated that the order to award interest by the Authority is again going contrary to the provisions. Rules for award of interest was introduced in the year 2018. The amount deposited with the Promotor has been ordered to be returned with interest. The interest has been allowed even for the period prior to introduction of U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 (in short "Rules of 2018"). It is even ignoring the rate of interest agreed by the parties. Challenge to the order has been made on that ground also.

7. We are first taking challenge to the order dated 5.4.2019, passed by the Authority to find out as to whether one member was competent to pass the order.

8. The issue has been raised in reference to Section 21 but it is not open for debate having been decided by this Court in ***Writ -C No.2248 of 2020 (M/s K.D.P. Build Well Pvt. Ltd. vs. State of U.P. and 4 Others) vide judgment dated 04.02.2020 and in Writ- C No.3289 of 2020 (Rudra Buildwell Constructions Pvt. Ltd. vs. Poonam Sood and Another) vide judgment dated 06.02.2020*** holding order by one member to be legal. The issue regarding composition of RERA was considered in reference to Sections 21 and 81 of the Act of 2016. Section 81 provides for delegation of power/function and taking the aforesaid provision into consideration, the argument was not accepted.

9. At this stage, learned counsel for the petitioner has made a reference to the judgment of Punjab and Haryana High Court on the same issue in ***Civil Writ Petition No.8548 of 2020 (Janta Land Promoters Private Limited vs. Union of India and others) vide judgment dated 16.10.2020***. It is stated that judgment of this Court has been referred by Punjab and Haryana High Court and has taken a different view.

10. What we find is binding effect of the judgment rendered by this Court than to follow the judgment of other High Court. Accordingly, we are unable to accept the first argument in reference to Section 21 of the Act of 2016. It is more so when the petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the

matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint.

11. It is further necessary to refer Sections 21, 29 and 30 of the Act of 2016 to discuss the issue independent to the earlier judgments. The provisions aforesaid are quoted hereunder :

*"**21. Composition of Authority.-** The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government."*

***29. Meeting of Authority.-** (1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.*

(2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.

(4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application.

Provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

*30. **Vacancies, etc., not to invalidate proceeding of Authority.-** No act or proceeding of the Authority shall be invalid merely by reason of--*

(a) any vacancy in, or any defect in the constitution of, the Authority; or

(b) any defect in the appointment of a person acting as a Member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case."

12. Section 21 of Act of 2016 speaks about composition of the Authority, which shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government. Section 29, however, talks about the meeting of Authority and perusal of sub-section (2) thereof shows that in absence of Chairperson for any reason, the other Member chosen by the Members present amongst themselves at the meeting, shall preside thereby. Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson so appointed by the appropriate Government. Thus, it is not necessary that the adjudication of the complaint has to be made by the composition of Authority, as given under Section 21 of the Act of 2016 though as per Section 29 also, it should be by two Members in absence of the Chairperson.

13. Section 30 of Act of 2016 is, however, relevant and address the issue raised in this petition. The vacancies, etc. not to invalidate proceeding of the

Authority. It shows that in case of vacancy, or any defect in the constitution of the Authority or any defect in the appointment of a person acting as a Member of the Authority, the proceeding of the Authority would not be invalidated. Section 30 of the Act of 2016 give complete answer to the objection raised by the petitioner regarding composition of the Authority. It is not that whatever composition given under Section 21 of the Act alone can decide the complaint rather reference of Section 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. This aspect was not brought to the notice of Punjab and Haryana High Court in the case of ***Janta Land Promoters Private Limited (supra).***

14. It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to Section 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to Section 21 of the Act of 2016 but has to be reference of other provisions, more specifically, Section 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. The resolution of the Authority has also been challenged but in the light of Section 30 of the Act of 2016, we find no ground to set aside the resolution as otherwise Section 81 saves it.

15. So far the second issue regarding rate of interest is concerned, it is nothing but a challenge on the merit of the order. We hold writ petition for it to be not maintainable as petitioner has remedy of appeal. Thus, we are not causing interference in the order on merit but allowing the petitioner to take remedy of appeal, if so desires. It is after taking note of the fact that the order of RERA is not otherwise onerous so as to maintain a writ petition.

16. The other challenge in the writ petition is to execution of the order made in reference to Section 40(1) of the Act of 2016. The recovery of the amount is to be made as arrears of land revenue. It is stated that recovery of interest, penalty or compensation alone can be made as arrears of land revenue. In the instance case, RERA has issued citation for return of the amount so deposited with the Promoter with interest. The refund of the principal amount cannot be through the process of execution given under Section 40(1) of the Act of 2016 but can be as per Section 40(2) of the Act of 2016.

17. To deal with the argument aforesaid, we are quoting Section 40 of the Act of 2016, hereunder :

"40 Recovery of interest or penalty or compensation and enforcement of order, etc.- *(1) If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such*

manner as may be prescribed as an arrears of land revenue.

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed."

18. Before addressing the issue further it would be necessary to go through the object of the enactment i.e. as to why the Parliament brought the Act of 2016. The object of Act of 2016 is to protect the interest of consumer in real estate sector apart from others. The Bill was introduced with the following object :

"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, ***or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal*** *and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."*

19. A perusal of the object reveals that the Act of 2016 has been enacted to save interest of consumers apart from others and thereby to regulate real estate in a proper manner. It is even to give speedy dispute redressal mechanism. Section 40(1) of Act of 2016 no doubt provides for mechanism for recovery of interest, penalty or compensation. It cannot however be ignored that recovery of the amount is provided under Section 40(1) alone. Section 40(2) is for execution of any other order or direction to any person to do any act, or refrain from doing any act, which is not empowered to do under the Act of 2016 and in case of failure to comply, execution can be enforced in the manner prescribed. Sub-section (2) of Section 40 was to enforce any direction of the nature of restrain or injunction which cannot be enforced as an arrears of land revenue. After coming into the force of the rules framed by the State of Uttar Pradesh, the matter of execution can be taken by the Adjudicating Authority. Sub-Section (2) of Section 40 is not meant for recovery of the amount but for any other direction either to act in a particular manner or to refrain a party in doing any act. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. Rules 23 and 24 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (in short "Rules of 2016") were brought for that purpose and provides the machanism for execution of the order.

20. In the light of the aforesaid, we are required to give proper interpretation to Section 40 so that the object sought to be achieved by enactment of Act of 2016 is carried out.

21. In the instant case, the consumer had deposited a sum of Rs.28 lacs and odd, in instalments but despite an agreement for giving possession of the flat in the year 2015, it was not handed over to the consumer. The direction for return of

the amount with interest has been given in those circumstances. If a consumer is to seek execution of the part of the order through the civil court then the very purpose of the enactment of Act of 2016 to provide speedy dispute redressal mechanism would frustrate. If the argument of the petitioner is accepted then for recovery of a sum of Rs. 28 lacs and odd, the non-petitioner consumer is to be send to civil court while recovery of amount of interest of Rs.19 lacs and odd can be made as arrears of land revenue, as admitted by the counsel for the petitioner himself. If recovery of amount is to be sought by dividing it in two parts and by different method, it would be against the object of the Act of 2016. The object of speedy redressal would frustrate if recovery of the amount is also sought through the civil court. We thus hold that the purpose and object of Section 40(1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. Section 40(1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. Section 40(2) is for any other direction either to act in a particular manner or to restrain a party to do certain act and execution of it can be made by the Adjudicating Authority and in case of failure, by the civil court. Section 40(2) covers basically the case of an order of injunction or mandatory injunction.

22. Accordingly, we are unable to accept even the last argument raised by the counsel for the petitioner. It would otherwise frustrate the very object of the Act of 2016 and would give rise to the anarchy, existing earlier, in the hands of Promoters.

23. So far as challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is concerned, the issue is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings However, as and when the Authority invokes Regulation 24 (a) of Regulation, 2019, the liberty is given to challenge the validity. Thus, issue is kept open for the aforesaid.

24. Thus, for all the reasons, we are unable to accept any of the arguments raised by the counsel for the petitioner. The writ petition is accordingly **dismissed**, however, with the liberty to avail the remedy of appeal if other than the issue decided by us remains, which may include the issue towards interest.

(2021)03ILR A667
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 24604 of 2020

M/S Newtech Promoters & Developers Pvt. Ltd. Delhi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pratik Chandra, Sri Azhar Ikram, Sri Manish Singh

Counsel for the Respondents:
C.S.C., Sri Wasim Masood

A. Civil Law – Real Estate Regulation - Real Estate (Regulation and Development) Act, 2016 - Section 30, 40(1), 43(5) - Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 - U.P. Real Estate Regulatory Authority (General) Regulation, 2019 - Rule 24(a).

Real Estate (Regulation and Development) Act, 2016 - Section 21, 29, 30 – Jurisdiction - Petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint. (Para 10)

It is not that whatever composition given u/s 21 of the Act alone can decide the complaint rather reference of S. 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. (Para 13)

It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to S. 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to S. 21 of the Act of 2016 but has to refer to other provisions, more specifically, S. 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. The resolution of the Authority has also been challenged but in the light of S. 30 of the Act of 2016, we find no ground to set aside the resolution as otherwise S. 81 saves it. (Para 12, 14)

B. Issue regarding the rate of interest has not been dealt with being a challenge on the merit of the case. (Para 15)

C. Interpretation of Section 40(2) – Sub-section (2) of Section 40 is not meant for recovery of the amount but for any other direction either to act in a particular manner or to restrain a party to do a certain act. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. S. 40 (2) covers basically the case of an order of injunction or mandatory injunction. Rules 23 and 24 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (in short "Rules of 2016") were brought for that purpose and provides the mechanism for execution of the order. (Para 19, 21)

D. The object of speedy redressal would frustrate if recovery of the amount is also sought through the civil court. It is stated that recovery of interest, penalty or compensation alone can be made as arrears of land revenue. The object of Act of 2016 is to protect the interest of consumer in real estate sector apart from others. If recovery of amount is to be sought by dividing it in two parts and by different method, it would be against the object of the Act of 2016. It has been that the purpose and object of S. 40 (1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. S. 40 (1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. (Para 18, 21)

E. Challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings. (Para 23)

Writ petition dismissed.(E-3)

Precedent followed:

1. M/s K.D.P. Build Well Pvt. Ltd. Vs St.of U.P. & 4 ors., Writ-C No. 2248 of 2020, judgment dated 04.02.2020 (Para 8)

2. Rudra Buildwell Constructions Pvt. Ltd. Vs Poonam Sood & anr., Writ-C No. 3289 of 2020, judgment dated 06.02.2020 (Para 8)

Precedent distinguished:

1. Janta Land Promoters Pvt. Ltd. Vs U.O.I. & ors., Civil Writ Petition No. 8548 of 2020 (Para 9, 13)

Present petition challenges order dated 13.03.2019, passed by Real Estate Regulatory Authority.

(Delivered by Hon'ble Munishwar Nath Bhandari, J. & Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Manish Singh with Sri Pratik Chandra and Sri Azhar Ikram, learned counsel for the petitioner. Sri Wasim Masood has put in appearance on behalf of respondents.

2. The writ petition has been filed with the following prayers:

"(i) Issue an appropriate writ, order or direction declaring the section 24(a) of the U.P. Real Estate Regulatory Authority (General) Regulation, 2019 as ultra vires and contrary to the section 21 and 85 of the RERA Act. .

(ii) Issue a writ, order or direction in the nature of Certiorari quashing order dated 13.3.2019 passed Regulatory Authority / Bench No. I, U.P. RERA Regional Office, Gautam Budh Nagar, in Complaint No. 9201817449 (Amitabh Kumar Goyel Vs. M/s Newtech Promoters and Developers Pvt. Ltd.).

(iii) Issue a writ, order or direction in the nature certiorari quashing the impugned Recovery Certificate dated 24.8.2020 issued by opposite party no. 4.

(iv) issue a writ, order or direction in the nature of certiorari quashing the impugned Recovery Citation dated 21.9.2020 issued by opposite party no. 5.

(v) Issue a writ, order or direction in the nature of mandamus not to give effect the impugned recovery certificate dated 24.8.2020 and recovery citation dated 21.9.2020 issued by opposite party no. 4 and 5.

(vi) Issue a writ, order or direction in the nature of mandamus directing the state respondents not to initiate coercive measures pursuant to the impugned recovery certificate dated 24.8.2020 and recovery citation dated 21.9.2020 issued by opposite party no. 4 and 5."

3. The petitioner has challenged the order passed by Real Estate Regulatory Authority (in short "RERA") dated 13.3.2019 though an appeal against the said order lies under Section 43(5) of Real Estate (Regulation and Development) Act, 2016 (in short "Act of 2016").

4. It is a case where a complaint was filed by the non-petitioner alleging that despite payment towards unit No. C-401 in the scheme introduced by the petitioner, the possession of a unit has not been given. The unit (flat) was booked on 15.3.2012 and was to be delivered in the year 2015. The prayer was made for refund of the amount of Rs.20,03,447/- with interest. The Authority found that as per the agreement entered between the parties, possession of the flat in question should have been delivered by 2015. The petitioner-Company failed to show delivery of possession of the flat in question. Thus, taking into consideration the default of the Promoter (petitioner herein) and referring to the

judgment of Apex Court, an order was passed by RERA on 13.3.2019 for refund of the principal amount alongwith interest. In pursuance thereof, order dated 13.3.2019 was issued for its execution. The amount of Rs.20,00,732/- was shown towards the principal amount while component of interest was Rs.13,28,727.43/-. The petitioner has filed this writ petition to challenge not only the order dated 13.3.2019 passed by RERA but the recovery certificate dated 24.8.2020 as well as recovery citation dated 21.9.2020 on the execution application.

5. Learned counsel for the petitioner submits that an appeal against the order passed by RERA is maintainable but this case has exceptional circumstances thus even a writ petition would be maintainable. One member of RERA has passed the order going against the Act of 2016. Section 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members. The impugned order is by one Member alone going against the mandate of Section 21 of the Act of 2016. In view of the above, there is no need to prefer an appeal as the order dated 13.3.2019 is without jurisdiction.

6. It is also stated that the order to award interest by the Authority is again going contrary to the provisions. Rules for award of interest was introduced in the year 2018. The amount deposited with the Promotor has been ordered to be returned with interest. The interest has been allowed even for the period prior to introduction of U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 (in short "Rules of 2018"). It is even ignoring the rate of interest agreed by the parties. Challenge to the order has been made on that ground also.

7. We are first taking challenge to the order dated 13.3.2019, passed by the Authority to find out as to whether one member was competent to pass the order.

8. The issue has been raised in reference to Section 21 but it is not open for debate having been decided by this Court in ***Writ -C No.2248 of 2020 (M/s K.D.P. Build Well Pvt. Ltd. vs. State of U.P. and 4 Others) vide judgment dated 04.02.2020 and in Writ- C No.3289 of 2020 (Rudra Buildwell Constructions Pvt. Ltd. vs. Poonam Sood and Another) vide judgment dated 06.02.2020*** holding order by one member to be legal. The issue regarding composition of RERA was considered in reference to Sections 21 and 81 of the Act of 2016. Section 81 provides for delegation of power/function and taking the aforesaid provision into consideration, the argument was not accepted.

9. At this stage, learned counsel for the petitioner has made a reference to the judgment of Punjab and Haryana High Court on the same issue in ***Civil Writ Petition No.8548 of 2020 (Janta Land Promoters Private Limited vs. Union of India and others) vide judgment dated 16.10.2020.*** It is stated that judgment of this Court has been referred by Punjab and Haryana High Court and has taken a different view.

10. What we find is binding effect of the judgment rendered by this Court than to follow the judgment of other High Court. Accordingly, we are unable to accept the first argument in reference to Section 21 of the Act of 2016. It is more so when the petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the

matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint.

11. It is further necessary to refer Sections 21, 29 and 30 of the Act of 2016 to discuss the issue independent to the earlier judgments. The provisions aforesaid are quoted hereunder :

*"**21. Composition of Authority**.- The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government."*

***29. Meeting of Authority.-** (1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.*

(2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.

(4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application.

Provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

***30. Vacancies, etc., not to invalidate proceeding of Authority**.- No act or proceeding of the Authority shall be invalid merely by reason of--*

(a) any vacancy in, or any defect in the constitution of, the Authority; or

(b) any defect in the appointment of a person acting as a Member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case." .

12. Section 21 of Act of 2016 speaks about composition of the Authority, which shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government. Section 29, however, talks about the meeting of Authority and perusal of sub-section (2) thereof shows that in absence of Chairperson for any reason, the other Member chosen by the Members present amongst themselves at the meeting, shall preside thereby. Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson so appointed by the appropriate Government. Thus, it is not necessary that the adjudication of the complaint has to be made by the composition of Authority, as given under Section 21 of the Act of 2016 though as per Section 29 also, it should be by two Members in absence of the Chairperson.

13. Section 30 of Act of 2016 is, however, relevant and address the issue raised in this petition. The vacancies, etc. not to invalidate proceeding of the

Authority. It shows that in case of vacancy, or any defect in the constitution of the Authority or any defect in the appointment of a person acting as a Member of the Authority, the proceeding of the Authority would not be invalidated. Section 30 of the Act of 2016 give complete answer to the objection raised by the petitioner regarding composition of the Authority. It is not that whatever composition given under Section 21 of the Act alone can decide the complaint rather reference of Section 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. This aspect was not brought to the notice of Punjab and Haryana High Court in the case of ***Janta Land Promoters Private Limited (supra).***

14. It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to Section 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to Section 21 of the Act of 2016 but has to be reference of other provisions, more specifically, Section 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. The resolution of the Authority has also been challenged but in the light of Section 30 of the Act of 2016, we find no ground to set aside the resolution as otherwise Section 81 saves it.

15. So far the second issue regarding rate of interest is concerned, it is nothing but a challenge on the merit of the order. We hold writ petition for it to be not maintainable as petitioner has remedy of appeal. Thus, we are not causing interference in the order on merit but allowing the petitioner to take remedy of appeal, if so desires. It is after taking note of the fact that the order of RERA is not otherwise onerous so as to maintain a writ petition.

16. The other challenge in the writ petition is to execution of the order made in reference to Section 40(1) of the Act of 2016. The recovery of the amount is to be made as arrears of land revenue. It is stated that recovery of interest, penalty or compensation alone can be made as arrears of land revenue. In the instance case, RERA has issued citation for return of the amount so deposited with the Promoter with interest. The refund of the principal amount cannot be through the process of execution given under Section 40(1) of the Act of 2016 but can be as per Section 40(2) of the Act of 2016.

17. To deal with the argument aforesaid, we are quoting Section 40 of the Act of 2016, hereunder :

"40 Recovery of interest or penalty or compensation and enforcement of order, etc.- (1) *If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.*

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed."

18. Before addressing the issue further it would be necessary to go through the object of the enactment i.e. as to why the Parliament brought the Act of 2016. The object of Act of 2016 is to protect the interest of consumer in real estate sector apart from others. The Bill was introduced with the following object :

"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, ***or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal*** *and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."*

19. A perusal of the object reveals that the Act of 2016 has been enacted to save interest of consumers apart from others and thereby to regulate real estate in a proper manner. It is even to give speedy dispute redressal mechanism. Section 40(1) of Act of 2016 no doubt provides for mechanism for recovery of interest, penalty or compensation. It cannot however be ignored that recovery of the amount is provided under Section 40(1) alone. Section 40(2) is for execution of any other order or direction to any person to do any act, or refrain from doing any act, which is not empowered to do under the Act of 2016 and in case of failure to comply, execution can be enforced in the manner prescribed. Sub-section (2) of Section 40 was to enforce any direction of the nature of restrain or injunction which cannot be enforced as an arrears of land revenue. After coming into the force of the rules framed by the State of Uttar Pradesh, the matter of execution can be taken by the Adjudicating Authority. Sub-Section (2) of Section 40 is not meant for recovery of the amount but for any other direction either to act in a particular manner or to refrain a party in doing any act. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. Rules 23 and 24 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (in short "Rules of 2016") were brought for that purpose and provides the machanism for execution of the order.

20. In the light of the aforesaid, we are required to give proper interpretation to Section 40 so that the object sought to be achieved by enactment of Act of 2016 is carried out.

21. In the instant case, the consumer had deposited a sum of Rs.20 lacs and odd, in instalments but despite an agreement for giving possession of the flat in the year 2015, it was not handed over to the consumer. The direction for return of the amount with interest has been given in those circumstances. If a consumer is to

seek execution of the part of the order through the civil court then the very purpose of the enactment of Act of 2016 to provide speedy dispute redressal mechanism would frustrate. If the argument of the petitioner is accepted then for recovery of a sum of Rs. 20 lacs and odd, the non-petitioner consumer is to be send to civil court while recovery of amount of interest of Rs.13 lacs and odd can be made as arrears of land revenue, as admitted by the counsel for the petitioner himself. If recovery of amount is to be sought by dividing it in two parts and by different method, it would be against the object of the Act of 2016. The object of speedy redressal would frustrate if recovery of the amount is also sought through the civil court. We thus hold that the purpose and object of Section 40(1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. Section 40(1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. Section 40(2) is for any other direction either to act in a particular manner or to restrain a party to do certain act and execution of it can be made by the Adjudicating Authority and in case of failure, by the civil court. Section 40(2) covers basically the case of an order of injunction or mandatory injunction.

22. Accordingly, we are unable to accept even the last argument raised by the counsel for the petitioner. It would otherwise frustrate the very object of the Act of 2016 and would give rise to the anarchy, existing earlier, in the hands of Promoters.

23. So far as challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is concerned, the issue is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings However, as and when the Authority invokes Regulation 24 (a) of Regulation, 2019, the liberty is given to challenge the validity. Thus, issue is kept open for the aforesaid.

24. Thus, for all the reasons, we are unable to accept any of the arguments raised by the counsel for the petitioner. The writ petition is accordingly **dismissed**, however, with the liberty to avail the remedy of appeal if other than the issue decided by us remains, which may include the issue towards interest.

(2021)03ILR A674
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 24609 of 2020

M/S Geotech Promoters Pvt. Ltd., Delhi ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pratik Chandra, Sri Manish Singh, Sri Azhar Ikram

Counsel for the Respondents:
C.S.C., Sri Wasim Masood

A. Real Estate (Regulation and Development) Act (16 of 2016), S. 21, S. 29, S. 30, S. 81 - Recovery Certificate challenged on ground that single member

of RERA alone could not pass order - as S. 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members - *Held* - Even single member competent to pass order - Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson - S. 30 shows that in case of vacancy, or any defect in the constitution of the Authority the proceeding of the Authority would not be invalidated - S. 81 provides for delegation of power/function, an order was issued to delegate the power to a Member for hearing of the complaint - More so petitioner did not raise objection before the single Member about his competence to adjudicate the complaint - petitioner challenged the order in reference to the composition only when he lost in the complaint (Para 8,10, 12, 13)

B. Real Estate (Regulation and Development) Act (16 of 2016), S. 40 (1), S. 40 (2) - Recovery - If a promoter or an allottee or a real estate agent, fails to pay *principal amount deposited with him*, *interest or penalty or compensation* imposed on him, it shall be recoverable as an arrears of land revenue u/s 40 (1) - recovery of the amount is provided under Section 40(1) alone - whereas S. 40(2) is to enforce any direction of the nature of restrain, injunction or to act in a particular manner or to refrain a party in doing any act, which cannot be enforced as an arrears of land revenue & it is not meant for recovery of the amount. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. (Para 19)

Complaint filed alleging that despite payment possession of a unit not given - prayer was made for refund of the amount with interest - an order was passed by RERA for refund of the principal amount of Rs 21,42,887/- alongwith interest - RERA issued citation for return of the principal amount of Rs 21,42,887/- deposited with the Promoter alongwith interest Rs 14,77,569/ - recovery of the amount was to be made as arrears of land revenue - Order challenged on the ground that refund of the principal amount is not recoverable as an arrears of land revenue u/s 40 (1) but can be as per Section 40(2) of the Act of 2016 - *Held* - If recovery of amount is sought by dividing it in two parts and by different method i.e. for recovery of principal amount consumer is to be send to civil court while recovery of amount of interest is made as arrears of land revenue then it would be against the object of the Act of 2016 of speedy redressal (Para 21)

Dismissed

List of Cases cited:-

1. M/s K.D.P. Build Well Pvt. Ltd. Vs State of U.P. & Ors Writ -C No.2248 of 2020 dt 04.02.2020

2. Rudra Buildwell Constructions Pvt. Ltd. Vs Poonam Sood & Anr Writ- C No.3289 of 2020 dt 06.02.2020

3. Janta Land Promoters Private Limited Vs U.O.I. CWP No.8548 of 2020 dt 16.10.2020 (P&H)

(Delivered by Hon'ble Munishwar Nath Bhandari, J. & Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Manish Singh with Sri Pratik Chandra and Sri Azhar Ikram, learned counsel for the petitioner. Sri Wasim Masood has put in appearance on behalf of respondents.

2. The writ petition has been filed with the following prayers:

"(i) Issue an appropriate writ, order or direction declaring the section 24(a) of the U.P. Real Estate Regulatory Authority (General) Regulation, 2019 as ultra vires and contrary to the section 21 and 85 of the RERA Act.

(ii) Issue a writ, order or direction in the nature of Certiorari quashing order

dated 27.8.2019 passed Regulatory Authority / Bench No. II, U.P. RERA Regional Office, Gautam Budh Nagar, in Complaint No. NCR144/05/0460/2019 (Narendra Nath Pandey and Jyoti Pandey vs. M/s Geotech Promoters Pvt. Ltd.).

(iii) Issue a writ, order or direction in the nature certiorari quashing the impugned Recovery Certificate dated 24.2.2020 issued by opposite party no. 4.

(iv) Issue a writ, order or direction in the nature of mandamus not to give effect the impugned recovery certificate dated 24.2.2020 issued by opposite party no. 4.

(vi) Issue a writ, order or direction in the nature of mandamus directing the state respondents not to initiate coercive measures pursuant to the impugned recovery certificate dated 24.2.2020 issued by opposite party no. 4."

3. The petitioner has challenged the order passed by Real Estate Regulatory Authority (in short "RERA") dated 27.8.2019 though an appeal against the said order lies under Section 43(5) of Real Estate (Regulation and Development) Act, 2016 (in short "Act of 2016").

4. It is a case where a complaint was filed by the non-petitioner alleging that despite payment towards unit No. A-2/702 in the scheme introduced by the petitioner, the possession of a unit has not been given. The unit (flat) was booked on 13.6.2015 and was to be delivered in the year 2018. The prayer was made for refund of the amount of Rs.27,70,977/- with interest. The Authority found that as per the agreement entered between the parties, possession of the flat in question should have been delivered by 2018. The petitioner-Company failed to show delivery of possession of the flat in question. Thus, taking into consideration the default of the Promoter (petitioner herein) and referring to the judgment of Apex Court, an order was passed by RERA on 27.8.2019 for refund of the principal amount alongwith interest. In pursuance thereof, order dated 27.8.2019 was issued for its execution. The amount of Rs.27,70,977/- was shown towards the principal amount while component of interest was Rs.10,62,399.50/-. The petitioner has filed this writ petition to challenge not only the order dated 27.8.2019 passed by RERA but the recovery certificate dated 24.2.2020 on the execution application.

5. Learned counsel for the petitioner submits that an appeal against the order passed by RERA is maintainable but this case has exceptional circumstances thus even a writ petition would be maintainable. One member of RERA has passed the order going against the Act of 2016. Section 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members. The impugned order is by one Member alone going against the mandate of Section 21 of the Act of 2016. In view of the above, there is no need to prefer an appeal as the order dated 27.8.2019 is without jurisdiction.

6. It is also stated that the order to award interest by the Authority is again going contrary to the provisions. Rules for award of interest was introduced in the year 2018. The amount deposited with the Promotor has been ordered to be returned with interest. The interest has been allowed even for the period prior to introduction of U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 (in short "Rules of 2018"). It is even ignoring the rate of interest agreed by the parties. Challenge to the order has been made on that ground also.

7. We are first taking challenge to the order dated 27.8.2019, passed by the Authority to find out as to whether one member was competent to pass the order.

8. The issue has been raised in reference to Section 21 but it is not open for debate having been decided by this Court in ***Writ -C No.2248 of 2020 (M/s K.D.P. Build Well Pvt. Ltd. vs. State of U.P. and 4 Others) vide judgment dated 04.02.2020 and in Writ- C No.3289 of 2020 (Rudra Buildwell Constructions Pvt. Ltd. vs. Poonam Sood and Another) vide judgment dated 06.02.2020*** holding order by one member to be legal. The issue regarding composition of RERA was considered in reference to Sections 21 and 81 of the Act of 2016. Section 81 provides for delegation of power/function and taking the aforesaid provision into consideration, the argument was not accepted.

9. At this stage, learned counsel for the petitioner has made a reference to the judgment of Punjab and Haryana High Court on the same issue in ***Civil Writ Petition No.8548 of 2020 (Janta Land Promoters Private Limited vs. Union of India and others) vide judgment dated 16.10.2020.*** It is stated that judgment of this Court has been referred by Punjab and Haryana High Court and has taken a different view.

10. What we find is binding effect of the judgment rendered by this Court than to follow the judgment of other High Court. Accordingly, we are unable to accept the first argument in reference to Section 21 of the Act of 2016. It is more so when the petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint.

11. It is further necessary to refer Sections 21, 29 and 30 of the Act of 2016 to discuss the issue independent to the earlier judgments. The provisions aforesaid are quoted hereunder :

*"**21. Composition of Authority.-** The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government."*

29. Meeting of Authority.- *(1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.*

(2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.

(4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application.

Provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

30. Vacancies, etc., not to invalidate proceeding of Authority*.- No act or proceeding of the Authority shall be invalid merely by reason of--*

(a) any vacancy in, or any defect in the constitution of, the Authority; or

(b) any defect in the appointment of a person acting as a Member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case."

12. Section 21 of Act of 2016 speaks about composition of the Authority, which shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government. Section 29, however, talks about the meeting of Authority and perusal of sub-section (2) thereof shows that in absence of Chairperson for any reason, the other Member chosen by the Members present amongst themselves at the meeting, shall preside thereby. Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson so appointed by the appropriate Government. Thus, it is not necessary that the adjudication of the complaint has to be made by the composition of Authority, as given under Section 21 of the Act of 2016 though as per Section 29 also, it should be by two Members in absence of the Chairperson.

13. Section 30 of Act of 2016 is, however, relevant and address the issue raised in this petition. The vacancies, etc. not to invalidate proceeding of the Authority. It shows that in case of vacancy, or any defect in the constitution of the Authority or any defect in the appointment of a person acting as a Member of the Authority, the proceeding of the Authority would not be invalidated. Section 30 of the Act of 2016 give complete answer to the objection raised by the petitioner regarding composition of the Authority. It is not that whatever composition given under Section 21 of the Act alone can decide the complaint rather reference of Section 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. This aspect was not brought to the notice of Punjab and Haryana High Court in the case of ***Janta Land Promoters Private Limited (supra).***

14. It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to Section 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to Section 21 of the Act of 2016 but has to be reference of other provisions, more specifically, Section 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. The resolution of the Authority has also been challenged but in the light of Section 30 of the Act of 2016, we find no ground to set aside the resolution as otherwise Section 81 saves it.

15. So far the second issue regarding rate of interest is concerned, it is nothing but a challenge on the merit of the order. We hold writ petition for it to be not maintainable as petitioner has remedy of appeal. Thus, we are not causing interference in the order on merit but allowing the petitioner to take remedy of appeal, if so desires. It is after taking note of the fact that the order of RERA is not otherwise onerous so as to maintain a writ petition.

16. The other challenge in the writ petition is to execution of the order made in reference to Section 40(1) of the Act of 2016. The recovery of the amount is to be made as arrears of land revenue. It is stated that recovery of interest, penalty or compensation alone can be made as arrears of land revenue. In the instance case, RERA has issued citation for return of the amount so deposited with the Promoter with interest. The refund of the principal amount cannot be through the process of execution given under Section 40(1) of the Act of 2016 but can be as per Section 40(2) of the Act of 2016.

17. To deal with the argument aforesaid, we are quoting Section 40 of the Act of 2016, hereunder :

"40 Recovery of interest or penalty or compensation and enforcement of order, etc.- *(1) If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.*

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed."

18. Before addressing the issue further it would be necessary to go through the object of the enactment i.e. as to why the Parliament brought the Act of 2016. The object of Act of 2016 is to protect the interest of consumer in real estate sector apart from others. The Bill was introduced with the following object :

"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, ***or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal*** *and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."*

19. A perusal of the object reveals that the Act of 2016 has been enacted to save interest of consumers apart from others and thereby to regulate real estate in a proper manner. It is even to give speedy

dispute redressal mechanism. Section 40(1) of Act of 2016 no doubt provides for mechanism for recovery of interest, penalty or compensation. It cannot however be ignored that recovery of the amount is provided under Section 40(1) alone. Section 40(2) is for execution of any other order or direction to any person to do any act, or refrain from doing any act, which is not empowered to do under the Act of 2016 and in case of failure to comply, execution can be enforced in the manner prescribed. Sub-section (2) of Section 40 was to enforce any direction of the nature of restrain or injunction which cannot be enforced as an arrears of land revenue. After coming into the force of the rules framed by the State of Uttar Pradesh, the matter of execution can be taken by the Adjudicating Authority. Sub-Section (2) of Section 40 is not meant for recovery of the amount but for any other direction either to act in a particular manner or to refrain a party in doing any act. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. Rules 23 and 24 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (in short "Rules of 2016") were brought for that purpose and provides the machanism for execution of the order.

20. In the light of the aforesaid, we are required to give proper interpretation to Section 40 so that the object sought to be achieved by enactment of Act of 2016 is carried out.

21. In the instant case, the consumer had deposited a sum of Rs.27 lacs and odd, in instalments but despite an agreement for giving possession of the flat in the year 2018, it was not handed over to the consumer. The direction for return of the amount with interest has been given in those circumstances. If a consumer is to seek execution of the part of the order through the civil court then the very purpose of the enactment of Act of 2016 to provide speedy dispute redressal mechanism would frustrate. If the argument of the petitioner is accepted then for recovery of a sum of Rs. 27 lacs and odd, the non-petitioner consumer is to be send to civil court while recovery of amount of interest of Rs.10 lacs and odd can be made as arrears of land revenue, as admitted by the counsel for the petitioner himself. If recovery of amount is to be sought by dividing it in two parts and by different method, it would be against the object of the Act of 2016. The object of speedy redressal would frustrate if recovery of the amount is also sought through the civil court. We thus hold that the purpose and object of Section 40(1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. Section 40(1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. Section 40(2) is for any other direction either to act in a particular manner or to restrain a party to do certain act and execution of it can be made by the Adjudicating Authority and in case of failure, by the civil court. Section 40(2) covers basically the case of an order of injunction or mandatory injunction.

22. Accordingly, we are unable to accept even the last argument raised by the counsel for the petitioner. It would otherwise frustrate the very object of the Act of 2016 and would give rise to the anarchy, existing earlier, in the hands of Promoters.

23. So far as challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority

(General) Regulation, 2019 is concerned, the issue is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings However, as and when the Authority invokes Regulation 24 (a) of Regulation, 2019, the liberty is given to challenge the validity. Thus, issue is kept open for the aforesaid.

24. Thus, for all the reasons, we are unable to accept any of the arguments raised by the counsel for the petitioner. The writ petition is accordingly **dismissed**, however, with the liberty to avail the remedy of appeal if other than the issue decided by us remains, which may include the issue towards interest.

(2021)03ILR A681
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 24673 of 2020

La Residentia Developers Pvt. Ltd., Delhi ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pratik Chandra, Sri Azhar Ikram, Sri Manish Singh

Counsel for the Respondents:
C.S.C., Sri Wasim Masood

A. Real Estate (Regulation and Development) Act (16 of 2016), S. 21, S. 29, S. 30, S. 81 - Recovery Certificate challenged on ground that single member of RERA alone could not pass order - as S. 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members - *Held* - Even single member competent to pass order - Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson - S. 30 shows that in case of vacancy, or any defect in the constitution of the Authority the proceeding of the Authority would not be invalidated - S. 81 provides for delegation of power/function, an order was issued to delegate the power to a Member for hearing of the complaint - More so petitioner did not raise objection before the single Member about his competence to adjudicate the complaint - petitioner challenged the order in reference to the composition only when he lost in the complaint (Para 8,10, 12, 13)

B. Real Estate (Regulation and Development) Act (16 of 2016), S. 40 (1), S. 40 (2) - Recovery - If a promoter or an allottee or a real estate agent, fails to pay *principal amount deposited with him*, *interest or penalty or compensation* imposed on him, it shall be recoverable as an arrears of land revenue u/s 40 (1) - recovery of the amount is provided under Section 40(1) alone - whereas S. 40(2) is to enforce any direction of the nature of restrain, injunction or to act in a particular manner or to refrain a party in doing any act, which cannot be enforced as an arrears of land revenue & it is not meant for recovery of the amount. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. (Para 19)

Complaint filed alleging that despite payment possession of a unit not given - prayer was made for refund of the amount with interest - an order was passed by RERA for refund of the principal amount of Rs 21,42,887/- alongwith interest - RERA issued citation for return of the principal amount of Rs 21,42,887/- deposited with the Promoter alongwith interest Rs 14,77,569/ - recovery of

the amount was to be made as arrears of land revenue - Order challenged on the ground that refund of the principal amount is not recoverable as an arrears of land revenue u/s 40 (1) but can be as per Section 40(2) of the Act of 2016 - *Held* - If recovery of amount is sought by dividing it in two parts and by different method i.e. for recovery of principal amount consumer is to be send to civil court while recovery of amount of interest is made as arrears of land revenue then it would be against the object of the Act of 2016 of speedy redressal (Para 21)

Dismissed

List of Cases cited:-

1. M/s K.D.P. Build Well Pvt. Ltd. Vs State of U.P. & Ors Writ -C No.2248 of 2020 dt 04.02.2020

2. Rudra Buildwell Constructions Pvt. Ltd. Vs Poonam Sood & Anr Writ- C No.3289 of 2020 dt 06.02.2020

3. Janta Land Promoters Private Limited Vs U.O.I. CWP No.8548 of 2020 dt 16.10.2020 (P&H)

(Delivered by Hon'ble Munishwar Nath Bhandari, J. &
Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Manish Singh with Sri Pratik Chandra and Sri Azhar Ikram, learned counsel for the petitioner. Sri Wasim Masood has put in appearance on behalf of respondents.

2. The writ petition has been filed with the following prayers:

"(i) Issue an appropriate writ, order or direction declaring the section 24(a) of the U.P. Real Estate Regulatory Authority (General) Regulations, 2019 as ultra vires and contrary to the section 21 and 85 of the RERA Act.

(ii) Issue a writ, order or direction in the nature of Certiorari quashing order dated 24.4.2019 passed Regulatory Authority / Bench No. I, U.P. RERA Regional Office, Gautam Budh Nagar, in Complaint No. 9201819750 (Yasir Husain Khan Vs. M/s La residential developers Pvt. Ltd.).

(iii) Issue a writ, order or direction in the nature certiorari quashing the impugned Recovery Certificate dated 8.7.2020 issued by opposite party no. 4.

(iv) issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 20.10.2020 issued by opposite party no. 5.

(v) Issue a writ, order or direction in the nature of mandamus directing to de-freeze the respective bank accounts as mentioned in the impugned order dated 20.10.2020.

(vi) Issue a writ, order or direction in the nature of mandamus directing the state respondents not to initiate coercive measures pursuant to the impugned recovery certificate dated 8.7.2020 and order dated 20.10.2020 issued by opposite party no. 4 and 5."

3. The petitioner has challenged the order passed by Real Estate Regulatory Authority (in short "RERA") dated 24.4.2019 though an appeal against the said order lies under Section 43(5) of Real Estate (Regulation and Development) Act, 2016 (in short "Act of 2016").

4. It is a case where a complaint was filed by the non-petitioner alleging that despite payment towards unit No. T-29/1906 in the scheme introduced by the petitioner, the possession of a unit has not been given. The unit (flat) was to be delivered on 16.01.2019. The prayer was made for refund of the amount of

Rs.37,35,600/- with interest. The Authority found that as per the agreement entered between the parties, possession of the flat in question should have been delivered by 2019. The petitioner-Company failed to show delivery of possession of the flat in question. Thus, taking into consideration the default of the Promoter (petitioner herein) and referring to the judgment of Apex Court, an order was passed by RERA on 24.4.2019 for refund of the principal amount alongwith interest. In pursuance thereof, order was issued for its execution. The amount of Rs.37,35,600/- was shown towards the principal amount while component of interest was Rs.17,41,305.73/-. The petitioner has filed this writ petition to challenge not only the order dated 24.4.2019 passed by RERA but the recovery certificate dated 8.7.2020 as well as order dated dated 20.10.2020.

5. Learned counsel for the petitioner submits that an appeal against the order passed by RERA is maintainable but this case has exceptional circumstances thus even a writ petition would be maintainable. One member of RERA has passed the order going against the Act of 2016. Section 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members. The impugned order is by one Member alone going against the mandate of Section 21 of the Act of 2016. In view of the above, there is no need to prefer an appeal as the order dated 24.4.2019 is without jurisdiction.

6. It is also stated that the order to award interest by the Authority is again going contrary to the provisions. Rules for award of interest was introduced in the year 2018. The amount deposited with the Promotor has been ordered to be returned with interest. The interest has been allowed even for the period prior to introduction of U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 (in short "Rules of 2018"). It is even ignoring the rate of interest agreed by the parties. Challenge to the order has been made on that ground also.

7. We are first taking challenge to the order dated 24.4.2019, passed by the Authority to find out as to whether one member was competent to pass the order.

8. The issue has been raised in reference to Section 21 but it is not open for debate having been decided by this Court in ***Writ -C No.2248 of 2020 (M/s K.D.P. Build Well Pvt. Ltd. vs. State of U.P. and 4 Others) vide judgment dated 04.02.2020 and in Writ- C No.3289 of 2020 (Rudra Buildwell Constructions Pvt. Ltd. vs. Poonam Sood and Another) vide judgment dated 06.02.2020*** holding order by one member to be legal. The issue regarding composition of RERA was considered in reference to Sections 21 and 81 of the Act of 2016. Section 81 provides for delegation of power/function and taking the aforesaid provision into consideration, the argument was not accepted.

9. At this stage, learned counsel for the petitioner has made a reference to the judgment of ***Punjab and Haryana High Court on the same issue in Civil Writ Petition No.8548 of 2020 (Janta Land Promoters Private Limited vs. Union of India and others) vide judgment dated 16.10.2020***. It is stated that judgment of this Court has been referred by Punjab and Haryana High Court and has taken a different view.

10. What we find is binding effect of the judgment rendered by this Court than to

follow the judgment of other High Court. Accordingly, we are unable to accept the first argument in reference to Section 21 of the Act of 2016. It is more so when the petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint.

11. It is further necessary to refer Sections 21, 29 and 30 of the Act of 2016 to discuss the issue independent to the earlier judgments. The provisions aforesaid are quoted hereunder :

*"**21. Composition of Authority.-** The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government."*

***29. Meeting of Authority.-** (1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.*

(2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.

(4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application.

Provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

***30. Vacancies, etc., not to invalidate proceeding of Authority**.- No act or proceeding of the Authority shall be invalid merely by reason of--*

(a) any vacancy in, or any defect in the constitution of, the Authority; or

(b) any defect in the appointment of a person acting as a Member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case."

12. Section 21 of Act of 2016 speaks about composition of the Authority, which shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government. Section 29, however, talks about the meeting of Authority and perusal of sub-section (2) thereof shows that in absence of Chairperson for any reason, the other Member chosen by the Members present amongst themselves at the meeting, shall preside thereby. Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson so appointed by the appropriate Government. Thus, it is not necessary that the adjudication of the complaint has to be made by the composition of Authority, as given under

Section 21 of the Act of 2016 though as per Section 29 also, it should be by two Members in absence of the Chairperson.

13. Section 30 of Act of 2016 is, however, relevant and address the issue raised in this petition. The vacancies, etc. not to invalidate proceeding of the Authority. It shows that in case of vacancy, or any defect in the constitution of the Authority or any defect in the appointment of a person acting as a Member of the Authority, the proceeding of the Authority would not be invalidated. Section 30 of the Act of 2016 give complete answer to the objection raised by the petitioner regarding composition of the Authority. It is not that whatever composition given under Section 21 of the Act alone can decide the complaint rather reference of Section 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. This aspect was not brought to the notice of Punjab and Haryana High Court in the case of ***Janta Land Promoters Private Limited (supra).***

14. It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to Section 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to Section 21 of the Act of 2016 but has to be reference of other provisions, more specifically, Section 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. The resolution of the Authority has also been challenged but in the light of Section 30 of the Act of 2016, we find no ground to set aside the resolution as otherwise Section 81 saves it.

15. So far the second issue regarding rate of interest is concerned, it is nothing but a challenge on the merit of the order. We hold writ petition for it to be not maintainable as petitioner has remedy of appeal. Thus, we are not causing interference in the order on merit but allowing the petitioner to take remedy of appeal, if so desires. It is after taking note of the fact that the order of RERA is not otherwise onerous so as to maintain a writ petition.

16. The other challenge in the writ petition is to execution of the order made in reference to Section 40(1) of the Act of 2016. The recovery of the amount is to be made as arrears of land revenue. It is stated that recovery of interest, penalty or compensation alone can be made as arrears of land revenue. In the instance case, RERA has issued citation for return of the amount so deposited with the Promoter with interest. The refund of the principal amount cannot be through the process of execution given under Section 40(1) of the Act of 2016 but can be as per Section 40(2) of the Act of 2016.

17. To deal with the argument aforesaid, we are quoting Section 40 of the Act of 2016, hereunder :

"40 Recovery of interest or penalty or compensation and enforcement of order,

etc.- (1) *If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.*

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed."

18. Before addressing the issue further it would be necessary to go through the object of the enactment i.e. as to why the Parliament brought the Act of 2016. The object of Act of 2016 is to protect the interest of consumer in real estate sector apart from others. The Bill was introduced with the following object :

"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, ***or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal*** *and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."*

19. A perusal of the object reveals that the Act of 2016 has been enacted to save interest of consumers apart from others and thereby to regulate real estate in a proper manner. It is even to give speedy dispute redressal mechanism. Section 40(1) of Act of 2016 no doubt provides for mechanism for recovery of interest, penalty or compensation. It cannot however be ignored that recovery of the amount is provided under Section 40(1) alone. Section 40(2) is for execution of any other order or direction to any person to do any act, or refrain from doing any act, which is not empowered to do under the Act of 2016 and in case of failure to comply, execution can be enforced in the manner prescribed. Sub-section (2) of Section 40 was to enforce any direction of the nature of restrain or injunction which cannot be enforced as an arrears of land revenue. After coming into the force of the rules framed by the State of Uttar Pradesh, the matter of execution can be taken by the Adjudicating Authority. Sub-Section (2) of Section 40 is not meant for recovery of the amount but for any other direction either to act in a particular manner or to refrain a party in doing any act. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. Rules 23 and 24 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (in short "Rules of 2016") were brought for that purpose and provides the machanism for execution of the order.

20. In the light of the aforesaid, we are required to give proper interpretation to

Section 40 so that the object sought to be achieved by enactment of Act of 2016 is carried out.

21. In the instant case, the consumer had deposited a sum of Rs.37 lacs and odd, in instalments but despite an agreement for giving possession of the flat in the year 2019, it was not handed over to the consumer. The direction for return of the amount with interest has been given in those circumstances. If a consumer is to seek execution of the part of the order through the civil court then the very purpose of the enactment of Act of 2016 to provide speedy dispute redressal mechanism would frustrate. If the argument of the petitioner is accepted then for recovery of a sum of Rs. 37 lacs and odd, the non-petitioner consumer is to be send to civil court while recovery of amount of interest of Rs.17 lacs and odd can be made as arrears of land revenue, as admitted by the counsel for the petitioner himself. If recovery of amount is to be sought by dividing it in two parts and by different method, it would be against the object of the Act of 2016. The object of speedy redressal would frustrate if recovery of the amount is also sought through the civil court. We thus hold that the purpose and object of Section 40(1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. Section 40(1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. Section 40(2) is for any other direction either to act in a particular manner or to restrain a party to do certain act and execution of it can be made by the Adjudicating Authority and in case of failure, by the civil court. Section 40(2) covers basically the case of an order of injunction or mandatory injunction.

22. Accordingly, we are unable to accept even the last argument raised by the counsel for the petitioner. It would otherwise frustrate the very object of the Act of 2016 and would give rise to the anarchy, existing earlier, in the hands of Promoters.

23. So far as challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is concerned, the issue is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings However, as and when the Authority invokes Regulation 24 (a) of Regulation, 2019, the liberty is given to challenge the validity. Thus, issue is kept open for the aforesaid.

24. Thus, for all the reasons, we are unable to accept any of the arguments raised by the counsel for the petitioner. The writ petition is accordingly **dismissed**, however, with the liberty to avail the remedy of appeal if other than the issue decided by us remains, which may include the issue towards interest.

(2021)03ILR A687
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 26439 of 2020

M/S Geotech Promoters Pvt. Ltd., Delhi ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pratik Chandra, Sri Azhar Ikram, Sri Manish Singh

Counsel for the Respondents:
C.S.C., Sri Wasim Masood

A. Real Estate (Regulation and Development) Act (16 of 2016), S. 21, S. 29, S. 30, S. 81 - Recovery Certificate challenged on ground that single member of RERA alone could not pass order - as S. 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members - *Held* - Even single member competent to pass order - Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson - S. 30 shows that in case of vacancy, or any defect in the constitution of the Authority the proceeding of the Authority would not be invalidated - S. 81 provides for delegation of power/function, an order was issued to delegate the power to a Member for hearing of the complaint - More so petitioner did not raise objection before the single Member about his competence to adjudicate the complaint - petitioner challenged the order in reference to the composition only when he lost in the complaint (Para 8,10, 12, 13)

B. Real Estate (Regulation and Development) Act (16 of 2016), S. 40 (1), S. 40 (2) - Recovery - If a promoter or an allottee or a real estate agent, fails to pay *principal amount deposited with him*, *interest or penalty or compensation* imposed on him, it shall be recoverable as an arrears of land revenue u/s 40 (1) - recovery of the amount is provided under Section 40(1) alone - whereas S. 40(2) is to enforce any direction of the nature of restrain, injunction or to act in a particular manner or to refrain a party in doing any act, which cannot be enforced as an arrears of land revenue & it is not meant for recovery of the amount. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. (Para 19)

Complaint filed alleging that despite payment possession of a unit not given - prayer was made for refund of the amount with interest - an order was passed by RERA for refund of the principal amount of Rs 21,42,887/- alongwith interest - RERA issued citation for return of the principal amount of Rs 21,42,887/- deposited with the Promoter alongwith interest Rs 14,77,569/ - recovery of the amount was to be made as arrears of land revenue - Order challenged on the ground that refund of the principal amount is not recoverable as an arrears of land revenue u/s 40 (1) but can be as per Section 40(2) of the Act of 2016 - *Held* - If recovery of amount is sought by dividing it in two parts and by different method i.e. for recovery of principal amount consumer is to be send to civil court while recovery of amount of interest is made as arrears of land revenue then it would be against the object of the Act of 2016 of speedy redressal (Para 21)

Dismissed

List of cases cited:-

1. M/s K.D.P. Build Well Pvt. Ltd. Vs State of U.P. & Ors Writ -C No.2248 of 2020 dt 04.02.2020

2. Rudra Buildwell Constructions Pvt. Ltd. Vs Poonam Sood & Anr Writ- C No.3289 of 2020 dt 06.02.2020

3. Janta Land Promoters Private Limited Vs U.O.I. CWP No.8548 of 2020 dt 16.10.2020 (P&H)

(Delivered by Hon'ble Munishwar Nath Bhandari, J. &
Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Manish Singh with Sri Pratik Chandra and Sri Azhar Ikram, learned counsel for the petitioner. Sri Wasim Masood has put in appearance on behalf of respondents.

2. The writ petition has been filed with the following prayers:

"(i) Issue an appropriate writ, order or direction declaring the section 24(a) of the U.P. Real Estate Regulatory Authority (General) Regulation, 2019 as ultra vires and contrary to the section 21 and 85 of the RERA Act.

(ii) Issue a writ, order or direction in the nature of Certiorari quashing order dated 27.8.2019 passed Regulatory Authority / Bench No. II, U.P. RERA Regional Office, Gautam Budh Nagar, in Complaint No. NCR144/05/0460/2019 (Narendra Nath Pandey and Jyoti Pandey Vs. M/s Geotech Promoters Pvt. Ltd.).

(iii) Issue a writ, order or direction in the nature certiorari quashing the impugned Recovery Certificate dated 27.2.2020 issued by opposite party no. 4.

(iv) Issue a writ, order or direction in the nature of mandamus not to give effect the impugned recovery certificate dated 27.2.2020 issued by opposite party no. 4.

(v) Issue a writ, order or direction in the nature of mandamus directing the state respondents not to initiate coercive measures pursuant to the impugned recovery certificate dated 27.2.2020 issued by opposite party no. 4."

3. The petitioner has challenged the order passed by Real Estate Regulatory Authority (in short "RERA") dated 27.8.2019 though an appeal against the said order lies under Section 43(5) of Real Estate (Regulation and Development) Act, 2016 (in short "Act of 2016").

4. It is a case where a complaint was filed by the non-petitioner alleging that despite payment towards unit No. A-2/203 in the scheme introduced by the petitioner, the possession of a unit has not been given. The unit (flat) was booked on 27.11.2015 and was to be delivered in the year 2018. The prayer was made for refund of the amount of Rs.25,46,903/- with interest. The Authority found that as per the agreement entered between the parties, possession of the flat in question should have been delivered by 2018. The petitioner-Company failed to show delivery of possession of the flat in question. Thus, taking into consideration the default of the Promoter (petitioner herein) and referring to the judgment of Apex Court, an order was passed by RERA on 27.8.2019 for refund of the principal amount alongwith interest. In pursuance thereof, order dated 27.8.2019 was issued for its execution. The amount of Rs.25,46,903/- was shown towards the principal amount while component of interest was Rs.9,31,981.38/-. The petitioner has filed this writ petition to challenge not only the order dated 27.8.2019 passed by RERA but the recovery certificate dated 27.2.2020 on the execution application.

5. Learned counsel for the petitioner submits that an appeal against the order passed by RERA is maintainable but this case has exceptional circumstances thus even a writ petition would be maintainable. One member of RERA has passed the order going against the Act of 2016. Section 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members. The impugned order is by one Member alone going against the mandate of Section 21 of the Act of 2016. In view of the above, there is no need to prefer an appeal as the order dated 27.8.2019 is without jurisdiction.

6. It is also stated that the order to award interest by the Authority is again going contrary to the provisions. Rules for award of interest was introduced in the year 2018. The amount deposited with the Promotor has been ordered to be returned

with interest. The interest has been allowed even for the period prior to introduction of U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 (in short "Rules of 2018"). It is even ignoring the rate of interest agreed by the parties. Challenge to the order has been made on that ground also.

7. We are first taking challenge to the order dated 27.8.2019, passed by the Authority to find out as to whether one member was competent to pass the order.

8. The issue has been raised in reference to Section 21 but it is not open for debate having been decided by this Court in ***Writ -C No.2248 of 2020 (M/s K.D.P. Build Well Pvt. Ltd. vs. State of U.P. and 4 Others) vide judgment dated 04.02.2020 and in Writ-C No.3289 of 2020 (Rudra Buildwell Constructions Pvt. Ltd. vs. Poonam Sood and Another) vide judgment dated 06.02.2020*** holding order by one member to be legal. The issue regarding composition of RERA was considered in reference to Sections 21 and 81 of the Act of 2016. Section 81 provides for delegation of power/function and taking the aforesaid provision into consideration, the argument was not accepted.

9. At this stage, learned counsel for the petitioner has made a reference to the judgment of Punjab and Haryana High Court on the same issue in ***Civil Writ Petition No.8548 of 2020 (Janta Land Promoters Private Limited vs. Union of India and others) vide judgment dated 16.10.2020***. It is stated that judgment of this Court has been referred by Punjab and Haryana High Court and has taken a different view.

10. What we find is binding effect of the judgment rendered by this Court than to follow the judgment of other High Court. Accordingly, we are unable to accept the first argument in reference to Section 21 of the Act of 2016. It is more so when the petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint.

11. It is further necessary to refer Sections 21, 29 and 30 of the Act of 2016 to discuss the issue independent to the earlier judgments. The provisions aforesaid are quoted hereunder :

"21. Composition of Authority.- *The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government."*

29. Meeting of Authority.- *(1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.*

(2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person

presiding shall have a second or casting vote.

(4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application.

Provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

***30. Vacancies, etc., not to invalidate proceeding of Authority**.- No act or proceeding of the Authority shall be invalid merely by reason of--*

(a) any vacancy in, or any defect in the constitution of, the Authority; or

(b) any defect in the appointment of a person acting as a Member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case."

12. Section 21 of Act of 2016 speaks about composition of the Authority, which shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government. Section 29, however, talks about the meeting of Authority and perusal of sub-section (2) thereof shows that in absence of Chairperson for any reason, the other Member chosen by the Members present amongst themselves at the meeting, shall preside thereby. Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson so appointed by the appropriate Government. Thus, it is not necessary that the adjudication of the complaint has to be made by the composition of Authority, as given under Section 21 of the Act of 2016 though as per Section 29 also, it should be by two Members in absence of the Chairperson.

13. Section 30 of Act of 2016 is, however, relevant and address the issue raised in this petition. The vacancies, etc. not to invalidate proceeding of the Authority. It shows that in case of vacancy, or any defect in the constitution of the Authority or any defect in the appointment of a person acting as a Member of the Authority, the proceeding of the Authority would not be invalidated. Section 30 of the Act of 2016 give complete answer to the objection raised by the petitioner regarding composition of the Authority. It is not that whatever composition given under Section 21 of the Act alone can decide the complaint rather reference of Section 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. This aspect was not brought to the notice of Punjab and Haryana High Court in the case of ***Janta Land Promoters Private Limited (supra).***

14. It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to Section 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to Section 21 of the Act of 2016 but has to be reference of other provisions, more specifically, Section 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to

delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. The resolution of the Authority has also been challenged but in the light of Section 30 of the Act of 2016, we find no ground to set aside the resolution as otherwise Section 81 saves it.

15. So far the second issue regarding rate of interest is concerned, it is nothing but a challenge on the merit of the order. We hold writ petition for it to be not maintainable as petitioner has remedy of appeal. Thus, we are not causing interference in the order on merit but allowing the petitioner to take remedy of appeal, if so desires. It is after taking note of the fact that the order of RERA is not otherwise onerous so as to maintain a writ petition.

16. The other challenge in the writ petition is to execution of the order made in reference to Section 40(1) of the Act of 2016. The recovery of the amount is to be made as arrears of land revenue. It is stated that recovery of interest, penalty or compensation alone can be made as arrears of land revenue. In the instance case, RERA has issued citation for return of the amount so deposited with the Promoter with interest. The refund of the principal amount cannot be through the process of execution given under Section 40(1) of the Act of 2016 but can be as per Section 40(2) of the Act of 2016.

17. To deal with the argument aforesaid, we are quoting Section 40 of the Act of 2016, hereunder :

"40 Recovery of interest or penalty or compensation and enforcement of order, etc.- *(1) If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.*

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed."

18. Before addressing the issue further it would be necessary to go through the object of the enactment i.e. as to why the Parliament brought the Act of 2016. The object of Act of 2016 is to protect the interest of consumer in real estate sector apart from others. The Bill was introduced with the following object :

"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, ***or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal*** *and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or*

orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."

19. A perusal of the object reveals that the Act of 2016 has been enacted to save interest of consumers apart from others and thereby to regulate real estate in a proper manner. It is even to give speedy dispute redressal mechanism. Section 40(1) of Act of 2016 no doubt provides for mechanism for recovery of interest, penalty or compensation. It cannot however be ignored that recovery of the amount is provided under Section 40(1) alone. Section 40(2) is for execution of any other order or direction to any person to do any act, or refrain from doing any act, which is not empowered to do under the Act of 2016 and in case of failure to comply, execution can be enforced in the manner prescribed. Sub-section (2) of Section 40 was to enforce any direction of the nature of restrain or injunction which cannot be enforced as an arrears of land revenue. After coming into the force of the rules framed by the State of Uttar Pradesh, the matter of execution can be taken by the Adjudicating Authority. Sub-Section (2) of Section 40 is not meant for recovery of the amount but for any other direction either to act in a particular manner or to refrain a party in doing any act. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. Rules 23 and 24 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (in short "Rules of 2016") were brought for that purpose and provides the machanism for execution of the order.

20. In the light of the aforesaid, we are required to give proper interpretation to Section 40 so that the object sought to be achieved by enactment of Act of 2016 is carried out.

21. In the instant case, the consumer had deposited a sum of Rs.25 lacs and odd, in instalments but despite an agreement for giving possession of the flat in the year 2018, it was not handed over to the consumer. The direction for return of the amount with interest has been given in those circumstances. If a consumer is to seek execution of the part of the order through the civil court then the very purpose of the enactment of Act of 2016 to provide speedy dispute redressal mechanism would frustrate. If the argument of the petitioner is accepted then for recovery of a sum of Rs. 25 lacs and odd, the non-petitioner consumer is to be send to civil court while recovery of amount of interest of Rs.9 lacs and odd can be made as arrears of land revenue, as admitted by the counsel for the petitioner himself. If recovery of amount is to be sought by dividing it in two parts and by different method, it would be against the object of the Act of 2016. The object of speedy redressal would frustrate if recovery of the amount is also sought through the civil court. We thus hold that the purpose and object of Section 40(1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. Section 40(1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. Section 40(2) is for any other direction either to act in a particular manner or to restrain a party to do certain act and execution of it can be made by the Adjudicating Authority and in case of failure, by the civil court. Section 40(2) covers basically the case of an order of injunction or mandatory injunction.

22. Accordingly, we are unable to accept even the last argument raised by the counsel for the petitioner. It would otherwise frustrate the very object of the Act of 2016 and would give rise to the anarchy, existing earlier, in the hands of Promoters.

23. So far as challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is concerned, the issue is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings However, as and when the Authority invokes Regulation 24 (a) of Regulation, 2019, the liberty is given to challenge the validity. Thus, issue is kept open for the aforesaid.

24. Thus, for all the reasons, we are unable to accept any of the arguments raised by the counsel for the petitioner. The writ petition is accordingly **dismissed**, however, with the liberty to avail the remedy of appeal if other than the issue decided by us remains, which may include the issue towards interest.

(2021)03ILR A694
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 26446 of 2020

M/S Newtech Promoters & Developers Pvt. Ltd. Delhi ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manish Singh, Sri Pratik Chandra, Sri Azhar Ikram

Counsel for the Respondents:
C.S.C., Wasim Masood

A. Civil Law – Real Estate Regulation - Real Estate (Regulation and Development) Act, 2016 - Section 30, 40(1), 43(5) - Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 - U.P. Real Estate Regulatory Authority (General) Regulation, 2019 - Rule 24(a).

Real Estate (Regulation and Development) Act, 2016 - Section 21, 29, 30 – Jurisdiction - Petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint. (Para 10)

It is not that whatever composition given u/s 21 of the Act alone can decide the complaint rather reference of S. 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. (Para 13)

It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to S. 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to S. 21 of the Act of 2016 but has to refer to other provisions, more specifically, S. 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power

to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. The resolution of the Authority has also been challenged but in the light of S. 30 of the Act of 2016, we find no ground to set aside the resolution as otherwise S. 81 saves it. (Para 12, 14)

B. Issue regarding the rate of interest has not been dealt with being a challenge on the merit of the case. (Para 15)

C. Interpretation of Section 40(2) – Sub-section (2) of Section 40 is not meant for recovery of the amount but for any other direction either to act in a particular manner or to restrain a party to do a certain act. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. S. 40 (2) covers basically the case of an order of injunction or mandatory injunction. Rules 23 and 24 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (in short "Rules of 2016") were brought for that purpose and provides the mechanism for execution of the order. (Para 19, 21)

D. The object of speedy redressal would frustrate if recovery of the amount is also sought through the civil court. It is stated that recovery of interest, penalty or compensation alone can be made as arrears of land revenue. The object of Act of 2016 is to protect the interest of consumer in real estate sector apart from others. If recovery of amount is to be sought by dividing it in two parts and by different method, it would be against the object of the Act of 2016. It has been that the purpose and object of S. 40 (1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. S. 40 (1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. (Para 18, 21)

E. Challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings. (Para 23)

Writ petition dismissed.(E-3)

Precedent followed:

1. M/s K.D.P. Build Well Pvt. Ltd. Vs St. of U.P. & 4 ors., Writ-C No. 2248 of 2020, judgment dated 04.02.2020 (Para 8)

2. Rudra Buildwell Constructions Pvt. Ltd. Vs Poonam Sood & anr., Writ-C No. 3289 of 2020, judgment dated 06.02.2020 (Para 8)

Precedent distinguished:

1. Janta Land Promoters Pvt. Ltd. Vs U.O.I. & ors., Civil Writ Petition No. 8548 of 2020 (Para 9, 13)

Present petition challenges order dated 05.04.2019, passed by Real Estate Regulatory Authority.

(Delivered by Hon'ble Munishwar Nath Bhandari, J. & Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Manish Singh with Sri Pratik Chandra and Sri Azhar Ikram, learned counsel for the petitioner. Sri Wasim Masood has put in appearance on behalf of respondents.

2. The writ petition has been filed with the following prayers:

"(i) Issue an appropriate writ, order or direction declaring the section 24(a) of the U.P. Real Estate Regulatory Authority (General) Regulation, 2019 as ultra vires and contrary to the section 21 and 85 of the RERA Act.

(ii) Issue a writ, order or direction in the nature of Certiorari quashing order dated 5.4.2019 passed Regulatory

Authority / Bench No. I, U.P. RERA Regional Office, Gautam Budh Nagar, in Complaint No. 5201810245 (Joydeep Das GuptaVs. M/s Newtech Promoters and Developers Pvt. Ltd.).

(iii) Issue a writ, order or direction in the nature certiorari quashing the impugned Recovery Certificate dated 12.3.2020 issued by opposite party no. 4.

(iv) Issue a writ, order or direction in the nature of mandamus not to give effect the impugned recovery certificate dated 12.3.2020 issued by opposite party no. 4.

(v) Issue a writ, order or direction in the nature of mandamus directing the state respondents not to initiate coercive measures pursuant to the impugned recovery certificate dated 27.2.2020 issued by opposite party no. 4."

3. The petitioner has challenged the order passed by Real Estate Regulatory Authority (in short "RERA") dated 5.4.2019 though an appeal against the said order lies under Section 43(5) of Real Estate (Regulation and Development) Act, 2016 (in short "Act of 2016").

4. It is a case where a complaint was filed by the non-petitioner alleging that despite payment towards unit No. B-1202 in the scheme introduced by the petitioner, the possession of a unit has not been given. The unit (flat) was booked on 4.10.2012 and was to be delivered in the year 2015. The prayer was made for refund of the amount of Rs.39,32,217/- with interest. The Authority found that as per the agreement entered between the parties, possession of the flat in question should have been delivered by 2015. The petitioner-Company failed to show delivery of possession of the flat in question. Thus, taking into consideration the default of the Promoter (petitioner herein) and referring to the judgment of Apex Court, an order was passed by RERA on 5.4.2019 for refund of the principal amount alongwith interest. In pursuance thereof, order dated 5.4.2019 was issued for its execution. The amount of Rs.39,32,217/- was shown towards the principal amount while component of interest was Rs.23,00,699.16/-. The petitioner has filed this writ petition to challenge not only the order dated 5.4.2019 passed by RERA but the recovery certificate dated 12.3.2020 on the execution application.

5. Learned counsel for the petitioner submits that an appeal against the order passed by RERA is maintainable but this case has exceptional circumstances thus even a writ petition would be maintainable. One member of RERA has passed the order going against the Act of 2016. Section 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members. The impugned order is by one Member alone going against the mandate of Section 21 of the Act of 2016. In view of the above, there is no need to prefer an appeal as the order dated 5.4.2019 is without jurisdiction.

6. It is also stated that the order to award interest by the Authority is again going contrary to the provisions. Rules for award of interest was introduced in the year 2018. The amount deposited with the Promotor has been ordered to be returned with interest. The interest has been allowed even for the period prior to introduction of U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 (in short "Rules of 2018"). It is even ignoring the rate of interest agreed by the parties. Challenge to the order has been made on that ground also.

7. We are first taking challenge to the order dated 5.4.2019, passed by the Authority to find out as to whether one member was competent to pass the order.

8. The issue has been raised in reference to Section 21 but it is not open for debate having been decided by this Court in ***Writ -C No.2248 of 2020 (M/s K.D.P. Build Well Pvt. Ltd. vs. State of U.P. and 4 Others) vide judgment dated 04.02.2020 and in Writ- C No.3289 of 2020 (Rudra Buildwell Constructions Pvt. Ltd. vs. Poonam Sood and Another) vide judgment dated 06.02.2020*** holding order by one member to be legal. The issue regarding composition of RERA was considered in reference to Sections 21 and 81 of the Act of 2016. Section 81 provides for delegation of power/function and taking the aforesaid provision into consideration, the argument was not accepted.

9. At this stage, learned counsel for the petitioner has made a reference to the judgment of Punjab and Haryana High Court on the same issue in ***Civil Writ Petition No.8548 of 2020 (Janta Land Promoters Private Limited vs. Union of India and others) vide judgment dated 16.10.2020***. It is stated that judgment of this Court has been referred by Punjab and Haryana High Court and has taken a different view.

10. What we find is binding effect of the judgment rendered by this Court than to follow the judgment of other High Court. Accordingly, we are unable to accept the first argument in reference to Section 21 of the Act of 2016. It is more so when the petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint.

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we find no ground to set aside the resolution as otherwise Section 81 saves it.

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*"**40 Recovery of interest or penalty or compensation and enforcement of order, etc.-** (1) If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.*

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed."

18. Before addressing the issue further it would be necessary to go through the object of the enactment i.e. as to why the Parliament brought the Act of 2016. The object of Act of 2016 is to protect the interest of consumer in real estate sector apart from others. The Bill was introduced with the following object :

*"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, **or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal** and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."*

19. A perusal of the object reveals that the Act of 2016 has been enacted to

save interest of consumers apart from others and thereby to regulate real estate in a proper manner. It is even to give speedy dispute redressal mechanism. Section 40(1) of Act of 2016 no doubt provides for mechanism for recovery of interest, penalty or compensation. It cannot however be ignored that recovery of the amount is provided under Section 40(1) alone. Section 40(2) is for execution of any other order or direction to any person to do any act, or refrain from doing any act, which is not empowered to do under the Act of 2016 and in case of failure to comply, execution can be enforced in the manner prescribed. Sub-section (2) of Section 40 was to enforce any direction of the nature of restrain or injunction which cannot be enforced as an arrears of land revenue. After coming into the force of the rules framed by the State of Uttar Pradesh, the matter of execution can be taken by the Adjudicating Authority. Sub-Section (2) of Section 40 is not meant for recovery of the amount but for any other direction either to act in a particular manner or to refrain a party in doing any act. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. Rules 23 and 24 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (in short "Rules of 2016") were brought for that purpose and provides the machanism for execution of the order.

20. In the light of the aforesaid, we are required to give proper interpretation to Section 40 so that the object sought to be achieved by enactment of Act of 2016 is carried out.

21. In the instant case, the consumer had deposited a sum of Rs.39 lacs and odd, in instalments but despite an agreement for giving possession of the flat in the year 2015, it was not handed over to the consumer. The direction for return of the amount with interest has been given in those circumstances. If a consumer is to seek execution of the part of the order through the civil court then the very purpose of the enactment of Act of 2016 to provide speedy dispute redressal mechanism would frustrate. If the argument of the petitioner is accepted then for recovery of a sum of Rs. 39 lacs and odd, the non-petitioner consumer is to be send to civil court while recovery of amount of interest of Rs.23 lacs and odd can be made as arrears of land revenue, as admitted by the counsel for the petitioner himself. If recovery of amount is to be sought by dividing it in two parts and by different method, it would be against the object of the Act of 2016. The object of speedy redressal would frustrate if recovery of the amount is also sought through the civil court. We thus hold that the purpose and object of Section 40(1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. Section 40(1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. Section 40(2) is for any other direction either to act in a particular manner or to restrain a party to do certain act and execution of it can be made by the Adjudicating Authority and in case of failure, by the civil court. Section 40(2) covers basically the case of an order of injunction or mandatory injunction.

22. Accordingly, we are unable to accept even the last argument raised by the counsel for the petitioner. It would otherwise frustrate the very object of the Act of 2016 and would give rise to the

anarchy, existing earlier, in the hands of Promoters.

23. So far as challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is concerned, the issue is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings However, as and when the Authority invokes Regulation 24 (a) of Regulation, 2019, the liberty is given to challenge the validity. Thus, issue is kept open for the aforesaid.

24. Thus, for all the reasons, we are unable to accept any of the arguments raised by the counsel for the petitioner. The writ petition is accordingly **dismissed**, however, with the liberty to avail the remedy of appeal if other than the issue decided by us remains, which may include the issue towards interest.

(2021)03ILR A701
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 26450 of 2020

M/s Newtech Promoters and Developers Pvt. Ltd., Delhi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pratik Chandra

Counsel for the Respondents:
C.S.C., Wasim Masood

A. Real Estate (Regulation and Development) Act (16 of 2016), S. 21, S. 29, S. 30, S. 81 - Recovery Certificate challenged on ground that single member of RERA alone could not pass order - as S. 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members - *Held* - Even single member competent to pass order - Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson - S. 30 shows that in case of vacancy, or any defect in the constitution of the Authority the proceeding of the Authority would not be invalidated - S. 81 provides for delegation of power/function, an order was issued to delegate the power to a Member for hearing of the complaint - More so petitioner did not raise objection before the single Member about his competence to adjudicate the complaint - petitioner challenged the order in reference to the composition only when he lost in the complaint (Para 7,9, 11, 12)

B. Real Estate (Regulation and Development) Act (16 of 2016), S. 40 (1), S. 40 (2) - Recovery - If a promoter or an allottee or a real estate agent, fails to pay *principal amount deposited with him*, interest or penalty or compensation imposed on him, it shall be recoverable as an arrears of land revenue u/s 40 (1) - recovery of the amount is provided under Section 40(1) alone - whereas S. 40(2) is to enforce any direction of the nature of restrain, injunction or to act in a particular manner or to refrain a party in doing any act, which cannot be enforced as an arrears of land revenue & it is not meant for recovery of the amount - Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. (Para 18)

Complaint filed alleging that despite payment possession of a unit not given - prayer was made for refund of the amount with interest - an order was passed by RERA for refund of the

principal amount of Rs 21,42,887/- alongwith interest - RERA issued citation for return of the principal amount of Rs 21,42,887/- deposited with the Promoter alongwith interest Rs 14,77,569/ - recovery of the amount was to be made as arrears of land revenue - Order challenged on the ground that refund of the principal amount is not recoverable as an arrears of land revenue u/s 40 (1) but can be as per Section 40(2) of the Act of 2016 - *Held* - If recovery of amount is sought by dividing it in two parts and by different method i.e. for recovery of principal amount consumer is to be send to civil court while recovery of amount of interest is made as arrears of land revenue then it would be against the object of the Act of 2016 of speedy redressal (Para 20)

Dismissed

List of Cases cited:-

1. M/s K.D.P. Build Well Pvt. Ltd. Vs State of U.P. & Ors Writ -C No.2248 of 2020 dt 04.02.2020

2. Rudra Buildwell Constructions Pvt. Ltd. Vs Poonam Sood & Anr Writ- C No.3289 of 2020 dt 06.02.2020

3. Janta Land Promoters Private Limited Vs U.O.I. CWP No.8548 of 2020 dt 16.10.2020 (P&H)

(Delivered by Hon'ble Munishwar Nath Bhandari, J. & Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Manish Singh with Sri Pratik Chandra and Sri Azhar Ikram, learned counsel for the petitioner. Sri Wasim Masood has put in appearance on behalf of respondents.

2. The writ petition has been filed with the following prayers:

"(i) Issue an appropriate writ, order or direction declaring the section 24(a) of the U.P. Real Estate Regulatory Authority (General) Regulation, 2019 as ultra vires and contrary to the section 21 and 85 of the RERA Act.

(ii) Issue a writ, order or direction in the nature of Certiorari quashing order dated 5.4.2019 passed Regulatory Authority / Bench No. I, U.P. RERA Regional Office, Gautam Budh Nagar, in Complaint No. 7201814183 (Chandeshwar Pandey M/s Newtech Promoters and Developers Pvt. Ltd.).

(iii) Issue a writ, order or direction in the nature certiorari quashing the impugned Recovery Certificate dated 13.2.2020 issued by opposite party no. 4.

(iv) Issue a writ, order or direction in the nature of mandamus not to give effect the impugned recovery certificate dated 13.2.2020 issued by opposite party no. 4.

(v) Issue a writ, order or direction in the nature of mandamus directing the state respondents not to initiate coercive measures pursuant to the impugned recovery certificate issued by opposite party no. 4."

2. The petitioner has challenged the order passed by Real Estate Regulatory Authority (in short "RERA") dated 5.4.2019 though an appeal against the said order lies under Section 43(5) of Real Estate (Regulation and Development) Act, 2016 (in short "Act of 2016").

3. It is a case where a complaint was filed by the non-petitioner alleging that despite payment towards unit No. B-1202 in the scheme introduced by the petitioner, the possession of a unit has not been given. The unit (flat) was booked on 4.10.2012 and was to be delivered in the year 2015. The prayer was made for refund of the amount of Rs.21,42,887/- with interest. The Authority found that as per the agreement entered between the parties, possession of

the flat in question should have been delivered by 2015. The petitioner-Company failed to show delivery of possession of the flat in question. Thus, taking into consideration the default of the Promoter (petitioner herein) and referring to the judgment of Apex Court, an order was passed by RERA on 5.4.2019 for refund of the principal amount alongwith interest. In pursuance thereof, order dated 5.4.2019 was issued for its execution. The amount of Rs.21,42,887/- was shown towards the principal amount while component of interest was Rs.14,77,569.75/-. The petitioner has filed this writ petition to challenge not only the order dated 5.4.2019 passed by RERA but the recovery certificate dated 13.2.2020 on the execution application.

4. Learned counsel for the petitioner submits that an appeal against the order passed by RERA is maintainable but this case has exceptional circumstances thus even a writ petition would be maintainable. One member of RERA has passed the order going against the Act of 2016. Section 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members. The impugned order is by one Member alone going against the mandate of Section 21 of the Act of 2016. In view of the above, there is no need to prefer an appeal as the order dated 5.4.2019 is without jurisdiction.

5. It is also stated that the order to award interest by the Authority is again going contrary to the provisions. Rules for award of interest was introduced in the year 2018. The amount deposited with the Promotor has been ordered to be returned with interest. The interest has been allowed even for the period prior to introduction of U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 (in short "Rules of 2018"). It is even ignoring the rate of interest agreed by the parties. Challenge to the order has been made on that ground also.

6. We are first taking challenge to the order dated 5.4.2019, passed by the Authority to find out as to whether one member was competent to pass the order.

7. The issue has been raised in reference to Section 21 but it is not open for debate having been decided by this Court in ***Writ -C No.2248 of 2020 (M/s K.D.P. Build Well Pvt. Ltd. vs. State of U.P. and 4 Others) vide judgment dated 04.02.2020 and in Writ- C No.3289 of 2020 (Rudra Buildwell Constructions Pvt. Ltd. vs. Poonam Sood and Another) vide judgment dated 06.02.2020*** holding order by one member to be legal. The issue regarding composition of RERA was considered in reference to Sections 21 and 81 of the Act of 2016. Section 81 provides for delegation of power/function and taking the aforesaid provision into consideration, the argument was not accepted.

8. At this stage, learned counsel for the petitioner has made a reference to the judgment of Punjab and Haryana High Court on the same issue in ***Civil Writ Petition No.8548 of 2020 (Janta Land Promoters Private Limited vs. Union of India and others) vide judgment dated 16.10.2020***. It is stated that judgment of this Court has been referred by Punjab and Haryana High Court and has taken a different view.

9. What we find is binding effect of the judgment rendered by this Court than to follow the judgment of other High Court. Accordingly, we are unable to accept the

first argument in reference to Section 21 of the Act of 2016. It is more so when the petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint.

10. It is further necessary to refer Sections 21, 29 and 30 of the Act of 2016 to discuss the issue independent to the earlier judgments. The provisions aforesaid are quoted hereunder :

*"**21. Composition of Authority**.- The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government."*

***29. Meeting of Authority.-** (1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.*

(2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.

(4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application.

Provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

***30. Vacancies, etc., not to invalidate proceeding of Authority**.- No act or proceeding of the Authority shall be invalid merely by reason of--*

(a) any vacancy in, or any defect in the constitution of, the Authority; or

(b) any defect in the appointment of a person acting as a Member of the Authority;
or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case."

11. Section 21 of Act of 2016 speaks about composition of the Authority, which shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government. Section 29, however, talks about the meeting of Authority and perusal of sub-section (2) thereof shows that in absence of Chairperson for any reason, the other Member chosen by the Members present amongst themselves at the meeting, shall preside thereby. Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson so appointed by the appropriate Government. Thus, it is not necessary that the adjudication of the complaint has to be made by the composition of Authority, as given under Section 21 of the Act of 2016 though as per

Section 29 also, it should be by two Members in absence of the Chairperson.

12. Section 30 of Act of 2016 is, however, relevant and address the issue raised in this petition. The vacancies, etc. not to invalidate proceeding of the Authority. It shows that in case of vacancy, or any defect in the constitution of the Authority or any defect in the appointment of a person acting as a Member of the Authority, the proceeding of the Authority would not be invalidated. Section 30 of the Act of 2016 give complete answer to the objection raised by the petitioner regarding composition of the Authority. It is not that whatever composition given under Section 21 of the Act alone can decide the complaint rather reference of Section 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. This aspect was not brought to the notice of Punjab and Haryana High Court in the case of ***Janta Land Promoters Private Limited (supra).***

13. It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to Section 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to Section 21 of the Act of 2016 but has to be reference of other provisions, more specifically, Section 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. The resolution of the Authority has also been challenged but in the light of Section 30 of the Act of 2016, we find no ground to set aside the resolution as otherwise Section 81 saves it.

14. So far the second issue regarding rate of interest is concerned, it is nothing but a challenge on the merit of the order. We hold writ petition for it to be not maintainable as petitioner has remedy of appeal. Thus, we are not causing interference in the order on merit but allowing the petitioner to take remedy of appeal, if so desires. It is after taking note of the fact that the order of RERA is not otherwise onerous so as to maintain a writ petition.

15. The other challenge in the writ petition is to execution of the order made in reference to Section 40(1) of the Act of 2016. The recovery of the amount is to be made as arrears of land revenue. It is stated that recovery of interest, penalty or compensation alone can be made as arrears of land revenue. In the instance case, RERA has issued citation for return of the amount so deposited with the Promoter with interest. The refund of the principal amount cannot be through the process of execution given under Section 40(1) of the Act of 2016 but can be as per Section 40(2) of the Act of 2016.

16. To deal with the argument aforesaid, we are quoting Section 40 of the Act of 2016, hereunder :

"40 Recovery of interest or penalty or compensation and enforcement of order, etc.- (1) *If a promoter or an allottee or a*

real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed."

17. Before addressing the issue further it would be necessary to go through the object of the enactment i.e. as to why the Parliament brought the Act of 2016. The object of Act of 2016 is to protect the interest of consumer in real estate sector apart from others. The Bill was introduced with the following object :

*"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be**, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal** and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."*

18. A perusal of the object reveals that the Act of 2016 has been enacted to save interest of consumers apart from others and thereby to regulate real estate in a proper manner. It is even to give speedy dispute redressal mechanism. Section 40(1) of Act of 2016 no doubt provides for mechanism for recovery of interest, penalty or compensation. It cannot however be ignored that recovery of the amount is provided under Section 40(1) alone. Section 40(2) is for execution of any other order or direction to any person to do any act, or refrain from doing any act, which is not empowered to do under the Act of 2016 and in case of failure to comply, execution can be enforced in the manner prescribed. Sub-section (2) of Section 40 was to enforce any direction of the nature of restrain or injunction which cannot be enforced as an arrears of land revenue. After coming into the force of the rules framed by the State of Uttar Pradesh, the matter of execution can be taken by the Adjudicating Authority. Sub-Section (2) of Section 40 is not meant for recovery of the amount but for any other direction either to act in a particular manner or to refrain a party in doing any act. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. Rules 23 and 24 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (in short "Rules of 2016") were brought for that purpose and provides the machanism for execution of the order.

19. In the light of the aforesaid, we are required to give proper interpretation to Section 40 so that the object sought to be

achieved by enactment of Act of 2016 is carried out.

20. In the instant case, the consumer had deposited a sum of Rs.21 lacs and odd, in instalments but despite an agreement for giving possession of the flat in the year 2015, it was not handed over to the consumer. The direction for return of the amount with interest has been given in those circumstances. If a consumer is to seek execution of the part of the order through the civil court then the very purpose of the enactment of Act of 2016 to provide speedy dispute redressal mechanism would frustrate. If the argument of the petitioner is accepted then for recovery of a sum of Rs. 21 lacs and odd, the non-petitioner consumer is to be send to civil court while recovery of amount of interest of Rs.14 lacs and odd can be made as arrears of land revenue, as admitted by the counsel for the petitioner himself. If recovery of amount is to be sought by dividing it in two parts and by different method, it would be against the object of the Act of 2016. The object of speedy redressal would frustrate if recovery of the amount is also sought through the civil court. We thus hold that the purpose and object of Section 40(1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. Section 40(1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. Section 40(2) is for any other direction either to act in a particular manner or to restrain a party to do certain act and execution of it can be made by the Adjudicating Authority and in case of failure, by the civil court. Section 40(2) covers basically the case of an order of injunction or mandatory injunction.

21. Accordingly, we are unable to accept even the last argument raised by the counsel for the petitioner. It would otherwise frustrate the very object of the Act of 2016 and would give rise to the anarchy, existing earlier, in the hands of Promoters.

22. So far as challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is concerned, the issue is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings However, as and when the Authority invokes Regulation 24 (a) of Regulation, 2019, the liberty is given to challenge the validity. Thus, issue is kept open for the aforesaid.

23. Thus, for all the reasons, we are unable to accept any of the arguments raised by the counsel for the petitioner. The writ petition is accordingly **dismissed**, however, with the liberty to avail the remedy of appeal if other than the issue decided by us remains, which may include the issue towards interest.

(2021)03ILR A707
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 26451 of 2020

M/S Newtech Promoters & Developers Pvt. Ltd. Delhi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pratik Chandra, Sri Azhar Ikram, Sri Manish Singh

Counsel for the Respondents:
C.S.C., Wasim Masood

A. Civil Law – Real Estate Regulation - Real Estate (Regulation and Development) Act, 2016 - Section 30, 40(1), 43(5); Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 - U.P. Real Estate Regulatory Authority (General) Regulation, 2019 - Rule 24(a).

Real Estate (Regulation and Development) Act, 2016 - Section 21, 29, 30 – Jurisdiction - Petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint. (Para 10)

It is not that whatever composition given u/s 21 of the Act alone can decide the complaint rather reference of S. 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. (Para 13)

It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to S. 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to S. 21 of the Act of 2016 but has to refer to other provisions, more specifically, S. 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. The resolution of the Authority has also been challenged but in the light of S. 30 of the Act of 2016, we find no ground to set aside the resolution as otherwise S. 81 saves it. (Para 12, 14)

B. Issue regarding the rate of interest has not been dealt with being a challenge on the merit of the case. (Para 15)

C. Interpretation of Section 40(2) – Sub-section (2) of Section 40 is not meant for recovery of the amount but for any other direction either to act in a particular manner or to restrain a party to do a certain act. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. S. 40 (2) covers basically the case of an order of injunction or mandatory injunction. Rules 23 and 24 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (in short "Rules of 2016") were brought for that purpose and provides the mechanism for execution of the order. (Para 19, 21)

D. The object of speedy redressal would frustrate if recovery of the amount is also sought through the civil court. It is stated that recovery of interest, penalty or compensation alone can be made as arrears of land revenue. The object of Act of 2016 is to protect the interest of consumer in real estate sector apart from others. If recovery of amount is to be sought by dividing it in two parts and by different method, it would be against the object of the Act of 2016. It has been that the purpose and object of S. 40 (1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. S. 40 (1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. (Para 18, 21)

E. Challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings. (Para 23)

Writ petition dismissed.(E-3)

Precedent followed:

1. M/s K.D.P. Build Well Pvt. Ltd. Vs St. of U.P. & 4 ors., Writ-C No. 2248 of 2020, judgment dated 04.02.2020 (Para 8)

2. Rudra Buildwell Constructions Pvt. Ltd. Vs Poonam Sood & anr., Writ-C No. 3289 of 2020, judgment dated 06.02.2020 (Para 8)

Precedent distinguished:

1. Janta Land Promoters Pvt. Ltd. Vs U.O.I. & ors., Civil Writ Petition No. 8548 of 2020 (Para 9, 13)

Present petition challenges order dated 27.03.2019, passed by Real Estate Regulatory Authority.

(Delivered by Hon'ble Munishwar Nath Bhandari, J. & Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Manish Singh with Sri Pratik Chandra and Sri Azhar Ikram, learned counsel for the petitioner. Sri Wasim Masood has put in appearance on behalf of respondents.

2. The writ petition has been filed with the following prayers:

"(i) Issue an appropriate writ, order or direction declaring the section 24(a) of the U.P. Real Estate Regulatory Authority (General) Regulation, 2019 as ultra vires and contrary to the section 21 and 85 of the RERA Act.

(ii) Issue a writ, order or direction in the nature of Certiorari quashing order dated 27.3.2019 passed Regulatory Authority / Bench No. I, U.P. RERA Regional Office, Gautam Budh Nagar, in Complaint No. 12201825459 (Virendra Kumar Vs. M/s Newtech Promoters and Developers Pvt. Ltd.).

(iii) Issue a writ, order or direction in the nature certiorari quashing the impugned Recovery Certificate dated 10.1.2020 issued by opposite party no. 4.

(iv) Issue a writ, order or direction in the nature of mandamus not to give effect the impugned recovery certificate dated 27.3.2019 issued by opposite party no. 4.

(v) Issue a writ, order or direction in the nature of mandamus directing the state respondents not to initiate coercive measures pursuant to the impugned recovery certificate issued by opposite party no. 4."

3. The petitioner has challenged the order passed by Real Estate Regulatory Authority (in short "RERA") dated 27.3.2019 though an appeal against the said order lies under Section 43(5) of Real Estate (Regulation and Development) Act, 2016 (in short "Act of 2016").

4. It is a case where a complaint was filed by the non-petitioner alleging that despite payment towards unit No. E-102 in the scheme introduced by the petitioner, the possession of a unit has not been given. The unit (flat) was booked on 25.03.2012 and was to be delivered in the year 2015. The prayer was made for refund of the amount of Rs.27,09,026/- with interest. The Authority found that as per the agreement entered between the parties, possession of the flat in question should have been delivered by 2015. The petitioner-Company failed to show delivery of possession of the flat in question. Thus, taking into consideration the default of the Promoter (petitioner herein) and referring to the judgment of Apex Court, an order was passed by RERA on 27.3.2019 for refund of the principal amount alongwith interest. In pursuance thereof, order dated 27.3.2019 was issued for its execution. The amount of

Rs.27,09,026/- was shown towards the principal amount while component of interest was Rs.17,35,581.16/-. The petitioner has filed this writ petition to challenge not only the order dated 27.3.2019 passed by RERA but the recovery certificate dated 10.01.2020 on the execution application.

5. Learned counsel for the petitioner submits that an appeal against the order passed by RERA is maintainable but this case has exceptional circumstances thus even a writ petition would be maintainable. One member of RERA has passed the order going against the Act of 2016. Section 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members. The impugned order is by one Member alone going against the mandate of Section 21 of the Act of 2016. In view of the above, there is no need to prefer an appeal as the order dated 27.3.2019 is without jurisdiction.

6. It is also stated that the order to award interest by the Authority is again going contrary to the provisions. Rules for award of interest was introduced in the year 2018. The amount deposited with the Promotor has been ordered to be returned with interest. The interest has been allowed even for the period prior to introduction of U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 (in short "Rules of 2018"). It is even ignoring the rate of interest agreed by the parties. Challenge to the order has been made on that ground also.

7. We are first taking challenge to the order dated 27.3.2019, passed by the Authority to find out as to whether one member was competent to pass the order.

8. The issue has been raised in reference to Section 21 but it is not open for debate having been decided by this Court in ***Writ -C No.2248 of 2020 (M/s K.D.P. Build Well Pvt. Ltd. vs. State of U.P. and 4 Others) vide judgment dated 04.02.2020 and in Writ- C No.3289 of 2020 (Rudra Buildwell Constructions Pvt. Ltd. vs. Poonam Sood and Another) vide judgment dated 06.02.2020*** holding order by one member to be legal. The issue regarding composition of RERA was considered in reference to Sections 21 and 81 of the Act of 2016. Section 81 provides for delegation of power/function and taking the aforesaid provision into consideration, the argument was not accepted.

9. At this stage, learned counsel for the petitioner has made a reference to the judgment of Punjab and Haryana High Court on the same issue in ***Civil Writ Petition No.8548 of 2020 (Janta Land Promoters Private Limited vs. Union of India and others) vide judgment dated 16.10.2020***. It is stated that judgment of this Court has been referred by Punjab and Haryana High Court and has taken a different view.

10. What we find is binding effect of the judgment rendered by this Court than to follow the judgment of other High Court. Accordingly, we are unable to accept the first argument in reference to Section 21 of the Act of 2016. It is more so when the petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the

composition only when he lost in the complaint.

11. It is further necessary to refer Sections 21, 29 and 30 of the Act of 2016 to discuss the issue independent to the earlier judgments. The provisions aforesaid are quoted hereunder :

*"**21. Composition of Authority**.- The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government."*

*29. **Meeting of Authority**.- (1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.*

(2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.

(4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application.

Provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

***30. Vacancies, etc., not to invalidate proceeding of Authority.-** No act or proceeding of the Authority shall be invalid merely by reason of--*

(a) any vacancy in, or any defect in the constitution of, the Authority; or

(b) any defect in the appointment of a person acting as a Member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case."

12. Section 21 of Act of 2016 speaks about composition of the Authority, which shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government. Section 29, however, talks about the meeting of Authority and perusal of sub-section (2) thereof shows that in absence of Chairperson for any reason, the other Member chosen by the Members present amongst themselves at the meeting, shall preside thereby. Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson so appointed by the appropriate Government. Thus, it is not necessary that the adjudication of the complaint has to be made by the composition of Authority, as given under Section 21 of the Act of 2016 though as per Section 29 also, it should be by two Members in absence of the Chairperson.

13. Section 30 of Act of 2016 is, however, relevant and address the issue raised in this petition. The vacancies, etc. not to invalidate proceeding of the Authority. It shows that in case of vacancy, or any defect in the constitution of the Authority or any defect in the appointment

of a person acting as a Member of the Authority, the proceeding of the Authority would not be invalidated. Section 30 of the Act of 2016 give complete answer to the objection raised by the petitioner regarding composition of the Authority. It is not that whatever composition given under Section 21 of the Act alone can decide the complaint rather reference of Section 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. This aspect was not brought to the notice of Punjab and Haryana High Court in the case of ***Janta Land Promoters Private Limited (supra).***

14. It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to Section 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to Section 21 of the Act of 2016 but has to be reference of other provisions, more specifically, Section 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. The resolution of the Authority has also been challenged but in the light of Section 30 of the Act of 2016, we find no ground to set aside the resolution as otherwise Section 81 saves it.

15. So far the second issue regarding rate of interest is concerned, it is nothing but a challenge on the merit of the order. We hold writ petition for it to be not maintainable as petitioner has remedy of appeal. Thus, we are not causing interference in the order on merit but allowing the petitioner to take remedy of appeal, if so desires. It is after taking note of the fact that the order of RERA is not otherwise onerous so as to maintain a writ petition.

16. The other challenge in the writ petition is to execution of the order made in reference to Section 40(1) of the Act of 2016. The recovery of the amount is to be made as arrears of land revenue. It is stated that recovery of interest, penalty or compensation alone can be made as arrears of land revenue. In the instance case, RERA has issued citation for return of the amount so deposited with the Promoter with interest. The refund of the principal amount cannot be through the process of execution given under Section 40(1) of the Act of 2016 but can be as per Section 40(2) of the Act of 2016.

17. To deal with the argument aforesaid, we are quoting Section 40 of the Act of 2016, hereunder :

"40 Recovery of interest or penalty or compensation and enforcement of order, etc.- (1) *If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.*

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed."

18. Before addressing the issue further it would be necessary to go through the object of the enactment i.e. as to why the Parliament brought the Act of 2016. The object of Act of 2016 is to protect the interest of consumer in real estate sector apart from others. The Bill was introduced with the following object :

*"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be**, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal** and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."*

19. A perusal of the object reveals that the Act of 2016 has been enacted to save interest of consumers apart from others and thereby to regulate real estate in a proper manner. It is even to give speedy dispute redressal mechanism. Section 40(1) of Act of 2016 no doubt provides for mechanism for recovery of interest, penalty or compensation. It cannot however be ignored that recovery of the amount is provided under Section 40(1) alone. Section 40(2) is for execution of any other order or direction to any person to do any act, or refrain from doing any act, which is not empowered to do under the Act of 2016 and in case of failure to comply, execution can be enforced in the manner prescribed. Sub-section (2) of Section 40 was to enforce any direction of the nature of restrain or injunction which cannot be enforced as an arrears of land revenue. After coming into the force of the rules framed by the State of Uttar Pradesh, the matter of execution can be taken by the Adjudicating Authority. Sub-Section (2) of Section 40 is not meant for recovery of the amount but for any other direction either to act in a particular manner or to refrain a party in doing any act. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. Rules 23 and 24 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (in short "Rules of 2016") were brought for that purpose and provides the machanism for execution of the order.

20. In the light of the aforesaid, we are required to give proper interpretation to Section 40 so that the object sought to be achieved by enactment of Act of 2016 is carried out.

21. In the instant case, the consumer had deposited a sum of Rs.27 lacs and odd, in instalments but despite an agreement for giving possession of the flat in the year 2015, it was not handed over to the consumer. The direction for return of the amount with interest has been given in those circumstances. If a consumer is to

seek execution of the part of the order through the civil court then the very purpose of the enactment of Act of 2016 to provide speedy dispute redressal mechanism would frustrate. If the argument of the petitioner is accepted then for recovery of a sum of Rs.27 lacs and odd, the non-petitioner consumer is to be send to civil court while recovery of amount of interest of Rs.17 lacs and odd can be made as arrears of land revenue, as admitted by the counsel for the petitioner himself. If recovery of amount is to be sought by dividing it in two parts and by different method, it would be against the object of the Act of 2016. The object of speedy redressal would frustrate if recovery of the amount is also sought through the civil court. We thus hold that the purpose and object of Section 40(1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. Section 40(1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. Section 40(2) is for any other direction either to act in a particular manner or to restrain a party to do certain act and execution of it can be made by the Adjudicating Authority and in case of failure, by the civil court. Section 40(2) covers basically the case of an order of injunction or mandatory injunction.

22. Accordingly, we are unable to accept even the last argument raised by the counsel for the petitioner. It would otherwise frustrate the very object of the Act of 2016 and would give rise to the anarchy, existing earlier, in the hands of Promoters.

23. So far as challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is concerned, the issue is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings However, as and when the Authority invokes Regulation 24 (a) of Regulation, 2019, the liberty is given to challenge the validity. Thus, issue is kept open for the aforesaid.

24. Thus, for all the reasons, we are unable to accept any of the arguments raised by the counsel for the petitioner. The writ petition is accordingly **dismissed,** however, with the liberty to avail the remedy of appeal if other than the issue decided by us remains, which may include the issue towards interest.

(2021)03ILR A714
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 26458 of 2020

M/S Unibera Developers Pvt. Ltd., New Delhi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pratik Chandra, Sri Azhar Ikram, Sri Manish Singh

Counsel for the Respondents:
C.S.C., Wasim Masood

A. Real Estate (Regulation and Development) Act (16 of 2016), S. 21, S. 29, S. 30, S. 81 - Recovery Certificate challenged on ground that single member

of RERA alone could not pass order - as S. 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members - *Held* - Even single member competent to pass order - Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson - S. 30 shows that in case of vacancy, or any defect in the constitution of the Authority the proceeding of the Authority would not be invalidated - S. 81 provides for delegation of power/function, an order was issued to delegate the power to a Member for hearing of the complaint - More so petitioner did not raise objection before the single Member about his competence to adjudicate the complaint - petitioner challenged the order in reference to the composition only when he lost in the complaint (Para 8,10, 12, 13)

B. Real Estate (Regulation and Development) Act (16 of 2016), S. 40 (1), S. 40 (2) - Recovery - If a promoter or an allottee or a real estate agent, fails to pay *principal amount deposited with him*, *interest or penalty or compensation* imposed on him, it shall be recoverable as an arrears of land revenue u/s 40 (1) - recovery of the amount is provided under Section 40(1) alone - whereas S. 40(2) is to enforce any direction of the nature of restrain, injunction or to act in a particular manner or to refrain a party in doing any act, which cannot be enforced as an arrears of land revenue & it is not meant for recovery of the amount. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. (Para 19)

Complaint filed alleging that despite payment possession of a unit not given - prayer was made for refund of the amount with interest - an order was passed by RERA for refund of the principal amount of Rs 21,42,887/- alongwith interest - RERA issued citation for return of the principal amount of Rs 21,42,887/- deposited with the Promoter alongwith interest Rs 14,77,569/ - recovery of the amount was to be made as arrears of land revenue - Order challenged on the ground that refund of the principal amount is not recoverable as an arrears of land revenue u/s 40 (1) but can be as per Section 40(2) of the Act of 2016 - *Held* - If recovery of amount is sought by dividing it in two parts and by different method i.e. for recovery of principal amount consumer is to be send to civil court while recovery of amount of interest is made as arrears of land revenue then it would be against the object of the Act of 2016 of speedy redressal (Para 21)

Dismissed

List of Cases cited:-

1. M/s K.D.P. Build Well Pvt. Ltd. Vs State of U.P. & Ors Writ -C No.2248 of 2020 dt 04.02.2020

2. Rudra Buildwell Constructions Pvt. Ltd. Vs Poonam Sood & Anr Writ- C No.3289 of 2020 dt 06.02.2020

3. Janta Land Promoters Private Limited Vs U.O.I. CWP No.8548 of 2020 dt 16.10.2020 (P&H)

(Delivered by Hon'ble Munishwar Nath Bhandari, J. & Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Manish Singh with Sri Pratik Chandra and Sri Azhar Ikram, learned counsel for the petitioner. Sri Wasim Masood has put in appearance on behalf of respondents.

2. The writ petition has been filed with the following prayers:

"(i) Issue an appropriate writ, order or direction declaring the section 24(a) of the U.P. Real Estate Regulatory Authority (General) Regulation, 2019 as ultra vires and contrary to the section 21 and 85 of the RERA Act.

(ii) Issue a writ, order or direction in the nature of Certiorari quashing order dated 20.11.2019 passed Regulatory

Authority / Bench No. I, U.P. RERA Regional Office, Gautam Budh Nagar, in Complaint No. NCR144030675/2019 (Ms. Munni Vs. M/s Unibera Developers Ltd.).

(iii) Issue a writ, order or direction in the nature certiorari quashing the impugned Recovery Certificate dated 4.3.2020 issued by opposite party no. 4.

(iv) Issue a writ, order or direction in the nature of mandamus not to give effect the impugned recovery certificate dated 4.3.2020 issued by opposite party no. 4.

(v) Issue a writ, order or direction in the nature of mandamus directing the state respondents not to initiate coercive measures pursuant to the impugned recovery certificate issued by opposite party no. 4."

3. The petitioner has challenged the order passed by Real Estate Regulatory Authority (in short "RERA") dated 20.11.2019 though an appeal against the said order lies under Section 43(5) of Real Estate (Regulation and Development) Act, 2016 (in short "Act of 2016").

4. It is a case where a complaint was filed by the non-petitioner alleging that despite payment towards unit No. T3 1202 in the scheme introduced by the petitioner, the possession of a unit has not been given. The unit (flat) which was booked and was to be delivered in the year 2017. The prayer was made for refund of the amount of Rs.14,94,285/- with interest. The Authority found that as per the agreement entered between the parties, possession of the flat in question should have been delivered by 2017. The petitioner-Company failed to show delivery of possession of the flat in question. Thus, taking into consideration the default of the Promoter (petitioner herein) and referring to the judgment of Apex Court, an order was passed by RERA on 20.11.2019 for refund of the principal amount alongwith interest. In pursuance thereof, order dated 20.11.2019 was issued for its execution. The amount of Rs.14,94,285/- was shown towards the principal amount while component of interest was Rs.7,36,074.61/-. The petitioner has filed this writ petition to challenge not only the order dated 20.11.2019 passed by RERA but the recovery certificate dated 4.3.2020 on the execution application.

5. Learned counsel for the petitioner submits that an appeal against the order passed by RERA is maintainable but this case has exceptional circumstances thus even a writ petition would be maintainable. One member of RERA has passed the order going against the Act of 2016. Section 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members. The impugned order is by one Member alone going against the mandate of Section 21 of the Act of 2016. In view of the above, there is no need to prefer an appeal as the order dated 20.11.2019 is without jurisdiction.

6. It is also stated that the order to award interest by the Authority is again going contrary to the provisions. Rules for award of interest was introduced in the year 2018. The amount deposited with the Promotor has been ordered to be returned with interest. The interest has been allowed even for the period prior to introduction of U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 (in short "Rules of 2018"). It is even ignoring the rate of interest agreed by the parties. Challenge to the order has been made on that ground also.

7. We are first taking challenge to the order dated 20.11.2019, passed by the Authority to find out as to whether one member was competent to pass the order.

8. The issue has been raised in reference to Section 21 but it is not open for debate having been decided by this Court in ***Writ -C No.2248 of 2020 (M/s K.D.P. Build Well Pvt. Ltd. vs. State of U.P. and 4 Others) vide judgment dated 04.02.2020 and in Writ- C No.3289 of 2020 (Rudra Buildwell Constructions Pvt. Ltd. vs. Poonam Sood and Another) vide judgment dated 06.02.2020*** holding order by one member to be legal. The issue regarding composition of RERA was considered in reference to Sections 21 and 81 of the Act of 2016. Section 81 provides for delegation of power/function and taking the aforesaid provision into consideration, the argument was not accepted.

9. At this stage, learned counsel for the petitioner has made a reference to the judgment of Punjab and Haryana High Court on the same issue in ***Civil Writ Petition No.8548 of 2020 (Janta Land Promoters Private Limited vs. Union of India and others) vide judgment dated 16.10.2020***. It is stated that judgment of this Court has been referred by Punjab and Haryana High Court and has taken a different view.

10. What we find is binding effect of the judgment rendered by this Court than to follow the judgment of other High Court. Accordingly, we are unable to accept the first argument in reference to Section 21 of the Act of 2016. It is more so when the petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint.

11. It is further necessary to refer Sections 21, 29 and 30 of the Act of 2016 to discuss the issue independent to the earlier judgments. The provisions aforesaid are quoted hereunder :

*"**21. Composition of Authority**.- The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government."*

29. Meeting of Authority.- *(1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.*

(2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.

(4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application.

Provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

30. Vacancies, etc., not to invalidate proceeding of Authority.- *No act or proceeding of the Authority shall be invalid merely by reason of--*

(a) any vacancy in, or any defect in the constitution of, the Authority; or

(b) any defect in the appointment of a person acting as a Member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case."

12. Section 21 of Act of 2016 speaks about composition of the Authority, which shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government. Section 29, however, talks about the meeting of Authority and perusal of sub-section (2) thereof shows that in absence of Chairperson for any reason, the other Member chosen by the Members present amongst themselves at the meeting, shall preside thereby. Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson so appointed by the appropriate Government. Thus, it is not necessary that the adjudication of the complaint has to be made by the composition of Authority, as given under Section 21 of the Act of 2016 though as per Section 29 also, it should be by two Members in absence of the Chairperson.

13. Section 30 of Act of 2016 is, however, relevant and address the issue raised in this petition. The vacancies, etc. not to invalidate proceeding of the Authority. It shows that in case of vacancy, or any defect in the constitution of the Authority or any defect in the appointment of a person acting as a Member of the Authority, the proceeding of the Authority would not be invalidated. Section 30 of the Act of 2016 give complete answer to the objection raised by the petitioner regarding composition of the Authority. It is not that whatever composition given under Section 21 of the Act alone can decide the complaint rather reference of Section 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. This aspect was not brought to the notice of Punjab and Haryana High Court in the case of ***Janta Land Promoters Private Limited (supra).***

14. It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to Section 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to Section 21 of the Act of 2016 but has to be reference of other provisions, more specifically, Section 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. The resolution of the Authority has also been challenged but in the light of Section 30 of the Act of 2016,

we find no ground to set aside the resolution as otherwise Section 81 saves it.

15. So far the second issue regarding rate of interest is concerned, it is nothing but a challenge on the merit of the order. We hold writ petition for it to be not maintainable as petitioner has remedy of appeal. Thus, we are not causing interference in the order on merit but allowing the petitioner to take remedy of appeal, if so desires. It is after taking note of the fact that the order of RERA is not otherwise onerous so as to maintain a writ petition.

16. The other challenge in the writ petition is to execution of the order made in reference to Section 40(1) of the Act of 2016. The recovery of the amount is to be made as arrears of land revenue. It is stated that recovery of interest, penalty or compensation alone can be made as arrears of land revenue. In the instance case, RERA has issued citation for return of the amount so deposited with the Promoter with interest. The refund of the principal amount cannot be through the process of execution given under Section 40(1) of the Act of 2016 but can be as per Section 40(2) of the Act of 2016.

17. To deal with the argument aforesaid, we are quoting Section 40 of the Act of 2016, hereunder :

*"**40 Recovery of interest or penalty or compensation and enforcement of order, etc.-** (1) If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.*

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed."

18. Before addressing the issue further it would be necessary to go through the object of the enactment i.e. as to why the Parliament brought the Act of 2016. The object of Act of 2016 is to protect the interest of consumer in real estate sector apart from others. The Bill was introduced with the following object :

*"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, **or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal** and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."*

19. A perusal of the object reveals that the Act of 2016 has been enacted to

save interest of consumers apart from others and thereby to regulate real estate in a proper manner. It is even to give speedy dispute redressal mechanism. Section 40(1) of Act of 2016 no doubt provides for mechanism for recovery of interest, penalty or compensation. It cannot however be ignored that recovery of the amount is provided under Section 40(1) alone. Section 40(2) is for execution of any other order or direction to any person to do any act, or refrain from doing any act, which is not empowered to do under the Act of 2016 and in case of failure to comply, execution can be enforced in the manner prescribed. Sub-section (2) of Section 40 was to enforce any direction of the nature of restrain or injunction which cannot be enforced as an arrears of land revenue. After coming into the force of the rules framed by the State of Uttar Pradesh, the matter of execution can be taken by the Adjudicating Authority. Sub-Section (2) of Section 40 is not meant for recovery of the amount but for any other direction either to act in a particular manner or to refrain a party in doing any act. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. Rules 23 and 24 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (in short "Rules of 2016") were brought for that purpose and provides the machanism for execution of the order.

20. In the light of the aforesaid, we are required to give proper interpretation to Section 40 so that the object sought to be achieved by enactment of Act of 2016 is carried out.

21. In the instant case, the consumer had deposited a sum of Rs.14 lacs and odd, in instalments but despite an agreement for giving possession of the flat in the year 2017, it was not handed over to the consumer. The direction for return of the amount with interest has been given in those circumstances. If a consumer is to seek execution of the part of the order through the civil court then the very purpose of the enactment of Act of 2016 to provide speedy dispute redressal mechanism would frustrate. If the argument of the petitioner is accepted then for recovery of a sum of Rs.14 lacs and odd, the non-petitioner consumer is to be send to civil court while recovery of amount of interest of Rs.7 lacs and odd can be made as arrears of land revenue, as admitted by the counsel for the petitioner himself. If recovery of amount is to be sought by dividing it in two parts and by different method, it would be against the object of the Act of 2016. The object of speedy redressal would frustrate if recovery of the amount is also sought through the civil court. We thus hold that the purpose and object of Section 40(1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. Section 40(1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. Section 40(2) is for any other direction either to act in a particular manner or to restrain a party to do certain act and execution of it can be made by the Adjudicating Authority and in case of failure, by the civil court. Section 40(2) covers basically the case of an order of injunction or mandatory injunction.

22. Accordingly, we are unable to accept even the last argument raised by the counsel for the petitioner. It would otherwise frustrate the very object of the Act of 2016 and would give rise to the

anarchy, existing earlier, in the hands of Promoters.

23. So far as challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is concerned, the issue is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings However, as and when the Authority invokes Regulation 24 (a) of Regulation, 2019, the liberty is given to challenge the validity. Thus, issue is kept open for the aforesaid.

24. Thus, for all the reasons, we are unable to accept any of the arguments raised by the counsel for the petitioner. The writ petition is accordingly **dismissed**, however, with the liberty to avail the remedy of appeal if other than the issue decided by us remains, which may include the issue towards interest.

(2021)03ILR A721
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 26462 of 2020

La Residentia Developers Pvt. Ltd., Delhi ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pratik Chandra, Sri Azhar Ikram, Sri Manish Singh

Counsel for the Respondents:
C.S.C., Sri Wasim Masood

A. Real Estate (Regulation and Development) Act (16 of 2016), S. 21, S. 29, S. 30, S. 81 - Recovery Certificate challenged on ground that single member of RERA alone could not pass order - as S. 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members - *Held* - Even single member competent to pass order - Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson - S. 30 shows that in case of vacancy, or any defect in the constitution of the Authority the proceeding of the Authority would not be invalidated - S. 81 provides for delegation of power/function, an order was issued to delegate the power to a Member for hearing of the complaint - More so petitioner did not raise objection before the single Member about his competence to adjudicate the complaint - petitioner challenged the order in reference to the composition only when he lost in the complaint (Para 8,10, 12, 13)

B. Real Estate (Regulation and Development) Act (16 of 2016), S. 40 (1), S. 40 (2) - Recovery - If a promoter or an allottee or a real estate agent, fails to pay *principal amount deposited with him*, *interest or penalty or compensation* imposed on him, it shall be recoverable as an arrears of land revenue u/s 40 (1) - recovery of the amount is provided under Section 40(1) alone - whereas S. 40(2) is to enforce any direction of the nature of restrain, injunction or to act in a particular manner or to refrain a party in doing any act, which cannot be enforced as an arrears of land revenue & it is not meant for recovery of the amount. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. (Para 19)

Complaint filed alleging that despite payment possession of a unit not given - prayer was made for refund of the amount with interest -

an order was passed by RERA for refund of the principal amount of Rs 21,42,887/- alongwith interest - RERA issued citation for return of the principal amount of Rs 21,42,887/- deposited with the Promoter alongwith interest Rs 14,77,569/ - recovery of the amount was to be made as arrears of land revenue - Order challenged on the ground that refund of the principal amount is not recoverable as an arrears of land revenue u/s 40 (1) but can be as per Section 40(2) of the Act of 2016 - *Held* - If recovery of amount is sought by dividing it in two parts and by different method i.e. for recovery of principal amount consumer is to be send to civil court while recovery of amount of interest is made as arrears of land revenue then it would be against the object of the Act of 2016 of speedy redressal (Para 21)

Dismissed

List of Cases cited:-

1. M/s K.D.P. Build Well Pvt. Ltd. Vs State of U.P. & Ors Writ -C No.2248 of 2020 dt 04.02.2020

2. Rudra Buildwell Constructions Pvt. Ltd. Vs Poonam Sood & Anr Writ- C No.3289 of 2020 dt 06.02.2020

3. Janta Land Promoters Private Limited Vs U.O.I. CWP No.8548 of 2020 dt 16.10.2020 (P&H)

(Delivered by Hon'ble Munishwar Nath Bhandari, J. & Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Manish Singh with Sri Pratik Chandra and Sri Azhar Ikram, learned counsel for the petitioner. Sri Wasim Masood has put in appearance on behalf of respondents.

2. The writ petition has been filed with the following prayers:

"(i) Issue an appropriate writ, order or direction declaring the section 24(a) of the U.P. Real Estate Regulatory Authority (General) Regulation, 2019 as ultra vires and contrary to the section 21 and 85 of the RERA Act.

(ii) Issue a writ, order or direction in the nature of Certiorari quashing order dated 8.5.2019 passed Regulatory Authority / Bench No. I, U.P. RERA Regional Office, Gautam Budh Nagar, in Complaint No. 6201811573 (Maninder Singh Vs. La Residentia Developers Pvt. Ltd.).

(iii) Issue a writ, order or direction in the nature of Certiorari quashing order dated 15.9.2020 passed Regulatory Authority / Bench No. I, U.P. RERA Regional Office, Gautam Budh Nagar, in Complaint No. 6201811573 (Maninder Singh Vs. La Residentia Developers Pvt. Ltd.).

(iv) Issue a writ, order or direction in the nature certiorari quashing the impugned Recovery Certificate dated 27.10.2020 issued by opposite party no. 4.

(v) Issue a writ, order or direction in the nature of mandamus not to give effect the impugned recovery certificate dated 27.10.2020 issued by opposite party no. 4.

(vi) Issue a writ, order or direction in the nature of mandamus directing the state respondents not to initiate coercive measures pursuant to the impugned recovery certificate issued by opposite party no. 4."

3. The petitioner has challenged the orders passed by Real Estate Regulatory Authority (in short "RERA") dated 8.5.2019 and 15.9.2020 though an appeal against the said order lies under Section 43(5) of Real Estate (Regulation and Development) Act, 2016 (in short "Act of 2016").

4. It is a case where a complaint was filed by the non-petitioner alleging that despite payment towards unit No. T 38/2004 in the scheme introduced by the

petitioner, the possession of a unit has not been given. The unit (flat) which was booked and was to be delivered in the year 2018. The prayer was made for refund of the amount of Rs.28,74,964/- with interest. The Authority found that as per the agreement entered between the parties, possession of the flat in question should have been delivered by 2018. The petitioner-Company failed to show delivery of possession of the flat in question. Thus, taking into consideration the default of the Promoter (petitioner herein) and referring to the judgment of Apex Court, an order was passed by RERA on 8.5.2019 and 15.9.2020 for refund of the principal amount alongwith interest. In pursuance thereof, order dated 8.5.2019 and 15.9.2020 were issued for its execution. The amount of Rs.28,74,964/- was shown towards the principal amount while component of interest was Rs.9,24,323.66/-. The petitioner has filed this writ petition to challenge not only the order dated 8.5.2019 and 15.9.2020 passed by RERA but the recovery certificate dated 27.10.2020 on the execution application.

5. Learned counsel for the petitioner submits that an appeal against the order passed by RERA is maintainable but this case has exceptional circumstances thus even a writ petition would be maintainable. One member of RERA has passed the order going against the Act of 2016. Section 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members. The impugned order is by one Member alone going against the mandate of Section 21 of the Act of 2016. In view of the above, there is no need to prefer an appeal as the order dated 8.5.2019 and 15.9.2020 is without jurisdiction.

6. It is also stated that the order to award interest by the Authority is again going contrary to the provisions. Rules for award of interest was introduced in the year 2018. The amount deposited with the Promotor has been ordered to be returned with interest. The interest has been allowed even for the period prior to introduction of U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 (in short "Rules of 2018"). It is even ignoring the rate of interest agreed by the parties. Challenge to the order has been made on that ground also.

7. We are first taking challenge to the order dated 8.5.2019 and 15.9.2020, passed by the Authority to find out as to whether one member was competent to pass the order.

8. The issue has been raised in reference to Section 21 but it is not open for debate having been decided by this Court in ***Writ -C No.2248 of 2020 (M/s K.D.P. Build Well Pvt. Ltd. vs. State of U.P. and 4 Others) vide judgment dated 04.02.2020 and in Writ- C No.3289 of 2020 (Rudra Buildwell Constructions Pvt. Ltd. vs. Poonam Sood and Another) vide judgment dated 06.02.2020*** holding order by one member to be legal. The issue regarding composition of RERA was considered in reference to Sections 21 and 81 of the Act of 2016. Section 81 provides for delegation of power/function and taking the aforesaid provision into consideration, the argument was not accepted.

9. At this stage, learned counsel for the petitioner has made a reference to the judgment of Punjab and Haryana High Court on the same issue in ***Civil Writ Petition No.8548 of 2020 (Janta Land Promoters Private Limited vs. Union of India and others) vide judgment dated 16.10.2020***. It is stated that judgment of

this Court has been referred by Punjab and Haryana High Court and has taken a different view.

10. What we find is binding effect of the judgment rendered by this Court than to follow the judgment of other High Court. Accordingly, we are unable to accept the first argument in reference to Section 21 of the Act of 2016. It is more so when the petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint.

11. It is further necessary to refer Sections 21, 29 and 30 of the Act of 2016 to discuss the issue independent to the earlier judgments. The provisions aforesaid are quoted hereunder :

*"**21. Composition of Authority**.- The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government."*

***29. Meeting of Authority**.- (1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.*

(2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.

(4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application.

Provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

***30. Vacancies, etc., not to invalidate proceeding of Authority.-** No act or proceeding of the Authority shall be invalid merely by reason of--*

(a) any vacancy in, or any defect in the constitution of, the Authority; or

(b) any defect in the appointment of a person acting as a Member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case."

12. Section 21 of Act of 2016 speaks about composition of the Authority, which shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government. Section 29, however, talks about the meeting of Authority and perusal of sub-section (2) thereof shows that in absence of Chairperson for any reason, the other Member chosen by the Members present amongst themselves at the meeting, shall preside thereby. Sub-section (2) to Section

29 permits adjudication of complaint even in absence of Chairperson so appointed by the appropriate Government. Thus, it is not necessary that the adjudication of the complaint has to be made by the composition of Authority, as given under Section 21 of the Act of 2016 though as per Section 29 also, it should be by two Members in absence of the Chairperson.

13. Section 30 of Act of 2016 is, however, relevant and address the issue raised in this petition. The vacancies, etc. not to invalidate proceeding of the Authority. It shows that in case of vacancy, or any defect in the constitution of the Authority or any defect in the appointment of a person acting as a Member of the Authority, the proceeding of the Authority would not be invalidated. Section 30 of the Act of 2016 give complete answer to the objection raised by the petitioner regarding composition of the Authority. It is not that whatever composition given under Section 21 of the Act alone can decide the complaint rather reference of Section 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. This aspect was not brought to the notice of Punjab and Haryana High Court in the case of ***Janta Land Promoters Private Limited (supra).***

14. It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to Section 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to Section 21 of the Act of 2016 but has to be reference of other provisions, more specifically, Section 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. The resolution of the Authority has also been challenged but in the light of Section 30 of the Act of 2016, we find no ground to set aside the resolution as otherwise Section 81 saves it.

15. So far the second issue regarding rate of interest is concerned, it is nothing but a challenge on the merit of the order. We hold writ petition for it to be not maintainable as petitioner has remedy of appeal. Thus, we are not causing interference in the order on merit but allowing the petitioner to take remedy of appeal, if so desires. It is after taking note of the fact that the order of RERA is not otherwise onerous so as to maintain a writ petition.

16. The other challenge in the writ petition is to execution of the order made in reference to Section 40(1) of the Act of 2016. The recovery of the amount is to be made as arrears of land revenue. It is stated that recovery of interest, penalty or compensation alone can be made as arrears of land revenue. In the instance case, RERA has issued citation for return of the amount so deposited with the Promoter with interest. The refund of the principal amount cannot be through the process of execution given under Section 40(1) of the Act of 2016 but can be as per Section 40(2) of the Act of 2016.

17. To deal with the argument aforesaid, we are quoting Section 40 of the Act of 2016, hereunder :

*"**40 Recovery of interest or penalty or compensation and enforcement of order, etc.-** (1) If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.*

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed."

18. Before addressing the issue further it would be necessary to go through the object of the enactment i.e. as to why the Parliament brought the Act of 2016. The object of Act of 2016 is to protect the interest of consumer in real estate sector apart from others. The Bill was introduced with the following object :

"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, ***or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal*** *and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."*

19. A perusal of the object reveals that the Act of 2016 has been enacted to save interest of consumers apart from others and thereby to regulate real estate in a proper manner. It is even to give speedy dispute redressal mechanism. Section 40(1) of Act of 2016 no doubt provides for mechanism for recovery of interest, penalty or compensation. It cannot however be ignored that recovery of the amount is provided under Section 40(1) alone. Section 40(2) is for execution of any other order or direction to any person to do any act, or refrain from doing any act, which is not empowered to do under the Act of 2016 and in case of failure to comply, execution can be enforced in the manner prescribed. Sub-section (2) of Section 40 was to enforce any direction of the nature of restrain or injunction which cannot be enforced as an arrears of land revenue. After coming into the force of the rules framed by the State of Uttar Pradesh, the matter of execution can be taken by the Adjudicating Authority. Sub-Section (2) of Section 40 is not meant for recovery of the amount but for any other direction either to act in a particular manner or to refrain a party in doing any act. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. Rules 23 and 24 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (in short "Rules

of 2016") were brought for that purpose and provides the machanism for execution of the order.

20. In the light of the aforesaid, we are required to give proper interpretation to Section 40 so that the object sought to be achieved by enactment of Act of 2016 is carried out.

21. In the instant case, the consumer had deposited a sum of Rs.28 lacs and odd, in instalments but despite an agreement for giving possession of the flat in the year 2018, it was not handed over to the consumer. The direction for return of the amount with interest has been given in those circumstances. If a consumer is to seek execution of the part of the order through the civil court then the very purpose of the enactment of Act of 2016 to provide speedy dispute redressal mechanism would frustrate. If the argument of the petitioner is accepted then for recovery of a sum of Rs.28 lacs and odd, the non-petitioner consumer is to be send to civil court while recovery of amount of interest of Rs.9 lacs and odd can be made as arrears of land revenue, as admitted by the counsel for the petitioner himself. If recovery of amount is to be sought by dividing it in two parts and by different method, it would be against the object of the Act of 2016. The object of speedy redressal would frustrate if recovery of the amount is also sought through the civil court. We thus hold that the purpose and object of Section 40(1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. Section 40(1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. Section 40(2) is for any other direction either to act in a particular manner or to restrain a party to do certain act and execution of it can be made by the Adjudicating Authority and in case of failure, by the civil court. Section 40(2) covers basically the case of an order of injunction or mandatory injunction.

22. Accordingly, we are unable to accept even the last argument raised by the counsel for the petitioner. It would otherwise frustrate the very object of the Act of 2016 and would give rise to the anarchy, existing earlier, in the hands of Promoters.

23. So far as challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is concerned, the issue is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings However, as and when the Authority invokes Regulation 24 (a) of Regulation, 2019, the liberty is given to challenge the validity. Thus, issue is kept open for the aforesaid.

24. Thus, for all the reasons, we are unable to accept any of the arguments raised by the counsel for the petitioner. The writ petition is accordingly **dismissed**, however, with the liberty to avail the remedy of appeal if other than the issue decided by us remains, which may include the issue towards interest.

(2021)03ILR A727
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 26475 of 2020

M/S Newtech Promoters and Developers Pvt. Ltd., Delhi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pratik Chandra, Sri Manish Singh, Sri Azhar Ikram

Counsel for the Respondents:
C.S.C., Sri Wasim Masood

A. Real Estate (Regulation and Development) Act (16 of 2016), S. 21, S. 29, S. 30, S. 81 - Recovery Certificate challenged on ground that single member of RERA alone could not pass order - as S. 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members - *Held* - Even single member competent to pass order - Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson - S. 30 shows that in case of vacancy, or any defect in the constitution of the Authority the proceeding of the Authority would not be invalidated - S. 81 provides for delegation of power/function, an order was issued to delegate the power to a Member for hearing of the complaint - More so petitioner did not raise objection before the single Member about his competence to adjudicate the complaint - petitioner challenged the order in reference to the composition only when he lost in the complaint (Para 8,10, 12, 13)

B. Real Estate (Regulation and Development) Act (16 of 2016), S. 40 (1), S. 40 (2) - Recovery - If a promoter or an allottee or a real estate agent, fails to pay *principal amount deposited with him*, *interest or penalty or compensation* imposed on him, it shall be recoverable as an arrears of land revenue u/s 40 (1) - recovery of the amount is provided under Section 40(1) alone - whereas S. 40(2) is to enforce any direction of the nature of restrain, injunction or to act in a particular manner or to refrain a party in doing any act, which cannot be enforced as an arrears of land revenue & it is not meant for recovery of the amount. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. (Para 19)

Complaint filed alleging that despite payment possession of a unit not given - prayer was made for refund of the amount with interest - an order was passed by RERA for refund of the principal amount of Rs 21,42,887/- alongwith interest - RERA issued citation for return of the principal amount of Rs 21,42,887/- deposited with the Promoter alongwith interest Rs 14,77,569/ - recovery of the amount was to be made as arrears of land revenue - Order challenged on the ground that refund of the principal amount is not recoverable as an arrears of land revenue u/s 40 (1) but can be as per Section 40(2) of the Act of 2016 - *Held* - If recovery of amount is sought by dividing it in two parts and by different method i.e. for recovery of principal amount consumer is to be send to civil court while recovery of amount of interest is made as arrears of land revenue then it would be against the object of the Act of 2016 of speedy redressal (Para 21)

Dismissed

List of Cases cited:-

1. M/s K.D.P. Build Well Pvt. Ltd. Vs State of U.P. & Ors Writ -C No.2248 of 2020 dt 04.02.2020

2. Rudra Buildwell Constructions Pvt. Ltd. Vs Poonam Sood & Anr Writ- C No.3289 of 2020 dt 06.02.2020

3. Janta Land Promoters Private Limited Vs U.O.I. CWP No.8548 of 2020 dt 16.10.2020 (P&H)

(Delivered by Hon'ble Munishwar Nath Bhandari, J. &
Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Manish Singh with Sri Pratik Chandra and Sri Azhar Ikram, learned counsel for the petitioner. Sri Wasim Masood has put in appearance on behalf of respondents.

2. The writ petition has been filed with the following prayers:

"(i) Issue an appropriate writ, order or direction declaring the section 24(a) of the U.P. Real Estate Regulatory Authority (General) Regulation, 2019 as ultra vires and contrary to the section 21 and 85 of the RERA Act.

(ii) Issue a writ, order or direction in the nature of Certiorari quashing order dated 27.2.2019 passed Regulatory Authority / Bench No. I, U.P. RERA Regional Office, Gautam Budh Nagar, in Complaint No. 7201814183 (Chandeshwar Pandey Vs. M/s Newtech Promoters and Developers Pvt. Ltd.).

(iii) Issue a writ, order or direction in the nature certiorari quashing the impugned Recovery Certificate dated 8.9.2020 issued by opposite party no. 4.

(iv) Issue a writ, order or direction in the nature of mandamus not to give effect the impugned recovery certificate dated 8.9.2020 issued by opposite party no. 4.

(v) Issue a writ, order or direction in the nature of mandamus directing the state respondents not to initiate coercive measures pursuant to the impugned recovery certificate issued by opposite party no. 4."

3. The petitioner has challenged the order passed by Real Estate Regulatory Authority (in short "RERA") dated 27.2.2019 though an appeal against the said order lies under Section 43(5) of Real Estate (Regulation and Development) Act, 2016 (in short "Act of 2016").

4. It is a case where a complaint was filed by the non-petitioner alleging that despite payment towards unit No. D-502 in the scheme introduced by the petitioner, the possession of a unit has not been given. The unit (flat) was booked on 6.10.2012 and was to be delivered in the year 2015. The prayer was made for refund of the amount of Rs.29,11,265/- with interest. The Authority found that as per the agreement entered between the parties, possession of the flat in question should have been delivered by 2015. The petitioner-Company failed to show delivery of possession of the flat in question. Thus, taking into consideration the default of the Promoter (petitioner herein) and referring to the judgment of Apex Court, an order was passed by RERA on 27.2.2019 for refund of the principal amount alongwith interest. In pursuance thereof, order dated 27.2.2019 was issued for its execution. The amount of Rs.29,11,265/- was shown towards the principal amount while component of interest was Rs.19,36,558.07/-. The petitioner has filed this writ petition to challenge not only the order dated 27.2.2019 passed by RERA but the recovery certificate dated 8.9.2020 on the execution application.

5. Learned counsel for the petitioner submits that an appeal against the order passed by RERA is maintainable but this case has exceptional circumstances thus even a writ petition would be maintainable. One member of RERA has passed the order going against the Act of 2016. Section 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members. The impugned order is by one Member alone going against the mandate of Section 21 of the Act of 2016. In view of the above, there is no need to prefer an appeal as the order dated 27.2.2019 is without jurisdiction.

6. It is also stated that the order to award interest by the Authority is again going contrary to the provisions. Rules for award of interest was introduced in the year 2018. The amount deposited with the Promotor has been ordered to be returned

with interest. The interest has been allowed even for the period prior to introduction of U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 (in short "Rules of 2018"). It is even ignoring the rate of interest agreed by the parties. Challenge to the order has been made on that ground also.

7. We are first taking challenge to the order dated 27.2.2019, passed by the Authority to find out as to whether one member was competent to pass the order.

8. The issue has been raised in reference to Section 21 but it is not open for debate having been decided by this Court in ***Writ -C No.2248 of 2020 (M/s K.D.P. Build Well Pvt. Ltd. vs. State of U.P. and 4 Others) vide judgment dated 04.02.2020 and in Writ-C No.3289 of 2020 (Rudra Buildwell Constructions Pvt. Ltd. vs. Poonam Sood and Another) vide judgment dated 06.02.2020*** holding order by one member to be legal. The issue regarding composition of RERA was considered in reference to Sections 21 and 81 of the Act of 2016. Section 81 provides for delegation of power/function and taking the aforesaid provision into consideration, the argument was not accepted.

9. At this stage, learned counsel for the petitioner has made a reference to the judgment of Punjab and Haryana High Court on the same issue in ***Civil Writ Petition No.8548 of 2020 (Janta Land Promoters Private Limited vs. Union of India and others) vide judgment dated 16.10.2020***. It is stated that judgment of this Court has been referred by Punjab and Haryana High Court and has taken a different view.

10. What we find is binding effect of the judgment rendered by this Court than to follow the judgment of other High Court. Accordingly, we are unable to accept the first argument in reference to Section 21 of the Act of 2016. It is more so when the petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint.

11. It is further necessary to refer Sections 21, 29 and 30 of the Act of 2016 to discuss the issue independent to the earlier judgments. The provisions aforesaid are quoted hereunder :

"21. Composition of Authority.- *The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government."*

29. Meeting of Authority.- *(1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.*

(2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person

presiding shall have a second or casting vote.

(4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application.

Provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

***30. Vacancies, etc., not to invalidate proceeding of Authority**.- No act or proceeding of the Authority shall be invalid merely by reason of--*

(a) any vacancy in, or any defect in the constitution of, the Authority; or

(b) any defect in the appointment of a person acting as a Member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case."

12. Section 21 of Act of 2016 speaks about composition of the Authority, which shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government. Section 29, however, talks about the meeting of Authority and perusal of sub-section (2) thereof shows that in absence of Chairperson for any reason, the other Member chosen by the Members present amongst themselves at the meeting, shall preside thereby. Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson so appointed by the appropriate Government. Thus, it is not necessary that the adjudication of the complaint has to be made by the composition of Authority, as given under Section 21 of the Act of 2016 though as per Section 29 also, it should be by two Members in absence of the Chairperson.

13. Section 30 of Act of 2016 is, however, relevant and address the issue raised in this petition. The vacancies, etc. not to invalidate proceeding of the Authority. It shows that in case of vacancy, or any defect in the constitution of the Authority or any defect in the appointment of a person acting as a Member of the Authority, the proceeding of the Authority would not be invalidated. Section 30 of the Act of 2016 give complete answer to the objection raised by the petitioner regarding composition of the Authority. It is not that whatever composition given under Section 21 of the Act alone can decide the complaint rather reference of Section 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. This aspect was not brought to the notice of Punjab and Haryana High Court in the case of ***Janta Land Promoters Private Limited (supra).***

14. It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to Section 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to Section 21 of the Act of 2016 but has to be reference of other provisions, more specifically, Section 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to

delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. The resolution of the Authority has also been challenged but in the light of Section 30 of the Act of 2016, we find no ground to set aside the resolution as otherwise Section 81 saves it.

15. So far the second issue regarding rate of interest is concerned, it is nothing but a challenge on the merit of the order. We hold writ petition for it to be not maintainable as petitioner has remedy of appeal. Thus, we are not causing interference in the order on merit but allowing the petitioner to take remedy of appeal, if so desires. It is after taking note of the fact that the order of RERA is not otherwise onerous so as to maintain a writ petition.

16. The other challenge in the writ petition is to execution of the order made in reference to Section 40(1) of the Act of 2016. The recovery of the amount is to be made as arrears of land revenue. It is stated that recovery of interest, penalty or compensation alone can be made as arrears of land revenue. In the instance case, RERA has issued citation for return of the amount so deposited with the Promoter with interest. The refund of the principal amount cannot be through the process of execution given under Section 40(1) of the Act of 2016 but can be as per Section 40(2) of the Act of 2016.

17. To deal with the argument aforesaid, we are quoting Section 40 of the Act of 2016, hereunder :

"40 Recovery of interest or penalty or compensation and enforcement of order, etc.- *(1) If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.*

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed."

18. Before addressing the issue further it would be necessary to go through the object of the enactment i.e. as to why the Parliament brought the Act of 2016. The object of Act of 2016 is to protect the interest of consumer in real estate sector apart from others. The Bill was introduced with the following object :

*"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be**, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal** and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or*

orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."

19. A perusal of the object reveals that the Act of 2016 has been enacted to save interest of consumers apart from others and thereby to regulate real estate in a proper manner. It is even to give speedy dispute redressal mechanism. Section 40(1) of Act of 2016 no doubt provides for mechanism for recovery of interest, penalty or compensation. It cannot however be ignored that recovery of the amount is provided under Section 40(1) alone. Section 40(2) is for execution of any other order or direction to any person to do any act, or refrain from doing any act, which is not empowered to do under the Act of 2016 and in case of failure to comply, execution can be enforced in the manner prescribed. Sub-section (2) of Section 40 was to enforce any direction of the nature of restrain or injunction which cannot be enforced as an arrears of land revenue. After coming into the force of the rules framed by the State of Uttar Pradesh, the matter of execution can be taken by the Adjudicating Authority. Sub-Section (2) of Section 40 is not meant for recovery of the amount but for any other direction either to act in a particular manner or to refrain a party in doing any act. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. Rules 23 and 24 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (in short "Rules of 2016") were brought for that purpose and provides the machanism for execution of the order.

20. In the light of the aforesaid, we are required to give proper interpretation to Section 40 so that the object sought to be achieved by enactment of Act of 2016 is carried out.

21. In the instant case, the consumer had deposited a sum of Rs.29 lacs and odd, in instalments but despite an agreement for giving possession of the flat in the year 2015, it was not handed over to the consumer. The direction for return of the amount with interest has been given in those circumstances. If a consumer is to seek execution of the part of the order through the civil court then the very purpose of the enactment of Act of 2016 to provide speedy dispute redressal mechanism would frustrate. If the argument of the petitioner is accepted then for recovery of a sum of Rs. 29 lacs and odd, the non-petitioner consumer is to be send to civil court while recovery of amount of interest of Rs.19 lacs and odd can be made as arrears of land revenue, as admitted by the counsel for the petitioner himself. If recovery of amount is to be sought by dividing it in two parts and by different method, it would be against the object of the Act of 2016. The object of speedy redressal would frustrate if recovery of the amount is also sought through the civil court. We thus hold that the purpose and object of Section 40(1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. Section 40(1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. Section 40(2) is for any other direction either to act in a particular manner or to restrain a party to do certain act and execution of it can be made by the Adjudicating Authority and in case of failure, by the civil court. Section 40(2) covers basically the case of an order of injunction or mandatory injunction.

22. Accordingly, we are unable to accept even the last argument raised by the counsel for the petitioner. It would otherwise frustrate the very object of the Act of 2016 and would give rise to the anarchy, existing earlier, in the hands of Promoters.

23. So far as challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is concerned, the issue is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings However, as and when the Authority invokes Regulation 24 (a) of Regulation, 2019, the liberty is given to challenge the validity. Thus, issue is kept open for the aforesaid.

24. Thus, for all the reasons, we are unable to accept any of the arguments raised by the counsel for the petitioner. The writ petition is accordingly **dismissed**, however, with the liberty to avail the remedy of appeal if other than the issue decided by us remains, which may include the issue towards interest.

(2021)03ILR A734
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.10.2018

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE HARSH KUMAR, J.

Writ-C No. 54830 of 2011

State of U.P. ...Petitioner
Versus
Amin Uddin & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Goswami (A.C.S.C.)

Counsel for the Respondents:
Sri Ashfaq Ahmad Ansari, Sri Madhusudan Dikshit

A. Civil Law – Urban Land (Ceiling & Regulation) Act, 1976 - Sections 10(5), 10(6) - If possession had not been taken either from the original tenure holder or the answering respondents in accordance with the provisions of the 1976 Act, namely after complying with the provisions of Section 10(5) & 10(6) of the 1976 Act, then the tenure holder and his heirs the answering respondents are entitled to the benefit of the Repeal Act of 1999 (Para 5)

The entire proceedings including the issuance of notice under Section 10(5) of the Urban Land (Ceiling & Regulation) Act, 1976 against the tenure holder were coram non judice as no proceedings could have been undertaken against a dead person. (Para 8)

It has been found that the possession memo which was prepared on 22/23.3.1998, nowhere indicates as to how possession was taken and what is the name of witness in whose presence such possession was taken. There is no name indicated in the writ petition filed by the State or even in the rejoinder affidavit. The name of the Lekhpal in whose presence the alleged possession is said to have been taken has not been mentioned and the printed proforma of the possession memo is blank to that effect. (Para 12)

B. Under the provisions of Section 10(5) of the Urban Land (Ceiling & Regulation) Act, 1976 a period of 30 days is given to the tenure holder to handover peaceful possession, and then if the tenure holder fails to deliver possession forcible possession can be adhered to in terms of Section 10(6) thereof. In the instant case surprisingly enough even before the expiry of 30 days, the possession memo is said to have been taken on 22/23.3.1998. This was clearly an over-reach and a clear paper transaction which establishes that the petitioner-State has

proceeded to assume possession only on paper which is contrary to the provisions of Section 10(5) of the Act and is unlawful. (Para 13, 14)

The question of taking actual possession also has not been established inasmuch as the proceedings were against a tenure holder who had already died without any notice to the heirs or legal representatives of the tenure holder. (Para 15)

C. The beneficiary gets rights only after the proceedings attain finality after full contest, subject to any judicial proceedings including the higher judiciary. Thus, unless finality is attached with regard to the vesting of the land in the State, a beneficiary would not get any better title than the State and would succeed only if the land vests in the State. If the land is held to be that of the tenure holder and if the surplus declaration is held to be invalid in judicial proceedings, the vesting of the land in the State would dissolve and would not be final and complete so as to allow the beneficiary to claim any right title or interest whatsoever.

The disputed land therefore will not vest in the State as a result whereof the beneficiary, namely the Saharanpur Development Authority cannot step into the shoes of the State to claim possession. (Para 16)

D. Jurisdiction of Collector – The actual physical possession has been found to be in favour of the answering respondents as per the impugned order of the Collector itself which was not an order under the 1976 Act but was a fact finding order as per the direction of the High Court dated 09.04.2009. In such circumstances neither the impugned order can be described as or without authority in law nor the State has been able to establish that the finding recorded by the Collector with regard to actual physical possession is perverse. (Para 15)

Writ petition dismissed/rejected. (E-3)

Precedent followed:

1. Mohd. Islam & 3 ors. Vs St. of U.P., Writ Petition No. 15864 of 2015, decided on 04.12.2017 (Para 12)

2. Rati Ram Vs St. of U.P. & ors., 2018 (4) ALJ 338 (Para 12)

3. St. of U.P. Vs Hari Ram, 2013 (4) SCC 280 (Para 14)

4. Raghbir Singh Sehrawat Vs St. of Har. & ors., 2012 (1) SCC 792 (Para 14)

5. Yasin Vs St. of U.P. & ors., 2014 (4) ADJ 305 (Para 14)

6. Lalji Vs St. of U.P. & 2 ors., 2018 (5) ADJ 541 (Para 14)

Precedent distinguished:

1. St. of Assam Vs Bhaskar Jyoti Sharma & ors., 2015 (5) SCC 321 (Para 14)

2. Shiv Ram Singh Vs St. of U.P. & ors., 2015 (5) AWC 4918 (Para 14)

Present petition challenges order dated 29.10.2010, passed by Collector Saharanpur.

(Delivered by Hon'ble Amreshwar Pratap Sahi, J. & Hon'ble Harsh Kumar, J.)

1. Heard the learned Standing Counsel for the State and Sri Madhusudan Dikshit for the respondent nos. 1 to 5.

2. The State has filed this writ petition assailing the order passed by the Collector Saharanpur dated 29.10.2010 primarily on two grounds, namely, that the Collector had no jurisdiction in the matter to pass any such order relating to the declaration of possession or otherwise, which could have been done only by the competent authority under the Urban Land (Ceiling & Regulation) Act, 1976. The other submission raised by the learned Standing counsel is that the possession of the disputed land from the tenure holder had been taken as per the provisions of Section 10(5) of the Urban Land (Ceiling &

Regulation) Act, 1976, and consequently, once the possession had been taken over, the finding of the Collector that actual physical possession remained with the respondents is of no consequence keeping in view the various pronouncements of this Court as well as the Apex Court. The learned Standing Counsel therefore submits that once the possession had been taken over and it had been handed over to the Saharanpur Development Authority, there was no occasion for the Collector to have commented upon the nature of the proceedings.

3. Sri Madhusudan Dikshit on the other hand for the respondents submits that the Collector has done nothing but simply on the administrative side complied with the directions of the High Court dated 09.04.2009 on making an enquiry with regard to the status of actual physical possession of the respondents and nothing beyond that. He submits that the order of the Collector was not an adjudication of any of the rights of the parties in terms of Urban Land (Ceiling & Regulation) Act, 1976 and was a compliance order in view of the direction of the High Court dated 09.04.2009 in Writ Petition No. 50818 of 2000.

4. Sri Dikshit further submits that the original tenure holder late Sri Ruknuddin against whom the notice had been issued and the proceedings had been initiated admittedly had died on 22.01.1993. In the circumstances, the notice of possession as alleged by the petitioner-State and appended as Annexure-8 to the writ petition was clearly issued in the name of a dead person. There was no occasion for its service on a dead person, and even otherwise, no such notice was served either on the heirs or legal representatives namely the answering respondents who are sons of late Ruknuddin.

5. It has further been submitted that if possession had not been taken either from the original tenure holder or the answering respondents in accordance with the provisions of the 1976 Act, namely after complying with the provisions of Section 10(5) & 10(6) of the 1976 Act, then the tenure holder and his heirs the answering respondents are entitled to the benefit of the Repeal Act of 1999, and consequently, the land would not vest in the petitioner-State. The same will therefore be treated to have been released, and accordingly, the order of the Collector does not require any interference by this Court. The counter affidavit has been filed categorically stating the facts as pleaded before us on behalf of the respondents to which a rejoinder has been filed by the petitioner-State. The fact of death of Ruknuddin has not been denied and to the contrary in paragraph no. 11 of the rejoinder affidavit it is admitted that a notice had been issued on 10.04.1998 to the tenure holder who is none else than late Sri Ruknuddin. This is evident also from the recital in the notice as also the possession memo dated 22/23.04.1998 that has been relied upon by the petitioner. It has been stated in the rejoinder affidavit of the State that the land had been declared surplus under the proceedings of the Urban Land (Ceiling & Regulation) Act, 1976 after the tenure holder had been issued notices and who failed to submit any return to the said notice, and consequently, notices were issued on 09.09.1993 under section 10(1) of the Act followed by a notification on 28.01.1994 under Section 10(3) of the Act.

6. We have considered the submissions raised and perused the pleadings on record.

7. The facts as borne out in the affidavits exchanged between the parties indicates that the original tenure holder Ruknuddin had died during the pendency of the proceedings before the competent/prescribed authority with regard to which an information had been tendered, yet the proceedings were finalised against him on 22.07.1993 after his death followed by the notice under Section 10(1) of the 1976 Act on 09.09.1993 and under Section 10(3) on 28.01.1994.

8. The petitioner-State contends that it had issued notices under Section 10(5) on 10.03.1998. We have examined the said notice and we find it to have been issued in the name of late Sri Ruknuddin who had admittedly died in January 1993 and was the recorded tenure holder. In the rejoinder affidavit as well as in the writ petition there is no averment denying the aforesaid fact which is the stand taken by the respondents. There is also no material filed on behalf of the State to demonstrate that such a notice under Section 10(5) of the 1976 Act was served on the heirs of late Ruknuddin. In the aforesaid background when the date of death of Ruknuddin is not disputed and is admitted in paragraph 8 of the writ petition then it is more evident that the entire proceedings including the issuance of notice under Section 10(5) of the Urban Land (Ceiling & Regulation) Act, 1976 against the tenure holder were coram non judice as no proceedings could have been undertaken against a dead person.

9. Apart from this we further find that the answering respondents being legal heirs filed an appeal No. 1007 of 1998 against the proceedings before the competent authority that was exparte before the District Judge which was dismissed as having abated on 19.05.1999. This was on account of the repeal Act having come into force, and consequently, another application moved on their behalf before the competent authority on 18.09.2000 was dismissed on 22.09.2000.

10. It appears that the answering respondents came up before this Court by filing a Writ Petition No. 50818 of 2000 challenging the aforesaid action and seeking protection from this Court in relation to the aforesaid disputed land. A Division Bench of this Court issued a direction to the Collector on 09.04.2009 to examine the claim of the petitioner including the fact as to whether they are entitled to seek any benefit under Section 3(2)(a) of the repeal Act 1999 or not.

11. The Collector therefore in compliance of the said order called for a report from the competent authority dated 22.06.2009 and from the Tehsildar, Saharanpur on 22.07.2009 and also heard the answering respondents in response thereto. After having examined the records, the Collector Saharanpur came to the conclusion that even though the transaction proceedings of taking over possession is on record and the entry has been made in the revenue records under the column land declared surplus under the Urban Land (Ceiling & Regulation) Act, 1976, yet the actual physical possession of the answering respondents has remained intact with them and they are in actual possession of the land continuously.

12. We having gone through the records and we find that the possession memo which was prepared on 22/23.03.1998, no where indicates as to how possession was taken and what is the name of witness in whose presence such

possession was taken. There is no name indicated in the writ petition filed by the State or even in the rejoinder affidavit. The name of the Lekhpal in whose presence the alleged possession is said to have been taken has not been mentioned and the printed proforma of the possession memo is blank to that effect. The question as to how the factum of taking actual physical possession has been established by the State was discussed by a Division Bench in the case of ***Mohd. Islam & 3 Others Vs. State of U.P.*** in Writ Petition No. 15864 of 2015 decided on 4th December, 2017. The said decision was quoted with approval by a Division Bench in the case of ***Rati Ram Vs. State of U.P. & Others 2018 (4) ALJ 338*** paragraph no. 8 as follows:-

*"**8.** The 'Dakhalnama' a certified copy whereof has been produced before us does not even bear the signatures of any attesting witness. We find this to be a lapse and patent illegality the benefit whereof has to be given to the land holder in view of the Division Bench judgment in the case of Mohd. Islam and 3 others v. State of U.P. and 2 others, Writ Petition No. 15864 of 2015 decided on 4th December, 2017. It was also a case of District-Saharanpur. We extract paragraph Nos. 44 to 47 of the said judgment which are as under:*

"44. Since, in the present case, neither factum of taking actual physical possession by Competent Authority under Ceiling Act has been fortified by placing any document nor factum of possession of Development Authority at any point of time has been shown, therefore, argument advanced by learned Standing Counsel on the basis of State of Assam (supra) will not help.

45. Viewed from the above exposition of law we find in the present case that no such exercise of issuing notice under Section 10(6) of the Act, 1976 and thereafter execution of memo on the spot had taken place which is mandatory for ceiling authorities as admittedly the original tenure-holder and then his successors had never voluntarily surrendered the possession of land. In the absence of voluntary surrender of possession of surplus land, the authorities were required to proceed with forcible possession. The document of possession memo would not by itself evidence the actual taking of possession unless it is witnessed by two independent persons acknowledging the act of forcible possession. As discussed above in the earlier part of this. judgment we are not able to accept the alleged possession memo worth calling a document as such in the absence of certain requisites, nor does it bear the details of witnesses who signed the document. It bears mainly signatures of Chackbandi Lekhpal, a person taking possession and then the document has been directed to be kept on file. This is no way of taking forcible possession nor, a document worth calling possession memo. A mere issuance of notification under Section 10(3) and notice under Section 10(5) regarding delivery of possession does not amount to actual delivery of possession of land more especially in the face of the fact that the tenureholder had in fact not voluntarily made surrender of possession of surplus land and no proceeding under Section 10(6) had taken place.

46. Since, we have held that possession memo dated 20.06.1993 is not a possession memo and is a void document for want of necessary compliance under Section 10(6) of the Act, 1976, the petitioners are entitled to the benefit under Section 4 of the Repeal Act, 1999 that came into force w.e.f. 20.03.1999.

47. We may also place on record that respondents claim that possession of land

in question was handed over to Saharanpur Development Authority pursuant to Government Order dated 29.12.1984 but here also we find that no material has been placed on record to show that any such actual physical possession was handed over to Saharanpur Development Authority and the said authority is in de facto possession of land in dispute. Except bare averment made in the counter-affidavit respondent have not chosen to place anything on record to support the stand that de facto possession over land in dispute is that of Saharanpur Development Authority. Therefore even this stand has no legs to stand and is rejected."

13. There is yet another aspect of the matter namely under the provisions of Section 10(5) of the Urban Land (Ceiling & Regulation) Act, 1976 a period of 30 days is given to the tenure holder to handover peaceful possession, and then if the tenure holder fails to deliver possession forcible possession can be adhered to in terms of Section 10(6) thereof.

14. In the instant case surprisingly enough even before the expiry of 30 days, the possession memo is said to have been taken on 22/23.03.1998. This was clearly an over-reach and a clear paper transaction which establishes that the petitioner-State has proceeded to assume possession only on paper which is contrary to the provisions of Section 10(5) of the Act and is unlawful. In all such matters the State relies on the judgment of the Apex Court in the case of ***State of Assam Vs. Bhaskar Jyoti Sharma & Others 2015 (5) SCC 321*** that has been followed by a Division Bench of this Court in the case of ***Shiv Ram Singh Vs. State of U.P. & Others 2015 (5) AWC 4918***. In the instant case the aforesaid judgments would not apply in view of the peculiar facts of this case as discussed herein. To the contrary since taking over of possession by the State has not been established in the present case, the issue stands covered by the decision of the Apex Court in the case of ***State of U.P. Vs. Hari Ram 2013 (4) SCC 280*** and the decision in the case of ***Raghbir Singh Sehrawat Vs. State of Haryana & Others 2012 (1) SCC 792*** as well as the Division Bench judgment of this Court in the case of ***Yasin Vs. State of U.P. & Others 2014 (4) ADJ 305***. The latest Division Bench of this Court with which we find ourselves in complete agreement with is in the case of ***Lalji Vs. State of U.P. & 2 Others 2018 (5) ADJ 541*** that has been delivered after taking into account the judgment of the Apex Court in the case of Bhasker Jyoti Sharma ***(supra).***

15. The question of taking actual possession also has not been established inasmuch as the proceedings were against a tenure holder who had already died without any notice to the heirs or legal representatives of the tenure holder. Apart from this actual physical possession has been found to be in favour of the answering respondents as per the impugned order of the Collector itself which was not an order under the 1976 Act but was a fact finding order as per the direction of the High Court dated 09.04.2009. In such circumstances neither the impugned order can be described as or without authority in law nor the State has been able to establish that the finding recorded by the Collector with regard to actual physical possession is perverse.

16. On the other hand possession has neither been taken lawfully nor actually from the respondents. The contention that possession had been handed over to the Saharanpur Development Authority is

therefor also unsubstantiated and falls through. The disputed land therefore will not vest in the State as a result whereof the beneficiary, namely the Saharanpur Development Authority cannot step into the shoes of the State to claim possession. In all matters pertaining to Ceiling laws, there is a compulsory exaction and practically confiscation of land through legislation, by virtue whereof the land vests in the State for further settlement to a beneficiary. In our opinion, the beneficiary gets rights only after the proceedings attain finality after full contest subject to any judicial proceedings including the higher judiciary. Thus, unless finality is attached with regard to the vesting of the land in the State, a beneficiary would not get any better title than the State and would succeed only if the land vests in the State. If the land is held to be that of the tenure holder and if the surplus declaration is held to be invalid in judicial proceedings, the vesting of the land in the State would dissolve and would not be final and complete so as to allow the beneficiary to claim any right title or interest whatsoever.

17. The Development Authority has not chosen to content the matter either by filing it's petition or by seeking impleadment in this case. The petitioner-state has also not impleaded the Authority as a co-petitioner or even a performa respondent.

18. Consequently, writ petition has no merits and is accordingly ***rejected.*** The petitioner-State through the Collector and the competent authority Urban Ceiling are directed to correct the entries and restore them in favour of the answering respondents accordingly.

(2021)03ILR A740

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Special Appeal No. 326 of 2020
Connected with

Special Appeal Nos. 167 of 2020, 315 of 2020, 316 of 2020, 317 of 2020, 318 of 2020, 319 of 2020, 320 of 2020, 321 of 2020, 322 of 2020, 323 of 2020, 324 of 2020, 325 of 2020, 327 of 2020, 328 of 2020, 329 of 2020, 330 of 2020, 331 of 2020, 332 of 2020, 333 of 2020, 334 of 2020, 335 of 2020, 336 of 2020, 337 of 2020, 338 of 2020, 339 of 2020, 340 of 2020, 341 of 2020, 342 of 2020, 343 of 2020, 344 of 2020, 345 of 2020, 346 of 2020, 347 of 2020, 355 of 2020, 356 of 2020, 357 of 2020, 358 of 2020, 359 of 2020, 360 of 2020, 361 of 2020, 362 of 2020, 363 of 2020, 364 of 2020, 365 of 2020, 366 of 2020, 367 of 2020, 368 of 2020, 369 of 2020, 370 of 2020, 379 of 2020, 380 of 2020, 381 of 2020, 382 of 2020, 383 of 2020, 384 of 2020, 388 of 2020, 389 of 2020, 390 of 2020, 391 of 2020, 392 of 2020, 393 of 2020, 394 of 2020, 395 of 2020, 396 of 2020, 397 of 2020, 398 of 2020, 399 of 2020, 400 of 2020, 401 of 2020, 402 of 2020, 403 of 2020, 404 of 2020, 405 of 2020, 409 of 2020, 410 of 2020, 411 of 2020, 412 of 2020, 413 of 2020, 414 of 2020, 415 of 2020, 416 of 2020, 417 of 2020, 418 of 2020, 423 of 2020, 424 of 2020, 425 of 2020, 426 of 2020, 427 of 2020, 428 of 2020, 429 of 2020, 430 of 2020, 431 of 2020, 433 of 2020, 434 of 2020, 435 of

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Special Appeals (Defective) No. 837 of 2020, 981 of 2020, 1000 of 2020, 1032 of 2020, 1034 of 2020, 1035 of 2020, 1036 of 2020, 1037 of 2020, 1039 of 2020, 1041 of 2020, 1042 of 2020, 1043 of 2020, 1044 of 2020, 1045 of 2020, 1046 of 2020, 1047 of 2020, 1048 of 2020, 1049 of 2020, 1050 of 2020, 1051 of 2020, 1052 of 2020, 1102 of 2020, 1107 of 2020, 1112 of 2020, 1116 of 2020, 1122 of 2020, 1146 of 2020, 1157 of 2020, 1159 of 2020, 1164 of 2020, 1165 of 2020, 1170 of 2020, 1171 of 2020, 1173 of 2020, 1176 of 2020, 1177 of 2020, 1179 of 2020, 1221 of 2020, 1235 of 2020, 1237 of 2020, 1241 of 2020, 1250 of 2020, 1251 of 2020, 1252 of 2020, 1253 of 2020, 1255 of 2020, 1256 of 2020, 1258 of 2020, 1259 of 2020, 1266 of 2020, 1284 of 2020, 1322 of 2020 and 26 of 2021.

Kiran Lata Singh ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Khare, Sri Ashok Khare, Sri Rajendra Singh Yadav, Sri Satya Prakash Maurya

Counsel for the Respondents:
C.S.C., Sri Avneesh Tripathi, Sri Gagan Mehta, Sri Jagannath Maurya, Sri Nisheeth Yadav

A. Constitution of India – Article 311 – UP Government Servant (Punishment & Appeal) Rules, 1999 – Assistant teacher – Termination – Appointment sought based on fake or tempered marksheet – No Department enquiry – Effect – Held, Observance of the Rules of 1999 and Article 311 of the Constitution of India is not warranted in the cases where appointment was taken by fraudulent means – Procedure given under the Rule of 1999 was not required to be applied for an order of termination in reference to fake or tampered mark-sheets and degrees. (Para 70 and 72)

B. Service law – Appointment based on fake marksheet – Termination – 10 years delay in passing the termination order – Effect – Held, issue of delay in passing the order of termination is of no substance – Mere rendering the service for more than 10 years cannot be a ground to set aside the order of termination. If the prayer is accepted, then it would mean endorsement of fake or tampered mark-sheets – *R. Vishwanatha Pillai's case* of the Supreme Court followed. (Para 73, 74, 75 and 77)

Special Appeal disposed of. (E-1)

Cases relied on :-

1. Mahipal Singh Tomar Vs St. of U.P., (2013) 16 SCC 771

2. Inderpreet Singh Kahlon Vs St.of Punj. & ors., (2006) 11 SCC 356

3. U.O.I. & anr. Vs Raghuwar Pal Singh, (2018) 15 SCC 463

4. St. of Bihar & ors. Vs Kirti Narayan Prasad, (2019) 13 SCC 250

5. Punjab Urban Planning and Development Authority & anr. Vs Karamjit Singh, AIR 2019 SC 1913; (2019) 16 SCC 782

6. Managing Director, ECIL Hyderabad, AIR 1944 SC 1074

7. Nidhi Kaim & anr. Vs St. of M.P. & ors., (2017) 4 SCC 1

8. Bank of India & anr. Vs Avinash D. Mandivikar & ors., (2005) 7 SCC 690

9. R. Vishwanatha Pillai Vs St. of Kerala & ors., (2004) 2 SCC 105

10. Rita Misra & ors. Vs Director, Primary Education, Bihar, AIR 1988 (Patna) 26

ग. शिक्षा सेवा कानून – भारत में गुरु का महत्त्व व योगदान – गुरु देवो भव – जिम्मेदार नागरिक के रूप में छात्र का निर्माण – शिक्षक का व्यवसाय एक पवित्र व्यवसाय है, यह केवल जीविका चलाने का साधन मात्र नहीं है – भौक्षिक प्रक्रिया की सफलता बहुत कुछ शिक्षक पर निर्भर करती है, क्योंकि यही वो शिक्षक है, जो छात्रों में उद्देश्य का प्रत्यारोपण और चरित्र का निर्माण करते हैं, इसलिए शिक्षक प्रणाली की क्षमता के लिए शिक्षकों की गुणवत्ता, योग्यता व चरित्र का सर्वाधिक महत्त्व है, जिससे छात्र भविश्य में एक जिम्मेदार नागरिक बन सकें। (पैरा 3, 4 एवं 5 – सहमति निर्णय द्वारा न्यायमूर्ति सौरभ श्याम शमशेरी)

घ. शिक्षा सेवा कानून – नियुक्ति प्राप्त करने में छल का प्रयोग – प्रभाव – धोखाधड़ी पवित्र कृत्य को भी निश्प्रभावी कर देती है – धोखाधड़ी और न्याय एक साथ नहीं रहते हैं – जो व्यक्ति प्रारंभ से ही छल, कपट व धोखाधड़ी के आधार पर पद प्राप्त किया हो, वह शिक्षक के रूप मे छात्रों को अच्छे संस्कार दे पायेंगे, इसकी संभावना नगण्य है – अभिनिर्धारित किया गया, छल से प्राप्त नियुक्ति प्रारंभ से ही भून्य मानी जायेगी – ऐसी नियुक्ति के कारण न केवल योग्य अभ्यर्थी के अधिकार का हनन किया जाता है, बल्कि आने वाले पीढ़ी के भविश्य पर भी कुठाराघात किया जाता है – कूटरचित दस्तावेज से नियुक्ति पाने का कृत्य नियोक्ता के प्रति दुर्व्यपदेशन व छल है और ऐसी नियुक्ति को रद्द करने के पूर्व न तो जांच की आवश्यकता है और न ही लम्बी सेवा अवधि को बचाव का आधार बनाया जा सकता है। (पैरा 9, 10 एवं 11 – सहमति निर्णय द्वारा न्यायमूर्ति सौरभ श्याम शमशेरी)

<u>उल्लेखित पूर्व निर्णय :-</u>

1. अविनाश नागरा बनाम नवोदय विद्यालय समिति; (1097) 2 एस सी सी 534

2. सुश्मिता वासु व अन्य बनाम बैलीगुनें शिक्षा समिति; (2006) 7 एस सी सी 680

3. महाराश्ट्र राज्य बनाम विकास साहेबराव राउनदले; (1992) 4 एस सी सी 465

4. राम चन्द्र सिंह बनाम सावित्री देवी और अन्य; (2003) 8 एस सी सी 319

5. जैनेन्द्र सिंह बनाम उत्तर प्रदेश राज्य; (2012) 8 एस सी सी 748

6. सुधाकर पाठक और अन्य बनाम उत्तर प्रदे ा राज्य व एक अन्य; 2019 (1) ए. डी. जी. 589 (डी. बी.)

7. बिहार राज्य व अन्य बनाम देवेन्द्र भार्मा; 2019 एस सी सी ऑन लाइन एस सी 1360

(Delivered by Hon'ble Munishwar Nath Bhandari, J.)

1. Heard Sri Ashok Khare, Senior Advocate assisted by Sri Siddharth Khare, Sri H.N. Singh, Senior Advocate assisted by Sri Vineet Kumar Singh, Sri Radha Kant Ojha, Senior Advocate assisted by Sri Shivendu Ojha, Sri Prabhakar Awasthi and Smt. Arti Raje, learned counsel appearing for the petitioners/appellants. Sri M.C. Chaturvedi, Additional Advocate General assisted by Sri Rama Nand Pandey, Additional Chief Standing Counsel and Sri Rajiv Singh is appearing for the State Government, Sri Ashok Mehta, Senior Advocate assisted by Sri Gagan Mehta is appearing for the Agra University and Sri J.N. Maurya, learned counsel is appearing for the U.P. Education Board/Basic Shiksha Adhikari.

2. The batch of appeals have been filed to assail the judgment dated 29.04.2020 whereby bunch of writ petitions were decided.

3. The writ petitions were filed to challenge the order passed by the District Basic Education Officer by which the appointments of the petitioners/appellants on the post of Assistant Teacher were cancelled/terminated. It was alleged that appointments sought were based on fake or

tampered mark-sheets/degrees of B.Ed. Examination, 2005.

BRIEF FACTS OF THE CASE AND PREVIOUS LITIGATION

4. The facts available on record and taken into consideration by the learned Single Judge, reflect that the education was made a saleable product by the Dr. B.R. Ambedkar University, Agra (for short "*University*") and thereby the candidates, who even did not appear in B.Ed. Examination, 2005 were conferred with the mark-sheet and degree. The other allegation is for tampering of marks apart from candidates having same roll numbers on the mark-sheets.

5. The efface of the University came in the knowledge of the Court when a writ petition was filed by one Sunil Kumar bearing Writ Petition No. 2906 of 2013 on issuance of two mark-sheets to him by the University for B.Ed. Examination 2005. The learned Single Judge hearing the said writ petition directed the University to produce the tabulation sheets of B.Ed. Examination, 2005. In pursuance to the direction aforesaid, the tabulation sheets were produced. It was not bearing signature of any authorized officer/person of the University. The learned Single Judge hearing the said writ petition passed an order on 28.02.2013 directing the Vice Chancellor of the University to file an affidavit in respect to the B.Ed. Examination 2005. The affidavit was sworn. The learned Single Judge observed cross list/tabulation sheets to be manufactured documents in absence of signature of the officer. It was admitted by the University that tabulation sheets/cross list are always signed by the authorized officer/person otherwise it cannot be accepted as genuine.

6. In pursuance to the subsequent order dated 28.02.2013, the then Vice Chancellor Professor D.N. Jauhar filed an affidavit stating that a three member inquiry committee was constituted on the receipt of the complaint and information regarding manipulation and discrepancies in the mark charts. The committee found following discrepancies-:

(i) Font of computer printing on some pages are different from other pages;

(ii) Font quality on paper used in different pages defers;

(iii) The signature of authorized person of agency was also found different on different pages.

7. The learned Single Judge hearing the writ petition of Sunil Kumar passed another order on 23.01.2014 for impartial inquiry into the affairs of the University in regard to B.Ed. Examination, 2005. In pursuance to the order dated 23.01.2014, the State Government constituted a Special Investigation Team (For short "S.I.T."). The writ petition of Sunil Kumar was then treated to be a Public Interest Litigation, thus to be placed before the Division Bench. After referring the matter to the Division Bench, the record of said writ petition was not found traceable, thus matter could not be heard for further direction. The file was reconstituted in the year 2020 pursuant to the order of the Court.

8. The S.I.T. constituted by the State Government submitted its report dated 14.08.2017 before this Court after the investigation. As per the report, the allegation of issuance of fake mark-sheets

apart from tampered mark-sheets were found based on the material collected during the course of investigation/inquiry.

9. After receipt of the report from the S.I.T., the University as well as the State Government decided to take action in the matter. The Director of Basic Education issued show cause notice to the petitioners/appellants. The show cause notice was challenged by a ***Writ Petition (A) No. 56739 of 2017 (Smt. Suryavati and 150 others Vs. State of U.P. and 24 others).*** An interim order was passed therein to continue the petitioners/appellants with payment of salary. The Court, however, allowed the Department to proceed in the matter in accordance to Rules. It was followed by large number of writ petitions.

10. The Basic Shiksha Adhikari passed the order of termination pursuant to the show cause notice. It was challenged separately by maintaining a writ petition. The first writ petition for it was ***Writ A No. 20244 of 2018 (Santosh Kuamr and others Vs. State of U.P. and others).*** The said writ petition was dismissed by the judgment dated 20.09.2018. The judgment in the case of Santosh Kumar (supra) was challenged by maintaining an appeal where an interim order was passed.

11. The University also proceeded in the matter and accordingly a notice was published in the news papers requiring the doubtful candidates to submit reply to the questionnaire supported by material. The validity of the show cause notice of the University was also challenged ***by Writ A No. 486 of 2020 (Tilak Singh and others Vs. State of U.P. and others).*** The said writ petition was dismissed by the learned Single Judge by its judgment dated 20.01.2020 with a direction to the University to proceed further in the matter.

12. In pursuance to the show cause notice given by the University, majority of candidates, alleged to have fake mark-sheets, did not submit any reply and in few cases, reply was submitted with incomplete information and documents or after the last date for it. Only 18 candidates/students submitted proper reply along with documents. The University cancelled B.Ed. degree of 2823 candidates by the order dated 07.02.2020, who failed to submit reply. The order dated 07.02.2020 was passed during the pendency of the writ petition. It was brought on record by way of an affidavit by the University. The hearing of the writ petition commenced thereafter on different dates. The arguments were concluded on 06.03.2020 and thereupon the impugned judgment was pronounced on 29.04.2020.

13. The learned Single Judge decided the batch of writ petitions with certain directions in paragraph 69 of the impugned judgment which has been assailed by the appellants herein.

14. In few appeals, there is delay and in few appeals, an application to seek leave for appeal has been submitted. The application for condonation of delay so as the leave to appeal are allowed as otherwise no objection to it has been raised by the side opposite. It is looking to the fact that few appeals have been preferred within limitation, thus, would be decided on merits and judgments therein would apply on all the appeals and accordingly even leave to appeal is granted because the applicants are either effected by the impugned judgment or in their pending writ petitions they cannot get result unless

judgment in question is set aside. Thus, prayed for leave and accordingly granted for the ends of justice. Accordingly, all the appeal were heard together.

15. Before we proceed to refer to the arguments of the learned counsel for the appellants, it would be material to refer judgment in the case of Tilak Singh & others Vs. State of U.P. and others, ***Writ-A 468 of 2020. The said writ petition was decided by the judgment dated 20.01.2020***. It is without causing interference the show cause notice given by the University though certain formalities were interfered which were basically to have verification of documents through the Principal etc. but no interference in the material information sought by the University was caused rather a direction was given to the University to proceed in the matter in regard to the degrees which are alleged to be forged. The procedure given under Section 67 of U.P. State Universities Act, 1973 was not required to be applied for fake degrees though it was mandated for the tampered mark-sheet.

16. All the facts narrated above are relevant and otherwise summarised by the counsel for the appellants.

ARGUMENTS OF LEARNED COUNSEL FOR THE APPELLANTS

17. Learned counsel submits that the appellants were appointed on the post of Assistant Teacher after undergoing the selection as per U.P. Basic Education Staff Rules, 1973 (in short "***Rules of 1973***"). All the appellants were thus regular employees and even granted promotion during the intervening period. They could not have terminated from service without a departmental enquiry under the U.P. Government Servant (Punishment & Appeal) Rules, 1999 (In short "***Rules of 1999***"). They could not have been terminated from service only by serving a show cause notice. Learned Single Judge failed to consider this aspect of the matter. The show cause notice was even stayed in the set of another litigation initiated by ***Suryavati and 150 others (supra)***. During currency of the interim order, the respondents could not have proceeded to pass termination order. It is more so when there was no material with the State Government to infer B.Ed. degrees of the appellants either fake or tampered. The State Government could not have relied on the report submitted by the S.I.T. It was barely an opinion of the S.I.T. thus could not have been treated to be substantive piece of evidence. The report of the S.I.T. would be tested by the court in the criminal trial. Thus, the sole basis to terminate the services of the appellants was not made out.

18. It is further urged that the learned Single Judge could not have decided the writ petition in reference to the order dated 07.02.2020 passed by the University to cancel the degrees finding it to be fake, as no opportunity was given to them to assail the order dated 07.02.2020. It is despite their request.

19. The learned Single Judge decided the writ petition after taking adverse inference pursuant to the order of the University dated 07.02.2020 cancelling the degrees of the appellants. The Court should have given opportunity to challenge the order dated 07.02.2020 passed by the University.

20. The learned Single Judge has even drawn a statement to classify the number of

candidates obtained fake mark-sheets while others having tampered mark-sheets. The third category is of the candidates having mark-sheets with same roll numbers. The statement of candidates given in the judgment should not be relied as otherwise S.I.T. has given data on their own assumption. The appellants have challenged S.I.T. report in the case of ***Sunil Kumar (Supra)*** which petition was converted into Public Interest Litigation and is yet to be decided. The finding of the learned Single Judge that the appellants have not challenged the S.I.T. report is thus perversed.

21. The learned Single Judge has relied the judgment in the case of ***Tilak Singh (Supra)*** though the said writ petition was against the show cause notice given by the University, thus dismissed. The judgment in the case of ***Tilak Singh (Supra)*** has not decided any issue pertaining to the case rather directed the University to proceed further in the matter, thus no final decision was given holding certain mark-sheet to be fake or tampered. The learned Single Judge should not have relied on the judgment in the case of ***Tilak Singh (Supra).***

22. The report of S.I.T. considered by learned Single Judge was based on superficial mathematical calculation. No supporting material exist to arrive at the calculation of eligible candidates for B.Ed. Examination, 2005 with the figures students actually appeared followed by declaration of the result of excess candidates. The S.I.T. had failed to take note of the judgment of Lucknow Bench in the case of ***Shri Puran Prasad Gupta Memorial Degree College Vs. State of U.P. dated 06.04.2007 passed in Writ Petition No.399 (M.B.) 2007*** wherein a direction was given to declare the result of additional students. The S.I.T. failed to take note of those students while making calculation of the studens appeared in the examination. Thus, there was no reason for the learned Single Judge to place reliance on the S.I.T. report.

23. It is also submitted that even if the learned Single Judge was to proceed with a matter in reference to the order dated 07.05.2020 passed by the University cancelling the degrees, it should not have been in ignorance of the fact that out of total 3637 candidates, 814 candidates had submitted reply but while passing the order dated 07.02.2020, the University cancelled the degree of all the candidates without giving any reason. The order dated 07.02.2020 should not have been relied by the learned Single Judge.

24. So far as finding regarding tampered mark-sheet is concerned, the judgment of learned Single Judge is in ignorance of the fact the candidates had no access to the record of the University to become instrument to tamper the mark-sheet. In fact mark-sheets were issued immediately with declaration of result. Thus, there was no occasion for any candidates to tamper the mark-sheet.

25. The tampering of mark-sheets in fact did not effect even the candidature to seek appointments on the post of the Assistant Teacher as it was based on the selection test where all the candidates remained successful. It was also stated that if candidates were involved in tampering of the mark-sheets, their marks would not have been reduced whereas in many cases, marks of the candidates were less compared to the marks in the foil recovered by the S.I.T. Thus, allegation of tampering

of mark-sheet was not even made out. The allegation of tampering of the mark-sheets is also without any basis as neither tabulation sheets were available nor original marks foil were recovered by the S.I.T. The record seized by the S.I.T. is lying with it or with the Registrar of High Court. The original marks foil may accordingly be called to consider the argument aforesaid.

26. In view of above, termination order should have been interfered by the learned Single Judge. The denial of wages during the intervening period till the University passes the order after compliance of the procedure given under Section 67 of the State Universities Act, 1973 in regards to tampered mark sheets is also illegal.

27. Learned counsel for the appellants submitted that if a direction is given to the University to pass an order in regard to tampered mark-sheets after following the procedure given under Section 67 of the Act, then appellants would have no grievance rather submitted that subject to the outcome of the order pursuant to it, the order of termination be governed. If the decision of the University comes adverse to them then they would not question their termination order but in case of favourable report, it should be interfered thus appropriate order for it may be passed.

28. It is also submitted that the marks foil recovered by the SIT is not of all the papers of B.Ed. Examination rather is of two papers only. The aforesaid should not have been taken to be a decisive factor to hold mark-sheets to be tampered.

29. Some of the counsel of the appellants even challenged the order dated 07.02.2020 passed by the University cancelling B.Ed. degrees of 2005 of 2823 candidates. It is submitted that the University proceeded to pass the order dated 07.02.2020 solely based on the report of SIT. It is by presuming admission of the allegation by the candidates in absence of reply to show cause notice containing a questionnaire. The University could not have cancelled the degrees only in reference to the report of SIT. Thus the order dated 07.02.2020 passed by the University may also be interfered. The learned counsel pressing the appeal for challenge to the order dated 07.02.2020 submitted that an opportunity to challenge the said order was not given by the learned Single Judge, thus it has been challenged in these appeals.

30. One set of the counsel appearing for the appellants, however, submitted that they do not prefer to challenge the order dated 07.02.2020 in these appeals as for that separate writ petitions can be filed or even filed. The fact however remains that one set of the appellants have challenged the order dated 07.02.2020 passed by the University and accordingly, we need to decide the issue aforesaid, otherwise this judgment may be criticized alleging that despite a challenge to the order dated 07.02.2020 passed by the University, consideration of argument has not been made by us. Accordingly, we proceed to determine all the issues raised before us not only in reference to the challenge to the judgment of the learned Single Judge but the order dated 07.02.2020 passed by the University.

31. No other arguments have been raised by the appellants other than what have been mentioned above. The written arguments have been submitted by the

counsel but we are confining to the oral argument before this Court and otherwise the written arguments should have been confined to the oral argument made before this Court.

32. The prayer of learned counsel for appellants is to set aside the termination order so as the judgment of learned Single Judge or pass any other appropriate order in the fitness of the case. The order dated 07.02.2020 passed by the University may also be quashed. Learned counsel for the appellants have cited judgments to support their arguments which would be referred by this Court while recording finding on the rival submission of the parties.

33. The prayer of learned counsel for appellants is to consider the documents submitted on the direction of this Court to show that the candidates were having required documents to show their admission in the college followed by payment of fee apart from issuance of admit cards for appearance in the examination followed by other documents to show their appearance in the examination. At this stage, it is also stated that University has passed an order to cancel remaining fake mark-sheets and degrees other than of two students by the order dated 27.07.2020. It is out of 814 students/candidates.

ARGUMENTS OF LEARNED COUNSEL FOR SIDE OPPOSITE

34. Per contra, the contest to the appeals has been made by the counsel appearing for the State and the University. The have supported the judgment of the learned Single Judge.

35. It is submitted by the Senior Counsel appearing for the University that pursuant to the direction of this Court in the case of ***Sunil Kumar (supra)***, the University had initially constituted a Committee of three members. The Committee found that font of the cross sheet/tabulation sheet is different on certain pages. It is apart from the different font size in the cross sheet/tabulation register. The University, thus realized manipulation and malpractices in the B.Ed. examination of 2005. It decided to proceed against the officers involved in the manipulations.

36. The matter was referred to SIT by the State Government for investigation followed by a report in the light of the direction in the case of ***Sunil Kumar (supra).*** On the receipt of the report from S.I.T., the State Government gave direction to University to proceed in the matter and accordingly the University decided to issue show cause notice to the candidates by publishing it in the newspaper requiring the candidates to submit their reply to the questionnaire with supporting material. The show cause notice was challenged by ***Tilak Singh and 495 other candidates***. The writ petition was dismissed vide judgment dated 20.01.2020 with a direction to the University to proceed in the matter of fake mark-sheets without observing Section 67 of the Act of 1973 but for tampered mark-sheets, to proceed under Section 67 of the Act of 1973. The University accordingly proceeded in compliance to the judgment in the case of ***Tilak Singh (supra)*** as the judgment in the said case was not challenged thus attained finality.

37. In pursuance to the notice published in the newspaper, reply was submitted only by 814 candidates within the time prescribed for it. It was out of 4766 candidates which was for fake degree as well as tampered. 2823 candidates did

not send reply to show cause notice while 814 candidates sent the reply, however out of 814 also 796 candidates did not submit complete information sought in the show cause notice. Only 18 candidates submitted proper reply with material. The University thus proceeded to pass order dated 07.02.2020 holding that 2823 students are having fake degrees. It is thus incorrect to state that by the order dated 07.02.2020, all the degrees were declared fake, which includes the degrees of 814 candidates. It is also incorrect that the University has declared 2823 candidates to be fake based on the report of the SIT. In fact, the report of the SIT was the basis to initiate the action and accordingly proper questionnaire was prepared by the University to independently assess the allegations. The failure of the candidates to submit the reply was taken adverse. There was no reason for the candidates not to submit reply to the notice with relevant materials. The University proceeded in the matter pursuant to the direction of the Court in the case of ***Tilak Singh (supra).*** Thus there is no illegality in the order dated 07.02.2020. The appellants have not submitted any material even while filing the appeal and direction of this Court other than seven candidates those who had even submitted reply to the show cause notice.

38. The learned counsel for the University has given details of all the students who could have appeared in B.Ed. Examination of 2005. It is by referring to the number of institutions recognized by the N.C.T. and the students to be admitted by each of the institutions. It is submitted that out of total 82 institutions having recognition from the N.C.T., each was entitle to admit 100 students, 50 percent through management quota and 50 percent through counselling or 15 percent through management quota and 85 percent through counselling. A controversy regarding quota through counselling came in reference to 25 self-financed/unaided colleges which was subject matter of litigation and pursuant to which, many self-financed/unaided colleges, were permitted to admit 135 students. The university however declared the final results keeping in mind the intake of each institution though 135 students appeared in many self-financed institutions. Thus, as per the direction of the Court in the case of ***Sri Puram Prasad Gupta Memorial Degree College (supra)***, by the judgment dated 06.04.2007, result of all the students, who appeared in the examination was declared.

39. Taking aforesaid to be an input, it is submitted that maximum 9075 students could have appeared in the examination if it is figured out with 100 students for all the 82 colleges coming to 8200 with addition of 35 students for 25 self-financed/unaided institutions coming to 875 totalling to 9070. It is the maximum number of students though, admission was given to 8899 students.

40. 8899 students appeared in the examination out of which 869 were those who were admitted in excess to the approved strength of 100 students pursuant to the direction of the Lucknow Bench. In fact, in all the self-financed/unaided institutions, total excess admission were 869 against 35 additional seats given to it. As against 8899 students appeared in the examination, the result of 8930 students was declared thereby it was in excess by 31 students. The marks foil recovered by the S.I.T. proves the fact aforesaid. The original marks foil was seen by the Court as well as counsel for the appellants during the course of argument. The tabulation

chart/cross sheet of the University was however containing result of 12472 students.

41. In the light of the fact aforesaid, even the counsel for the appellants have admitted that result in the tabulation sheet is in excess to students appeared in the examination even pursuant to the direction of Bench at Lucknow. The question however raised by them is that the excess students may not be the appellants but others.

42. It is submitted that S.I.T. made report based on the record recovered by them from the University. The material recovered by the S.I.T. was input for the action and thereby University had issued show cause notice to verify the truth after giving an opportunity to the students. The students failed to send reply to the questionnaire with material. They were accordingly declared to be fake students as otherwise they would have given the reply to the questionnaire. It is more so when this Court in the case of ***Tilak Singh (supra***) directed the University to proceed with the matter in regard to fake students and judgment in that case has already attained finality. Thus, the learned Single Judge has rightly drawn conclusion about the fake students and for that there is no basis to challenge the order dated 07.02.2020. The petitioners/appellants have not submitted any material or documents pursuant to questionnaire even while challenging the order of termination passed by the State Government or now the order dated 07.02.2020 other than by few. It is even while filing the appeal despite an opportunity for it. The documents have been filed only by few students who had otherwise submitted their reply pursuant to the show cause notice of the University. Thus, other than few students, who are maximum 18 in number, none has produced any material before the Court to show truthfulness of their appearance in the examination. Accordingly, no basis remains to cause interference in the order dated 07.02.2020 and the order passed by learned Single Judge. The University has even passed an order dated 27.07.2020 to declare 812 students to be fake out of 814 students.

43. It is also stated that University has proceed to cause disciplinary inquiry against those involved in the racket.

44. So far as the allegation of tampering of the mark-sheets is concerned, the University would proceed to take action after applying Section 67 of the Act of 1973.

45. Learned counsel has even made a reference of the F.I.R. registered against those indulged in issuance of fake mark-sheets so as the tampered. The charge-sheet has also been filed pursuant to four F.I.Rs. It is also stated that a Committee under the Chairmanship of a retired Judge was constituted to fix the responsibilities of those officers involved in this case and accordingly respondents would proceed to take action against all those officers involved in this case.

46. Learned counsel for the University further submits that during the course of hearing of the case of ***Sunil Kumar (supra),*** it was noticed that three bags of fake mark-sheets were found at the residence of Principal of one affiliated college of the University. The fact aforesaid was flashed even in the newspaper, thus, the conduct of the then officer of the University and the students is writ large.

47. In view of the above, this Court may not cause interference in the judgment passed by the learned Single Judge.

48. Learned counsel appearing for the University has made further argument and it would be elaborately discussed during the course of consideration of the rival arguments to avoid repetition.

49. Learned Additional Advocate General appearing for the State has also supported the judgment of learned Single Judge. It is submitted that in pursuance to the direction of this Court in the case of ***Sunil Kumar (supra)***, criminal racket involved in issuance of the fake and tampered mark-sheets came in the notice of the State Government. It may be when a writ petition was filed by Sunil Kumar showing two mark-sheets issued to him for B.Ed. Examination, 2005. The reference of the case to the S.I.T. was pursuant to the direction of the Court and accordingly State Government constituted 5 members to investigate the affairs of the University in reference to the B.Ed. Examination of 2005. The S.I.T. had given detailed report in reference to the material collected by it during the course of investigation. It could recover the material which includes marks foil to draw its report finding cases not only of tampering but issuance of the fake mark-sheets. It was also for issuance of mark-sheets to the students with same roll number.

50. On the receipt of the report, the Government issued direction not only to the University but even to the Basic Shiksha Adhikari for appropriate action. The show cause notice was issued and when reply to it was not found satisfactory, passed the order of termination finding case of obtaining service based on the forged or tampered mark-sheets. The writ petition was then filed by the appellants but therein also, they failed to supply material to prove their appearance in B.Ed. Examination of 2005. Seven appellants have produced the material pursuant to the direction of this Court to show their appearances in B.Ed. Examination 2005. It is while three other failed to produce document to prove their appearance in the Examination 2005. This itself is enough to show that even the petitioners/appellants failed to produce any material before the Court to prove their appearance in the Examination of 2005 so as to challenge the allegation of obtaining fake mark-sheets.

51. The racket was involved in this case has been admitted even by the appellants realising that as against the intake capacity of each college with additional seats permitted by the High Court, the total students could not have been 12,472. The question however raised is as to whether the excess students having forged mark-sheets are the petitioners/appellants or others. The argument aforesaid has been raised without realising that to prove genuineness of B.Ed. degree, appellants failed to produce material in reference to the show cause notice before the order of termination and even along with the writ petition. Thus, truthfulness of the allegation against the petitioners/appellants gets satisfied on the face of record. In view of the above, the challenge to the judgment may not be accepted.

52. Learned Additional Advocate General has further submitted that for passing the order of termination, Regulations of 1999 were not required to be applied. The appointment taken based on the forged or tampered mark-sheets were void. The compliance of Regulation of 1999 is not envisaged in such cases rather for that the Government was not even required to issue a show cause notice.

However, to provide an opportunity to submit the necessary documents to prove appearance in the B.Ed. Examination, 2005, a show cause notice was given. The order of termination was passed thereupon when appellant failed to give satisfactory reply supported with material. It is thus incorrect to state that the order of termination is simply based on the S.I.T. report.

53. It is also submitted that merely for the reason that petitioners/appellants are in service for the last 10 to 15 years would not vitiate the action taken by the State as the foundation of appointment is based on forgery. Such appointments remain void *ab-initio* and thereby the learned Single Judge has rightly refused to cause interference in the order of termination. The learned Additional Advocate General cited the judgments to support the argument which would be referred at the time of discussion of rival submissions.

54. Learned Additional Advocate General has further given reply to all the arguments raised by the learned counsel for appellants for challenge to the judgment of learned Single Judge which could also be referred at the time of dealing with the arguments to avoid bulkiness of the judgment.

DISCUSSION OF THE ISSUES BY THE COURT

55. We have considered the rival submissions of the parties and scanned the matter carefully.

56. It is a case where District Basic Education Officer passed an order of termination/cancellation of the appointments given to the appellants on the post of Assistant Teacher on the ground that appointments were sought based on fake or tampered mark-sheets of B.Ed. Examination, 2005. The termination/cancellation of the appointments were after giving opportunity of hearing by serving a show cause notice. The order of termination/cancellation of appointments of the appellants was challenged by maintaining a writ petition. The learned Single Judge found appointment based on fake mark-sheets of B.Ed. Examination, 2005 so as the tampered. The fact about issuance of fake or tampered mark-sheets came to the notice of the respondents when S.I.T. made investigation pursuant to the case registered on the direction of this Court in the writ petition filed by one ***Sunil Kumar (supra)***. The brief detail of the litigation thereupon has been given but needs to be reiterated for ready reference.

57. The brief facts pertaining to the case show that on a writ petition filed by one ***Sunil Kumar (supra),*** this Court passed orders from time to time to direct the University not only to file affidavit but constitution of the investigation team by the State Government in regard to B.Ed. Examination 2005 conducted by the University. It is on finding manipulation in the B.Ed. Examination, 2005. Pursuant to the direction of the Court, S.I.T. conducted investigation followed by a report. The F.I.R. was registered for offence under Sections 409, 420, 467, 468, 471, 204, 201 read with 120 I.P.C. and 13 (1) (d), 13 (2) and 13 (3) of Prevention of Corruption Act. The charge sheet in all the cases has been filed other than one.

58. The judgment of learned Single Judge has been challenged by the appellants on the ground that non

interference in the order of termination from the service is mainly in reference to the order dated 07.02.2020 passed by the University declaring 2823 degrees to be fake. It is without realising that the order dated 07.02.2020 was passed during the pendency of the writ petition. The appellants had no opportunity to challenge it. The judgment of learned Single Judge in reference to dismissal of the writ petition of 2823 candidates has been questioned on the aforesaid ground apart from many other grounds. We would be dealing with each of the arguments raised by the counsel for parties.

59. The first argument raised by counsel for the appellant is in reference to the Regulation of 1999. It is stated that the order of termination has been passed without causing inquiry by applying the procedure given under the Rules of 1999. It is despite the fact that all the appellants were appointed under the Rules of 1973 and were permanent employees. Few of them were given promotion.

60. The judgments to support the argument have also been referred. The argument in reference to Rules of 1999 has been raised without realising the foundation for passing the order of termination. The termination order is in reference to the appointments based on the forged and tampered mark-sheets. If appointment is sought based on the forged or tampered documents, then remains void and in those circumstances, the procedure given under the U.P. Government Servant (Punishment and Appeal) Rules, 1999 is not required to be applied.

61. The main thrust of argument of the counsel for the appellants is without taking note of the aforesaid aspect. They have relied on the judgment of Apex Court in the case of ***Mahipal Singh Tomar Vs. State of U.P., 2013 (16) SCC 771***. A perusal of the judgment shows altogether on different facts. Para 13 and 14 of the said judgment has been relied by the learned counsel for the appellants without taking note of the facts of that case. In the instant case, the appellants were served with the show cause notice and it is after considering their reply, if submitted, the order of termination was passed. It is in reference to the forged or tampered B.Ed. degree.

62. The other judgment referred by the learned counsel for the appellants is in the case of ***Inderpreet Singh Kahlon Vs. State of Punjab and others, 2006 (11) SCC 356***. In the said case, the entire selection process was cancelled said to be vitiated by corruption. The Court found that the evidence need to be adduced before the Court to prove that selection was tainted due to mass cheating. The case in hand is having distinguishable facts inasmuch as before passing the order, the respondents issued show cause notice on the petitioners/appellants and thereupon the order was passed. Sufficient material has been produced before the Court to show that appointment was secured based on forged and tampered mark-sheets, thus it was void. The judgment aforesaid provide no assistance to the appellants on the facts of this case.

63. In fact, procedure given under the Rules of 1999 is to be applied if the appointment is not based on forged or tampered documents.

64. As against the judgment cited by the learned counsel for the appellants, learned counsel for the State has cited

judgments directly applicable to the facts of the case. A reference of the judgment in the case of ***Union of India and another Vs. Raghuwar Pal Singh, (2018) 15 SCC 463*** for it would be relevant. In the said case, the order of termination was passed without an opportunity of hearing. The Apex Court refused to cause interference in the order and thereby the judgment of the High Court was set aside by restoring the judgment of Central Administrative Tribunal holding termination to be legal. Para 19 and 20 of the said judgment are quoted herein for ready reference-:

"19. We shall now consider the efficacy of the reason so recorded in the office order. The recruitment procedure in relation to the post of Veterinary Compounder is governed by the statutory rules titled, Central Cattle Breeding Farms (Class III and Class IV posts) Recruitment Rules, 1969, as amended from time to time and including the executive instructions issued in that behalf. As per the stated dispensation for such recruitment, the appointment letter could be issued only by an authorised officer and after grant of approval by the competent authority. Nowhere in the Original Application filed by the respondent, it has been asserted that such prior approval is not the quintessence for issuing a letter of appointment.

20. For taking this contention forward, we may assume, for the time being, that the then Director Incharge H.S. Rathore, Agriculture Officer had the authority to issue a letter of appointment. Nevertheless, he could do so only upon obtaining prior written approval of the competent authority. No case has been made out in the Original Application that due approval was granted by the competent authority before issue of the letter of appointment to the respondent. Thus, it is indisputable that no prior approval of the competent authority was given for the appointment of the respondent. In such a case, the next logical issue that arises for consideration is: whether the appointment letter issued to the respondent, would be a case of nullity or a mere irregularity? If it is a case of nullity, affording opportunity to the incumbent would be a mere formality and non grant of opportunity may not vitiate the final decision of termination of his services. The Tribunal has rightly held that in absence of prior approval of the competent authority, the Director Incharge could not have hastened issuance of the appointment letter. The act of commission and omission of the then Director Incharge would, therefore, suffer from the vice of lack of authority and nullity in law."

65. Same view was taken by the Apex Court in the case of ***State of Bihar and others Vs. Kirti Narayan Prasad, (2019) 13 SCC 250***. In the aforesaid case, the regularisation sought by the petitioner was not permitted as claim was based on forged appointment letters. The termination order was thus not interfered. Para 16 of the said judgment is quoted herein-:

"16. In the instant cases the writ petitioners have filed the petitions before the High Court with a specific prayer to regularize their service and to set aside the order of termination of their services. They have also challenged the report submitted by the State Committee. The real controversy is whether the writ petitioners were legally and validly appointed. The finding of the State Committee is that many writ petitioners had secured appointment by producing fake or forged appointment letter or had been inducted in Government service surreptitiously by concerned Civil Surgeon-cum-Chief Medical Officer by

issuing a posting order. The writ petitioners are the beneficiaries of illegal orders made by the Civil Surgeon-cum-Chief Medical Officer. They were given notice to establish the genuineness of their appointment and to show cause. None of them could establish the genuineness or legality of their appointment before the State Committee. The State Committee on appreciation of the materials on record has opined that their appointment was illegal and void ab initio. We do not find any ground to disagree with the finding of the State Committee. In the circumstances, the question of regularisation of their services by invoking para 53 of the judgment in Umadevi (supra) does not arise. Since the appointment of the petitioners is ab initio void, they cannot be said to be the civil servants of the State. Therefore, holding disciplinary proceedings envisaged by Article 311 of the Constitution or under any other disciplinary rules shall not arise."

66. The same view was taken by the Apex Court in the case of ***Punjab Urban Planning and Development Authority and another Vs. Karamjit Singh, AIR 2019 SC 1913; (2019) 16 SCC 782***.

67. The argument therein was in reference to the provisions of Industrial Disputes Act, 1947. The argument was not accepted by the Apex Court finding appointment to be illegal. The regularization sought by misrepresentation of fact. The judgment relied by the High Court in the case of ***Managing Director, ECIL Hyderabad, AIR 1944 SC 1074*** was not approved. Para 6, 6.1, 6.2 and 7 are quoted herein-:

"6. In the present case, the Single Judge had held that "rightly or wrongly", the Respondent had obtained regularization, and was therefore entitled to a disciplinary enquiry. The Division Bench affirmed the Judgment of the Single Judge.

6.1. The High Court however failed to appreciate that the decision in Managing Director, ECIL, Hyderabad (supra) is applicable to "employees" of Government Departments. Since the very appointment of the Respondent on regular basis was illegal, he could not be treated as an "employee" of the Appellant - Authority.

In Rupa Rani Rakshit & Ors. v. Jharkhand Gramin Bank & Ors., this Court held that service rendered in pursuance of an illegal appointment or promotion cannot be equated to service rendered in pursuance of a valid and lawful appointment or promotion.

6.2. The illegality of such an appointment goes to the root of the Respondent's absorption as a regular employee. The Respondent could not be considered to be an "employee", and would not be entitled to any benefits under the Regulations applicable to employees of the Appellant - Authority.

Therefore, the High Court erroneously placed reliance on the decision in Managing Director, ECIL, Hyderabad (supra), which would not be applicable to the facts of the present case.

7. The question of holding disciplinary proceedings as envisaged under Article 311 of the Constitution, or under any other disciplinary rules did not arise in the present case since the Respondent was admittedly not an "employee" of the Appellant - Authority, and did not hold a civil post under the State Government. He was merely a daily wager on the muster rolls of the Appellant - Authority."

68. The judgment of the Apex Court in the case of ***Nidhi Kaim and another Vs. State of Madhya Pradesh and others,***

(2017) 4 SCC 1 is also relevant. The medical examination was cancelled when it was found to be based on cheating, unfair means and leakage of question paper. It was held that "fraud unravels everything".

69. The another judgment of the Apex Court relied by the learned counsel for respondents is in the case of ***Bank of India and another Vs. Avinash D. Mandivikar and others, (2005) 7 SCC 690. The judgment of the Apex Court in the case of R. Vishwanatha Pillai Vs. State of Kerala and others, (2004) 2 SCC 105*** was cited in reference to Article 311 which was not held to be applicable in case appointment is procured based on false caste certificate. Such an appointment was not held to be an appointment in the eyes of law. The dismissal of person from service, thus, was not to attract Article 311 so as the All India Services (Discipline and Appeal) Rules, 1969.

70. The judgment aforesaid answers the question raised by the appellants in regard to the application of Rules of 1999 for passing the order of termination. The observance of the Rules of 1999 and Article 311 of the Constitution of India is not warranted in the cases where appointment was taken by fraudulent means. Para 15 of the said judgment is quoted herein for ready reference-:

"This apart, the appellant obtained the appointment in the service on the basis that he belonged to a Scheduled Caste community. When it was found by the Scrutiny Committee that he did not belong to the Scheduled Caste community, then the very basis of his appointment was taken away. His appointment was no appointment in the eye of law. He cannot claim a right to the post as he had usurped the post meant for a reserved candidate by playing a fraud and producing a false caste certificate. Unless the appellant can lay a claim to the post on the basis of his appointment he cannot claim the constitutional guarantee given under the Article 311 of the Constitution. As he had obtained the appointment on the basis of a false caste certificate he cannot be considered to be a person who holds a post within the meaning of Article 311 of the Constitution of India. Finding recorded by the Scrutiny Committee that the appellant got the appointment on the basis of false caste certificate has become final. The position, therefore, is that the appellant has usurped the post which should have gone to a member of the Scheduled Caste. In view of the finding recorded by the Scrutiny Committee and upheld upto this Court he has disqualified himself to hold the post. The appointment was void from its inception. It cannot be said that the said void appointment would enable the appellant to claim that he was holding a civil post within the meaning of Article 311 of the Constitution of India. As appellant had obtained the appointment by playing a fraud he cannot be allowed to take advantage of his own fraud in entering the service and claim that he was holder of the post entitled to be dealt with in terms of Article 311 of the Constitution of India or the Rules framed thereunder. Where an appointment in a service has been acquired by practising fraud or deceit such an appointment is no appointment in law, in service and in such a situation Article 311 of the Constitution is not attracted at all."

71. The same view has been taken by the Patna High Court in the case of ***Rita Misra and others Vs. Director, Primary Education, Bihar, AIR 1988 (Patna) 26***

which is approved by the Apex Court in the case of ***R. Vishwanatha (supra).***

72. In view of the judgments referred to above, we find no substance in the first argument raised by the learned counsel for appellants. The procedure given under the Rule of 1999 was not required to be applied for an order of termination in reference to fake or tampered mark-sheets and degrees.

73. The other issue raised by counsel for the appellants is about the delay in initiation of action. It is stated that appellants are serving with the respondents (Basic Education) for the last 10 to 15 years. Their services have been terminated ignoring the aforesaid.

74. The issue of delay in passing the order of termination is of no substance. It is not only for the reason that the fraudulent affairs of the University came into notice to the High Court when the writ petition was filed by ***Sunil Kumar (supra)*** in the year 2013.

75. The efface of the University in regard to B.Ed. Examination 2005 was investigated by the S.I.T. on the direction of the Court. It is on collection of material, the fact about issuance of fake mark-sheets apart from tampered came in notice of the State. The action was immediately initiated thereupon not only by the State but the University. The issue of delay has otherwise been considered by the Apex Court in the case of ***R. Vishwanatha Pillai Vs. State of Kerala and others, (2004) 2 SCC 105*** therein the action was taken after 27 years. The Apex Court refused to accept the plea in the light of the fact that the appointments secured based on fraud is void. The writ petition therein was filed by the son to secure the pensionary benefits. The long service was not accepted as a ground to secure the pensionary benefits. Para 15 and 19 of the said judgment are quoted herein for ready reference-:

"15. This apart, the appellant obtained the appointment in the service on the basis that he belonged to a Scheduled Caste community. When it was found by the Scrutiny Committee that he did not belong to the Scheduled Caste community, then the very basis of his appointment was taken away. His appointment was no appointment in the eyes of law. He cannot claim a right to the post as he had usurped the post meant for a reserved candidate by playing a fraud and producing a false caste certificate. Unless the appellant can lay a claim to the post on the basis of his appointment he cannot claim the constitutional guarantee given under the Article 311 of the Constitution. As he had obtained the appointment on the basis of a false caste certificate he cannot be considered to be a person who holds a post within the meaning of Article 311 of the Constitution of India. Finding recorded by the Scrutiny Committee that the appellant got the appointment on the basis of false caste certificate has become final. The position, therefore, is that the appellant has usurped the post which should have gone to a member of the Scheduled Caste. In view of the finding recorded by the Scrutiny Committee and upheld upto this Court he has disqualified himself to hold the post. Appointment was void from its inception. It cannot be said that the said void appointment would enable the appellant to claim that he was holding a civil post within the meaning of Article 311 of the Constitution of India. As appellant had obtained the appointment by playing a fraud he cannot be allowed to take advantage of his own fraud in entering the

service and claim that he was holder of the post entitled to be dealt with in terms of Article 311 of the Constitution of India or the Rules framed thereunder. Where an appointment in a service has been acquired by practising fraud or deceit such an appointment is no appointment in law, in service and in such a situation Article 311 of the Constitution is not attracted at all.

19. It was then contended by Shri Ranjit Kumar, learned senior counsel for the appellant that since the appellant has rendered about 27 years of service the order of dismissal be substituted by an order of compulsory retirement or removal from service to protect the pensionary benefits of the appellant. We do not find any substance in this submission, as well. The rights to salary, pension and other service benefits are entirely statutory in nature in public service. Appellant obtained the appointment against a post meant for a reserved candidate by producing a false caste certificate and by playing a fraud. His appointment to the post was void and non est in the eyes of law. The right to salary or pension after retirement flow from a valid and legal appointment. The consequential right of pension and monetary benefits can be given only if the appointment was valid and legal. Such benefits cannot be given in a case where the appointment was found to have been obtained fraudulently and rested on false caste certificate. A person who entered the service by producing a false caste certificate and obtained appointment for the post meant for Scheduled Caste thus depriving the genuine Scheduled Caste of appointment to that post does not deserve any sympathy or indulgence of this Court. A person who seeks equity must come with clean hands. He, who comes to the Court with false claims, cannot plead equity nor the Court would be justified to exercise equity jurisdiction in his favour. A person who seeks equity must act in a fair and equitable manner. Equity jurisdiction cannot be exercised in the case of a person who got the appointment on the basis of false caste certificate by playing a fraud. No sympathy and equitable consideration can come to his rescue. We are of the view that equity or compassion cannot be allowed to bend the arms of law in a case where an individual acquired a status by practising fraud."

76. The Apex Court refused to grant relief on compassion or equity even though the deceased had rendered 27 years of service. The prayer to substitute the order of dismissal by compulsory retirement or removal to protect pensionary benefits was not accepted therein.

77. In view of the above, we do not find that mere rendering the service for more than 10 years can be a ground to set aside the order of termination. If the prayer is accepted, then it would mean endorsement of fake or tampered mark-sheets.

78. The next question advanced by counsel for the appellants is in reference to an interim order passed by the Court in the case of ***Smt. Suryavati and 150 others (supra)*** on the show cause notice issued by the State Government. A perusal of the interim order goes against the appellants in view of the fact that learned Single Judge while protecting the salary of the appellants, allowed the respondents to proceed in the matter as per Rules and accordingly there was no restrain to proceed in the matter for passing the order of termination or cancellation of the order of appointment. If there would have been disobedience of the Court's order in the said

writ petitions, the appellants could have moved for contempt. The fact is that no contempt petition was preferred. Thus, challenge to the order of termination in reference to the interim order passed by the Court in the case of ***Suryavati and 152 others Vs. State of U.P. and 24 others, Writ A No. 56739 of 2017*** remains of no consequence. For ready reference, the operative portion of the order dated 29.11.2017 in the case of ***Suryavati and 152 others (supra)*** is quoted herein-:

"Reliance has been placed on the decisions rendered by this Court in Writ Petition No. 399 (MB) of 2007 (Shri Puran Prasad Gupta Memorial Degree College Versus State of U.P. and others) decided on 6 April 2007 and in Service Single No. 3335 of 2001 (Akhtyar Ahmad Versus State of U.P. and others) decided on 7 August 2015.

Submission requires consideration.

Till the next date of listing, it will be open for the respondents to initiate proceedings against the petitioners for removal/termination in accordance with the Rules. Respondents, however, in the mean time are restrained from interfering in the functioning of the petitioners, they shall be entitled to their salary as and when due which shall abide by the outcome of the proceedings initiated against the petitioners."

79. It is not correct to state that respondents passed order of termination in defiance of the order quoted above. There was no restrain in passing the order of termination.

80. It is also urged by the learned counsel for appellants that the report of S.I.T. was made basis for passing the order of termination whereas report is not final in nature rather would be subject matter of trial in criminal case. The fact aforesaid has been clarified by the learned Additional Advocate General for the State. The sequence of the events in reference to the earlier litigation has been given in the opening paras. It started with a writ petition filed by ***Sunil Kumar (supra).*** The S.I.T. was constituted by the State Government pursuant to the direction of this Court. The S.I.T. collected material in the course of inquiry/investigation. A report was then submitted.

81. The basis for taking action is the material collected by the S.I.T. and not the report alone. It is thus incorrect to state that no material was available with the respondents to proceed in the matter. The fact about manipulation came in the notice of the High Court on filing of a writ petition by ***Sunil Kumar (supra),*** when he was given two mark-sheets of B.Ed. Examination, 2005. A direction and on the production of affidavit by the Vice Chancellor, this Court observed about manufacturing of tabulation sheets, thus, directed the State Government to refer the matter to CBCID. The S.I.T. was constituted thereupon. During the course of investigation, the marks foil were recovered to assess how many marks were given by the examiner to each of the candidates apart from the fact as to how many candidates appeared in the B.Ed. Examination 2005. The details of it has been given by the learned Single Judge. The result of 12472 students was declared whereas admission and appearance of the students in the examination was less than to it. The figure of students appeared in the examination revealed from the record. It is not only in reference to the intake capacity

of each institution approved by the N.C.T. but subsequent judgment of Bench at Lucknow in the case of ***Sri Puram Prasad Gupta Memorial Degree College (supra)***. Total 8899 students appeared in the examination out of which 869 were those who appeared pursuant to the direction of the Bench at Lucknow. The result of the examination thereupon was declared for 8930 students. The declaration of excess result of 31 students was again pursuant to the direction of the Bench at Lucknow. As against it, the mark-sheets were issued in favour of 12472 students.

82. The fact aforesaid could not be disputed even by the counsel for the appellants other than to emphasize that S.I.T. did not take care of the judgment of the Bench at Lucknow in the case of ***Sri Puram Prasad Gupta Memorial Degree College (supra).*** The argument aforesaid has been raised without realising that the S.I.T. had taken figure of additional 869 students in excess to the admission otherwise given by the colleges. It was pursuant to the interim order and judgment of Bench at Lucknow. It was admitted by the counsel for the appellants that fraudulent mark-sheets have been issued but how it can be said to be to the appellants and not to the others. The argument aforesaid is relevant because nobody could dispute about declaration of result of the students in excess to admission as well as the appearance in the examination. It is therefore only the tabulation sheet/cross list produced by the University was not containing signatures of any authorized officer/person and additional pages were in different font. The question remains as to how the appellants alone can be said to have obtained fake mark-sheets out of those whose name appeared in tabulation sheet in excess to the students appeared in the examination. The determination of the aforesaid issue is not difficult in view of the fact that even while filing the writ petitions to question the order of termination, the appellants did not submit relevant documents to show their admission in any of the colleges with payment of fee apart from all other material to prove relevant facts as otherwise submitted by few appellants now namely-:

(i) Surendra Kumar S/o Sri Mauji Lal

(ii) Rajiv Singh Yadav S/o Sri Ram Ladait Yadav

(iii) Sudeep Kumar S/o Sri Ajay Pal Singh

(iv) Smt. Reeta Gautam D/o Sri Ram Gautam

(v) Reeta Yadav D/o Sri Janki Lal Yadav

(vi) Anuradha D/o Sri Rajendra Singh

(vii) Rekha Lavania D/o Sri Vijendra Singh

83. The documents aforesaid were submitted when Court asked the appellants to prove their case but other than few, none else could submit the documents rather if the documents in reference to Sarvesh Kumar Chaturvedi and Rajesh Kumar Chaturvedi S/o Sri Shankar Lal Chaturvedi, submitted by the Senior Counsel Sri Ashok Khare are perused, they are not of the nature submitted by other appellants named above. No material was submitted by the petitioners along with the writ petition to prove their admission in the college and appearance in the B.Ed. Examination, 2005. The documents submitted along with the writ petition were largely the mark-sheets and the degrees which have been considered to be fake. The majority of mark-sheets are not containing even the enrollment number. No reason has been given as to why other than 18 candidates, which includes candidates named above,

did not file reply to the notice given by the University along with complete material if they were genuine candidates. The material was not submitted even in response to the notice given by the Basic Education Officer. It is otherwise a fact that name of the appellants did not find place in the marks foil.

84. The marks foil so recovered by the S.I.T. were called in the Court during the course of hearing even for perusal of counsel for the appellants. It was when they had shown their doubt about availability of the marks foil. The doubt was mainly raised by those counsel who have appeared for the students having the tampered mark-sheets. The original marks foil is material to show that appellants did not appear in the examination, thus are having fake mark-sheets. The marks foil was seen by the counsel for the appellants also. It is thus not correct to state that S.I.T. report alone was basis for passing termination order rather it is even the material collected during the course of investigation. There was no reason for the appellants not to produce relevant material while filing the writ petition to prove themselves to be genuine students.

85. Learned counsel for appellants further stated that the basis to dismiss the writ petitions by the learned Single Judge is the order dated 07.02.2020 passed by the University to cancel the degrees.

86. It is without a liberty to challenge the order. It is a fact that during the pendency of the writ petition, the University cancelled the degrees issued in favour of 2823 students who failed to submit reply along with material to prove their appearance in the examination after admission in any of the colleges. The impugned judgment however shows detail arguments of the appellants against the order dated 07.02.2020 and discussion of each issue thereupon. It is thus not correct to state that learned Single Judge did not allow challenge or arguments against the order dated 07.02.2020. Those candidates have challenged the order of termination without placing material to show their admission and appearance in the B.Ed. Examination 2005. The impugned judgment shows extensive arguments of the counsel for the appellants against the order dated 07.02.2020 without a formal challenge. The learned Single Judge has discussed all the arguments while passing the judgment.

87. The order dated 07.02.2020 is not based on the S.I.T. report alone. The University called for the information in its show cause notice. 2823 students failed to submit reply to notice and even failed to place any material along with the writ petitions to prove their admission in the college apart from appearance in the examination. The questionnaire given by the University through its notice is as under-:

1	छात्र/छात्रा का नाम	
2	छात्र/छात्रा का स्थाई/पत्रव्यवहार का पता, मो0 नंबर एवं आधार कार्ड नंबरः	
3	छात्र/छात्रा के पिता का नामः	
4	प्रवेश परीक्षा का अनुक्रमांकः	
5	जिस महाविद्यालय में प्रवेश लिया उसका नाम	
6	प्रवेश काउन्सलिंग अथवा प्रबंधकीय कोटे में हुआ (स्पस्ट उल्लेख करें)	
7	काउन्सलिंग संख्या/प्रबंधकीय कोटे में प्रवेश सूची में स्थान (काउन्सलिंग पत्र संलग्न करें)	
8	महाविद्यालय में प्रवेश के समय	ड्राफ्ट/रसीद

	प्रवेश शुल्क ड्राफ्ट/नकद जमा कराने का विवरण	संख्या .... /धनराशि..... ....दिनांक (प्रमाण सहित)
9	महाविद्यालय में स्कॉलरशिप प्राप्त की दशा में विवरण।	ड्राफ्ट/रसीद संख्या .... /धनराशि..... ....दिनांक (प्रमाण सहित)
10	नामांकन संख्या	
11	मुख्य परीक्षा बी0एड0 05 का अनुक्रमांक	
12	बी0एड0 वर्ष 2005 मुख्य परीक्षा के परीक्षा केन्द्र का नाम	
13	बी0एड0 वर्ष 2005 परीक्षा में बैठने का प्रवेश पत्र की छायाप्रति	
14	बी0एड0 वर्ष 2005 की परीक्षा में सम्मिलित होने के बाद अंकतालिका स्वयं प्रमाणित कर संलग्न करें।	
15	यदि अस्थाई प्रमाण पत्र विश्वविद्यालय द्वारा निर्गत किया गया हो तो प्रमाण पत्रों की संख्या समस्त अस्थाई प्रमाणपत्रों की छाया प्रति संलग्न करें।	
16	मूल उपाधि का विवरण क्रमांक संख्या	
17	अन्य कोई विवरण/सूचना	

''नोट–: उपरोक्त से संबंधित सभी अभिलेखों की स्वप्रमाणित प्रतियां/प्रमाणक अनिवार्य रुप से संलग्न करें। संलग्नों की संख्या अंकों में ..... (शब्दों में)..... संबंधित महाविद्यालय के प्राचार्य द्वारा अग्रसारण–: प्रमाणित किया जाता है कि श्री/श्रीमती/कुमारी..... पुत्र/पुत्री..... निवासी..... ने महाविद्यालय में वर्ष 2004–05 काउन्सलिंग मेनेजमेंट ..... के अंतर्गत विधि सम्मत प्रवेशित छात्र/छात्रा थे/थी। श्री ..... को जो अंकतालिका विश्वविद्यालय द्वारा जारी की गयी थी उसके ..... अंक प्राप्त हुये थे तथा सैद्धान्तिक में .... श्रेणी तथा प्रायोगिक में ..... श्रेणी था।

छात्र/छात्रा के हस्ताक्षर.

प्राचार्य

हस्ताक्षर एवं मुहर''

88. No explanation has been given for non-submission of information sought by the University along with material, if candidates appeared in the B.Ed. Examination, 2005. The information sought in the questionnaire was not such which would not have been available if a candidate took admission in the college and appeared in the examination.

89. It is also urged that appellants had appeared in the selection test and stood in the merit, thus could not have been terminated. Mere appearance in the selection test for the post of Assistant Teacher and qualifying it would not make the candidates eligible for the post having fake or tampered mark-sheets. In absence of valid B.Ed. degrees, they were not eligible for appointment as B.Ed. course is an essential qualification for appointment on the post of Assistant Teacher.

90. It is at this stage we are again considering the order dated 07.02.2020 passed by the University as few appellants have challenged the order aforesaid in these appeals. The order dated 07.02.2020 was passed by the University after issuance of show cause notice. It was not interfered by this Court in the case of ***Tilak Singh (supra).*** The notice was published in the news papers where a questionnaire was given to each of the candidates to answer it and submit reply along with supporting material. 2823 candidates did not submit any reply to the notice and accordingly they were declared to be holder of fake mark-sheets. The degrees as well as mark sheets were thus cancelled. The order dated 07.02.2020 has been questioned by the appellants without supplying any material even along with the appeal other than seven

candidates named in the earlier paragraph. It is despite an opportunity by the University and even by the State.

91. It is more so when name of such students came during the course of investigation as no record for their appearance in examination was found. The marks foil recovered in the investigation were not containing their names. The cross list/tabulation sheet was observed to be manufactured documents by this Court in the case of ***Sunil Kumar (supra)*** as it was not containing signature of any authorized officer/person and it was having different font. In fact there were addition of pages in the tabulation sheet and thereby it was containing the result over and above those appeared in the examination. The University conducted the inquiry and it is on the recommendation of the Committee that the order dated 07.02.2020 was passed. Why the reply to questionnaire was not given by the appellants could not be explained if they are genuine students. It was not submitted even while filing the writ petition. It goes against the appellants whose degrees have been cancelled holding it to be fake.

92. In view of the above, we do not find any substance in the arguments for challenge to the order dated 07.02.2020. We are alive of the situation that few writ petitions have been separately instituted to question the order dated 07.02.2020 and are pending but it does not affect the right of others to challenge it in the appeal. The order dated 02.07.2020 came on record during the pendency of the writ petition and extensive arguments were made even before the learned Single Judge, who recorded finding on each argument. No error in the finding has been shown other than to state that appellants were not permitted to challenge the order dated 07.02.2020 though manifold arguments against the said order were made before the learned Single Judge. The argument of the appellants that learned Single Judge did not give opportunity to question the order dated 07.02.2020 passed by the University, thus cannot be accepted. The opportunity for it has otherwise been given by this Court in the appeal on the request of counsel for the appellants and otherwise arguments were even raised before the learned Single Judge also who has recorded its finding on each argument and has not been questioned. This virtually nullifies the argument of learned counsel for appellants to question the judgment in reference to the order dated 07.02.2020 passed by the University.

93. The University has already taken decision in regard to other 814 students also which includes 18 those students who filed detailed reply and submitted material to support it. The copy of the order dated 29.07.2020 in reference to 814 students was placed on record by Sri Ashok Khare, Senior Advocate along with written arguments. The direction of the learned Single Judge in regard to 814 candidates has been thus complied. They did not submit material along with the writ petition or the appeal for challenge to the order of termination other than few. It was submitted only by seven candidates pursuant to the direction in these appeals to show their admission in the college and appearance in the examination. The documents should have been filed otherwise for scrutiny by the State. The order dated 29.07.2020 has been kept in abeyance by the University pursuant to the interim order in these appeals. The interim orders are vacated; accordingly order would be revived.

94. The other argument of learned counsel for appellants is that the S.I.T. report is not final because a challenge to it has been made in the case of ***Sunil Kumar*** converted into a P.I.L. The argument aforesaid is of no relevance in view of the fact that this Court has passed a detailed judgment holding action of the respondents to be independent to the report. The material collected during the course of investigation has been used. There is no contest and denial regarding issuance of fake mark-sheets though it has been qualified as to how fake candidates can be appellants alone and not others. The argument aforesaid has already been dealt with by this Court. The S.I.T. report alone was not taken as a piece of evidence rather the material recovered by the S.I.T. is also basis for passing the order. Marks foil were otherwise perused by the counsel for the appellants on their request, as was called by this Court from the respondents. The name of fake candidates does not exist in the marks foil. In the majority of mark-sheets submitted by them does not even contain enrollment number. In view of the above, the appellants declared to be fake students should have produced material in their defence.

95. The impugned judgment of learned Single Judge is not otherwise based on the judgment of this Court in the case of ***Tilak Singh (supra)***. It is however a fact that issue about the competence of the officer/council, apart from other issues, adjudicated therein and attained finality in absence of further challenge, thus relied upon by the learned Single Judge. The issues settled therein are not open for challenge in these cases. The learned Single Judge was aware of the fact that judgment aforesaid was against the show cause notice.

96. The argument has also been made by the counsel for the appellants that result of B.Ed. Examination 2005 was declared on two occasions, one prior to the judgment in the case of ***Shri Puran Prasad Gupta Memorial Degree College (supra)*** dated 06.04.2007 and another subsequent to it. The S.I.T. has not taken note of the aforesaid. The argument aforesaid has been raised without taking into consideration that as against 82 institutions, how many students could have been admitted pursuant to the intake capacity given by the N.C.T. to those institutions with actual figure of students. The material recovered by the S.I.T. has made the picture clear. The figure of total students was taken with addition to the students pursuant to the judgment of Bench at Lucknow in the case of ***Sri Puram Prasad Gupta Memorial Degree College (supra).***

97. Learned counsel for the appellants has failed to refer the interim order passed in the said case from time to time while challenging number of the students taken by the S.I.T. and even while doing so, they could not come out with a figure as to how many students appeared pursuant to the judgment of Bench at Lucknow. In fact the effort of the appellants is only to confuse the Court. The learned Additional Advocate General appeared for the State clarified the picture after referring to the material collected by the S.I.T. as to how many students appeared in the examination.

98. An argument has been raised even in reference to the marks foil. It contains marks of only two papers, thus could not have been relied by the S.I.T. and this Court. The marks foil recovered during the course of investigation were called for perusal of the Court as well as counsel for the appellants. It is true that marks foil of

only two papers have been recovered but therein also marks appeared in the mark-sheets were found different than what has been recorded in the marks foil, prepared based on the marks allotted by the examiner. They were sufficient to prove tampering of mark sheets and even the number of the students appeared in the examination.

99. At this stage, another argument was raised that the name of those appeared in the marks foil is to be treated as genuine candidates. The argument for it was raised by the counsel appearing for the candidates having tampered mark-sheets. The argument aforesaid is accepted for tampered mark-sheets. The name of 2823+814 students does not exist in the marks foil which was even examined by the Court on random basis in the presence of counsel for the appellants. Two candidates out of 814 students appeared as ex-students, thus, they are excluded from the list of fake students. They are Km. Anita Maurya D/o Bhola Singh and Vijay Singh S/o Hari Singh. The case of seven candidates named in earlier paras needs to be considered separately for which necessary direction would be passed.

100. The counsel were invited to refer the name of any of the candidates whose mark-sheets/degree was declared to be fake. The name given by the counsel for the appellants were not found in the marks foil and it was perused not only for one institution but more than one on random basis. It is also that other than seven out of 814 students/candidates failed to produce any material to prove their appearance in the examination. In view of the above, their termination order are not interfered. The action of the State for 814 candidates is taken to be independent to the action of University. The learned Single Judge found that even mark-sheets produced by them do not contain enrollment number.

101. In view of the above, we do not find substance in any of the arguments raised on behalf of appellants/students whose mark-sheets/degrees were found to be fake and accordingly we do not find any reason to cause interference in the order of termination.

102. The issue now remains about the tampered mark-sheets. Learned counsel for appellants submits that University has yet to undertake exercise in reference to the tampered mark-sheets. Thus, the order of the learned Single Judge may be interfered. Whatever decision is taken by the University after applying the procedure given under Section 67 of the Act of 1973, the aforesaid would be acceptable to the appellants. Thus, their order of termination may be made subject to final outcome of the exercise yet to be taken by the University for tampered mark-sheets.

103. The counsel for University has raised no objection. The learned counsel for the State however made a contest. It is submitted that marks foil are sufficient to show tampering of mark-sheets.

104. It is however submitted that if any direction in reference to the request of the appellants is given, they should not be reinstated at this stage but their termination be made subject to final outcome of the exercise to be undertaken by the University.

105. In that case, issue regarding lessor marks in the tampered mark-sheets in few cases would also be considered by the University though so far as the State is

concerned, they still support their the order of termination/cancellation of appointments as it is based on the material collected by the S.I.T. The marks folio show different marks than appeared in the mark-sheets. The tabulation sheets was also showing marks at variance to marks folio.

106. In view of the above, the respondent-State prayed to maintain order for termination of those involved in the tampering of mark-sheets. According to them, the fact about tampering gets established as one Sunil Kumar was issued two different mark-sheets containing different marks. It happened due to tampering of marks. The said Sunil Kumar then preferred the writ petition to challenge the issuance of two mark-sheets showing different marks. It is thereupon only the manipulation and malpractices played by the University came in the notice of the High Court. It is however admitted that the direction of the learned Single Judge in regards to tampered mark-sheets has not been challenged by the State.

107. In view of the above and as we find no error in the judgment to direct the University to proceed in the matter as per Section 67 of the Act of 1977 and making termination order subject to the outcome of the aforesaid, we accept the prayer of the appellants and for that to modify the direction only in regards to payment of salary of the intervening period.

108. In view of the above, we would pass appropriate order in the concluding paragraph for the tampering of mark-sheets.

109. No arguments in reference to the candidates given mark-sheets on one roll number has been made rather the appeal was filed by only those candidates who have been terminated holding their mark-sheets to be fake or tampered. Accordingly, limited to that extent, the judgment is rendered.

110. In the light of the discussion made above, we ***dispose of*** all these appeals with following directions substituting the judgment of learned Single Judge-:

(1) No interference is made in the order of termination/cancellation of appointment of those who obtained service based on fake mark-sheets other than those whose writ petition was allowed by the learned Single Judge. The direction aforesaid would apply not only to 2823 candidates whose mark-sheets/degrees were cancelled by the University by order dated 07.02.2020 but remaining 814 candidates also other than those excluded by the learned Single Judge and one Km. Anita Maurya D/o Bhola Singh of T.R.K. College, Aligarh and Vijay Singh S/o Hari Singh of K.R.T.T. College, Mathura. This direction would further exclude seven other candidates, viz. (i) Surendra Kumar S/o Sri Mauji Lal; (ii) Rajiv Singh Yadav S/o Sri Ram Ladait Yadav; (iii) Sudeep Kumar S/o Sri Ajay Pal Singh; (iv) Smt. Reeta Gautam D/o Sri Ram Gautam; (v) Reeta Yadav D/o Sri Janki Lal Yadav; (vi) Anuradha D/o Sri Rajendra Singh; (vii) Rekha Lavania D/o Sri Vijendra Singh. The respondent-State and University are directed to reconsider the case of above named seven candidates in the light of the documents submitted by them pursuant to the liberty given by this Court in these appeals. It would be in coordination. Necessary exercise in regard to those candidates would made within a period of one month from the date of receipt of copy of this order. If their

admission in the college coupled with appearance in the examination is found proved, then the termination order would be recalled in reference to them. For a period of one month, those candidates would continue in service subject to outcome of the direction given above. List of 812 candidates out of 814 is enclosed as Schedule-I. Their order of termination of 812 candidates has been examined independently by the Court. It was not otherwise made dependent by the State to the order to be passed by the University for 814 candidates.

(2) So far as the challenge to the order dated 07.02.2020 passed by the University is concerned, no interference therein is made. Extensive arguments against the said order were made even before the learned Single Judge without a formal challenge to it but arguments so made were then dealt with by the learned Single Judge. The finding recorded therein does not suffer from error and even no argument to challenge the finding has been made other than to state that no opportunity was given to challenge the order dated 07.02.2020 ignoring that extensive arguments were made by the learned counsel. The finding in regard to it has been recorded by this Court also.

(3) The judgment of learned Single Judge is interfered in regard to the direction to the concerned District Basic Education Officer to effect the recovery of benefits obtained pursuant to the interim order of the Court. The liberty given by the learned Single Judge to the District Basic Education Officer for recovery is set aside.

(4) So far as the termination orders in reference to tampered mark-sheets are concerned, as urged by the learned counsel for the appellants, the University is directed to complete the exercise, as directed by the learned Single Judge, after observance of the provisions of law referred in the judgment and otherwise directed by this Court in the case of ***Tilak Singh (supra).*** The order in reference to those candidates would be made within a period of four months from the date of receipt of copy of this order. The order of termination/cancellation of appointments would be governed by the outcome of the order passed by the University, as agreed by the learned counsel for the appellants. If the University hold mark-sheets to be genuine instead of tampered of any of the appellants, the order of termination/cancellation of appointments, those would stand set aside. However, if the University records a finding about any of the candidates holding tampered mark-sheets, then the order of termination/cancellation of appointments would have effect but it would be from the date of the order passed by the University and accordingly for a period of four months from the date of receipt of copy of this judgment by the University, the order of termination/cancellation of appointments of the candidates holding tampered mark-sheets is kept in abeyance. Those candidates would be allowed to work with payment of salary.

111. It is, however, made clear that in case any of the candidate fails to participate in the proceedings initiated by the University or delays it, this order would not be to their benefit and accordingly, the direction herein above would remain operative only for a period of four months from the date of receipt of copy of this order by the University. On the expiry of the period given above, the order of termination/cancellation of appointments would become effective and thereby the University is directed to complete the exercise within the period given above. In

case any candidate fails to cooperate with them, then a separate order for it can be passed but University would not, in any case, delay the process and for that no extension would be given by this Court rather default of the University to comply the direction aforesaid would have consequences of stoppage of salary of those who have to take action and to pass order in pursuance to the direction of this Court. The Vice Chancellor of the University would monitor compliance of this order and in case of delay, he would not be entitle to salary.

112. The University would be at liberty to make inspection of the marks folio lying with the Registrar, High Court or the S.I.T. for the purpose of verification, if so required and accordingly Registrar, High Court as well as S.I.T. is directed to cooperate with the University for it.

(5) The list of 2823 students has been enclosed along with the impugned judgment and list of remaining 812 candidates is enclosed as schedule I to this judgment.

113. All the appeals are ***disposed of*** with the aforesaid.

<u>द्वारा:- माननीय सौरभ श्याम शमशेरी, न्यायमूर्ति</u>

1. यह मेरा सौभाग्य है, की मुझे मेरे भ्राता न्यायमूर्ति श्री मुनीश्वर नाथ भंडारी द्वारा लिखा गया, एक अर्थपूर्ण व सारगर्भित निर्णय को पढ़ने का मौक़ा मिला। मैं उनके द्वारा प्रश्नगत विषय पर दिये गये तथ्यात्तमक व विधिक विश्लेषण, निष्कर्ष व निर्देशों से पूर्ण रुप से सहमत हूँ और केवल "भारत वर्ष में गुरु की महत्ता' व "छल का प्रभाव' पर पूरक निर्णय दे रहा हूँ:-

<u>भारत वर्ष में गुरु की महत्ता</u>

गुरुर्ब्रह्मा गुरुर्विष्णु र्गुरुर्देवो महेश्वरः|
गुरु साक्षात परब्रह्मा तस्मै श्रीगुरवे नमः||
(गुरु ही ब्रह्मा है, गुरु ही विष्णु है और गुरु ही भगवान शंकर है।
गुरु ही साक्षात परब्रह्म है, ऐसे गुरु को मैं प्रणाम करता हूं।)

2. भारतीय समाज में गुरु के उच्च स्थान की परिकल्पना उपरोक्त श्लोक से सर्वविदित होती है, जहाँ उसको भगवान की प्रतिमूर्ति माना जाता है। शिक्षक, ब्रह्मा के रूप में, ज्ञान और बुद्धिमत्ता का निर्माण करता है, विष्णु के रुप में, विद्वता का परिक्षण करता है तथा महेश्वर के रूप में अज्ञान का संहार करता है। कबीर दास जी गुरु को भगवान से भी ऊपर मानते है,जब वो कहते हैं :

"गुरु गोविन्द दोऊ खड़े,काके लागू पाय।
बलिहारी गुरु आपने, गोविन्द दियो बताय"।

3. शैक्षिक प्रक्रिया की सफलता, बहुत कुछ शिक्षक पर निर्भर करती है, क्योंकि यही वो शिक्षक हैं, जो छात्रों में उद्देश्य का प्रत्यारोपण और चरित्र का निर्माण करते हैं, इसलिए शिक्षकों की गुणवत्ता, योग्यता व चरित्र का शिक्षण प्रणाली की क्षमता के लिये सर्वाधिक महत्ता है, जिससे छात्र भविष्य में एक ज़िम्मेदार नागरिक बन सके।

4. शिक्षक का व्यवसाय एक पवित्र व्यवसाय है, यह केवल जीविका चलाने का साधन मात्र नहीं है। शिक्षक, राष्ट्र निर्माण में महत्वपूर्ण भूमिका निभाते हैं। यह शिक्षक ही है जो न केवल ज्ञान प्रदान करते हैं, वरन् भविष्य के नागरिकों को ऐसे साँचें में ढालते हैं, जिससे

उनको दिल व दिमाग़ की विशेषताओं के अतिरिक्त, देश के प्रति कर्तव्य, नितिपरायणता और निष्ठा का भी बोध हो।

5. शिक्षक,माता पिता के बाद, '**गुरु देवो भव**' की तरह सुशोभित होते हैं, क्योंकि वो बालक में सांस्कृतिक लोकाचार, बौद्धिक उत्कृष्टता व अनुशासित होने का भाव जागृति करने में मुख्य कारक होते हैं।

6. महर्षि अरविंद ने शिक्षकों के सम्बन्ध में कहा कि "शिक्षक राष्ट्र की संस्कृति के चतुर माली होते हैं। वे संस्कारों की जड़ों में खाद देते हैं और अपने श्रम से सींचकर उन्हें शक्ति में निर्मित करते हैं।" उनका मानना था कि किसी राष्ट्र के वास्तविक निर्माता उस देश के शिक्षक होते हैं। एक विकसित, समृद्ध एवम् हर्षित राष्ट्र व विश्व के निर्माण में शिक्षकों की भूमिका ही सबसे अधिक महत्वपूर्ण होती है। **(देखें - अविनाश नागरा बनाम नवोदय विधालय समिति (१९९७) २ एस सी सी ५३४, सुष्मिता वासु व अन्य बनाम बैलीगुनजें शिक्षा समिति (२००६)७ एस सी सी ६८०, महाराष्ट्र राज्य बनाम विकास साहेबराव राउनदले (१९९२)४ एस सी सी ४३५)**

''छल का प्रभाव'

7. वर्तमान प्रकरण के तथ्य व परिस्थितियाँ, उपरोक्त वर्णित शिक्षक की समाज में महत्ता से पूर्ण रुप से विपरीत है। तथ्यों की पुनरावृत्ति न करते हुए, यह विदित है कि विश्वविद्यालय व कॉलेजों के अधिकारियों, कर्मचारियों व अन्य ने अपीलार्थीयों को सदोष अभिलाभ पहुँचाने के उद्देश्य के लिए छल व कपट करके कुटरचित दस्तावेज़ों का निर्माण किया और इन्हें फ़र्ज़ी शिक्षा स्नातक की अंकतालिका व डिग्री प्रदान करायी गयी, जिसके आधार पर इन्होंने सहायक शिक्षक के पद पर नियुक्ति प्राप्त कर ली। यह विधि की अतिसामान्य अभिधारणा है, कि कोई ऐसा कृत्य जिसका आधार छल या कपट या धोखाधड़ी हो तो वो प्रारंभ से ही शुन्य माना जायेगा। अत: यह नियुक्ति आरम्भ से ही शून्य है।

8. अपीलार्थीयों ने छल व कपट से शिक्षक बनकर न केवल छात्रों के भविष्य से खिलवाड़ किया है, वरन् शिक्षक के सम्मान को ठेस भी पहुँचाई है। प्रकरण के तथ्यात्मक व विधिक विश्लेषण अपीलार्थीयों के प्रतिकूल है।

9. विधि की यह स्पष्ट व्यवस्था है कि 'धोखाधड़ी पवित्र कृत्य को भी निष्प्रभावी कर देती है' और 'धोखाधड़ी और न्याय कभी एक साथ नहीं रहते हैं।' दुवयपदेशन स्वयं में ही एक धोखा है ।

10. जब कोई व्यक्ति कूटरचित / जाली दस्तावेज़ों के आधार पर नियुक्ति प्राप्त करता है, तो वो कृत्य नियोक्ता के प्रति दुवयपदेशन व छल माना जायेगा और इसलिये, न तो उसके पक्ष में कोई न्यायसंगता उत्पन्न होगी और न ही नियोक्ता को विबंधन होगा, अगर बिना किसी जाँच के वो उसको सेवा से हटा दें और न हीं सेवा की अवधि की कोई प्रासंगिकता रहेगी । **[देखें :- राम चन्द्र सिंह बनाम सावित्री देवी और अन्य, (२००३) ८ एस सी सी ३१९; जैनेन्दर सिंह बनाम उत्तर प्रदेश राज्य: (२०१२)८ एस सी सी ७४८; सुधाकर पाठक और अन्य बनाम उत्तर प्रदेश राज्य व एक अन्य, २०१९(१) ए.डी.जे. ५८९ (डी.बी.); बिहार राज्य व अन्य बनाम देवेन्द्र शर्मा 2019 एस सी सी ऑन लाइन एस सी 1360]**

11. वर्तमान प्रकरण में जहां प्रारम्भ से ही छल, कपट व धोखाधड़ी के आधार पर पद प्राप्त किया हो, वो शिक्षक भविष्य में छात्रों को अच्छे संस्कार दे पायेंगे, इसकी संभावना नगण्य है। अपीलार्थीयों ने यह जानकारी होते हुए भी की उनकी डिग्री या अंकतालिका वास्तविक नहीं है और वो छल व कपट के द्वारा प्राप्त किया गया एक कुटरचित दस्तावेज है, उसको वास्तविक

दस्तावेज के रुप में नियोक्ता को दे कर, पदनियोक्ति प्राप्त करी है, जैसा की पूर्व में उल्लेखित किया गया है, ऐसी नियुक्ति प्रारम्भ से ही शून्य मानी जायेगी। छल और धोखाधड़ी के आधार पर ली गयी नियुक्ति के कारण न केवल योग्य प्रत्यक्षी के अधिकार का हनन किया है वरन् आने वाली पीढ़ी के भविष्य पर भी कुठाराघात किया है।

12. इस न्यायालय के निर्देश पर गठित विशिष्ट अनुसंधान दल द्वारा दस्तावेज़ों व अन्य साक्ष्यों के आधार पर इस निष्कर्ष पर पहुँचना कि प्रकरण में बड़े स्तर पर धांधली हुई है तथा उन छात्रों को सूचीबद्ध करना जो फेक छात्र हैं, जिनकी अंकतालिका टैम्पर्ड या जिन्होंने प्रतिरुपण किया है, में कोई त्रुटि प्रतीत नहीं होती है, क्योंकि अपीलार्थी, विश्वविद्यालय द्वारा जारी करी गई प्रश्नावली के उत्तर के साथ, ऐसा कोई भी साक्ष्य न तो प्राधिकारी या न्यायालय के समक्ष प्रस्तुत कर पाये, जिससे उनकी डिग्री व अंकतालिका वास्तविक मानी जा सके। वर्तमान प्रकरण में नैसर्गिक न्याय के सिद्धान्तों का भी पूर्णतः परिपालन हुआ है, जबकि धोखाधड़ी के आधार पर नौकरी लेने वालों के प्रकरण में, इन सिद्धान्तों के परिपालन का अपवाद है। इस विशिष्ट अनुसंधान दल ने विश्वविद्यालय से वर्ष 2005 के शिक्षा स्नातक के संबंधित सभी उपलब्ध दस्तावेजों को एकत्र किया, उनका अध्ययन किया और सारणीबद्ध किया। सारणी के ध्यानपूर्वक परिशीलन से यह विदित होता है कि, यह सारणी विश्वविद्यालय द्वारा उपलब्ध दस्तावेज़ों के आधार पर, स्पष्ट रुप से शीर्षकों में विभक्त करके बनाई गयी है। ऐसा कोई कारण नहीं है, जिसके आधार पर विशेष अनुसंधान दल की रिपोर्ट पर संशय करा जा सके।

13. अत: अपीलार्थीयों को कोई भी राहत नहीं दी जा सकती है। मैं भ्राता न्यायमूर्ति द्वारा प्रश्नगत विषय पर दिये गये विधिक विश्लेषण, निष्कर्ष व निर्देशों से पूर्ण रुप से सहमत हूँ ।

Order Date-: 26.02.2021

Schedule-I

S.No.	Roll NO.	Roll No.	Name of	Father's Nam	College Code	College Name	Recommendation
1.	F4	5027134	VANDANA	M. CHANDRA	27	AK COLLEGE, SIKOHABAD	**Remain in the "Fake" Category**
2.	F7	5027137	RA	BRIJLAL	27	AK C	**Remain "Fake"**
3.	F10	5027140	MEEN	KHOOBSIN	27	AK C OLLEGE	**Remain "Fake" Category**
4.	F11	5027141	PRAMI	RAISINGH	27	AK C	**Remain "Fake"**
5.	F19	5027149	SUR	KAN	27	AK C OLLEGE	**Remain "Fake" Category**
6.	F23	5027153	DE	SELEMSIN	27	AK C	**Remain "Fake"**
7.	F24	5027154	RAJES	N.K. YADAV	27	AK C OLLEGE	**Remain "Fake" Category**
8.	F31	5027301	SANJ	LALLUSIN	27	AK C	**Remain "Fake"**
9.	F35	5027305	MAN	R. SINGH	27	AK C OLLEGE	**Remain "Fake" Category**
10.	F36	5027306	GU	RAM	27	AK C	**Remain "Fake"**
11.	F37	5027307	DIG	JAG	27	AK C OLLEGE	**Remain "Fake" Category**
12.	F46	5280087	MANOJ	GENDALAL	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
13.	F47	5280088	BHUPSI	PATIRAM	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
14.	F48	5280089	VIJAY	RAM	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
15.	F57	5280117	ANILK	RAM KHILAR	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
16.	F58	5280118	VINITAPA	HARIRAM	280	APS COLLEGE, BAINA	**Remain "Fake" Category**

17.	F62	5280 122	DEENDAYA	MUNNA SINGH	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
18.	F63	5280 123	SANDIP	RAN	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
19.	F65	5280 125	RUCHI	RAJ	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
20.	F66	5280 126	MANG	SHIV DAYAL	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
21.	F67	5280 127	AKH	SIDDHNATH	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
22.	F68	5280 128	ALOO	A.K	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
23.	F69	5280 129	ANEKSI	SAR	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
24.	F70	5280 130	VIMAL	K.S. YADAV	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
25.	F74	5280 134	KAU	R.C. RATHORE	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
26.	F78	5280 138	PAN	C.P. MISHRA	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
27.	F80	5280 140	RAMNI	SUMIRAM	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
28.	F81	5280 141	SANDI	M.C	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
29.	F83	5280 143	SHYAMVI	HAR	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
30.	F84	5280 144	SRI	PURAN SINGH	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
31.	F85	5280 145	SUJITSIN	R.V.	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
32.	F86	5280 146	VIJ	SAR	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
33.	F88	5280 148	MAN	MAH	280	APS COLLEGE, BAINA	**Remain "Fake" Category**
34.	F92	5101 087	SANDH	RAVIN	101	ACADEMY OF MGT.	**Remain "Fake" Category**
35.	F93	5101 088	VAVESHKUM	MALKH	101	ACADEMY OF MGT.	**Remain "Fake" Category**
36.	F95	5101 090	SATEN	VIRPAL SINGH	101	ACADEMY OF MGT.	**Remain "Fake" Category**
37.	F111	5101 121	UPEND	RAM SHANKAR	101	ACADEMY OF MGT.	**Remain "Fake" Category**
38.	F112	5101 122	NARREN	AJAY	101	ACADEMY OF MGT.	**Remain "Fake" Category**
39.	F138	5101 148	BRIJE	VIRENDRA	101	ACADEMY OF MGT.	**Remain "Fake" Category**
40.	F142	5101 303	KUNJ	OMPRAKASH	101	ACADEMY OF MGT.	**Remain "Fake" Category**
41.	F143	5101 304	BRAJE	NATHURAM	101	ACADEMY OF MGT.	**Remain "Fake" Category**

42.	F144	5101 305	SAVITA	RAM KHILARI	101	ACADEMY OF MGT.	**Remain "Fake" Category**
43.	F148	5101 309	SANTO	GIRIR	101	ACADEMY OF MGT.	**Remain "Fake" Category**
44.	F150	5101 311	RENUPAL	MAHESH BABU	101	ACADEMY OF MGT.	**Remain "Fake" Category**
45.	F158	5116 132	SANT	RAJE	116	ACMY INST OF MGT. & TECH., SIKAND	**Remain "Fake" Category**
46.	F164	5116 138	BABITA	CHANDRA PAL	116	ACMY INST OF MGT. & TECH., SIKAND	**Remain "Fake" Category**
47.	F168	5116 142	RAMRATA	PREM CHAND	116	ACMY INST OF MGT. & TECH., SIKAND	**Remain "Fake" Category**
48.	F205	5116 305	RAJKUM	RAM KISHAN	116	ACMY INST OF MGT. & TECH., SIKAND	**Remain "Fake" Category**
49.	F209	5116 309	DEEP	SATI	116	ACMY INST OF MGT. & TECH., SIKAND	**Remain "Fake" Category**
50.	F211	5116 311	POONA	RAM	116	ACMY INST OF MGT. & TECH., SIKAND	**Remain "Fake" Category**
51.	F214	5116 314	KAILASHB	BABU LAL	116	ACMY INST OF MGT. & TECH., SIKAND	**Remain "Fake" Category**
52.	F215	5116 315	PAWANKUM	KRIPAL SINGH	116	ACMY INST OF MGT. & TECH., SIKANDRA, AGRA	**Remain "Fake" Category**
53.	F220	5243 074	SURENDR	MAUJI LAL	243	ADARSH KRISHNA COLLEGE NA	**Remain "Fake" Category**
54.	F221	5243 075	SANDEEP	AJAY	243	ADARSH	**Remain**
				KUMAR	SINGH		KRISHNA COLLEGE N	**"Fake" Category**
55.	F222	5243 076	RAJ VIR SINGH YADAV	RAM YADAV	243	ADARSH KRISHNA COLLEGE	**Remain "Fake" Category**
56.	F223	5243 083	POONAM S	R.P. SHAKYA	243	ADARSH KRISHNA COLLEGE	**Remain "Fake" Category**
57.	F225	5243 085	JAGVIR SINGH	SHIV SINGH	243	ADARSH KRISHNA COLLEGE	**Remain "Fake" Category**
58.	F228	5243 088	SATYA PRAKASH	RAMESH WAR DAYAL	243	ADARSH KRISHNA COLLEGE NAGAR	**Remain "Fake" Category**

59.	F229	5243089	RANVIR SINGH	ROSHAN S	243	ADARSH KRISHNA COLLEGE	**Remain "Fake" Category**
60.	F234	5243094	SUMAN	RAMESH C	243	ADARSH KRISHNA COLLEGE	**Remain "Fake" Category**
61.	F235	5243095	VINEET KUMAR BHARTI	MAHARAM	243	ADARSH KRISHNA COLLEGE	**Remain "Fake" Category**
62.	F247	5232116	ARUN PRATAP	S. LAL	232	AGRA PUBLIC TEACHE	**Remain "Fake" Category**
63.	F248	5232117	NARENDRA PAL SINGH	CHATUR	232	AGRA PUBLIC TEACHE	**Remain "Fake" Category**
64.	F249	5232118	VINESH KUMAR	SHIV DAYAL	232	AGRA PUB	**Remain "Fake" Category**

						TRAININGCO	
65.	F253	5232122	KAVITA	NAREN	232	AGRA PUBLIC TEACHE	**Remain "Fake" Category**
66.	F254	5232123	UJAGER SINGH	RAM SAHAYA	232	AGRA PUBLIC TEACHERS TRAININ	**Remain "Fake" Category**
67.	F255	5232124	DHARMENDRA KUMAR KANS	CHHAT	232	AGRA PUBLIC TEACHE	**Remain "Fake" Category**
68.	F260	5232129	RAJESH KUMAR	KHACH	232	AGRA PUBLIC TEACHE	**Remain "Fake" Category**
69.	F261	5232130	OM PRAKASH BAGHE	NARAYAN SINGH	232	AGRA PUBLIC TEACHE	**Remain "Fake" Category**
70.	F264	5232133	KM. SARITA	VIDHYARAM	232	AGRA PUBLIC TEACHE	**Remain "Fake" Category**
71.	F265	5232134	RENU	RADHEY	232	AGRA PUBLIC TEACHE	**Remain "Fake" Category**
72.	F271	5232140	KAPTAN SINGH	DHARA	232	AGRA PUBLIC TEACHE	**Remain "Fake" Category**
73.	F273	5232142	SANDE	RADHEY LAL	232	AGRA PUBLIC TEACHE	**Remain "Fake" Category**
74.	F282	5279087	SACHIN GOYAL	MAHEN	279	ALIGAR	**Remain "Fake" Category**
75.	F283	5279088	SWATI KASHYAP	RAM	279	ALIGAR	**Remain "Fake" Category**
76.	F285	5279090	MANOJ KUMAR	LOKPAL SINGH	279	ALIGAR	**Remain "Fake" Category**

77.	F294	5279118	SIMAN LATA	RAJENDRA	279	ALIGARH T	**Remain "Fake" Category**
						CO	
78.	F295	5279119	JITEND	BHARAT SINGH	279	ALIGAR	**Remain "Fake" Category**
79.	F299	5279123	AVADES	MUNSHI SINGH	279	ALIGAR	**Remain "Fake" Category**
80.	F302	5279126	MANOJ	ROSHAN LAL	279	ALIGAR	**Remain "Fake" Category**
81.	F327	5172087	NARE	SHAB SINGH	172	AMAR	**Remain "Fake" Catego**
82.	F328	5172088	DHARM PAL	BANI PAL	172	AMAR	**Remain "Fake" Catego**
83.	F329	5172089	SUNIL KUMA	ATAR SINGH	172	AMAR	**Remain "Fake" Catego**
84.	F331	5172091	NARSH	DURG	172	AMAR	**Remain "Fake" Catego**
85.	F333	5172093	ALOK YADAV	UMES	172	AMAR	**Remain "Fake" Catego**
86.	F340	5172308	BALW	CHAR	172	AMAR	**Remain "Fake" Catego**
87.	F344	5172312	NAVIN	RAM	172	AMARDEE	**Remain "Fake" Category**
88.	F361	5281117	POOJA KANOJIA	M.C. KANOJIA	281	ANAND COLLEGE	**Remain "Fake" Category**
89.	F362	5281118	BHUVNESHWAR SIN	CHIRAN	281	ANAND COLLEGE	**Remain "Fake" Category**
90.	F363	5281119	SUREND	LATA SINGH	281	ANAND COLLEGE	**Remain "Fake" Category**
91.	F364	5281120	VIRESH KUMAR	POKHPAL	281	ANAND COLLEGE	**Remain "Fake" Category**
92.	F365	5281121	SURJEE	MAHAVI	281	ANAND COLLEGE	**Remain "Fake" Category**
93.	F366	5281122	ALKA	PREM	281	ANAND	**Remain**
				SINGH		COLLEGE	**"Fake" Category**
94.	F368	5281124	YADVENDRA SINGH	NIHAL SINGH	281	ANAND COLLEGE	**Remain "Fake" Category**
95.	F369	5281125	RISHI KUMAR	BANVARI LAL	281	ANAND COLLEGE	**Remain "Fake" Category**
96.	F370	5281126	SATYA PRAKASH	FATEH SINGH	281	ANAND COLLEGE	**Remain "Fake" Category**

97.	F384	5281140	SHALINI	SHANTI	281	ANAND COLLEGE	**Remain "Fake" Category**
98.	F397	5281303	RITU VARSHNEY	LAJPAT	281	ANAND COLLEGE	**Remain "Fake" Category**
99.	F399	5281305	MITHILESH	DEVI SINGH	281	ANAND COLLEGE	**Remain "Fake" Category**
100.	F400	5281306	UMESH KUMAR	RAM BHAROSE	281	ANAND COLLEGE	**Remain "Fake" Category**
101.	F407	5281313	VISHNU KUMAR	CHARAN DAS	281	ANAND COLLEGE	**Remain "Fake" Category**
102.	F418	5131090	RAM VIR SINGH	JAI BAHADUR SINGH	131	ANJALI	**Remain "Fake" Cate**
103.	F419	5131091	DHARM VIR SIN	GANGA	131	ANJALI	**Remain "Fake" Cate**
104.	F426	5131116	YATIN NARA	A.N. SHARMA	131	ANJALI	**Remain "Fake" Cate**
105.	F429	5131119	HEMA	GUMANI RAM	131	ANJALI	**Remain "Fake" Cate**
106.	F439	5131129	SADHN	SUMAN	131	ANJALI	**Remain "Fake" Cate**
107.	F452	5131142	ANUJ KUMAR	SHIV CHARAN	131	ANJALI	**Remain**
			GAUTAM	LAL GAUTAM		OF MGT. & SC., ETMAD	**"Fake" Category**
108.	F454	5131144	SURENDRA PAL	SHRI RATI RAM	131	ANJALI	**Remain "Fake" Category**
109.	F455	5131145	OM VIR SINGH	LAL BAHADUR SINGH	131	ANJALI	**Remain "Fake" Category**
110.	F459	5131302	REKHA	MAHA	131	ANJALI	**Remain "Fake" Category**
111.	F461	5131304	VIKASH YADAV	RAJ VIR SINGH	131	ANJALI	**Remain "Fake" Category**
112.	F462	5131305	GYAN	BHOOP SINGH	131	ANJALI	**Remain "Fake" Catego**
113.	F463	5131306	LAXMI	BRIJ LAL	131	ANJALI	**Remain "Fake" Category**
114.	F464	5131307	GUDDU KUMAR	BADRI PRASAD	131	ANJALI	**Remain "Fake" Category**
115.	F466	5131309	GOVIN	S. RAM	131	ANJALI	**Remain "Fake" Category**
116.	F467	5131310	JITEN	J. SINGH	131	ANJALI	**Remain "Fake" Catego**
117.	F473	5120131	HARISH KUMA	PRAM	120	ARYAN INS	**Remain "Fake" Catego**
118.	F482	5120140	BHAWAN SINGH	MANIK	120	ARYAN INS	**Remain "Fake" Catego**
119.	F495	5120226	SHASHI	MOHAR	120	ARYAN INS	**Remain "Fake" Catego**

120.	F497	5120228	UDAY	JAI SINGH	120	ARYAN INS	**Remain "Fake" Catego**
121.	F501	5120232	PREM LATA	H.S. SINGH	120	ARYAN INS	**Remain "Fake" Catego**
122.	F502	5120233	SHASHI KALA	HODIL SINGH	120	ARYAN INS	**Remain "Fake" Catego**
123.	F503	5120234	SUMIT VERMA	MADAN SINGH	120	ARYAN INS	**Remain "Fake" Catego**
124.	F504	5120235	ANJANA RAJAK	B.L. RAJAK	120	ARYAN INSTITUTE, AGRA	**Remain "Fake" Category**

125.	F505	5120236	RENU	JAI SINGH	120	ARYAN INS	**Remain "Fake"**
126.	F507	5120238	ATUL	LAK	120	ARYAN INS	**Remain "Fake"**
127.	F523	5120305	RAK	OM PRAKASH	120	ARYAN INS	**Remain "Fake"**
128.	F524	5120306	RATAN KUMAR	KAIL	120	ARYAN INS	**Remain "Fake"**
129.	F525	5120307	GHANSH	JAG	120	ARYAN INS	**Remain "Fake"**
130.	F528	5120310	ABH	P.K. MATHUR	120	ARYAN INS	**Remain "Fake"**
131.	F534	5005304	MANJU	RAM NATH	5	B.D.	**Remain "Fake" Cate**
132.	F536	5005306	MEENAKSHI	OMKAR SINGH	5	B.D.	**Remain "Fake" Cate**

133.	F558	5017276	MADHU RANI	RAM	17	B.S.AC	**Remain "Fake"**
134.	F559	5017277	SHO	K.C. MISHRA	17	B.S.AC	**Remain "Fake"**
135.	F563	5017304	SANJU YADAV	RAM	17	B.S.AC	**Remain "Fake"**
136.	F566	5017307	RAJEEV KUMAR	RAM SWA	17	B.S.AC	**Remain "Fake"**
137.	F581	5234095	DHARMENDRA SHA	RAJEE	234	BALMUKUND BAJARI COLLEGE	**Remain "Fake" Cate**
138.	F585	5234116	LATA THAKUR	MAHES	234	BALMUKUND BAJARI COLLEGE	**Remain "Fake" Cate**
139.	F586	5234117	SURENDRA PRATAP	JAI SINGH	234	BALMUKUND BAJARI COLLEGE	**Remain "Fake" Cate**
140.	F591	5234122	SACHE	R.S. LAL	234	BALMUKUND BAJARI COLLEGE	**Remain "Fake" Cate**
141.	F592	5234123	JYOTI SHARMA	B.P. PATHAK	234	BALMUKUND BAJARI COLLEGE	**Remain "Fake" Cate**

142.	F607	5234138	ASHISH KUMAR MISH	RAVINDRA NATH	234	BALMUKUND BAJARI	**Remain "Fake" Cate**
143.	F615	5234146	CHANDRA PAL	KISHORI LAL	234	BALMUKUND BAJARI	**Remain "Fake" Cate**

144.	F621	5134089	MITHILESH	HARI SINGH	134	BON	**Remain "Fake"**
145.	F626	5134094	KARM	SHIV	134	BON	**Remain "Fake"**
146.	F629	5134301	DEEPAK SINGH	AMAR SINGH	134	BON	**Remain "Fake"**
147.	F630	5134302	SHASHI	GAN	134	BON	**Remain "Fake"**
148.	F640	5246089	MANJU YADAV	R.S. YADAV	246	BRAJ	**Remain "Fake" Cate**
149.	F644	5246093	GOPAL	GAURI	246	BRAJ	**Remain "Fake" Cate**
150.	F650	5246118	ANITA	HARI KISHAN	246	BRAJ	**Remain "Fake" Cate**
151.	F654	5246122	SHIV KUMARI	DAYA RAM	246	BRAJ	**Remain "Fake" Cate**
152.	F655	5246123	MANJUC	BUDDSENCHAU	246	BRAJ	**Remain "Fake" Cate**
153.	F672	5246146	DINESH CHAND	RAM	246	BRAJ	**Remain "Fake" Cate**
154.	F688	5136096	ASHOK KUMA	BHIKA RAM	136	C-	**Remain "Fak**
155.	F699	5136305	GEETA YADA	JANGI	136	C-I	**Remain "Fak**
156.	F702	5136308	SHENLATA	GYAN SINGH	136	C-	**Remain "Fak**
157.	F705	5136311	MAN	V.K. CHITRAVA	136	C-I	**Remain "Fak**
158.	F707	5136313	PRAMILA SINGH	S.B. SINGH	136	C-	**Remain "Fak**
159.	F713	5136320	REKH	NAWAB	136	C-IMP	**Remain**
			SINGH			AGRA	**"Fak"**
160.	F717	5008083	RAMVIR SINGH	INDRA	8	D.S. COLL	**Remain "Fak**
161.	F719	5008085	PREETICH	SURAJN	8	D.S. COLLEGE, ALIGA	**Remain "Fake"**
162.	F723	5008089	OM NARAY	HUBLAL	8	D.S. COLLEGE	**Remain "Fak**
163.	F725	8008091	UMA	LA	8	D.S. COLL	**Remain "Fak**
164.	F729	5008095	POONAM	SALIGRAM	8	D.S. COLLEGE	**Remain "Fak**
165.	F740	5008106	SUNITA	RAGH	8	D.S. COLL	**Remain "Fak**
166.	F741	5008107	RAM	SAD	8	D.S. COLLEGE	**Remain "Fak**
167.	F748	5008304	SA	KI	8	D.S. COLL	**Remain "Fak**
168.	F756	5030302	PRITI VERMA	AMAR	30	DAU	**Remain "Fake" Cate**
169.	F757	5030303	JUGNU VERMA	UDAL	30	DAU	**Remain "Fake" Cate**
170.	F760	5030306	PREET	R.N. SHARMA	30	DAU	**Remain "Fake" Cate**
171.	F768	5275092	VED PRAKASH JAIN	UDAI	275	DEVEDUCATIONG	**Remain "Fake" Category**

172.	F770	5216086	NEERAJ BHADAURIA	K.K. SINGH	216	DR.	**Remain "Fake" Category**
173.	F777	5216093	KHUSHIRAMA	LALA RAM	216	DR.	**Remain "Fake" Category**
174.	F778	5216094	JEEVAN	KAMAN SINGH	216	DR.	**Remain "Fake" Category**
175.	F780	5216096	SANTOSH	H.P. SHARMA	216	DR.	**Remain "Fake" Category**
176.	F786	5216305	SATY	JAI PAL SINGH	216	DR.	**Remain "Fake"**

						CO	
177.	F788	5216307	DHARMENDRA SINGH	ANEK SINGH	216	DR. ISLAM MAZID TEACHERS TRAINING	**Remain "Fake" Ca**
178.	F789	5216308	MEENA	JAI SINGH	216	DR.	**Remain "Fake" Ca**
179.	F793	5126308A	NARESH	RAJENDR	216	DR.	**Remain "Fake" Ca**

180.	F797	5245092	HRADE	RAM PRAKASH SINGH	245	F.S. COLLEGE OF EDU	**Remain "Fake"**
181.	F798	5245093	SHWETA SINGH SIKARWAR	RAMESH KUMAR SING	245	F.S. COLLEGE OF EDU	**Remain "Fake"**
182.	F799	5245094	SATYA BEER	RAM RATAN	245	F.S. COLLEGE OF EDU	**Remain "Fake"**
183.	F802	5245116	SEEMA TOMAR	N.S. TOMAR	245	F.S. COLLEGE OF EDU	**Remain "Fake"**
184.	F803	5245117	DHEER	RAMESHWAR	245	F.S. COLLEGE OF EDU	**Remain "Fake"**
185.	F804	5245118	PRITI RATHORE	RAMESHWAR	245	F.S. COLLEGE OF EDU	**Remain "Fake"**
186.	F808	5245122	JAY	KANCH	245	F.S. COLLEGE OF EDU	**Remain "Fake"**
187.	F810	5245124	NEERA	G.C. KAUSHIK	245	F.S. COLLEGE OF EDU	**Remain "Fake"**
188.	F817	5245131	SHAILBALA	GAJEN	245	F.S. COLLEGE OF EDU	**Remain "Fake"**
189.	F818	5245132	GAYATRI	S. CHANDRA	245	F.S. COLLEGE	**Remain**

			SAXENA			OFEDU	**"Fake" Category**
190.	F824	5245138	KALPANA	RAMPHE	245	F.S. EDUCATION, S-	**Remain "Fake" Category**
191.	F825	5245139	SEEMA	JAGDIS	245	F.S. EDUCATION, S-	**Remain "Fake" Category**
192.	F826	5245140	BAVITA	SATYAV	245	F.S. EDUCATION, S-	**Remain "Fake" Category**
193.	F830	5245144	RENU SHARMA	S.P. SINGH	245	F.S. EDUCATION, S-	**Remain "Fake" Category**
194.	F832	5245146	SUNIL KUMAR	SUBAY SINGH	245	F.S. EDUCATION, S-	**Remain "Fake" Category**
195.	F833	5245147	ROHIT MALIK	N.	245	F.S. EDUCATION, S-	**Remain "Fake" Category**
196.	F834	5245148	MANOJ KUMAR	BIPIN KUMAR	245	F.S. EDUCATION, S-	**Remain "Fake" Category**
197.	F840	5245154	HARI	KHEM SINGH	245	F.S. EDUCATION, S-	**Remain "Fake" Category**
198.	F863	5123067	SHAILENDRAKU	CHATTA	123	FAIYAZ	**Remain "Fake" Category**
199.	F890	5123304	ROSHANARA	F.M. KHAN	123	FAIYAZ	**Remain "Fake" Category**
200.	F893	5075031	BHOOPENDRASIN	SHER SINGH	75	FAIZ-E-AL	**Remain "Fake" Category**
201.	F903	5075041	MEERA	CHOTTE	75	FAIZ-E-AL	**Remain "Fake" Category**
202.	F959	5075131	SEEMU	R.P. TIMORI	75	FAIZ	**Remain "Fake"**

						DEGR	
203.	F961	5075133	SARVESHkUMAR	RUSTAMSINGH	75	FAIZ-E-AMM	**Remain "Fake" category**
204.	F962	5075134	HENA DEVI	RAJEN	75	FAIZ-E-AMM	**Remain "Fake" category**
205.	F963	5075135	NAND	P.S. SHARMA	75	FAIZ-E-AMM	**Remain "Fake" category**
206.	F969	5075141	SUBOD	SHRI KRISHAN	75	FAIZ-E-AMM	**Remain "Fake" category**
207.	F970	5075142	SANJAYD	RAJBAHADUR	75	FAIZ-E-AMMODER	**Remain "Fake" category**

208.	F971	5075143	VIREN	HARGY	75	FAIZ-E-AMM	**Remain "Fake" category**
209.	F972	5075144	MANOJ KUMARI	PREM SINGH	75	FAIZ-E-AMM	**Remain "Fake" category**
210.	F973	5075145	KRISHNA	HARISHANDRA	75	FAIZ-E-AMM	**Remain "Fake" category**
211.	F974	5075146	INDRA	SURES	75	FAIZ-E-AMM	**Remain "Fake" category**
212.	F975	5075147	GULVER SINGH	MAKHA	75	FAIZ-E-AMM	**Remain "Fake" category**
213.	F977	5075149	VARSHARANI	MUNSHI SINGH	75	FAIZ-E-AMM	**Remain "Fake" category**
214.	F984	5075306	RANJE	RAJBAHADURBHA	75	FAIZ-E-AMM	**Remain "Fake" category**
215.	F987	5075309	DEV	BHA	75	FAIZ-E-A	**Remain "Fake" catego**

						CO	
216.	F991	5075313	SOM DUTT	RAMJI LAL	75	FAIZ-E	**Remain "Fake" category**
217.	F993	5075315	ARJUN	BABOO RAM	75	FAIZ-E	**Remain "Fake" category**
218.	F994	5075316	SATISH KUMAR	MANIK SINGH	75	FAIZ-E	**Remain "Fake" category**
219.	F996	5075318	HEMLATA	MANIK CHAND	75	FAIZ-E	**Remain "Fake" category**
220.	F997	5075319	GYANENT	SHANTI	75	FAIZ-E	**Remain "Fake" category**
221.	F998	5075320	CHANDR	GURUDAYAL SIN	75	FAIZ-E	**Remain "Fake" category**
222.	F999	5075321	DINESH KUMAR	BABOO LAL	75	FAIZ-E	**Remain "Fake" category**
223.	F1000	5075322	REENA KUMARI	RAJ KUMAR	75	FAIZ-E	**Remain "Fake" category**
224.	F1002	5075324	KUSUM	PRATAP SINGH	75	FAIZ-E	**Remain "Fake" category**
225.	F1015	5195116	BABLI	RAM SEWAK	195	GAGAN COLLEGE & TECHNOLOGY, ALIG	**Remain "Fake" category**

226.	F1017	5195118	AJAY	GODHANSINGHYA	195	GAGAN COLLEGE & TECHNOL	**Remain "Fake" category**
227.	F1018	5195119	SUNIL KUMAR	RAM	195	GAGAN COLLEGE & TECHNOL	**Remain "Fake" category**
228	F1	5195121	NAMR	KRISH	195	GAGA	**Rem**
			YADAV	SINGH		COLLEGE & TE	**"Fake" category**
229.	F1021	5195122	BANDANA SHAR	S.R. SHARMA	195	GAGAN COLLEGE & TE	**Remain "Fake" category**
230.	F1022	5195123	UMESH KUAMR	HAKIM SINGH	195	GAGAN COLLEGE & TE	**Remain "Fake" category**
231.	F1024	5195125	DHARMENDRA KUMAR	HARI	195	GAGAN COLLEGE & TE	**Remain "Fake" category**
232.	F1025	5195126	PRIYNKA ARUN	A.K.MAHESHWARI	195	GAGAN COLLEGE & TE	**Remain "Fake" category**
233.	F1028	5195129	SALINI	R. SINGH	195	GAGAN COLLEGE & TE	**Remain "Fake" category**
234.	F1032	5195133	RAM LAKHAN SINGH	ATAR SINGH	195	GAGAN COLLEGE & TE	**Remain "Fake" category**
235.	F1034	5195135	JASWANT SINGH	S.P. SINGH	195	GAGAN COLLEGE & TE	**Remain "Fake" category**
236.	F1035	5195136	SHRINESHKUMAR	INDRAJE	195	GAGAN COLLEGE & TE	**Remain "Fake" category**
237.	F1036	5195137	SANDEE	HOTILAL	195	GAGAN COLLEGE & TE	**Remain "Fake" category**
238.	F1037	5195138	BED PRAKASH	JAGDISH	195	GAGAN COLLEGE & TE	**Remain "Fake" category**
239.	F1039	5195140	ARCHANA	MEVA	195	GAGAN	**Rem**
						MANAGEMENT &	
240.	F1040	5195141	ANJALIPA	K.P. PARASAR	195	GAGAN COLLEGE & TE	**Remain "Fake" category**
241.	F1042	5195143	RAM PRAKASH SISHODIYA	RADHEY	195	GAGAN COLLEGE & TE	**Remain "Fake" category**

242.	F1043	5195144	YASHODA	HUKUM SINGH	195	GAGAN COLLEGE & TE	**Remain "Fake" category**
243.	F1044	5195145	SURESH CHAND	MOTI LAL	195	GAGAN COLLEGE & TE	**Remain "Fake" category**
244.	F1045	5195146	BHOOP SINGH	HAKIM SINGH	195	GAGAN COLLEGE & TE	**Remain "Fake" category**
245.	F1047	5195148	MUKUL KUMAR	LAXMI SINGH	195	GAGAN COLLEGE & TE	**Remain "Fake" category**
246.	F1048	5195149	VISHAL SINGH	AMAR SINGH	195	GAGAN COLLEGE & TE	**Remain "Fake" category**
247.	F1049	5195150	OM PRAKASH SINGH	FAGUNI SINGH	195	GAGAN COLLEGE & TE	**Remain "Fake" category**
248.	F1050	5014063	SADHANA	S.S.YADAV	14	GANJDUNDWARA	**Remain "Fake" category**
249.	F1063	5014305	ZEENAT ARSHI	ABDUL MAZID	14	GANJDUNDWARA	**Remain "Fake" category**
250.	F1065	5194087	MANOJ KUMAR	KUWAR	194	GRAMODHARMAHAV	**Remain "Fake" category**
251.	F1067	5194089	PRAVENDRA KUMAR	SHISHUPAL SINGH	194	GRAMODHARMAHAVIDHYALAYA,	**Remain "Fake" category**
252.	F1069	5194091	DINESH	RAMRATAN	194	GRAMODHARMAHAV	**Remain "Fake" category**
253.	F1076	5086088	AKHILESH KUMAR	J.P. PATHAK	86	GYANMAHAV	**Remain "Fake"**
254.	F1077	5086089	SUNITA DEVI	NEM SINGH	86	GYANMAHAV	**Remain "Fake"**
255.	F1086	5086116	RANJANA	R.S.S RIVASTAVA	86	GYANMAHAV	**Remain "Fake"**
256.	F1089	5086119	VINOD KUMAR	MUNNA LAL	86	GYANMAHAV	**Remain "Fake"**
257.	F1093	5086123	JAI PRAKASH	MAGH SINGH	86	GYANMAHAV	**Remain "Fake"**
258.	F1094	5086124	DHARMENDRA KUAM	MADAN	86	GYANMAHAV	**Remain "Fake"**
259.	F1095	5086125	NAM SINGH	LAL SINGH	86	GYANMAHAV	**Remain "Fake"**
260.	F1096	5086126	SHALINI KULSHRESH	P.K. KULSHRESHTA	86	GYANMAHAV	**Remain "Fake"**
261.	F1097	5086127	GEETA	RAMVIR SINGH	86	GYANMAHAV	**Remain "Fake"**
262.	F1098	5086128	SHAILJA SINGH	R.P.SINGH	86	GYANMAHAV	**Remain "Fake"**
263.	F1099	5086129	SANGITA YADAV	D.S.YADAV	86	GYANMAHAV	**Remain "Fake"**
264.	F1100	5086130	DHARMENDRA CHAUDHARY	HARDEV SINGH CHAU	86	GYANMAHAVIDHYALAYA,	**Remain "Fake" category**

265.	F1104	5086134	AMIT YADAV	R.P.SINGH	86	GYAN MAHAV	**Remain "Fake"**
266.	F1105	5086135	BHAW	R.S.YADAV	86	GYAN MAHAV	**Remain "Fake"**
267.	F1107	5086137	SANGITA	MAHE	86	GYAN MAHAV	**Remain "Fake"**
268.	F1108	5086138	SUNITA KUMARI	JAGD	86	GYAN MAHAV	**Remain "Fake"**
269.	F1109	5086139	VIJE	OM PRAKASH	86	GYAN MAHAV	**Remain "Fake"**
270.	F1110	5086140	OM PRABHA	KAMAL SINGH	86	GYAN MA	**Remain "Fak**
						AYA, ALIGA	
271.	F1111	5086141	ANIL KUMAR	RAM NIWAS	86	GYAN MAHA VIDHYAL	**Remain "F**
272.	F1112	5086142	BABITA PANDEY	J.P. PANDEY	86	GYAN MAHA VIDHYAL	**Remain "F**
273.	F1116	5086146	SHASHI WALA	DHANI RAM	86	GYAN MAHA VIDHYAL	**Remain "F**
274.	F1117	5086147	HEMEND	SOH	86	GYAN MAHA VIDHYAL	**Remain "F**
275.	F1118	5086148	MAH	SHIV	86	GYAN MAHA VIDHYAL	**Remain "F**
276.	F1120	5086150	SUSHMA	RAJ	86	GYAN MAHA VIDHYAL	**Remain "F**
277.	F1121	5155089	PA	RA	155	IIMT, ALIGARH	**Remain**
278.	F1130	5155118	BHARTI VERMA	A.K. VERMA	155	IIMT, ALIGARH	**Remain**
279.	F1131	5155119	RAJINI	HUBBLAL	155	IIMT, ALIGARH	**Remain**
280.	F1132	5155120	ANUJ KUMAR	SHIV CHA	155	IIMT, ALIGARH	**Remain**
281.	F1137	5155125	MA	KHEM	155	IIMT, ALIGARH	**Remain**
282.	F1138	5155126	ROHINI SINGH	VIJAY	155	IIMT, ALIGARH	**Remain**
283.	F1142	5155130	PR	SOBRAN SIN	155	IIMT, ALIGARH	**Remain**
284.	F1144	5155132	PRA	G.S.FAUJDAR	155	IIMT, ALIGARH	**Remain**
285.	F1149	5155137	YAVNESH	A.K. SINGH	155	IIMT, ALIGARH	**Remain**
286.	F1155	5155143	PUSHPEN DRA	SHIV NAN	155	IIMT, ALIGARH	**Remain**
287.	F1163	5155302	PR	RAM CHA	155	IIMT, ALIGARH	**Remain**
288.	F1164	5155303	GEETA	ML	155	IIMT, ALIGARH	**Remain**
289.	F1165	5155304	PREM SINGH	ML	155	IIMT, ALIGARH	**Remain**
290.	F1166	5155305	MEEN AK	RIS	155	IIMT, ALIGARH	**Remain**
291.	F1167	5155306	CHANDRA PAL	KHYALI RA	155	IIMT, ALIGARH	**Remain**
292.	F1168	5155307	SUVARNA SINGH	C.R.	155	IIMT, ALIGARH	**Remain**
293.	F1169	5155308	APARNA SINGH	C.B. SINGH	155	IIMT, ALIGARH	**Remain**
294.	F1170	5155309	KAVITA KHAIR	AMAR SIN	155	IIMT, ALIGARH	**Remain**
295.	F1173	5155312	LOKESH BABU	MA	155	IIMT, ALIGARH	**Remain**
296.	F1176	5155315	VIJ	BHEO	155	IIMT, ALIGARH	**Remain**
297.	F1181	5155320	NA	RAJ KUMAR	155	IIMT, ALI	**Remain**
298.	F1183	5155322	ANITA	MAH	155	IIMT, ALI	**Remain**
299.	F1184	5155323	UP	SH	155	IIMT, ALI	**Remain**
300.	F1185	5155324	JYOTI PATHAK	ASHOK	155	IIMT, ALIGARH	**Remain "Fake"**

301.	F1186	5155325	RITU VERMA	RAD	155	IIMT, ALL	**Remain "Fake"**
302.	F1187	5204086	KM. PANKAJ	INDER	204	J.S. EDUC	**Remain "Fake"**
303.	F1191	5204090	VINEET KUMAR	RAM KRISHNA	204	J.S. EDUC	**Remain "Fake"**
304.	F1193	5204092	INDU PRABHA	YOGENDRAKU	204	J.S. EDUC	**Remain "Fake"**
305.	F1194	5204093	YATENDRA KUMAR	JANAK SINGH YADAV	204	J.S. EDUC	**Remain "Fake"**
306.	F1195	5204094	RANU PONWAR	SHYAMVIR	204	J.S. EDUC	**Remain "Fake"**
307.	F1199	5204303	RANVE	DAYA RAM	204	J.S EDUC	**Remain "Fake"**
308.	F1200	5204304	SUBOD	B.R. CHAND RODAY	204	J.S EDUC	**Remain "Fake"**
309.	F1201	5204305	SUMAN KUMAR CHAU	RAJVIR SINGH	204	J.S EDUC	**Remain "Fake"**
310.	F1258	5265049	TIWAR	RAM	256	JAY	**Remain "Fake"**
311.	F1268	5265059	RAJESH KUMAR	HAR	265	JAY	**Remain "Fake"**
312.	F1274	5265065	SATY	RANJ	265	JAY	**Remain "Fake"**
						FIROZABAD	
313.	F1278	5265069	UMESH BABU	BHIKAM SINGH	265	JAY	**Remain "Fake" Category**
314.	F1290	5265081	YADUVIR SINGH	RAJVIR SINGH	265	JAY	**Remain "Fake" Category**
315.	F1297	5265088	CHANDRA	GANPATI RAM	265	JAY	**Remain "Fake" Category**
316.	F1355	5265149	SUBASH BABOO	GIRESH BABOO	265	JAY	**Remain "Fake" Category**
317.	F1358	5019304	NEEL	D.S. PANDEY	19	K.R.	**Remain "Fake" Category**
318.	F1374	5129094	TARUN PRATAP SIN	RAM PRAKASH SINGH CHAU	129	K.R. TEACHER TRAINING	**Remain "Fake" Category**
319.	F1407	5129127	NAREN	SUMAN SHYAM SINGH	129	K.R. TEACHER TRAINING	**Remain "Fake" Category**
320.	F1433	5129305	AJAY KUMAR	ASHO	129	K.R. TEACHER TRAINING	**Remain "Fake" Category**

321.	F1436	5129308	RAKSHARAM	RAMLAL	129	K.R. TEACHER TRAINING	**Remain "Fake" Category**
322.	F1437	5129309	DINESHKUMAR	RATAN SINGH	129	K.R. TEACHER TRAINING	**Remain "Fake" Category**
323.	F1438	5129310	SUMAN	HANUM	129	K.R. TEACHER TRAINING	**Remain "Fake" Category**
324.	F1439	5129311	INDRISH KHAN	AHLKAR KHAN	129	K.R. TEACHER TRAINING	**Remain "Fake" Category**
325.	F1440	5129312	RAKES	DEVI	129	K.R. TEACHER TRAINING	**Remain "Fake" Category**
326.	F1458	5223018	JAYPAL	BHOMSAIN	223	KEHRIMAL GAUTAM SMARAK	**Remain "Fake" Category**
327.	F1499	5223059	ARVINDKUMA	HARI	223	KEHRIMAL GAUTAM SMARA	**Remain "Fake" Category**

						AYA,	
328.	F1561	5223124	SATYA	INDRA JEET SINGH	223	KEHRIMAL GAUTAM SMA	**Remain "Fake"**
329.	F1588	5193085	ANKIT KUMAR	M.S. VERMA	193	KHER KANYA MA	**Remain "Fak**
330.	F1590	5193087	SHASHI	RAM SANAHI	193	KHER KANYA MA	**Remain "Fak**
331.	F1595	5193092	SWET	DAYA SHANKER DAUNERIA	193	KHER KANYA MA	**Remain "Fak**
332.	F1603	5193117	SEEMA RAY	BRIJ KISHOR RAY	193	KHER KANYA MA	**Remain "Fak**
333.	F1605	5193119	SUNE	G.S. SHARMA	193	KHER KANYA MA	**Remain "Fak**
334.	F1610	5193124	REKHA	DHARAM SINGH	193	KHER KANYA MA	**Remain "Fak**
335.	F1612	5193126	MITHL	RAM	193	KHER KANYA MA	**Remain "Fak**
336.	F1615	5193129	SARITA	BHAGWAN DAS	193	KHER KANYA MA	**Remain "Fak**
337.	F1616	5193130	ARCHANA	SURESH CHANDRA	193	KHER KANYA MA	**Remain "Fak**
338.	F1621	5193135	NEELA	MAHIPAL SINGH	193	KHER KANYA MA	**Remain "Fak**
339.	F1622	5193136	PROE	A.K. MISHRA	193	KHER KANYA MA	**Remain "Fak**
340.	G1623	5193137	SANGEETA DEVI	JAWAHER LAL SINGH	193	KHER KANYA MA	**Remain "Fak**
341.	F1632	5193146	SUNITA SHAKYA	MUNNI LAL	193	KHER KANYA MA	**Remain "Fak**
342.	F1633	5193147	MAMTA	GANGA SINGH	193	KHER KANYA MA	**Remain "Fak**
343.	F1635	5193149	PUSHP	R.K. SRIVASTAVA	193	KHER	**Remain "Fak**

						AYA,	
344.	F1638	5024302	NEER	UMA SHANKA	24	KR.	**Remain "Fake" Catego**
345.	F1645	5188088	PRATIBH	R.B. SARSWAT	188	KRISHNA COLLEGE	**Remain "Fake" Category**
346.	F1656	5188117	HITESH KUMAR SINGH	CHHTRA	188	KRISHNA COLLEGE	**Remain "Fake" Category**
347.	F1657	5188118	MANGAL SAIN	OMKAR SINGH	188	KRISHNA COLLEGE	**Remain "Fake" Category**
348.	F1659	5188120	RAJESH KUMAR	SHRIPAL SINGH	188	KRISHNA COLLEGE	**Remain "Fake" Category**
349.	F1660	5188121	VIJENDR	NATRAPA	188	KRISHNA COLLEGE	**Remain "Fake" Category**
350.	F1662	5188123	VIJAY SINGH	RAM KHILARI	188	KRISHNA COLLEGE	**Remain "Fake" Category**
351.	F1663	5188124	PUSH PENDRA SINGH	RAM DAS	188	KRISHNA COLLEGE	**Remain "Fake" Category**
352.	F1668	5188129	SOHAN RANA	U.S. RANA	188	KRISHNA COLLEGE	**Remain "Fake" Category**
353.	F1669	5188130	VIMAL SHARMA	R.P. SHARMA	188	KRISHNA COLLEGE	**Remain "Fake" Category**
354.	F1672	5188130	SHIVA	R.P. TIWARI	188	KRISHNA COLLEGE	**Remain "Fake" Category**
355	F1674	5188135	SHASHI KALA	RAV	188	KRISHNA	**Remai**
				MISHRA		COLLEGE	**"Fake" Category**
356.	F1679	5188140	MEENA KUMARI	M.I. SAGAR	188	KRISHNA COLLEGE	**Remain "Fake" Category**
357.	F1691	5188303	MAHESH	UMA SHANKAR SHARMA	188	KRISHNA COLLEGE	**Remain "Fake" Category**
358.	F1692	5188304	RAVINDRA KUMA	SUGREE	188	KRISHNA COLLEGE	**Remain "Fake" Category**
359.	F1694	5188306	SEEMA DEVI	BALBIR SINGH	188	KRISHNA COLLEGE	**Remain "Fake" Category**

360.	F1696	5188308	ANJU YADAV	KAYAM SINGH	18	KRISHNA COLLEGE	**Remain "Fake" Category**
361.	F1697	5188309	SEEMA YADAV	RAM KISHOR	18	KRISHNA COLLEGE	**Remain "Fake" Category**
362.	F1700	5188312	ROHITA	VISHAM BHAR	18	KRISHNA COLLEGE	**Remain "Fake" Category**
363.	F1714	5147116	NARES	KALI CHARAN	147	KRISHNA COLLEGE, BAMR	**Remain "Fake" Category**
364.	F1715	5147117	CHETANARYA	BHARAT SINGH VERMA	147	KRISHNA COLLEGE, BAMR	**Remain "Fake" Category**
365.	F1717	5147119	RAGINI SINGH	NATHI LAL	147	KRISHNA COLLEGE, BAMR	**Remain "Fake" Category**
366.	F1720	5147122	SAUB	C.P. SINGH	147	KRISHNA COLLEGE, BAMR	**Remain "Fake" Category**
367.	F1725	5147122	SAUB	C.P. SINGH	147	KRIS	**Remain "Fake" Catego**
						KATARA	
368.	F1726	5147127	NEEL	JADISH CHANDR	147	KRISHNA COLLEG	**Remain "Fake" Category**
369.	F1729	5147131	VIPIN	DILIP SINGH YADAV	147	KRISHNA COLLEGE, BA	**Remain "Fake" Category**
370.	F1746	5147148	SUSH	S.N. SARASWAT	147	KRISHNA COLLEG	**Remain "Fake" Category**
371.	F1751	5147304	SARSWATI	DIWALI	147	KRISHNA COLLEG	**Remain "Fake" Category**
372.	F1752	5147305	SUMI	R.C. GAUTAM	147	KRISHNA COLLEG	**Remain "Fake" Category**
373.	F1763	5147316	SATIS	BALVIR SINGH	147	KRISHNA COLLEG	**Remain "Fake" Category**
374.	F1769	5189088	SHYAM JEEVAN	CHHOTE LAL	189	M.D. COLLEGE	**Remain "Fake" Catego**
375.	F1771	5189090	ANGURI DEVI	JAY PAL SINGH	189	M.D. COLLEGE	**Remain "Fake" Catego**
376.	F1779	5189098	MUK	JAI	189	M.D. COLLEGE	**Remain "Fake" Catego**
377.	F1784	5189304	SHA	BAL KISHAN	189	M.D. COLLEGE	**Remain "Fake" Catego**
378.	F1808	5126096	KUSHAL	RAM SINGH	126	MEGH	**Remain "Fake" Category**
379.	F1836	5126141	CHANDRA	NARAYAN SINGH	126	MEGH	**Remain "Fake" Category**
380.	F1846	5126301	LAXMI DUBEY	K.N. DUBEY	126	MEGH	**Remain "Fake" Category**
381.	F1847	5126302	VIMAL KUMAR	SAVRAM	126	MEGH	**Remain "Fake" Category**

382.	F1848	5126303	GOVIND	RAM JI LAL	126	MEGH	**Remain "Fake" Category**
383.	F1851	5126306	KAMAL	TORAM SINGH	126	MEGH	**Remain "Fake"**

						COLLEGE, AVI	
384.	F1865	5237086	NEELA	RAMESH	237	MOTHER	**Remain "Fake" Category**
385.	F1875	5237118	RADHA	OM PRAKASH SHAR	237	MOTHER	**Remain "Fake" Category**
386.	F1877	5237120	REETA YADAV	RAGHUVIR SINGH	237	MOTHER	**Remain "Fake" Category**
387.	F1881	5237124	VANDA	R. S. SRIVAS	237	MOTHER	**Remain "Fake" Category**
388.	F1882	5237125	REEKH	KHEMKARAN SINGH	237	MOTHER	**Remain "Fake" Category**
389.	F1885	5237128	MACHALESH	RAJARAM	237	MOTHER	**Remain "Fake" Category**
390.	F1886	5237129	MOHANDEVI	RAM SAROOP	237	MOTHERTERI	**Remain "Fake" Category**

391.	F1887	5237130	REKHA KUMARI	MANIK CHAND	237	MOTHER	**Remain "Fake" Category**
392.	F1890	5237133	CHAMELI	DATARAM	237	MOTHER	**Remain "Fake" Category**
393.	F1891	5237134	ANITA	HORI LAL	237	MOTHER	**Remain "Fake" Category**
394.	F1896	5237140	MEENA	BIHARI LAL	237	MOTHER	**Remain "Fake" Category**
395.	F1907	5011077	MAHESH	KHUBI RAM	11	P.C.BAGL	**Remain "Fake"**
396.	F1908	5011078	AJAY	C K SHARMA	11	P.C.BAGL	**Remain "Fake"**
397.	F1909	5011079	NEERU	VINOD KUMAR	11	P.C.BAGLA	**Remain**

						CO	**"Fake" Category**
398.	F1912	5011082	SAND	RAM S ANEHI SAXENA	11	P.C	**Remain "Fake"**
399.	F1913	5011083	MANOJ KUMA	NEK	11	P.C	**Remain "Fake"**
400.	F1916	5011102	RAJESH	RAM DAS	11	P.C	**Remain "Fake"**
401.	F1917	5011103	SANDHYA	MALKHAN SING	11	P.C	**Remain "Fake"**
402.	F1919	5011105	RENU SHARM	G.D. SHARMA	11	P.C	**Remain "Fake"**

403.	F1923	5011109	ATIVEER	KAPTAN SINGH	11	P.C	**Remain "Fake" Catego**
404.	F1931	5011303	RAJESH VERMA	NARAYAN SIN	11	P.C	**Remain "Fake" Catego**
405.	F1968	5146085	DHARMENDR	GYANENDRA SINGH	146	R.B.	**Remain "Fake" category**
406.	F1989	5146306	PANKAJKUMAR	SATYAPRAK	146	R.B.	**Remain "Fake" categ**
407.	F1990	5146307	BALVEER SINGH	SAHAB SINGH	146	R.B.	**Remain "Fake" category**
408.	F1991	5146308	ANITA	SARVAN SINGH	146	R.B.	**Remain "Fake" categ**
409.	F1993	5146310	RAJVIR SINGH	SURAJ PAL	146	R.B.	**Remain "Fake" category**
410.	F1994	5146311	REETA	LAJJA RAM	146	R.B.	**Remain "Fake" categ**
411.	F1997	5002301	PRABHAT ARY	S.C. ARYA	2	R.B	**Remain "Fake" catego**
412.	F2034	5145132	PRASH	PARMANAND YADAV	145	R.K. COLLEGE OF SYS	**Remain "Fake" category**
413.	F2038	5145136	ASHU	BHART SINGH	145	R.K. COLLEGE OF SYS	**Remain "Fake" categ**
414.	F2052	5145303	RENU KATI	S.C. KATIYAR	145	R.K. COLLEGE OF SYSTEM & MANAGEME	**Remain "Fake" category**
415.	F2057	5145308	DINESH KUMAR	HUKUM SINGH	145	R.K. COLLEGE	**Remain**
						OF SYSTEM & MANAG	**"Fake" category**
416.	F2058	5145309	RISHI KUMAR	RAJVIR SINGH	145	R.K. COLLEGE OF SYSTEM &	**Remain "Fake"**
417.	F2059	5145310	DHARM	JAWAH	145	R.K. COLLEGE OF SYSTEM &	**Remain "Fake" categ**
418.	F2063	5145314	PUSHPEND	NATHU SINGH	145	R.K. COLLEGE OF SYSTEM &	**Remain "Fake"**
419.	F2066	5102251	ANAND KUMAR	VED RAM	102	R.K. GUPTA MEM. INST. OF TECH. &	**Remain "Fake" categ**
420.	F2067	5102252	AKHANDPRA	NATHU SINGH RATH	102	R.K. GUPTA MEM. INST. OF TECH. &	**Remain "Fake"**
421.	F2071	5102256	KARAN SINGH	BAL KUKAND	102	R.K. GUPTA MEM. INST. OF TECH. &	**Remain "Fake" categ**
422.	F2073	5102258	LOKE	K.C. VERMA	102	R.K. GUPTA MEM. INST. OF TECH. &	**Remain "Fake"**
423.	F2074	5102259	SONU SHARMA	BHAGW	102	R.K. GUPTA MEM. INST. OF TECH. &	**Remain "Fake" categ**
424.	F2078	5102263	HARENDRA PAL SINGH	LAXM	102	R.K. GUPTA MEM. INST. OF TECH. &	**Remain "Fake"**
425.	F2081	5102266	MOHD.	MOHD. IDRIS	102	R.K. GUPTA MEM. INST. OF TECH. &	**Remain "Fake" categ**

426.	F2082	5102267	SHIV	TEJ SINGH	102	R.K. GUPTA MEM. INST. OF TECH. &	**Remain "Fake" categ**
427.	F2084	5102269	RUPEN	MAHAV	102	R.K. GUPTA MEM. INST. OF TECH. &	**Remain "Fake" categ**
428.	F2086	5102271	SHIV	TEJ SINGH	102	R.K. GUPTA MEM. INST. OF TECH. &	**Remain "Fake" categ**
429.	F2087	5102272	RUPEN	KAPTAN SINGH	102	R.K. GUPTA MEM. INST. OF TECH. &	**Remain "Fake" categ**
430.	F2090	5102275	LAKE	RAME	102	R.K. GUPTA MEM. INST. OF TECH. &	**Remain "Fake"**
431	F2094	5102279	SUBHASH	BHARAT	102	R.K.	**Rem**

			CHAND			MEM.IN	**"Fake" category**
432.	F2095	5102280	ANJALI	VISHN	102	R.K. GUPTA	**Remain "Fake"**
433.	F2096	5102280	ANJALI	VISHNU	102	R.K. GUPTA	**Remain "Fake" categ**
434.	F2097	5102282	MAMTA SINGH	PORAN SINGH	102	R.K. GUPTA	**Remain "Fake"**
435.	F2100	5102285	DAKAS	JAI PRAKASH BHARD	102	R.K. GUPTA	**Remain "Fake" categ**
436.	F2101	5102286	UMA KUMARI	JAGDISH	102	R.K. GUPTA MEM.	**Remain "Fake" category**

437.	F2102	5102287	REKHA	VIJENDR	102	R.K. GUPTA	**Remain "Fake" categ**
438.	F2103	5102288	ALPNA SHARMA	REEMESH	102	R.K. GUPTA	**Remain "Fake"**
439.	F2107	5102292	MANOJ KUMAR SHAR	CHANDRA PAL SHARMA	102	R.K. GUPTA	**Remain "Fake" categ**
440.	F2109	5102294	SHIV	VIJAY	102	R.K. GUPTA	**Remain "Fake"**
441.	F2111	5102296	DINESH KUMAR	DEVI CHARAN GUPTA	102	R.K. GUPTA	**Remain "Fake" categ**
442.	F2115	5102300	SARITA RANI	VIJEND	102	R.K. GUPTA	**Remain "Fake"**
443.	F2116	5207084	YOGE	DHARDHAR	207	R.S.S.C	**Remain "Fake"**
444.	F2119	5207087	MANO	RAM PRAKASH YADAV	207	R.S.S.C	**Remain "Fake"**
445.	F2121	5207089	RAVI CHAUHAN	KRISHNA AVATAR	207	R.S.S.C	**Remain "Fake"**
446.	F2122	5207090	SUSHILA	AVAD	207	R.S.S.C	**Remain "Fake"**
447.	F2124	5207092	DISH	DIPENDR	207	R.S.S.C	**Remain "Fake"**
448.	F2129	5233087	MITHLESH	GYA PRASAD	223	RA	**Rem**

						N	**"Fake" category**

449.	F2135	5233118	SUMAN LATA	MEGH SINGH	233	RADHA KRISHAN	**Remain "Fake" category**
450.	F2137	5233120	REENA KUMARI	R.S.VARSHNEY	233	RADHA KRISHAN	**Remain "Fake" category**
451.	F2138	5233121	REENA	GORDHA	233	RADHA KRISHAN	**Remain "Fake" category**
452.	F2139	5233122	SNEHLAT	R.A.GAUTAM	233	RADHA KRISHAN	**Remain "Fake" category**
453.	F2146	5233129	NEETU SINGH	GOPI CHAND	233	RADHA KRISHAN	**Remain "Fake" category**
454.	F2150	5233133	MANJU V	R.C.VIDYARTHI	233	RADHA KRISHAN	**Remain "Fake" category**
455.	F2176	5222089	ANIL KUMAR	DWARIK	222	RAGHUVEER SARAN DEGREE	**Remain "Fake" category**
456.	F2179	5222092	SANJAY KUMAR	AJAB SINGH	222	RAGHUVEER SARAN DEGREE COLLEGE, SIKANDR	**Remain "Fake" category**
457.	F2190	5222122	0	0	222	RAGHUVEER SARAN DEGREE	**Remain "Fake" category**
458.	F2199	5222131	ARVIND KUMAR	JAGDISH	222	RAGHUVEER SARAN DEGREE	**Remain "Fake" category**
459.	F2200	5222132	RAKESH	BABU LAL	222	RAGHUV	**Remain "Fake"**

						DEGRE	
460.	F2202	5222134	MANOJ KUMAR	HAMRAJ	222	RAGHUVEER SARA	**Remain "Fake" category**
461.	F2203	5222135	ANIL KUMAR	KESHAV DEV	222	RAGHUVEER SARA	**Remain "Fake" category**
462.	F2204	5222136	TARUN KUMAR	SURESH	222	RAGHUVEER SARA	**Remain "Fake" category**
463.	F2205	5222137	SUBHAS	KHACHER MAL	222	RAGHUVEER SARA	**Remain "Fake" category**
464.	F2215	5222147	RAVI PRAKASH	MATADIN	222	RAGHUVEER SARAN DE	**Remain "Fake" category**

465.	F2221	5222223	KUMMED BABU	RAM SEWAK	222	RAGHUVEER SARA	**Remain "Fake" category**
466.	F2232	5222234	ASLAM	MOHD RAFEEK	222	RAGHUVEER SARA	**Remain "Fake" category**
467.	F2239	5222241	NIHAL SINGH	TETRA	222	RAGHUVEER SARA	**Remain "Fake" category**
468.	F2262	5277120	ANIL YADAV	TARA	277	RAJIV ACADEMY FOR TEACHERS	**Remain "Fake" category**
469.	F2264	5277122	MONIKA	C.M. RAJPUR	277	RAJIV ACADEMY FOR TEACHERS	**Remain "Fake" category**
470.	F2265	5277123	VIJAY KUMARI	MAHEND	277	RAJIV ACADEMY FOR TEACHERS	**Remain "Fake" category**

471.	F2266	5277124	DHRAM	SITARAM SHARM	277	RAJIV ACADEMY FOR TEACHERS EDUCAT	**Remain "Fake" categ**
472.	F2267	5277125	VINOD KUMAR SINGH	VIREN	277	RAJIV ACADEMY FOR TEACHERS EDUCAT	**Remain "Fake" categ**
473.	F2270	5277128	MOHAN	SEWA	277	RAJIV ACADEMY FOR TEACHERS EDUCATION,	**Remain "Fake" category**

474.	F2274	5277132	SUBHA	ISLAM	277	RAJIV ACADEMY FOR TEACHERS EDUCAT	**Remain "Fake" categ**
475.	F2293	5277301	SANJAY KUMAR	PRATAP SINGH	277	RAJIV ACADEMY FOR TEACHERS EDUCAT	**Remain "Fake" categ**
476.	F2294	5277302	HAMBIR SINGH	P.S.SHIKAWAR	277	RAJIV ACADEMY FOR TEACHERS EDUCAT	**Remain "Fake" categ**
477.	F2296	5277304	NEEROO	AJAY	277	RAJIV ACADEMY FOR TEACHERS EDUCAT	**Remain "Fake" categ**
478.	F2297	5277305	KAMAL SINGH	CHANDRA PAL SIN	277	RAJIV ACADEMY FOR TEACHERS EDUCAT	**Remain "Fake" categ**
479.	F2305	5277313	KALPA	JAI	277	RAJIV ACADEMY FOR TEACHERS EDUCAT	**Remain "Fake" categ**
480.	F2307	5104084	PREM SINGH	RAJE	104	RAJIV ACADEMY FOR TECH &	**Remain "Fake"**
481.	F2309	5104086	KALPA	K.C. MISHRA	104	RAJIV ACADEMY FOR TECH &	**Remain "Fake" categ**
482.	F2323	5104121	REENA	MAHE	104	RAJIV ACADEMY FOR TECH &	**Remain "Fake"**
483.	F2324	5104122	ASHISH	DRAGPAL SI	104	RAJIV ACADEMY FOR TECH & MGT., MATHURA	**Remain "Fake" category**

484.	F2325	5104123	SAVITA	MAHES	104	RAJIV ACADEMY FOR TECH &	**Remain "Fake" categ**
485.	F2327	5104125	JODHAN SINGH	HARD	104	RAJIV ACADEMY	**Remain "Fake" categ**
486.	F2328	5104126	SUNIL KUMAR	P.D. YADAV	104	RAJIV ACADEMY	**Remain "Fake" categ**
487.	F2330	5104128	AMIT SINGH	SANJAY SINGH	104	RAJIV ACADEMY	**Remain "Fake" categ**
488.	F2331	5104129	HEMAN	KESHAV DEV	104	RAJIV ACADEMY	**Remain "Fake" categ**
489.	F2333	5104131	HARENDR	LOKM	104	RAJIV ACADEMY	**Remain "Fake" categ**
490.	F2336	5104134	RAGHUVENDRA PRATAP SINGH	R.B.SINGH	104	RAJIV ACADEMY	**Remain "Fake" categ**
491.	F2337	5104135	VANDANA	SUDH	104	RAJIV ACADEMY	**Remain "Fake" categ**
492.	F2338	5104136	BHOOP SINGH	BEHERI LAL	104	RAJIV ACADEMY	**Remain "Fake" categ**
493.	F2339	5104137	PREM	OM PRKASH	104	RAJIV ACADEMY	**Remain "Fake" categ**
494.	F2343	5104141	VIRENDRA PRATAP MISHRA	MAHENDRA PAL	104	RAJIV ACADEMY FOR TECH & MGT	**Remain "Fake" category**
495.	F2346	5104144	SUBO	YOGE	104	RAJIV ACADEMY	**Remain "Fake" categ**
496.	F2368	5185124	SADHAN	D.P. SINGH	185	RAMESHWARI DEVI	**Remain "Fake" category**
497.	F2392	5185148	MANJU	NATHU SINGH KUSHWAHA	185	RAMESHWARI DEVI	**Remain "Fake" category**
498.	F2394	5185150	MAYA PRAKASH	CHANDRA PAL SINGH	185	RAMESHWARI DEVI	**Remain "Fake" category**
499.	F2396	5210082	SACHIN	R.K.GUPTA	210	S.M. DEGREE COLLEG	**Remain "Fake" categ**
500.	F2397	5210083	OMVEER SINGH	SO	210	S.M. DEG	**Remain "Fak**
						DU	
501.	F2401	5210087	MANJU TOMAR	RAM NIWAS TOMAR	210	S.M. DEGREE COLLEG	**Remain "Fake" categ**
502.	F2402	5210088	JATIPAL SINGH	HARVIR SINGH	210	S.M. DEGREE COL	**Remain "Fak"**
503.	F2403	5210089	RAM BAHADUR	SAGAR SINGH	210	S.M. DEGREE COL	**Remain "Fak"**
504.	F2404	5210090	SEEMA YADAV	V.S. YADAV	210	S.M. DEGR	**Remain "Fak"**
505.	F2420	5210160	SURENDRA PAL	RAM SAHAY	210	S.M. DEGREE COL	**Remain "Fak"**
506.	F2421	5007087	SNEH LATA	R.C. CHAUHAN	7	S. R	**Remain "Fak"**

507.	F2422	5007088	BIJ	RAM DAS	7	S.R	**Remain "Fake"**
508.	F2423	5007089	KASHMIRI	SON PAL	7	S.R	**Remain "Fake"**
509.	F2424	5007090	SUSHIL KUMAR	RAM CHARAN LAL	7	S.R	**Remain "Fake"**
510.	F2428	5007094	RAJESH KUMAR	DULI CHAND	7	S.R	**Remain "Fake"**
511.	F2435	5007116	JITE	UDAY	7	S.R	**Remain "Fake"**
512.	F2437	5007304	HARIYEN	MAHENDRA PAL	7	S.R	**Remain "Fake"**
513.	F2438	5007305	SAND	BACHCHU	7	S.R	**Remain "Fake"**
514.	F2439	5007306	SAT	RAMHARI	7	S.R	**Remain "Fake"**
515.	F2445	5007312	HAR	GYAN SINGH	7	S.R	**Remain "Fake"**
516.	F2480	5650085	BRAJ RAJ SINGH	HAKIM SINGH	650	S.S. COLLEGE	**Remain "Fake"**
517.	F2487	5009112	RAJEEV KUMA	SHIV	9	S.V. COL	**Remain "Fake"**
518.	F2490	5009115	ARC	R.K. SAGAR	9	S.V. COLLEG	**Remain "Fake"**
519.	F2491	5009116	HARI PRASAD	GAJJRAJ SINGH	9	S.V. COL	**Remain "Fake"**
520.	F2492	5009303	YOG	RAMVIR SINGH	9	S.V. COLLEG	**Remain "Fake"**
521.	F2497	5009308	NE	KAMAL SINGH	9	S.V. COL	**Remain "Fake"**
522.	F2499	5009310	VIVEK	MAL KHA	9	S.V. COL	**Remain "Fake"**
523.	F2500	5009311	HEMA	KIS	9	S.V. COLLEG	**Remain "Fake"**
524.	F2511	5231091	MANJURANI	PHOOL SINGH	231	SANT RAMKRISHANKANYA	**Remain "Fake" Category**
525.	F2512	5231092	SUSHMA	PRITAM ISNGH	231	SANT RAMKRISHANKANYA	**Remain "Fake" Category**
526.	F2515	5074054	JAGAT SING	MAHA NAND SINGH	74	SARVODAYA MAHAVIDH	**Remain "Fake" Category**
527.	F2518	5074057	ABHIS	SHIV SINGH	74	SARVODAYA MAHAVIDH	**Remain "Fake" Category**
528.	F2523	5074062	PUNEETKU	MAHAVIR SINGH	74	SARVODAYA MAHAVIDH	**Remain "Fake" Category**
529.	F2527	5074066	UDAI	CHHOTEY SINGH	74	SARVODAYA MAHAVIDH	**Remain "Fake" Category**
530.	F2529	5074068	SURESHKU	SAVAL DAS	74	SARVODAYA MAHAVIDH	**Remain "Fake" Category**
531.	F2539	5074078	ADITY	GANGA SINGH	74	SARVODAYA MAHAVIDH	**Remain "Fake" Category**
532.	F2541	5074080	KALPANA	NAURANGI LAL	74	SARVODAYA MAHAVIDH	**Remain "Fake" Category**

533.	F2547	5074086	VIMLESH	RAM BHAROSE LAL	74	SARVODAYA MAHAVIDH	**Remain "Fake" Category**
534.	F2562	5074110	CHANDRABANSINGH	KHAZANSINGH	74	SARVODAYA MAHAVIDHYALYA, CHAUMUHA, MATHURA	**Remain "Fake" Category**
535.	F2564	5074112	SALINI	OM PRATAP SINGH	74	SARVODAYA MAHAVIDHYALYA, CHAU	**Remain "Fake" Category**
536.	F2565	5074113	REKHA KUMARI	MUNNA	74	SARVODAYA MAHAVIDHYAL	**Remain "Fake" Category**
537.	F2566	5074114	CHANDR	KHEMCHAND SHARMA	74	SARVODAYA MAHAVIDHYAL	**Remain "Fake" Category**
538.	F2567	5074115	RAVI SHANKER	KASHI RAM	74	SARVODAYA MAHAVIDHYAL	**Remain "Fake" Category**
539.	F2580	5074128	JAYAMA	ASHOK	74	SARVODAYA MAHAVIDHYAL	**Remain "Fake" Category**
540.	F2619	5221117	SUSHMA RAN	RAJ PAL SINGH	221	SHANTINIKETA N COLL	**Remain "Fake"**
541.	F2620	5221118	RAJE	R.N. BHASKER	221	SHANTINIKETA N COLL	**Remain "Fake"**
542.	F2622	5221120	SATI	SURENDRA SINGH YADA	221	SHANTINIKETA N COLL	**Remain "Fake"**
543.	F2658	5221306	VISH	DURG SINGH	221	SHANTINIKETA N COLL	**Remain "Fake"**
544.	F2659	5221307	RAM	FAUH	221	SHANTINIKETA N COLL	**Remain "Fake"**
545.	F2666	5221314	SHAS	NATHU	221	SHANTINIKETA N COLL	**Remain "Fake"**
546.	F2667	5221315	SHUSHILA	BISHAMBHAR DAYA	221	SHANTINIKETA N COLL	**Remain "Fake"**
547.	F2669	5221317	RAJESH SAGAR	BABU	221	SHANTINIKETA N COLL	**Remain "Fake"**
548.	F2672	5087085	PUNIT KUMARI	LAL SINGH	87	SHIVDAN SINGH INSTITUTE OF MGMT	**Remain "Fake" Category**
549.	F2673	5087086	SUDHIR KUMAR	CHANDR	87	SHIVDAN SINGH INSTITUTE OF MGMT	**Remain "Fake" Category**
550.	F2675	5087088	NISHAN SINGH	SOHAN LAL	87	SHIVDAN SINGH INSTITUTE OF MGMT.	**Remain "Fake" Category**

551.	F2677	5087090	SHAKUNTALA	MAN SINGH	87	SHIVDAN SINGH INSTITU	**Remain "Fake" Category**
552.	F2686	5087118	SANGRAM	RAGHUVI	87	SHIVDAN SINGH INSTITU	**Remain "Fake" Category**
553.	F2687	5087119	VIBY	DAHARM PAL SINGH TOM	87	SHIVDAN SINGH INSTITU	**Remain "Fake" Category**
554.	F2690	5087122	MITHLES	CHUNILAL	87	SHIVDAN SINGH INSTITU	**Remain "Fake" Category**
555.	F2703	5087135	PRADEEP KUMAR YADAV	DEVENDRA KUMAR YADAV	87	SHIVDAN SINGH INSTITU	**Remain "Fake" Category**
556.	F2709	5087141	NUTAN KUMARI	JAGDISH PRASAD SAHA	87	SHIVDAN SINGH INSTITU	**Remain "Fake" Category**
557.	F2715	5087147	KOMAL SINGH	RAM LAL	87	SHIVDAN SINGH INSTITU	**Remain "Fake" Category**
558.	F2728	5079301	BRAJESH KUM	SAHAB SINGH	79	SHIVDAN SINGH SMRITI COLLEGE, IGL	**Remain "Fake" Category**
559.	F2729	5079302	RAJ KUMARI	BRIJENDR	79	SHIVDAN SINGH SMR	**Remain "Fake" Category**
560.	F2730	5079303	JAYCHANDRA SINGH	HAMIR	79	SHIVDAN SINGH SMR	**Remain "Fake" Category**
561.	F2735	5079308	NIRAJA DIXIT	K.M. DIXIT	79	SHIVDAN SINGH SMR	**Remain "Fake" Category**
562.	F2745	5079318	RADHA RANI	MANIK CHAND	79	SHIVDAN SINGH SMR	**Remain "Fake" Category**
563.	F2746	5079319	LAXMINARAY	JAGDISH PRASAD	79	SHIVDAN SINGH SMRITI COLL	**Remain "Fake" Category**
564.	F2747	5079320	VIKAS	AVNISH CHANDR	79	SHIVDAN SINGH SMRITI COLL	**Remain "Fake" Category**
565.	F2749	5212087	DHARM	HORI LAL	212	SHRI JEE BABA COLL	**Remain "Fake" Category**
566.	F2754	5212092	SHA	MOHAN LAL	212	SHRI JEE BABA COLL	**Remain "Fake" Category**
567.	F2770	5149116	PREM SINGH	BABU LAL	149	SHRI KRISHAN YOGI RAJ MAHA VIDHY	**Remain "Fake" Category**
568.	F2771	5149117	MAMTA CH	GOVIND SINGH FAUJDAR	149	SHRI KRISHAN YOGI RAJ MAHA VIDHYAL A,	**Remain "Fake" Category**

569.	F2773	5149119	SUNIL KUMAR	AZAD SINGH	149	SHRI KRISHAN YOGI RAJ MAHA VIDHY	**Remain "Fake" Category**
570.	F2774	5149120	ANIL KUMAR	JAGJIT SINGH	149	SHRI KRISHAN YOGI RAJ MAHA VIDHY	**Remain "Fake" Category**
571.	F2775	5149121	LALITA YADAV	JAYPAL YADAV	149	SHRI KRISHAN YOGI RAJ MAHA VIDHY	**Remain "Fake" Category**
572.	F2777	5149123	SHELEND	BRAJESH	149	SHRI KRISHAN YOGI RAJ MAHA VIDHY	**Remain "Fake" Category**
573.	F2805	5149302	ALDRIL	MURARI LAL	149	SHRI KRISHAN YOGI RAJ MAHA VIDHY	**Remain "Fake" Category**
574.	F2808	5149305	SANTOSH	SURESH CHAN	149	SHRI KRISHAN YOGI RAJ MAHA VIDHY	**Remain "Fake" Category**
575.	F2810	5149307	PRIYANKA	RAJN	149	SHRI KRISH	**Remain "Fake"**
						MAHAVIDHYALA, RATIBHANPUR,	
576.	F2812	5149309	RAJESH KUMAR	MAN SINGH	149	SHRI KRISHAN YOGIRAJ MAHAVIDHYAL	**Remain "Fake" Category**
577.	F2815	5149312	SUREND	MANGELAL	149	SHRI KRISHAN YOGIRAJ MAHAVIDHYAL	**Remain "Fake" Category**
578.	F2820	5225086	MAMTA YADAV	M.L. YADAV	225	SHRI RADHAGOVIND MAHAVIDHYALAYA,	**Remain "Fake" Category**
579.	F2821	5225087	LAKHAN SINGH	BHAGWA	225	SHRI RADHAGOVIND MAHAVIDHYALAYA	**Remain "Fake" Category**
580.	F2822	5225088	DIVAKER	SATISH	225	SHRI RADHAGOVIND MAHAVIDHYALAYA,	**Remain "Fake" Category**
581.	F2831	5225118	MANOJ KUMAR	RAJEND	225	SHRI RADHAGOVIND MAHAVIDHYALAYA	**Remain "Fake" Category**
582.	F2833	5225120	SAURABH	N.K. BISHNOI	225	SHRI RADHAGOVIND MAHAVIDHYALAYA,	**Remain "Fake" Category**
583.	F2836	5225123	ANOOP KUMAR	KISHOR	225	SHRI RADHAGOVIND MAHAVIDHYALAYA	**Remain "Fake" Category**
584.	F2839	5225126	SANTOSH K	MAHAVIRS	225	SHRI RADHAGOVIND MAHAVIDHYALAYA, HERAPUR	**Remain "Fake" Category**

585.	F2840	522127	SHASHI	RAJARA	225	SHRI RADHAGOVIND MAHAVIDHYALAYA	**Remain "Fake" Category**
586.	F2842	5225129	SUNITA TRIVEDI	K.N. TRIVEDI	225	SHRI RADHAGOVIND MAHAVIDHYALAYA, HERAPUR GOPI, ALIGARH	**Remain "Fake" Category**
587.	F2843	5225130	ALOK GOEL	MAHENDRA PAL GOEL	225	SHRI RADHAGOVIN	**Remain "Fake" Category**
588.	F2844	5225131	NABAB SINGH	SUBEDAR	225	SHRI RADHAGOVIN	**Remain "Fake" Category**
589.	F2846	5225133	MAHESH	RAM SANEHI	225	SHRI RADHAGOVIN	**Remain "Fake" Category**
590.	F2847	5225134	MANOJ SINGH	MOHAN SINGH	225	SHRI RADHAGOVIND MAHAVIDHYALAYA, HER	**Remain "Fake" Category**
591.	F2848	5225135	SHESH	ISHWAR DAYAL	225	SHRI RADHAGOVIN	**Remain "Fake" Category**
592.	F2849	522136	VIRENDR	****** SINGH	225	SHRI RADHAGOVIN	**Remain "Fake" Category**
593.	F2850	522137	DALVEE	BASDEV SINGH	225	SHRI RADHAGOVIN	**Remain "Fake" Category**
594.	F2852	522139	MANISH KUMAR SINGH YADAV	SUSHIL KUMAR SINGH	225	SHRI RADHAGOVIN	**Remain "Fake" Category**
595.	F2855	522142	JYOTI	S.P. KHAIR	225	SHRI RADHAGOVIN	**Remain "Fake" Category**
596.	F2857	522144	NEELAM	OM PRAKASH SINGH	225	SHRI RADHAGOVIN	**Remain "Fake" Category**
597.	F2858	5225145	KAVITA JADON	OM PRAKASH	225	SHRI RADHAG	**Remain "Fake" Category**
						AYA, HER	
598.	F2861	5225148	REKHA YADAV	K.V. SINGH	225	SHRI RADHAGOVIN D MA	**Remain "Fake" Category**

599.	F2863	5225150	MONA GUPTA	GOPAL GUPTA	225	SHRI RADHAGOVIN	**Remain "Fake" Category**
600.	F2870	5239092	SADHNA	GULAB SINGH SIKARBAR	239	SIR ETAH	**Remain "Fake" Category**
601.	F2887	5239126	GUDDI	RAM	239	SIR ETAH	**Remain "Fake" Category**
602.	F2888	5239127	REKHA RANI	RATAN KUMAR	239	SIR ETAH	**Remain "Fake" Category**
603.	F2890	5239129	GYANEN	BHUP SINGH	239	SIR ETAH	**Remain "Fake" Category**
604.	F2891	5239130	MEENA KUMARI	MAHEND	239	SIR ETAH	**Remain "Fake" Category**
605.	F2894	5239133	SUNITA	CHANDR	239	SIR ETAH	**Remain "Fake" Category**
606.	F2895	5239134	MITHLE	RAM	239	SIR ETAH	**Remain "Fake" Category**
607.	F2896	5239135	GULAN SINGH	RAM	239	SIR ETAH	**Remain "Fake" Category**
608.	F2897	5239136	RASHMI VERMA	R. K. VERMA	239	SIR ETAH	**Remain "Fake" category**
609.	F2899	5239138	PUSH LATA	MAHVIR SINGH	239	SIR ETAH	**Remain "Fake" category**
610.	F2900	5239139	DEV	BHI	239	SIR TRAI	**Remain "Fake" category**
611.	F2901	5239140	MO HD. KALEEM KHA	MOHD M	239	SIR ETAH	**Remain "Fake" category**
612.	F2904	5239143	KUNWAR SINGH	RAGHU	239	SIR ETAH	**Remain "Fake" category**
613.	F2907	5239146	SONIA SINGH	JAGDI	239	SIR ETAH	**Remain "Fake" category**
614.	F2908	5239147	BABLU	RAM AVATAR	239	SIR ETAH	**Remain "Fake" category**
615.	F2909	5239148	NIRMALA	RAM DAS	239	SIR ETAH	**Remain "Fake" category**
616.	F2911	5239150	ANJANA	AJAYV	239	SIR ETAH	**Remain "Fake" category**

617.	F2912	5239208	KAILASH	RANCH	239	SIRETAH	**Remain "Fake" category**
618.	F2913	5201083	DEEPA	MAHARA	201	SMT.	**Remain "Fake" category**
619.	F2914	5201084	POONAM	NATHURRAM	201	SMT.	**Remain "Fake" category**
620.	F2917	5201087	SURVATI	NATTHU SINGH	201	SMT.	**Remain "Fake" category**
621.	F2918	5201088	PREM	SUNDER LAL	201	SMT.	**Remain "Fake" category**
622.	F2925	5201116	ANIL	SUSHIL KUMAR	201	SMT.	**Remain "Fake" category**
						BA	
623.	F2926	5201117	PRAVEEN	M.S. SHARMA	201	SMT.	**Remain "Fake" category**
624.	F2927	5201118	MAHESH	RAM	201	SMT.	**Remain "Fake" category**
625.	F2929	5201120	SURBHI YADAV	SATISH KUMAR YADAV	201	SMT.	**Remain "Fake" category**
626.	F2930	5201121	DEVEND	KUMAR	201	SMT.	**Remain "Fake" category**
627.	F2932	5201123	SUSHIL KUMAR	GYAN PRASAD	201	SMT.	**Remain "Fake" category**
628.	F2938	5201129	NARENND	R.C. VERMA	201	SMT.	**Remain "Fake" category**
629.	F2939	5201130	CHANDRA	DEVAN SINGH YADAV	201	SMT.	**Remain "Fake" category**
630.	F2943	5201134	ANIL KUMAR	BHAN	201	SMT.	**Remain "Fake" category**
631.	F2945	5201136	SUNIL	AKBAR SINGH YADAV	201	SMT.	**Remain "Fake" category**
632.	F2946	5201137	MANOJ KUMAR	S.L. VERMA	201	SMT.	**Remain "Fake" category**

633.	F2947	5201138	MANOJ KUMAR	KANCHI LAL	201	SMT.	**Remain "Fake" category**
						KASGAN	
634.	F2948	5201139	BHUVNESHWAR PRA	NAREND	201	SMT.	**Remain "Fake" category**
635.	F2949	5201140	ARCHANA	SUKHRAM	201	SMT.	**Remain "Fake" category**
636.	F2956	5201147	OMHARI	K.P. SINGH	201	SMT.	**Remain "Fake" category**
637.	F2957	5201148	MANOJ VERMA	MITTAL	201	SMT.	**Remain "Fake" category**
638.	F2958	5201149	RAM SINGH	POORAN	201	SMT.	**Remain "Fake" category**
639.	F2959	5201150	SHUKVIR SINGH	PRATAP SINGH	201	SMT.	**Remain "Fake" category**
640.	F2960	5077080	ANOOP SINGH	DESHRAJ S	77	SMT.	**Remain "Fake" category**
641.	F2965	5077085	RAJENDR	NARAYAN	77	SMT.	**Remain "Fake" category**
642.	F2966	5077086	GEETA RANI	TEERAK PAL	77	SMT.	**Remain "Fake" category**
643.	F2967	5077087	NEERAJ KUMAR SHARM	RAMESHCHANDRA SINGH	77	SMT.	**Remain "Fake" category**
644.	F2969	5077089	PRASOO	R.S. RATHOR	77	SMT.	**Remain "Fake" category**
645.	F2971	5077091	CHETAN	J.P. SHARMA	77	SMT.	**Remain "Fake" category**
646.	F2978	5077154	ANEETA	SHRICHA	77	SMT.	**Remain "Fake" category**
647.	F2980	5077156	KULDEE	BADAN SINGH	77	SMT.	**Remain "Fake" category**
648.	F2983	5077159	TEJPAL SINGH	KHERI SINGH	77	SMT.	**Remain "Fake" category**

649.	F2991	5148084	PREM PAL	BHOOP SINGH	148	SMT. LONGSHREE DEVI	**Remain "Fake" category**
650.	F3002	5148095	SACHIN KUMAR	SUKHP	148	SMT. LONGSHREE DEVI	**Remain "Fake" category**
651.	F3043	5082161	PAWAN KUMAR	RAMESH	82	SRI	**Remain "Fake" category**
652.	F3044	5082162	HAREN	BABU RAM	82	SRI	**Remain "Fake" category**
653.	F3045	5082163	MAHEN	BRAJ RAJ SIGH CHAUHAN	82	SRI	**Remain "Fake" category**
654.	F3046	5082164	JITENDRA	B.R. SAGAR	82	SRI	**Remain "Fake" category**
655.	F3047	5082165	NEETU SINGH	BABU	82	SRI	**Remain "Fake" category**
656.	F3054	5082306	AMIT	BANWARI LAL VARSHNEY	82	SRI	**Remain "Fake" category**
657.	F3055	5082307	VI	RAJA RAM	82	SRI	**Remain "Fake"**
						COLLEGE, NIDHAULI KALAN,	
658.	F3063	5227084	AJAY	AMAR	277	SRI	**Remain "Fake" category**
659.	F3066	5227087	NARENN	RAGHU	277	SRI	**Remain "Fake" category**
660.	F3067	5227088	ANAND KUMA	RAM	277	SRI	**Remain "Fake" category**
661.	F3068	5227089	BIJEN	CHARA	277	SRI	**Remain "Fake" category**
662.	F3069	5227090	PRITI VERMA	LALLA	277	SRI	**Remain "Fake" category**
663.	F3093	5181122	NIDHI SHARMA	JAGDISH	181	SRI	**Remain "Fake" category**
664.	F3094	5181123	LAXMI ARYA	BANWARI LAL	181	SRI	**Remain "Fake" category**
665.	F3099	5181128	VINIT SINGH	CHETRAM	181	SRI	**Remain "Fake" category**
666.	F3102	5181131	RUPENDRA KU	ASHOK SINGH	181	SRI	**Remain "Fake" category**

667.	F3103	5181132	SURAJ SINGH	P.D. YADAV	181	SRI	**Remain "Fake" category**
668.	F3105	5181134	SUNIL	MAHI	181	SRI	**Remain "Fake" category**
669	F3109	5181138	HARENDR	RADHA CHARNA	181	SRI SINGH CHAUHAN SMRATI MAHA VIDHY	**Remain "Fake" category**
670.	F3123	5278088	SATYANDRA K	GYAN SINGH	278	SRI GUPTA MEMORIAL	**Remain "Fake" category**
671.	F3124	5278089	SARIKA	AMAR SINGH	278	SRI GUPTA MEMORIAL	**Remain "Fake" category**
672.	F3125	5278090	SANJAY KUMAR	CHOTE LAL	278	SRI GUPTA MEMORIAL DEGR	**Remain "Fake" category**
673.	F3126	5278091	RAMESH SINGH	POTHI RAM	278	SRI GUPTA MEMORIAL	**Remain "Fake" category**
674.	F3127	5278092	SHEEM KHITO	PRABHU DAYA	278	SRI GUPTA MEMORIAL	**Remain "Fake" category**
675.	F3142	5197116	GAURAV SINGH	NARENDR	197	SRI RADHARANI MAHA VIDHYAL	**Remain "Fake" category**
676.	F3145	5197119	BIREND	SARDAR SINGH	197	SRI RADHARANI MAHA VIDHYAL	**Remain "Fake" category**
677.	F3146	5197120	BANTI	SHER SINGH	197	SRI RADHARANI MAHA VIDHY	**Remain "Fake" category**
						, HATHRAS	
678.	F3147	5197121	HARI	BACHCHU SINGH	197	SRI RADHA RANI MAHAVIDHYALAYA, SIKAND	**Remain "Fake" cat**
679.	F3148	5197122	GYNENDRA	JAGDISH SINGH YADAV	197	SRI RADHA RANI MAHAVIDHYALAYA, SIKAND RARAO	**Remain "Fake" categ**

680.	F3149	5197123	AMIT SINGH	JITENDRA SINGH	197	SRI RADHA RANI MAHAVIDHYALAYA, SIKAND	**Remain "Fake" cat**
681.	F3151	5197125	SATISH KUMAR	RAJENDRA SINGH	197	SRI RADHA RANI MAHAVIDHYALAYA, SIKAND	**Remain "Fake" cat**
682.	F3153	5197127	AJAY	SHYAM SINGH	197	SRI RADHA RANI MAHAVIDHYALAYA, SIKAND	**Remain "Fake" cat**
683.	F3168	5197142	VIMLESH	NEM SINGH	197	SRI RADHA RANI MAHAVIDHYALAYA, SIKAND	**Remain "Fake" cat**
684.	F3169	5197143	RAM SHANKER SIN	AWADH NARAYAN	197	SRI RADHA RANI MAHAVIDHYALAYA, SIKAND	**Remain "Fake" cat**
685.	F3170	5197144	KULWANT KU	H.S. SINGH	197	SRI RADHA RANI MAHAVIDHYALAYA, SIKAND	**Remain "Fake" cat**
686.	F3171	5197145	TEJVEER SINGH	GOPAL SINGH	197	SRI RADHA RANI MAHAVIDHYALAYA, SIKAND	**Remain "Fake" cat**
687.	F3174	5197148	RAJVIR SINGH	DORI LAL	197	SRI RADHA RANI MAHAVIDHYALAYA, SIKAND	**Remain "Fake" cat**
688.	F3175	5197149	SANDHYA	AMAR SINGH	197	SRI RADHA RANI MAHAVIDHYALAYA, SIKAND	**Remain "Fake" cat**
689.	F3178	5197308	MANOJ KUMAR PARI	R.S. PARIHAR	197	SRI RADHA RANI MAHAVIDHYALAYA, SIKAND	**Remain "Fake" cat**
690.	F3189	5240117	SUSHIL KUMAR	RAJ BAHADUR	240	SRI ETAH	**Remain "Fake"**
691.	F3195	5240123	ARVIND	RAM GOPAL SRIVASTAVA	240	SRI ETAH	**Remain "Fake"**
692.	F3200	5240128	MAMTA	RAGHUNATH	240	SRI ETAH	**Remain "Fake"**
693.	F3209	5240137	SUMAN	G.S. SHARMA	240	SRI ETAH	**Remain "Fake"**
694.	F3210	5240138	ANIL KUMAR	BALVIR SINGH	240	SRI ETAH	**Remain "Fake"**
695.	F3211	5240139	KRISHA	DESH	240	SRI ETAH	**Remain "Fake"**
696.	F3214	5240142	GANESH	PREETAM LAL	240	SRI ETAH	**Remain "Fake"**

697.	F3216	5240144	SANGITA SINGH	S.P. SINGH	240	SRI ETAH	**Remain "Fake"**
698.	F3219	5240147	YOGEND	RAM SHANKAR	240	SRI ETAH	**Remain "Fake"**
699.	F3221	5240149	VISHNU KUMAR	RAM JI	240	SRI ETAH	**Remain "Fake"**
700.	F3222	5240150	UMESH KUMAR	CHATRA	240	SRI ETAH	**Remain "Fake"**
701.	F3224	5242086	VISHRA	A KUMAR	242	SURYA EDUCATIONAL INSTITUTE,	**Remain "Fake"**
702.	F3225	5242087	VIKAS	NAWAB SINGH	242	SURYA EDUCATIONAL INSTITUTE,	**Remain "Fake"**
703.	F3227	5242089	MUKESH BABU	MAHAVIR SINGH	242	SURYA EDUCATIONAL INSTITUTE,	**Remain "Fake"**
704.	F3228	5242090	HARI CHANDRA	DHANI RAM	242	SURYA EDUCATIONAL INSTITUTE,	**Remain "Fake"**
705.	F3235	5242116	VANDANA	JAGDISH BABU	242	SURYA EDUCATIONAL INSTITUTE,	**Remain "Fake"**
706.	F3236	5242117	BABIT	MANIK CHAND	242	SURYA EDUCATIONAL INSTITUTE,	**Remain "Fake"**
707.	F3237	5242118	UDAYA PRATAP SIN	SUNHARI LAL	242	SURYA EDUCATIONAL INSTITUTE,	**Remain "Fake"**
708.	F3238	5242119	JITEN	CHANDRA BHAN	242	SURYA EDUCATIONAL INSTITUTE,	**Remain "Fake"**
709.	F3239	5242120	VIVEK KUMAR	DORI SINGH	242	SURYA EDUCATIONAL INSTITUTE,	**Remain "Fake"**
710.	F3240	5242121	SARLA KUMARI	JALIM SINGH	242	SURYA EDUCATIONAL INSTITUTE,	**Remain "Fake"**
711.	F3241	5242122	SARVESH K	POKH	242	SURYA EDUCATIONAL INSTITUTE,	**Remain "Fake"**
712.	F3243	5242124	DEOKI PRASAD	BHUDE	242	SURYA EDUCATIONAL INSTITUTE,	**Remain "Fake"**
713.	F3253	5242134	NIRJA RANI	J.P. SINGH	242	SURYA EDUCATIONAL INSTITUTE,	**Remain "Fake"**
714.	F3257	5242138	CHAMP	RAM NIWAS AGARWAL	242	SURYA EDUCATIONAL INSTITUTE,	**Remain "Fake"**
715	F3260	5242141	RAVIND KUMAR VERMA	RAM SWAROOP	242	SURYA EDUCATIONAL INSTITUTE,	**Remain "Fake" Categ**
716.	F3270	5010069	BEENA	JAIPAL SINGH	10	T. R. K. COL	**Remain "Fak"**

717.	F3272	5010071	PRIYANKA RAN	HEM SINGH	10	T.R.K.C	**Remain "F**
718.	F3276	5010303	SUSH	KOMAL SINGH	10	T.R.K.C	**Remain "F**
719.	F3277	5010304	KRISHAN LAT	KAMAL SINGH YADAV	10	T.R.K.C	**Remain "F**
720.	F3279	5010306	SEEMA VERMA	RAJ VIR SINGH	10	T.R.K.C	**Remain "F**
721.	F3286	5209068	SUKRITI TIWARI	RAM CHANDRA TIW	209	USHA EDUCATION INS	**Remain "Fake"**
722.	F3289	5209071	ASHOK KUMAR	LAKHAN SI	209	USHA EDUCATION INS	**Remain "Fake"**
723.	F3290	5209072	RAJNIS	GAURISHANKER	209	USHA EDUCATION INS	**Remain "Fake"**
724.	F3291	5209073	PRATIB	R.C. PUSHKAR	209	USHA EDUCATION INS	**Remain "Fake"**
725.	F3292	5209074	DHARVE	GYANENDRA SINGH	209	USHA EDUCATION INS	**Remain "Fake"**
726.	F3298	5209080	JITEND	MAHENDRA SINGH	209	USHA EDUCATION INS	**Remain "Fake"**
727.	F3300	5209082	PUSHPEND	AMOL SINGH	209	USHA EDUCATION INS TITUTE	**Remain "Fake" Categ**
728.	F3301	5209083	RAHUL YADAV	OM PRAKASH YADAV	209	USHA EDUCATION INS	**Remain "Fake"**
729.	F3312	5209094	PUSHPE	JAGDISHSIN	209	USHA EDUCATION INS	**Remain "Fake"**
730	F3317	5209139	LALITA	J.P. SINGH	209	USHA	**Re**
						EDUCATION INS TIT	**"Fake" Categ**
731.	F3318	5209139	PRATIB	J.P. SINGH	209	USHA EDUCATION INS	**Remain "Fake"**
732.	F3319	5209140	MEENA RANI	BRAJ LAL	209	USHA EDUCATION INS	**Remain "Fake"**
733.	F3321	5209142	MANJU	R.P. SHARMA	209	USHA EDUCATION INS	**Remain "Fake"**
734.	F3323	5209144	PRAMOD KUMAR SINGH	MOHAR SINGH	209	USHA EDUCATION INS	**Remain "Fake"**
735.	F3326	5209147	JAI NARAYAN GUPTA	MUNNI LAL	209	USHA EDUCATION INS	**Remain "Fake"**
736.	F3328	5209149	CHANDRA PRATAP SINGH	B.R. SINGH	209	USHA EDUCATION INS TITUTE,	**Remain "Fake" Categor**

737.	F3334	5209306	ARUN	RAJEND	209	USHA EDUCATION INS	**Remain "Fake"**
738.	F3336	5209308	KUSUM LATA	R.NIWAS	209	USHA EDUCATION INS	**Remain "Fake"**
739.	F3337	5209309	RAM	NATHU SINGH	209	USHA EDUCATION INS	**Remain "Fake"**
740.	F3339	5209311	SATYA	MAHAVI	209	USHA EDUCATION INS	**Remain "Fake"**
741.	F3342	5200083	SUNIL KUMAR	SUKHD	200	V.K.	**Remain "Fak**
742.	F3343	5200084	SARV	HEERA LAL	200	V.K.	**Remain "Fak**
743.	F3345	5200086	SANTOSH	AJEET SINGH	200	V.K.	**Remain "Fak**
744.	F3346	5200087	VIPIN KUMAR	RAMA KANT MISHRA	200	V.K.	**Remain "Fak**
745.	F3347	5200088	AVINA	HARI	200	V.K.	**Remain "Fak**
746.	F3350	5200091	KAVITA	R.R. SINGH	200	V.K.	**Remain "Fak**
747.	F3357	5200116	LAXMI YADAV	ARTI YADAV	200	V.K.	**Remain "Fak**
748.	F3358	5200117	SEEMA CHAUDHARY	RAJEEV CHAUDHARY	200	V.K.	**Remain "Fak**
749.	F3359	5200118	HARIOM	SIYA	200	V.K.	**Remain "Fak**
750.	F3360	5200119	VIJAY	RAGHUVIR SING	200	V.K.	**Remain "Fak**
751.	F3362	5200121	SHASH	MANIKCHAND	200	V.K.	**Remain "Fak**
752.	F3366	5200125	SATE	MAHENDRA KUMAR SHAR	200	V.K.	**Remain "Fak**
753.	F3367	5200126	DEVENDR	SRI RAM PAL	200	V.K.	**Remain "Fak**
754.	F3368	5200127	SATE	GOPAL SINGH	200	V.K.	**Remain "Fak**
755.	F3369	5200128	SUNIL SHARMA	RAM AVATAR	200	V.K.	**Remain "Fak**
756.	F3373	5200132	DUSH	CHITRA SINGH	200	V.K.	**Remain "Fak**
757.	F3374	5200133	LOKENDR	MAHENDRA PAL SINGH	200	V.K.	**Remain "Fak**
758.	F3375	5200134	RAM NIWASH	BABU RAM	200	V.K.	**Remain "Fak**
759.	F3376	5200135	LALITASH	SANT	200	V.K.	**Remain "Fake"**

760.	F3377	5200136	NARENRA	BHOLASHA	200	V.K.	**Remain "Fake" Cate**
761.	F3378	5200137	PUSHPAYADAV	KISHANLAL	200	V.K.	**Remain "Fake" Cate**
762.	F3379	5200138	KULD	SANTOSH	200	V.K.	**Remain "Fake" Cate**
763.	F3382	5200141	KAMLADEVI	DAYARAM 200		V.K.	**Remain "Fake" Cate**
764.	F3383	5200142	ANURADHAKULSHREST	P.L.KULSHRESTHA	200	V.K.	**Remain "Fake" Cate**
765.	F3391	5200150	ASHAKUMARI	SHRI	200	V.K.	**Remain "Fake" Cate**
766.	F3392	5200307	SHIV NANDAN SINGH	RAMSARAN	200	V.K.	**Remain "Fake" Cate**
767.	F3394	5071080	VIKITA	MINRAJSINGH	71	VIRANGNAAV	**Remain "Fake" Category**
768.	F3398	5071084	KM.PINKY	SIYA RAM	71	VIRANGNAAV	**Remain "Fake" Category**
769.	F3399	5071085	SANTOSH KU	RAMPRASAD	71	VIRANGNAAVANT	**Remain "Fake" Category**
770.	F3413	5071123	PREMLATA	BHOOPSINGH	71	VIRANGNAAV	**Remain "Fake" Category**
771.	F3419	5071129	KUSHULATA	BHURELAL	71	VIRANGNAAV	**Remain "Fake" Category**
772.	F3420	5071130	URME	BISHRAMSIN	71	VIRAN	**Remain "Fake"**
						MAHAVID	
773.	F3424	5071134	PRATHAMA	RAMSINGH	71	VIRANGNAAV	**Remain "Fake" Category**
774.	F3425	5071135	ASHARAJPUT	JHUMAKLAL	71	VIRANGNAAV	**Remain "Fake" Category**
775.	F3442	5196084	ABHILASHASH	ANIL KUMAR SHARMA	196	VIVEKAN	**Remain "Fake" Cate**
776.	F3447	5196089	DHIRENDRA	VIRENDRASING	196	VIVEKAN	**Remain "Fake" Cate**
777.	F3448	5196090	BITTANDEVI	SEETARAM	196	VIVEKANAND C	**Remain "Fake" Category**

778.	F3462	5196308	VIRENDRA PAL SINGH	HAJARI LAL	196	VIVEKAN	**Remain "Fake" Cate**
779.	F3464	5196310	MANOJ	K.S. CHAUHAN	196	VIVEKAN	**Remain "Fake" Cate**
780.	F3465	5196311	VISHNU KUMAR SINGH	JASVIR SINGH	196	VIVEKAN	**Remain "Fake" Cate**
781.	F3479	5176052	RAJESH PRATAP SINGH	RAVINDRA PAL SINGH	176	ZAKIR	**Remain "Fake" Cate**
782.	F3481	5176054	VED	POOR	176	ZAKIR	**Remain "Fake" Cate**
783.	F3482	5176055	DHARMENDRA PRAKASH DIXIT	RAM SEVAK DIXIT	176	ZAKIR	**Remain "Fake" Cate**
784.	F3484	5176057	RAM	RAJ KUMAR	176	ZAKIR	**Remain "Fake" Cate**
785.	F3486	5176059	OM PRAKSH	NATTHU RAM	176	ZAKIR	**Remain "Fake" Cate**
786.	F3237	5176061	RAV	BALAK RAM	176	ZAKIR	**Remain "Fake"**
						ETAH	
787.	F3489	5176062	JAI C HANDRA SINGH	RADHA SHYAM	176	ZAKIR	**Remain "Fake" Cate**
788.	F3490	5176063	DEVENDRA SING	INDAL SINGH	176	ZAKIR HUS	**Remain "Fake" Category**
789.	F3494	5176067	YADU	ATAR SINGH	176	ZAKIR	**Remain "Fake" Cate**
790.	F3503	5194085	UMA SHANKAR SINGH	RAGHUVEER SINGH	194	GRAMODHARMAHAV	**Remain "Fake" Category**
791.	F3510	5181120	RAJKUMAR	GOPAL SINGH	181	SRI	**Remain "Fake" Category**
792.	F3512	5197302	RAJEEV KUMR	BABU RAM	197	SRI RADHARANI MAHAV	**Remain "Fake" Category**
793.	F3516	5196014	GAURA	ARVIND KUMA	196	VIVEKANAND COL	**Remain "Fake" Cate**
794.	F3517	5196017	SUNIL KUMAR	SURESH C	196	VIVEKANAND COL	**Remain "Fake" Cate**
795.	F3518	5196019	MINTU SINGH	RAM CHARAN	196	VIVEKANAND COL	**Remain "Fake" Cate**
796.	F3519	5196022	ARPITA GUPTA	HARI	196	VIVEKANAND COL	**Remain "Fake" Cate**
797.	F3522	5196028	GURU	0	196	VIVEKANAND COL	**Remain "Fake" Cate**
798.	F3524	5196030	SUSHIL KUMAR SINGH	NARAYANSING	196	VIVEKANAND COLLEGE	**Remain "Fake" Category**

799.	F3527	5196036	DINESH KUMAR YADAV	MAHENDRA SINGH YADAV	196	VIVEKANAND COLLEG	**Remain "Fake" Cate**
800.	F3529	5196040	TARA CHANDRA	RAM PRASAD	196	VIVEKANAND COL	**Remain "Fake"**
801.	F3532	5196058	INDRA JEET	SHANKER LAL	196	VIVEKANAND	**Remain "Fake"**

						ALIGAR	
802.	F3536	5196048	HEM LATA		196	VIVEKANAND COL	**Remain "Fake"**
803.	F3552	5079038	REETA GAUTAM	RAM SHANKAR	79	SHIVDAN SINGH SMR	**Remain "Fake" Category**
804.	F3553	5079063	RAM KUMAR	MAHAVEER SINGH	79	SHIVDAN SINGH SMR	**Remain "Fake" Category**
805.	F3557	5172306	SARAD KUMAR SINGH	SURENDRA	172	AMAR	**Remain "Fake"**
806.	F3577	5045118	SURENDRA	TOPI SINGH	45	PRAMOD MAHAVIDH	**Remain "Fake" Category**
807.	F3578	5045119	GAJENDR	RAM	45	PRAMOD MAHAVIDH	**Remain "Fake" Category**
808.	F3600	5045141	AZAD GULSHAN BANU	ALLAH BUX	45	PRAMOD MAHAVIDHYALAYA, M	**Remain "Fake" Category**
809.	F3606	5045147	VINOD KUMAR	PURAN SINGH	45	PRAMOD MAHAVIDHYALAYA, M	**Remain "Fake" Category**
810.	F3607	5045148	ALKA	TODI SINGH	45	PRAMOD MAHAVIDH	**Remain "Fake" Category**
811.	F3534	5045012	ARVIND KUMAR SRIVASTAVA	KESHAV PRASAD SRIVAST	45	PRAMOD MAHAVIDH	**Remain "Fake" Category**
812.	F3636	5243082	ANURADHA	RAJENDRA SINGH	243	ADARSH KRISHNA COLLEGE	**Remain "Fake" Category**

(2021)03ILR A811
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.02.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE PRAKASH PADIA, J.

Special Appeal No. 725 of 2020
Connected with
Special Appeals No. - 721 of 2020, 720 of 2020, 722 of 2020, 723 of 2020, 724 of 2020, 726 of 2020, 727 of 2020, 728 of 2020, 729 of 2020, 731 of 2020, 753 of 2020 & Special Appeal (D) No. 942 of 2020

State of U.P. & Ors. ...Appellants
Versus
Bhanu Pratap Rajput ...Respondent

Counsel for the Petitioner:
Sri Anand Kumar Ray, Sri Sanjeev Singh, C.S.C.

Counsel for the Respondents:
Sri Suresh Bahadur Singh

A. Civil Law - UP Police Constable and Head Constable Rules, 2015 – Rule 15(g) – Post of Constable – Recruitment – Medical fitness – Height and chest expansion – Assessment of Physical standard – Use of Standardized equipments – Finding of single judge that assessment of physical standard by the Committee constituted under Appendix- 2 with aid of standardized equipments, is liable to be preferred over the determination made by the Medical Board in terms of Appendix- 3, which had no standardized equipments – Validity – Held, Medical examination by the Medical Board consisting of medical experts under Rule 15(g) cannot be said to be inferior to the physical standard test conducted by a team of non-experts – Opinion of a committee of non-experts under Rule 15(d) for physical test of a candidate cannot override the opinion of the team of experts, i.e. Medical Board under Rule 15(g) of the Rules – Finding of Single Judge, held, not liable to be sustainable – On being made no-objection by the St.'s counsel for re-measurement of height and chest by a Medical Board, the Court directed for re-measurement as per provisions of Rule 15 (g). (Para 5, 16, 19 and 20)

Special Appeal disposed of. (E-1)

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

1. Heard Sri A.K. Rai, and Smt. Subhah Rathi, learned Additional Chief Standing Counsels and Sri P.K. Ganguli, learned Standing Counsel for the State-appellant and Sri Sanjeev Singh, learned counsel for petitioners-respondent.

2. All these Special Appeals have been preferred by the State-appellant challenging the orders dated 05.09.2018, 14.11.2019, 01.10.2019, 16.09.2019, 28.11.2019, 16.09.2019, 16.09.2019, 16.09.2019, 16.09.2019, 05.09.2018, 01.10.2019 & 25.11.2019 passed in Writ Petition No.14195 of 2018 (Bhanu Pratap Rajput Vs. State of U.P. and others), Writ Petition No.16840 of 2019 (Deepak Pal Vs. State of U.P. and others), Writ Petition No.14514 of 2019 (Sumit Vs. State of U.P. and others), Writ Petition No.14079 of 2019 (Bhanu Pratap Rajput Vs. State of U.P. and others), Writ Petition No.18772 of 2019 (Sri Shyam Singh Saroj Vs. State of U.P. and others), Writ Petition No.14093 of 2019 (Sarvesh Kumar Vs. State of U.P. and others), Writ Petition No.14100 of 2019 (Kapil Babu Vs. State of U.P. and others), Writ Petition No.14084 of 2019 (Anuj Kumar Vs. State of U.P. and others), Writ Petition No.14005 of 2019 (Sunil Kumar Vs. State of U.P. and others), Writ Petition No.14077 of 2019 (Ashish Kumar Vs. State of U.P. and others), Writ Petition No.14936 of 2018 (Mahesh Chand Vs. State of U.P. and others), Writ Petition No.14866 of 2019 (Chandra Shekhar Patel Vs. State of U.P. and others) & Writ Petition No.17619 of 2019 (Udit Gangwar Vs. State of U.P. and others) respectively.

3. With the consent of learned counsel for the parties, Special Appeal No.725 of 2020 (State Of U.P. Through Secretary, Department Of Home (Police Section) And 5 Others Vs. Bhanu Pratap Rajput) has been treated as leading Special Appeal and accordingly, orders were passed on earlier occasions.

Facts :-

4. The petitioners-respondents appeared in the examination of recruitment to the post of Constable (Male) in Civil Police and Police Armed Constabulary

which was held on 29.12.2015 as per provisions of Uttar Pradesh Police Constable and Head Constable Rules, 2015 (hereinafter referred to as the "Rules 2015"). On page 1 of the impugned judgement dated 05.09.2018, the learned Single Judge briefly noted the controversy that "The Recruitment Board forwarded the list of selected candidates to the Head of Department to proceed further in the matter. **"It is at this stage that petitioner has been declared medically unfit for the reason that petitioner's height and chest expansion was found to be inadequate. An appeal, preferred in that regard, was also rejected. Aggrieved by such action, petitioners has approached this Court by filing the present writ petition."**

5. The writ petition was allowed by the impugned judgement passed by the learned Single Judge with the following observations/findings:-

*"**The assessment of physical standard of a candidate** by use of standardized equipments, having Bureau of Indian Standards certification or duly certified by the Director of Weights and Measures **in terms of clause (4) of Appendix - 2, is entitled to greater weight, then an assessment of physical standard by the Medical Board in absence of such standardized equipments. Assessment of physical standard by the Committee constituted under Appendix - 2 to the Rules of 2015** with aid of standardized equipments, which, otherwise, attains finality under the Rules, therefore, **is liable to be preferred over the determination made by the Medical Board in terms of Appendix - 3,** which had no standardized equipments provided to it for the purposes.*

*In view of the aforesaid discussions, the inescapable conclusion is that the respondents were not justified in declaring the petitioner to be medically unfit on the ground that he does not possess physical standard specified in Appendix - 2, even after a declaration by the competent authority in terms of Appendix - 2 that petitioner possesses physical standards as prescribed in the Rules. **The report of the Medical Board, to the extent it declares the petitioner to be short in height and having incomplete chest expansion, stands quashed**. Since the Medical Board has, otherwise, not found the petitioner to be suffering from any deficiency and petitioner possesses physical standards specified in the Rules, as such, he is entitled to be considered for appointment to the post of Constable.*

The writ petition succeeds and is allowed."

6. Aggrieved with the aforesaid judgement of the learned Single Judge, the state appellants have filed the present special appeal.

7. The crux of the impugned judgement to allow the writ petition is that the assessment of the physical standard by the Committee constituted under the Appendix-2 to the Rules, 2015 with aid of standardized equipments, which, otherwise, attains finality under the Rules, is liable to be preferred over the determination made by the Medical Board in terms of Appendix - 3, which had no standardized equipments provided to it for the purposes.

8. We have carefully considered the submissions of learned counsels for the parties and perused the impugned judgement.

Relevant Provisions :-

9. The **relevant provisions** for the purposes of the controversy involved in the present Special Appeals are **Rules 13, 15 and Appendix-1, Appendix-2 and Appendix-3, which are reproduced below:-**

Rule 13. Physical fitness - *No candidate shall be appointed to a post in the service unless he is in good mental bodily health and* ***free from any physical defects*** *likely to interfere with the efficient performance of his duties.* ***Before a candidate is finally approved for appointment, he shall be required to pass an examination by a Medical Board.***

Note - The ***Medical Board shall examine the candidate for any physical standards prescribed for height, chest and weight measurement*** *as the case may be and deficiencies such as Knock Knee, bow-legs, flat feet, varicose veins, distant and near vision, colour blindness (total or partial), hearing test comprising of Rinne's Test, Webber's Test and tests of vertigo, speech defects etc.,* ***and such other deficiencies as may be notified by the State Government from time to time.***

Rule 15. Procedure for Direct Recruitment to the post of Constable -

(a) Application Form -

(I) A candidate shall fill only one application Form. The Board will accept only online applications. The application of candidates, who fill more than one Forms, may be rejected by the Board.

(ii) The details of the information regarding educational qualification, age, minimum qualifying standards for each category of examination, including physical, medical examination etc., other important guidelines as determined by the Board from time to time shall be made available by the Board on its own website and or by other means as it deems necessary.

(iii) The application shall be invited by the Board giving the applicants adequate time for making application, the candidate shall be personally and solely responsible for its accuracy and competeness, if the Form of any candidate is found incomplete, worng or having inaccurate information, it may be cancelled and the decision of the Board in this regard shall be final.

(iv) An applicant shall certify himself his certificates and documents and be responsible for their genuineness and correctness.

(v) In the application Form the detail of identity, specific identity card number, thump and finger impression, photographs or bio-matrix details will be so included as determined by the Board from time to time.

(vi) The Head of the Department may fix an application fee for any recruitment in consultation with the Recruitment Board.

(vii) The Board shall have the right to summarily reject the candidature of an applicant for any imcompleteness or inaccuracy or variation or conflict with any previous or subsequent information submitted by the candidate.

(viii) The Government may change the number of vacancies for any recruitment at any time or stage of recruitment without assigning any reason thereof.

(b) Merit List on the basis of 10th and 12th examination results

All such candidates whose application forms are found correct, shall be awarded marks on the basis of 10th and 12th examination results, or qualification equivalent thereto, as provided under clause (8) of these rules. For awarding these marks, maximum of 100 marks will be awarded on the basis of 10th standard Board examination and maximum of 200 marks will be awarded on the basis of 12th

standard Board examination. The marks such awarded to them will be counted upto second digit after decimal point and will be awarded to them will be counted upto second digit after decimal point and will be awarded as per following procedure -

(1) Marks awarded on the basis of 10th examination result = percentage of mrks obtained by the candidate in 10th standard Board or examination equivalent thereto.

(2) Marks awarded on the basis of 12th examination result = 2 x percentage of marks obtained by candidate in 12th standard Board or examination equivalent thereto.

If any examination Board, awards grades in place of marks to the candidates, in above mentioned 10th and 12th examination, then Board shall proceed only after taking information from concerned examination Board, regarding marks to be awarded equivalent to corresponding grades. Candidates shall be awarded total marks on the basis of such total marks awarded to them on the basis of 10th class examination results and marks awarded to them on the basis of 12th class examination results, as above. All candidates will be awarded total marks as per sum total of marks awarded as above, out of a maximum of 300 marks and a list in the order or merit will be prepared on the basis of these total awarded marks. Out of the merit list such prepared, candidates equal to 15 times the number of total vacancies, on the basis of merit shall be called for Physical Efficiency Test. If more than one candidates are found on the marks obtained by the last candidate in the merit list then all such candidates shall be considered eligible for physical Efficiency Test.

(c) Physical Efficiency Test

All candidates declared eligible in the merit list under clause (b) shall be required to participate in Physical Efficiency Test which shall be of 200 marks. The procedure for conducting the ***Physical Efficiency Test shall be as prescribed in Appendix-1****.*

(d) Scrutiny of Documents & Physical Standard Test -

The scrutiny of documents & Physical Standard Test of candidates selected under clause (c) mentioned above shall be done according to Appendix-2. In case any document is found to be manipulated, inaccurate or forged during the scrutiny or at any time after the scrutiny, the candidature of the applicant will be cancelled at the discretion of the Board or the Appointing authority as the case may be.

(e) Selection and Final Merit List -

From amongst the candidates found successful after Physical Standards Test and scrutiny of documents under clause (d), the Board shall prepare, as per the vacancies, a select list of each category of candidates, on the basis of sum total of, marks awarded to each candidate on the basis of 10th and 12th examination results as per clause (b) and marks obtained by him in physical efficiency test as pre clause (c), keeping in view the conservator policy and send it with recommendation to the head of the department subject to character verification, medical examination and 10th and 12 examination mark sheet verification. No waiting list shall be prepared by the Board. List of all candidates with marks obtained by each candidate shall be uploaded on its website by the Board. The Head of the Department shall after his approval forward the list

sent by the Board to the concerned Authority for further action.

Note - If two or more than two candidates obtain equal marks the merit list shall be decided according to the following procedure -

(1) If marks of two, or more candidates are equal then candidate obtaining higher marks, as per total marks awarded in clause (b), will be given preference.

(2) If two or more candidates are equal even after this the candidates who have the preferential qualification (in the same order as stated in Rule 9) will be given preference. Candidate having more than one preferential qualification shall get the benefit of only one preferential qualification.

(3) Even then if two or more candidates have equal marks then candidates older in age shall be given preference.

(4) If despite the aforementioned more than one candidates are equal, then preference to such candidate shall be determined according to the order in English Alphabets of their names mentioned in High School Certificate.

(f) Verification of 10th and 12th examination marks sheets

While preparing the final select list, the Board will send for verifications to the concerned Education Board, the 10th and 12th class mark sheets of all candidates included in the select list. As and when their verification reports from concerned Education Boards are received, the Board will send them separately to Police Headquarter later on, who will subsequently send it to the Appointing Authority for necessary action. If as per report sent by the concerned Educations Board, the 10th and 12 examination marks sheets of any candidate,is not verified, then such candidate shall be declared unfit by the Appointing Authority and such vacancies shall be carried forward for new selection.

(g) Medical Examination

The candidates whose name are in the select list sent as per clause (e), will be ***required to appear for Medical Examination by the Appointing authority.*** *Medical Examination will be conducted in the Police Line of the concerned District or at the place mentioned by the Appointing authority.* ***Medical Examination will be conducted*** *as per Appendix-3 The candidate found unsuccessful in Medical Examination shall be* ***declared unfit by the Appointing authority*** *and such vacancies shall be carried forward for new selection."*

APPENDIX-I

[See Rule 15 (c)]

Physical Efficiency Test for direct recruitment

1. The Physical Efficiency Test will be conducted by a team formed by the Board which shall have the following members -

(i) Sub Divisional Magistrate nominated by the District Magistrate of he District concerned;

(ii) Medical Officer nominated by the Chief Medical Officer of the District concerned;

(iii) Deputy Superintendent of Police nominated by Senior Superintendent of Police/Superintendent of Police.

Where according to the prevalent Government Orders representation of Scheduled Castes/Scheduled Tribes, Other Backward classes. Minority or any other category whose representation is necessary in the above team, the Board shall keep additional officers nominated by the

District Superintendent of Police to ensure their representation. Such nominated officers shall not be below the ranks of Inspector in police department.

The said team may take the help of any other expert for conducting the examination.

2. In the physical efficiency test for direct recruitment of constables, the male candidates will have to complete 4.8 Km. (Kilometre) run in 27 minutes and female candidates will have to complete 2.4 Km. (Kilometre) run in 16 minutes. Those candidates who fail to complete the run in stipulated time will not be eligible for next stage.

The allotment of the marks will be according to time taken by the candidates within the above stipulated time, for which there shall be a maximum of 200 marks and minimum of 120 marks.

For male candidates maximum of 200 marks will be awarded to those, who complete the 4.8 Km run in 17 minutes or time less than that. After that male candidates completing the run in more than 17 minutes and upto 17 minutes 15 seconds, will be awarded 198 marks, male candidates completing the run in more than 17 minutes 15 seconds and upto 17 minutes 30 seconds will be awarded 196 marks. Likewise in the increasing order of time as above, 2 marks shall be deducted every time from the marks to be awarded to male candidates for every 15 seconds increase in time interval. Likewise, serially as per above prescribed norms, all male candidates completing the run in more than 26 minutes 30 seconds and upto 26 minutes 45 seconds shall be awarded 122 marks and all male candidates completing the run in more than 26 minutes 45 seconds and upto 27 minutes will be awarded 120 marks, minimum prescribed for this run, and all those male candidates who complete the 4.8 Km. run in more than 27 minutes shall be declared unfit for selection.

For female candidates maximum of 200 marks will be awarded to those, who complete the 2.4 Km. run in 11 minutes or time less than that. After that female candidates completing the run in more than 11 minutes and upto 11 minutes 15 seconds, will be awarded 196 marks, female candidates completing the run in more than 11 minutes 15 seconds and upto 11 minutes 30 seconds will be awarded 192 marks. Likewise in the increasing order of time as above, 4 marks shall be deducted every time from the marks to be awarded to female candidates for every 15 seconds increase in time interval. Likewise, serially as per above prescribed norms, all female candidates completing the run in more than 15 minutes 30 second and upto 15 minutes 45 seconds shall be awarded 124 marks and all female candidates completing the run in more than 15 minutes 45 seconds and upto 16 minutes will be awarded 120 marks, minimum prescribed for his run, and all those male candidates who complete the 2.4 Km. run in more than 16 minutes shall be declared unfit for selection.

The detailed table for Physical Efficiency Test, indicating marks to be awarded for different timings as above, separately for male and female candidates, shall be displayed by Board on its website.

3. Manual timing shall not be permitted to be used by the team. Standardised Electronic Timing Equipment alongwith CCTV coverage and biometrics with adquate backup will be used to ensure accuracy, transparency and avoid impersonation.

4. The team shall follow the process laid down as under -

(a) the number of candidates to be tested per day shall be determined by the Board and decided depending on the total numbers to be tested and prevailing conditions.

(b) The information regarding minimum standards of physical efficiency of qualification and table indicating marks for different timing for physical efficiency test as given in para 2 of this appendix, shall be displayed on the notice board at the venue of the test.

(c) The result of this test will be displayed on the notice board at the end of the day, at the venue of the Test and if possible, will be uploaded on the Board's website as soon as possible.

(d) The members of the organizational team including testing agency if any who willfully commit an act which is wrong or omit to perform an act and which causes an unfair advantage or disadvantage to any candidate may be liable to Criminal proceedings or Department proceedings.

(e) The result of the Physical Efficiency Test will be made available to the candidates on the same day. The list of the successful candidates will be declared under the joint signature of the members of the team.

(f) The outdoor test shall be such that the results are capable of being measured and recorded mechanically without manual intervention. Only standardized equipments preferably having Bureau of Indian Standards certificate shall be used for Physical Efficiency Test.

(g) Candidates will be expected to appear on the date and time assigned to them. For reasons beyond their control and to be recorded in writing, the date and time of the test may be changed by the board for a group of candidates to be tested at a particular time.

(h) The list of successful and unsuccessful candidates shall be declared by the collective signatures of members of the team.

(i) If a candidate fails to appear in the examination on the scheduled date and time, then he can give application to the committee formed for conducting the test in concerned district, giving reasons in detail for absence and requesting to appear in the examination on some other date. The committee, after considering his application, may decide and allow him to appear for test on some other date. The candidate will be given only one chance in this regard and if he fails to appear in the examination on rescheduled date and time, he shall be considered unsuccessful. The candidates may give this application, before the last date fixed for this test, by the Board. No application will be accepted after the last date. The committee shall inform the Board about all such cases where the date and time of the test has been rescheduled.

(j) A candidate who fails for not achieving the prescribed standards in the examination, shall not be given another chance and no appeal shall lie for a retest for reasons of health and any other ground whatsoever.

Note-- Individual privacy will be respected in all video records and the record will be kept in safe custody and will be made available to a court of law when summoned by it, or to an officer with the permission of the Board.

Appendix-2

Scrutiny of the Documents

1. Candidates will be summoned with relevant documents with regard to eligibility, relaxation, preferential qualifications, etc., for scrutiny thereof to be carried out by a committee which will consist of following members:-

(a) A Deputy Collector nominated by the District Magistrate of the District will be the Chairman;

(b) a Deputy Superintendent of Police nominated by the Senior Superintendent of Police/Superintendent of Police of the district;

(c) District Inspector of Schools (D.I.O.S.) or Basic Siksha Adhikari (B.S.A) or any other gazetted officer of the education department by the District Magistrate.

Where according to the prevalent Government Orders representation of Scheduled Castes/Scheduled Tribes, Other Backward Classes, Minority or any other category whose representation is necessary in the said committee, the Board shall keep additional officers nominated by the District Superintendent of Police to ensure their representation. Such nominated officers shall not be below the ranks of Inspector in police department.

2. Original documents shall be checked as per the information provided in the application form.

3. During scrutiny of documents on being referred by any committee because of any doubt or any being brought directly in its notice, the Board can issue directions in this regard. The directions issued by the Board, shall be final.

*"**Physical Standard Test***

*The **above mentioned committee can take help of any Government employee** for conducting Physical Standard Test.*

*1. **Minimum Physical Standards** for male candidates are as follows -*

***(a) Height** -*

(one) for General/Other Backward classes and Scheduled Castes male candidates minimum height should be 168 centimetre.

(two) for Scheduled Tribe male candidates minimum height should be 160 centimetre.

***(b) Chest** -*

For the candidates belonging to General/Other Backward classes and Scheduled Castes minimum chest measurement should be 79 centimetres without expansion and at least 84 centimetres with expansion and for the Scheduled Tribes 77 centimetres without expansion and not less than 82 centimetres on expansion.

Note - Minimum 5 centimetres chest expansion is essential.

2. Minimum Physical Standards for female candidates are as follows -

(a) Height -

(one) for General/Other Backward classes and Scheduled Castes female candidates minimum height should be 152 centimetre.

(two) for Scheduled Tribes female candidates minimum height should be 147 centimetre.

(b) Weight -

Minimum 40 Kg. for female candidates.

*3. The **minimum physical standards for qualifying for each test** shall be displayed very prominently on Notice Boards in thevenue of examination before conducting the examination.*

4. Only standardized equipments having Bureau of Indian Standards certification or duly certified by the Director of Weights and Measures are to be used for physical standards test examination."

5. if any candidate is not satisfied with his Physical Standard Test, he/she may file an objection on the same day after the test. For clearing all such objection; the Board shall nominate one Additional Superintendent of Police at every place and Physical Standard Test of all such candidates will be conducted again by the committee in the presence of above nominated Additional Superintendent of Police. All those candidates who are again found unsuccessful in the Physical Standard Test, will be declared unfit and no further appeal will be entertained in this regard.

General Instructions

(1) Candidates will be expected to appear on the date and time assigned to them. For reasons beyond their control and to be recorded in writing, the date and time of the test may be changed by the Board for a group of candidates to be tested at a particular time.

(2) If a candidate fails to appear in the examination on the scheduled date and time, then he/she can give application to the committee formed for conducting the test in concerned district, giving reasons in detail for absence and requesting to appear in the examination on some other date. The committee, after considering his/her application, can decide and may allow him/her to appear for test on some other date. The candidate will be given only one chance in this regard and if he/she fails to appear in the examination on rescheduled date and time, he/she shall be considered unsuccessful. The candidates may give application before the last date fixed for this test, by the Board. No application will be accepted after the last day. The committee shall inform the Board about all such cases where the date and time of the test has been rescheduled.

(3) A candidate who fail for not achieving the prescribed standards in the examination, shall not be given another chance and no appeal shall lie for a retest for reasons of health and any other ground whatever.

(4) The candidate will be informed about result of Scrutiny of Documents and Physical Standards Test.

APPENDIX-3

[See rule 15(g)]

Medical Examination for direct recruitment

The appointing authority will request the Chief Medical Officer of the concerned District to constitute Medical Board for conducting Medical Examination. The Medical Board will consist of three Doctors, who will conduct Medical Examination as per "Police Recruitment Medical Examination Forms" as prescribed and codified by Head of Department in consultation with Director General of Medical Examination. Medical Board may take services of any expert as per requirements.

(1) ***The doctors will examine the candidates in accordance with the Medical Manual,*** *if any, and announce the result on the day of the Medical Examination.*

(2) The result of the Medical Examination will be displayed on the notice board outside the premises at the end of the day.

(3) ***Any candidate not satisfied by his Medical Examination, may file an appeal on the day of examination itself.*** *Any appeal in regard to Medical Examination will not be considered if the candidate fails to file appeal on the date of Medical Examination and declaration of its result itself.* ***The appeal should be disposed of by the Medical Board, constituted for the***

same purpose within two weeks of the appeal being filed. The Medical Board constituted for appeal shall have expert regarding Medical deficiency of the applicant.

(4) The members of the Medical Board who are found to give wrong report wilfully will be liable for criminal proceedings.

(5) The Medical Examination is only qualifying in nature and it has no effect on the merit list.

***Note**:- The Medical Board will examine the candidates and their deficiencies such as knock knee, bow legs, flat feet, varicose veins, distant and near vision, colour blindness, hearing test comprising of Rinne's Test, Webber's Test and Tests for vertigo etc. as notified by the government from time to time. The Medical Board may get conducted other examinations after obtaining opinion of experts.*

Discussions & Findings

10. From the Scheme of the Rules for the recruitment of Police Constable, as reproduced in the afore-quoted order dated 21.01.2021, it is evident that **Rule 15(a)** provides the procedure for filing of application for recruitment and matters relating thereto. **Rule 15(b)** provides for preparation of merit list on the basis of 10th and 12th examination result of candidates. **Rule 15(c)** provides for **physical efficiency** test as per procedure prescribed in Appendix-1. Rule 15(d) provides for scrutiny of documents and physical standard test in accordance with **Appendix-2. Rule 15(e) provides for preparation of select list on the basis of sum total of marks awarded to each candidate on the basis of 10th and 12th examination results as per Clause (b) and marks obtained by him in physical efficiency test as per Clause (c).**

11. Thereafter, the second phase starts. As per **Rule 15(f),** the verification of 10th and 12th examination mark-sheets of the candidates falling into select list, is done by the Board. As per Rule 15(g), the candidates falling in select list under Sub Rule (e) will be required to appear for **medical examination board** which will be conducted as per Appendix-3 in Police Lines of the concerned Districts or at a place of mentioned by the appointing authority. The candidate found unsuccessful in Medical Examination shall be declared unfit by the appointing authority as per Rule 13 of the Rules, 2015.

12. Perusal of the Appendix-2 under Rule 15(d) of the Rules, 2015 shows that scrutiny of documents and physical standard test shall be conducted by a Committee which consists of following members:-

(a) A Deputy Collector nominated by the District Magistrate of the District will be the Chairman;

(b) a Deputy Superintendent of Police nominated by the Senior Superintendent of Police/Superintendent of Police of the district;

(c) District Inspector of Schools (D.I.O.S.) or Basic Siksha Adhikari (B.S.A) or any other gazetted officer of the education department by the District Magistrate.

13. The physical test under Appendix-2 (referable to Rule 15(d)) shall be conducted by the aforesaid committee which has also been authorized to scrutinize the documents. This is a Committee of non-experts in the field of medical science. At the stage of physical standard test and scrutiny of documents under Rule 15(d), the number of candidates

seems to be very high. After the select list is prepared under Rule 15(e), the candidates stand shortlisted and a lesser number of candidates as per merit are included in the select list. Now thereafter, verification of educational certificate/mark-sheet under Rule 15(f) and medical examination by the Medical Board under Rule 15(g) starts.

14. We have also perused the pleadings in the writ petition and we find that there is no allegation in the writ petition that Medical Board has not examined the candidates as per medical manual.

15. Rule 15(g) of the Rules, 2015 contains a provision of appeal. The prescribed form of medical examination as provided in Appendix-3 has been filed today by the State Appellants by means of a supplementary affidavit dated 05.01.2021 which has been taken on record, would show that a format is also provided for appeal. The candidates/petitioners after having being found unfit in the medical examination by the Medical Board under Rule 15(g) read with Appendix-3, have preferred the appeals and their appeals were rejected by another Medical Board consisting of senior medical officers/experts.

16. **The medical examination by the Medical Board consisting of medical experts under Rule 15(g) cannot be said to be inferior to the physical standard test conducted by a team of non-experts. Therefore, we find that the finding recorded by the learned Single Judge in the impugned judgment that the assessment of physical standard by the committee constituted under Appendix-2 to the Rules, 2015 is liable to be preferred over the determination made by the Medical Board in terms of the Appendix-3**, is not sustainable. **Opinion of a committee of non-experts under Rule 15(d) for physical test of a candidate cannot override the opinion of the team of experts, i.e. Medical Board under Rule 15(g) of the Rules.**

17. In view of the above discussions, the **impugned orders** passed by the learned Single Judge **are quashed.**

18. On 21.01.2021, we passed a detail order in which we also noted the submissions of learned counsels for the parties. Paragraphs 14, 15, 16 and 17 of the order dated 21.01.2021, is reproduced below:-

14. Now learned counsel for the petitioners/respondents submits that since large number of candidates were examined by the appellate Medical Board on the same day, therefore, the chances of error cannot be ruled out and, therefore, an opportunity may be afforded to the petitioners-respondents to again appear before the appellate Medical Board and their height and chest measurement may again be done. The submission is that since some of the petitioners have been allowed to join pursuant to the impugned judgement passed by the learned Single Judge and petitioners are ready to bear the cost of medical examination, therefore, one opportunity may be afforded to meet the ends of justice. If in such medical examination, the petitioners are found to have the height and chest as per standard, then, they would continue in the service and in the event, they are still found unfit, then they shall have no grievance. In support of his submission, learned counsel for the petitioners-respondentshas relied

upon a recent judgement and order dated 23.11.2020 passed in ***Special Appeal (Defective) No.679 of 2020 (State of U.P. & 2 others Vs. Rahul Kumar)*** *which is reproduced below:-*

"Heard Sri Manish Goyal, learned Additional Advocate General for the appellants and Sri Irfan Ahmad, Advocate for the respondent-petitioner.

The respondent-petitioner as per the Advertisement No.P.R.P.B.-I-I(138)/2018 had appeared in the written examination and thereafter had appeared for the physical standard verification and was found to be lesser than 168 centimeters in height. However, since he was confident that he was above 168 centimeters in height and that a wrong measurement had been done, he filed a writ petition being Writ-A No.1454 of 2020 (Rahul Kumar vs. State of U.P. & Ors.) wherein the following order was passed on 4.2.2020 :-

"Heard counsel for the petitioner, learned Standing Counsel for the State and perused the material on record.

In the present petition, similar controversy as in Writ A No.1375 of 2020 arises. The contention of the learned counsel for the petitioner is that the height of the petitioner was above the prescribed height limit of 168 centimeters, however, he has been denied only on erroneous computation of the height of the petitioner. The petitioner claims that he has certificates issued by the Medical Authorities to establish that his height is above the prescribed limit of 168 centimeters.

In view of the contrary reports, I deem it appropriate to direct that the petitioner shall appear along with certified copy of this order before the Chief Medical Officer, Bulandshahar on 17.02.2020. The petitioner shall deposit a sum of Rs. 5,000/- as cost with Chief Medical Officer, Bulandshahar, the Chief Medical Officer, Bulandshahar is directed to constitute a Medical Board constituting of three Doctors of the level of Professor and Associate Professor available at the local District Hospital. The C.M.O. shall also inform the S.S.P. of the District, who shall depute an officer of the rank of Additional Superintendent of Police to remain present before the Board on 17.02.2020. The petitioner shall also produce materials in support of his identity before the Medical Board. The petitioner shall appear before the Medical Board on 17.02.2020 and he would be medically examined with regard to his height by the Board of three doctors. The report signed by the Chairman of the Board would be sent through the Chief Medical Officer, Bulandshahar before this Court on or before 26.2.2020. This report would constitute the basis for the Court to determine as to whether the report of the Medical Board and the Appellate Medical Board is liable to be questioned or not?

Post this matter in the additional cause list on 26.2.2020 before the appropriate Court.

The matter shall not be treated as tied-up or part heard to this Court."

Thereafter, on 26.2.2020, the result of the re-measurement, as per the order dated 4.2.2020, was sent to the Court and it was found that the petitioner was above 168 centimeters in height. The writ petition on the basis of the communication was allowed.

The order dated 26.2.2020 passed by the learned Single Bench by which the writ petition being Writ-A No.1454 of 2020 was allowed, was challenged by means of the instant Special Appeal and it has been argued that the learned Single Bench exceeded its jurisdiction when it directed the Board to re-measure the petitioner's height at Bulandshahar. It has also been

argued by the learned Additional Advocate General Sri Manish Goyal assisted by Ms. Akanksha Sharma, Advocate that when an Act provides for the measurement after the written examination only once then the Court could not have got re-measurement done. He has further argued that the procedure when was given out in the advertisement that the measurement would be done at the place where the petitioner had appeared in the examination, then the measurement should have been got done at Moradabad and not at Bulandshahar. He further submitted that when a procedure has been prescribed to do a particular thing in a particular manner, then there could be no deviation.

Learned counsel for the respondent-petitioner, however, submitted that when now the measurement had been done and it had been found that the petitioner was above 168 centimeters in height, then no further interference was warranted.

Having heard the learned counsel for the parties and after having gone through the records, this Court is of the view that even though there was nothing wrong in the re-measurement with regard to the height of the petitioner as it cleared the doubt which was in the mind of the candidate but that doubt could always have been cleared by repeating the measurement at Moradabad itself and the Board should not have been re-constituted at Bulandshahar.

Under such circumstances, the order of the learned Single Bench dated 26.2.2020 is modified to the extent that re-measurement may be done at the very same place where the earlier measurement had been done and for this purpose the Board, as had been constituted by the learned Single Judge, would remain the same but with the Doctors and Police personnel would be of Moradabad.

The Special Appeal is, accordingly, disposed of."

15. Learned Additional Chief Standing Counsel for the appellant now submits that he shall seek instructions from the appellants/competent authority for re-examination of the petitioners-respondents in the light of the afore-quoted judgement and order passed in the case of ***Rahul Kumar (supra).***

16. By order dated 16.12.2020, this Court directed learned Additional Chief Standing Counsel to produce Police Recruitment Medical Examination Form and Medical Manual but the Medical Manual has not been produced.

17. Put up in the additional cause list along with other connected Special Appeals on ***08.02.2021*** *at 2:00 p.m. The learned Additional Chief Standing Counsel shall produce Medical Manual."*

19. Pursuant to the afore-quoted order dated 21.01.2021, learned Additional Chief Standing Counsel has produced before us a copy of Chapter VI of the U.P. Medical Manual and states on instructions that the appellants have instructed that they have no objection if this court directs for re-measurement of height and chest of the petitioners-respondents by a Medical Board as per provisions of Rule 15 (g) of the Uttar Pradesh Police Constable and Head Constable Rules, 2015, provided it may not be made precedent.

20. Considering the statement given by the learned Additional Chief Standing Counsel as above noted, we **dispose of** all these special appeals with a direction to the appellant No.2 to carry out again measurement of height and chest of the petitioners-respondents by a Medical Board as provided under Rule 15(g) of the Rules, 2015 read with Appendix 3.

21. It is made clear that we have issued the above direction with the consent of the State-appellants on the basis of the

statement made by the learned Additional Chief Standing Counsel as afore-noted. **Therefore, this order, to the extent of direction for re-measurement of height and chest; shall not be treated as precedent.** The entire exercise shall be completed by the Appellant No.2 namely U.P. Police Recruitment and Promotion Board, expeditiously, preferably within a period of two months from the date of production of self attested computer generated copy of this order downloaded from the official website of the High Court Allahabad by the petitioners-respondents before appellant No.2.

22. With the aforesaid directions, all these Special Appeals are disposed off.

(2021)03ILR A825
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2021

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

Writ-A No. 7699 of 2020

Suman Lata ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prabhakar Awasthi

Counsel for the Respondents:
C.S.C., Sri Anuj Srivastava, Sri Prashant Mathur

A. Civil Law - UP Basic Education Act, 1972 – UP Basic Education (Teachers) Service Rules, 1981 – Rule 29 – Cantonment Fund Servants Rules, 1937 (C.F.C. Rules) – Assistant Teacher in Primary School managed by Cantonment Board – Age of retirement – 60 years or 62 years – Session benefit – Entitlement – Applicability of the Rules, 1937 – There are no statutory Rules prescribing the retirement age or granting session benefit to a teacher of a Primary School which does not belong to or is not maintained by the Board or a local body as defined in Section 2(e) of the Act, 1972 – C.F.S. Rules do not grant session benefit to a teacher who retires in the mid of the academic session – Held, the retirement age of the petitioner as well as her claim for session benefit can be decided only in terms of the C.F.S. Rules. (Para 32).

Writ Petition dismissed. (E-1)

Cases relied on :-

1. St. of U.P. Vs Ramesh Chandra Tiwari & ors.; 2015 (8) ADJ 509

2. Writ A No. 44835 of 2013; Usha Bunkar Vs General Officer, Commanding in Chief, Central Command & 2 ors. decided on 1.3.2017

3. Triloki Nath Saxena Vs Rookee's High School, Bareilly & ors.; 1997 AWC (Supp.) 422

4. Brahma Dayal Mehta Vs Senior Personnel Executive, Indian Drugs; 1990 (2) AWC 1121

5. Shailendra Kumar Srivastava & anr. Vs District Inspector of Schools,
Chandauli & ors.; 2013 (2) ESC 1016

6. Shyam Lal & anr. Vs St. of U.P. & ors.; 2011 (3) ADJ 640

(Delivered by Hon'ble Salil Kumar Rai, J.)

1. Heard Shri Prabhakar Awasthi, learned counsel for the petitioner as well as Shri Prashant Mathur, Advocate and Shri Bharat K. Srivastava, Advocate, representing the respondents.

2. The present writ petition has been filed challenging the order dated 30.7.2020 passed by the Chief Executive Officer, Cantonment Board, Bareilly Cantt, Bareilly (hereinafter referred to as, 'C.E.O.') retiring

the petitioner w.e.f. 31.7.2020 and for a consequential mandamus not to disturb her peaceful functioning as Headmistress till 31.3.2021, i.e., till the end of the present academic session.

3. The facts of the case are that R.A. Bazar, Primary School, Bareilly (hereinafter referred to as, 'Institution') is managed by the Cantonment Board, Bareilly. It has been stated in the writ petition that the Institution was recognized w.e.f. July 1959 by order dated 24.8.1959 passed by the District Inspector of Schools, Bareilly (hereinafter referred to as, 'D.I.O.S.'), i.e., before the Uttar Pradesh Basic Education Act, 1972 (hereinafter referred to as, 'Act, 1972') was enacted and continues to be recognized by the Basic Shiksha Parishad, i.e., the Uttar Pradesh Basic Education Board (hereinafter referred to as, 'Board') after the Act, 1972 came in operation.

4. The date of birth of the petitioner is 30.7.1958. The petitioner was appointed as Assistant Teacher by order dated 18.6.1982 of the Cantonment Executive Officer, Bareilly Cantonment and joined as such on 26.7.1982. The confirmation of the petitioner as Assistant Teacher is not disputed by the respondents. Subsequently, the petitioner was promoted as Headmistress of the Institution vide order dated 10.7.2014 passed by the C.E.O. A dispute arose between the petitioner and the Cantonment Board regarding the retirement age of the petitioner. The Cantonment Board, being of the view that the petitioner was to retire at the age of 60 years, intimated through notice dated 1.2.2018 her date of superannuation to be 31.7.2018, i.e., on the last date of the month in which she attained the age of 60 years. The Cantonment Board was of the view that the service conditions of the petitioner were governed by the Cantonment Fund Servants Rules, 1937 (hereinafter referred to as, 'C.F.S Rules') which prescribed the age of retirement to be sixty years. The petitioner challenged the aforesaid notice before this Court through Writ-A No. 9831 of 2018 on the ground that by virtue of Rule 29 of the Uttar Pradesh Basic Education (Teachers) Service Rules, 1981 as amended by the Uttar Pradesh Basic Education Teachers Service (12th Amendment) Rules, 2011 (hereinafter referred to as, 'Rules, 1981') her age of retirement was 62 years. This Court vide its order dated 12.4.2018 passed in Writ-A No. 9831 of 2018 stayed the operation of the notice dated 1.2.2018. By virtue of the aforesaid interim order the petitioner continued in service, but vide impugned order dated 30.7.2020, the petitioner was retired w.e.f. 31.7.2020, i.e., on the last date of the month in which she attained the age of 62 years. As noted earlier, the order dated 30.7.2020 passed by the C.E.O., i.e., respondent No. 2 has been challenged in the present writ petition.

5. It has been stated in the writ petition that by virtue of the Proviso to Rule 29 of the Rules, 1981, the petitioner was entitled to session benefit, i.e., she could not be retired before the end of the academic session which starts from 1st of April and ends on 31st March in the next year. It was argued that in the circumstance, the petitioner was entitled to continue as Headmistress of the Institution till 31.3.2021 as her date of retirement falls in the mid of the academic session starting from 1.4.2020. The aforesaid ground raised in the writ petition has also been argued by the counsel for the petitioner. The counsel for the petitioner has argued that the service conditions of the petitioner are not governed by the C.F.S. Rules but are

governed by 1981 Rules and Rule 29 of the 1981 Rules prescribe the age of superannuation of the Teachers appointed in the Basic Schools recognized by the Board. It has been argued that under Rule 29 as amended in 2011, the age of retirement of teachers of Basic Schools is 62 years and the Proviso to Rule 29 provides for extension of service till the end of academic session if the concerned teacher retires in the mid of academic session. Further, through Government Orders and notifications dated 15th October, 2014 and 9th December, 2014, the academic session which previously started from 1st April and ended on 30th June next has been changed and now the academic session in a Basic Schools starts from 1st April and ends on 31st March in the next year. It has been argued that in pursuance to the judgement of this Court in ***State of U.P. Vs. Ramesh Chandra Tiwari & Others, 2015 (8) ADJ 509*** a Government Order dated 8th October, 2015 was issued which in effect provided that a teacher who retires during an academic session shall be entitled to extension of service till the end of the academic session, i.e., till 31st March. It was argued by the counsel for the petitioner that the controversy regarding applicability of C.F.S. Rules on employees and teachers of Basic Schools recognized by the Board is no more res-integra and has already been resolved by this Court in ***Usha Bunkar Vs. General Officer, Commanding in Chief, Central Command & 2 Others Writ A No. 44835 of 2013*** in which this Court vide its judgement and order dated 1.3.2017 held that C.F.S. Rules were not applicable on teachers of the Institutions recognized by the Board and the service conditions of the said teachers shall be governed by the Rules framed under the Act, 1972. The judgement and order dated 1.3.2017 passed in ***Usha Bunkar (Supra)*** was affirmed by the Division Bench of this Court in Special Appeal No. 230 of 2017 vide its judgement and order dated 24.7.2018. It was also stated that the Special Leave Petition No. 22464 of 2018 ***(Cantonment Board, Kanpur & Another Vs. Usha Bunkar & Another)*** challenging the aforesaid two judgements of this Court was dismissed by the Supreme Court vide its judgement and order dated 14.9.2018. The said judgements of this court and the order of the Supreme Court have been annexed with the rejoinder affidavit. In support of his argument, the petitioner has also relied on the judgements referred by this Court in its judgement in ***Usha Bunkar (Supra).***

6. It was argued that in view of the aforesaid, the order dated 30.7.2020 passed by the C.E.O. is contrary to law and liable to be quashed.

7. In their short counter affidavit, the respondents have stated and it has been argued by the counsel for the respondents that the petitioner was appointed under the C.F.S. Rules and under Rule 22 of the C.F.S. Rules, the age of retirement is 58 years and vide letter dated 4th June, 1998 issued by the Ministry of Defence the concerned officers have been permitted to grant extension in service up to the age of 60 years to all Cantonment Fund Servants who were due to retire on 31.5.1981 or thereafter. It was argued that the petitioner was liable to retire in 2018, but continued till 30.7.202 by virtue of the interim order passed by this Court in Writ-A No. 9831 of 2018. It has been further stated in the counter affidavit that there was no provision in the C.F.S. Rules to grant extension of service till the end of academic session if the teacher retires in the mid of academic session and, therefore,

the claim of the petitioner to continue up to 31st March, 2021 even though she attained the age of 62 years on 30.7.2020 is not tenable. It has been argued that the appointment letter was issued to the petitioner under the C.F.S. Rules and her service conditions are not governed by the 1981 Rules but by the C.F.S. Rules and therefore there is no statutory provision entitling the petitioner to continue till the end of the academic session even though her date of retirement falls in the mid of academic session. It has been stated in the counter affidavit and it has also been argued by the counsel for the respondents that in any case by virtue of Article 254 of the Constitution of India, the C.F.S. Rules override any Rule or Regulations framed by the Board under the Act, 1972 and also because the C.F.S. Rules being Special Rules framed under the Cantonment Act, 1924 override the General Rules framed by the Board under the Act, 1972 and thus the petitioner can not claim the benefit of the Proviso to Rule 29 of the Rules, 1981. It was argued that for the aforesaid reasons, the writ petition is liable to be dismissed.

8. I have considered the rival submission of the counsel for the parties.

9. The Uttar Pradesh Basic Education Board was constituted by the State Government exercising its power under Section 3 of the Act, 1972. Under Section 19 of the Act, 1972, the State Government is empowered to make Rules, by notification, for carrying out the purposes of the Act and such Rules may provide for the recruitment and conditions of service of persons appointed to the post of teachers and other employees of basic schools recognized by the Board. Section 19 of the Act, 1972 is reproduced below :-

"19. Power to make Rules. -[(1) The State Government may, by notification, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely -

(a) the recruitment, and the conditions of service of persons appointed to the posts of officers, teachers and other employees under Section 6;

(b) the tenure of service, remuneration and other terms and conditions of service of officers, teachers and other employees transferred to the Board under Section 9;

(c) the recruitment, and the conditions of service of the persons appointed, to the posts of teachers and other employees of basic schools recognized by the Board;

(d) any other matter for which insufficient provision exists in the Act and provision in the rules is considered by the State Government to be necessary;

(e) any other matter which is to be or may be prescribed.]"

(Emphasis added)

10. A perusal of Section 19(2) of the Act, 1972 would show that the under the said provision, the State Government is empowered to make Rules prescribing the conditions of service of officers, teachers and its employees appointed under Section 6 of the Act, 1972, the conditions of service of teachers and other employees transferred to the Board under Section 9 of the Act, 1972 and the conditions of service of persons appointed to the post of teachers and others employees of basic schools **recognized by the Board**. It is not the case of the petitioner that he is an officer or employee of the Board appointed under Section 6 of the Act, 1972. It is also not the

case of the petitioner that he is an officer, teacher or an employee transferred to the Board under Section 9 of the Act, 1972.

11. In exercise of its power under Section 19(2)(c) of the Act, 1972, the State Government framed Rules, 1981. Rule 2(1)(b) of the Rules, 1981 defines the "Appointing Authority" to mean the District Basic Education Officer for teachers referred in Rule 3. Rule 2(1)(c) of the Rules, 1981 defines the "Basic School" as a school where instructions are imparted from classes I to VIII and Rule 2(1)(h) defines "Junior Basic School" as a Basic School where instructions from classes I to V are imparted. Rule 2(1)(n) defines "Service" to mean the Uttar Pradesh Basic Education Teachers' Service and Rule 2(1)(o) defines "Teacher" as a person employed for imparting instructions in Nursery Schools, Basic Schools, Junior Basic Schools, or Senior Basic Schools.

12. Rule 29 of the 1981 Rules prescribes the age of superannuation of teachers and is reproduced below :

29. Age of superannuation.-Every teacher shall retire from service in the afternoon of the last day of the month in which he attains the age of 60 years:

Provided that a teacher who retires during an academic session (July 1 to June 30) shall continue to work till the end of the academic session, that is, June 30 and such period of service will be deemed as extended period of employment.

13. Rule 3 of the Rules, 1981 states that the Rules shall apply to all teachers of local bodies transferred to the Board under Section 9 of the Act, 1972 and also to all teachers employed in the Basic and Nursery Schools established by the Board.

14. Rule 3 of the Rules 1981 are reproduced below :-

"3. Extent of application. - These rules shall apply to :

(i) All teachers of local bodies transferred to the Board under Section 9 of the Act; and

(ii) all teachers employed for the Basic and Nursery Schools **established by the Board."**

(Emphasis added)

15. It is pertinent to note that the Rules, 1981 do not define the term local body, but in accordance with Rule 2(2) of the Rules, 1981 the expression local body used in Rules 1981 shall have the same meaning as defined in Section 2(1)(e) of the Act, 1972. Section 2(1)(e) of the Act, 1972 defines "local body" to mean Zila Panchayat or Municipality as the case may be. Thus, Rules, 1981 govern the services conditions only of a teacher, who is either a teacher of a Zila Panchayat or Municipality transferred to the Board under Section 9 of the Act, 1972 or is a teacher in a Basic School **established by the Board**. The Cantonment Board is not a local body as defined in Section 2(1)(e) of the Act, 1972 and, the petitioner is not a teacher of a local body transferred to the Board under Section 9 of the Act, 1972, therefore, the petitioner is not covered by Rule 3(i) of the Rules, 1981. The Institution of the petitioner is not established by the Board. The Institution of the petitioner has been established and is being managed by the Cantonment Board. It is evident that the Institution is not covered by Rule 3(ii) of the Rules, 1981 also and thus the service conditions of the petitioner are not governed by the Uttar Pradesh Basic Education (Teachers) Service Rules, 1981. Consequently, Rule 29 of the Rules, 1981 is not applicable on

the petitioner and the petitioner can not seek benefit of the Proviso of the said Rule which provides for extension of service of a teacher in case his age of superannuation falls in the mid of academic session, i.e., between 1st April and 31st March of the next year.

16. The State Government in exercise of its power under Section 19 of the Act, 1972 has also framed The Uttar Pradesh Recognized Basic Schools (Recruitment & Conditions of Service of Teachers and Other Conditions) Rules, 1975 (hereinafter referred to as, 'Rules, 1975'). Rule 3 of the Rules, 1975 states that every recognized school shall be bound by the conditions and restrictions specified in the said Rules. Rule 3 of the Rules, 1975 is reproduced below :-

"**3. Applicability**. - Every recognised school shall be bound by the conditions and restrictions hereinafter specified."

Rule 2(b) of the Rules, 1975 defines Junior Basic School to mean an Institution other than High Schools or Intermediate Colleges imparting Education upon Vth Class.

17. Rule 2(e) of the Rules, 1975 defines recognized schools as follows :-

"**2(e).** "Recognised School" means any Junior Basic School, **not being an institution belonging to or wholly maintained by the board or any local body**, recognised by the Board before the commencement of these rules for imparting education from Class I to V."
(Emphasis added)

18. Local body has not been defined in the Rules, 1975 also but as the Rules, 1975 are delegated legislation framed by the State Government in exercise of its powers under Section 19(2)(c) of the Act, 1972, therefore, words or phrases used in the Rules but not defined would have the same meaning as defined in the Act, 1972. In view of the aforesaid, local body in Rule 2(e) of the Rules, 1975 would have the same meaning as defined in Section 2(1)(e) of the Act, 1972, i.e., Zila Panchayat or Municipality, as the case may be. The Institution neither belongs to nor is wholly maintained by the Board or any local body. However, it has been stated by the petitioner that the Institution was recognized before commencement of the Rules for imparting education from class I to V. In view of the aforesaid, on the averment of the petitioner, the 1975 Rules govern the service conditions of the petitioner.

19. A perusal of Rules, 1975 indicates that though Rule 10 of the Rules, 1975 ensures that even recognized schools shall undertake to pay to every teacher and employee the same scale of pay, dearness allowance and additional dearness allowance as are paid to the teachers and employees of the Board possessing similar qualifications and Rule 11 of the said Rules provide that no order dismissing, removing or terminating the services of a teacher or other employee of a recognized school shall be passed without prior approval in writing of the Basic Shiksha Adhikari, but there is no provision in the Rules, 1975 regarding superannuation of the teachers and the employees of recognized basic schools, i.e., Basic Schools which are not established and wholly maintained by the Board or local body as defined in Section 2(1)(e) of the Act, 1972. Rule, 13 of the Rules, 1975 merely provides that it would be the duty of the managing body to comply with the provisions of the Act and the Rules, 1975 and other lawful directions

as may from time to time be issued from a person authorized by the Board. The petitioner has not brought anything on record to show that any directions were issued by the Board to the Management of the Institution asking it to modify the service conditions of its employees to confirm with Rule 29 of the Rules, 1981. At this stage, it is clarified that the Court is not expressing any opinion on the validity of such direction, if any, issued by the Board as the same is not in issue before this Court.

20. The outcome of the above discussion is that the benefit of the Proviso of Rule 29 of Rules, 1981 is available only to teachers specified in Rule 3 of Rules, 1981 and the service conditions of teachers of Junior Basic Schools recognized by the board but not wholly maintained by the Board or any local body, i.e., a Zila Panchayat or a Municipality, shall be governed by the Rules, 1975. The Rules, 1975 do not prescribe the age of superannuation of such teachers, i.e., teachers whose service conditions are governed by Rules, 1975. The age of superannuation of such teachers and claim for extension of service beyond the age of superannuation would depend on the provision in the rules prescribed by the managing body of the school. In the present case it is the C.F.S. Rules which, admittedly, do not provide for extension of service beyond the age of superannuation.

21. Before dealing with the different cases referred by the counsel for the petitioner wherein orders have been passed granting session benefit to the teachers, it would be appropriate to refer to the Service Rules applicable in the said cases.

22. The service conditions of the teachers of recognized Junior High Schools are governed by the Uttar Pradesh Recognized Basic Schools (Junior High Schools)(Recruitment and Conditions of Service of Teachers), Rules, 1978 (hereinafter referred to as, 'Rules, 1978'). The said Rules have been made by the State Government in exercise of its power under Section 19(2) of the Act, 1972. Rule 2(h) of the Rules, 1978 defines "Recognized Schools" to mean any Junior High School, **not being an institution belonging to or wholly maintained by the Board or any local body**, recognized by the Board as such. Local body has not been defined in the Rules, 1978, and therefore, the term would have the same meaning as given in Section 2(1)(e) of the Act, 1972. A Junior High School recognized by the Board but not maintained by the Board or any local body would be a recognized school under Rule 2(h) of the Rules, 1978. Thus, a Junior High School managed and maintained by the Cantonment Board, but recognized by the Board, i.e., the Uttar Pradesh Board of Basic Education shall be a recognized school under the Rules, 1978 and the Rules, 1978 shall govern the service conditions of teachers of a Junior High School managed and maintained by the Cantonment Board.

23. Rule 14 of the Rules provide as follows :-

"14. Superannuation. -Every Headmaster or Assistant Teacher of a **recognised school** shall retire in the afternoon of the last day of the month in which he attains the age of sixty two years, provided that a Headmaster or Assistant Teacher who retires during an academic session, not being Headmaster and Assistant Teacher retiring on June 30, shall continue to work till June 30, following next after the date of retirement and such

period of service shall be deemed as extended period of employment."
(Emphasis added)

24. A reading of the Rule 14 of the Rules, 1978 shows that it is applicable on recognized school and the benefit of the said Rule is available to every Headmaster or Assistant Teacher of a recognized school. Rule 14 of the Rules, 1978 grant session benefit to a teacher of a recognized school who retires in the mid of the academic session.

25. Similarly, The Intermediate Education Act, 1921 (hereinafter referred to as, 'Act, 1921'), defines "Institution" in Section 2(b) to mean a recognised Intermediate College, Higher Secondary School or High School, and includes, where the context so requires, a part of an institution. Section 2(d) of the Act, 1921 defines "Recognition" to mean recognition for the purpose of preparing candidates for admission to the Board's examinations. "Board" in Section 2(a) of the Act, 1921 is defined to mean Board of High School and Intermediate Education. Section 2(e) of the Act, 1921 defines Regulations as 'Regulations made by the Board under the Act.' Section 15 empowers the Board to make Regulations for the purpose of carrying into effect the provisions of the Act and Section 15(2)(k) empowers the Board to make Regulations on all matters which by the Act are to be or may be provided for by the Regulations. **It is relevant to note that 'local body' has not been defined in the Act, 1921. Section 16G of the Act, 1921** provides that every person, which includes teachers and Head of the Institution, **employed in a recognised institution** shall be governed by such conditions of service as may be prescribed by Regulations and any agreement between the management and such employee insofar as it is inconsistent with the provisions of the Act, 1921 or the Regulations framed thereunder shall be void. Section 16G(1) of the Act, 1921 is reproduced below :-

"16G.[Conditions of service of Head of Institutions, teachers and other employees]. - (1) **Every person** employed in a **recognised institution** shall be governed by such **conditions of service as may be prescribed by Regulations and any agreement between the management and such employee insofar as it is inconsistent with the provisions of this Act or with the Regulations shall be void."** (Emphasis added)

26. Section 16H of the Act, 1921 exempts from the operation of Section 16G of the Act, 1921 recognized institutions maintained by the State Government or the Central Government as well as recognized institutions maintained by a local body who have been declared to be so exempted by the State Government.

27. A joint reading of the different sub-clauses of Section 2 with Sections 16G and 16H of the Act, 1921 shows that the service conditions of teachers and the Head of a Intermediate College, Higher Secondary School or High School **recognized by the Board of High School and Intermediate Education** shall be such as may be prescribed by the Regulations except where the Institution is maintained by the Central or State Government or is maintained by a local body and the State Government exempts the Institution from operation of Section 16G of the Act, 1921. Apparently the Act, 1921 and the Regulations framed thereunder shall apply on the recognized Intermediate Colleges

and High Schools managed and maintained by a Cantonment Board or any other local body till the State Government exempts the said schools as stipulated in Section 16H.

28. Chapter III of the Regulations framed under the Act, 1921 prescribes the conditions of service of the employees of the Institution governed by Act, 1921. Regulation 21 of the said Chapter III prescribes the age of retirement of the Principal, Headmaster and Teachers of such Institutions and also provides for extension of service till the end of academic session in case the age of retirement of any such employee falls in the mid of academic session. Regulation 21 is reproduced below :-

"21. आचार्य प्रधानाध्यापक, अध्यापकों का अधिवर्ष वय 62 वर्ष होगी फलस्वरूप 58 वर्ष की अधिवर्षता आयु पर मिलने वाले सेवा नैवृत्तिक लाभ अब 60 वर्ष की अधिवर्षता आयु पर तथा 60 वर्ष की अधिवर्षता आयु पर मिलने वाले सेवा नैवृत्तिक लाभ 62 वर्ष की अधिवर्षता आयु पर अनुमन्य होंगे। **यदि किसी आचार्य, प्रधानाध्यापक अथवा अध्यापक का उपर्युक्त अधिवर्ष वय 2 जुलाई और 30 जून के मध्य में किसी तिथि को पड़ता है तो उसे उस दशा को छोड़कर जबकि वह स्वंय सेवा विस्तरण न लेने हेतु लिखित सूचना अपने अधिवर्ष वय की तिथि से 2 माह पूर्व दे दें, 30 जून तक सेवा विस्तरण स्वयमेव प्रदान किया गया समझा जायेगा,** ताकि ग्रीष्मावकाश के उपरान्त जुलाई में प्रतिस्थानी की व्यवस्था हो सके। इसके अतिरिक्त सेवा विस्तारण केवल उन्हीं विशिष्ट दशाओं में प्रदान किया जा सकेगा जो राज्य सरकार द्वारा निर्धारित की जाय।"

(Emphasis added)

29. Regulation 21 was subsequently amended through notifications dated 12th June, 2014 and 15th October, 2014 providing that the academic session shall begin from 1st April and end on 31st March next year and consequently the extension of service shall be granted to the teachers whose retirement age falls between 2nd April and 31st March next.

30. The above discussion shows that age of superannuation and session benefit is prescribed in the Rules governing the service conditions of teachers of recognized Junior High Schools as well as recognized Intermediate Colleges, Higher Secondary Schools and High Schools, which includes such schools managed by the Cantonment Board. Similarly, age of superannuation and provision of extension of service is also provided in Rule 29 of Rules, 1981 which govern the service conditions of teachers of basic schools of Zila Panchayat and Municipality transferred to the Board and also of teachers employed for Basic Schools established by the Board. The Rules, 1981 do not govern the service conditions of Basic Schools managed and maintained by the Cantonment Board. However, Rules, 1975 which govern the service conditions of teachers of recognized Junior Basic Schools, which includes such schools managed by the Cantonment Board, does not prescribe the age of superannuation of teachers of Junior Basic Schools and also does not provide for extension of service in case the teacher retires in the mid of academic session. **It is this oddity in Rules, 1975, i.e., the omission to prescribe the age of superannuation and for extension of service till the end of academic session, which distinguishes it from Rules, 1981, Rules 1978 and the Regulations framed under the Act, 1921 and has to be kept in mind while considering the different judgements referred by the counsel for the petitioner.**

31. In Writ-A No. 44835 of 2013, i.e., the ***Usha Bunkar (Supra)*** case, the issue related to extension of service till the end of academic session to an Assistant Teacher of a Junior High School. A Junior High School managed or maintained by a

Cantonment Board would be governed by the Rules, 1978 and therefore the benefit of Rule 14 would be available to the teachers of such an Institution. Similarly, the judgements of this Court in ***Triloki Nath Saxena Vs. Rookee's High School, Bareilly & Others 1997 AWC (Supp.) 422, Brahma Dayal Mehta Vs. Senior Personnel Executive, Indian Drugs, 1990 (2) AWC 1121, Shailendra Kumar Srivastava & Another Vs. District Inspector of Schools, Chandauli & Others, 2013 (2) ESC 1016 and Shyam Lal and Another Vs. State of U.P. & Others, 2011 (3) ADJ 640,*** relate to applicability of Section 16G of the Act, 1921 and benefit of Regulations 21 to the teachers employed in recognized Institutions as defined in the Act, 1921. In ***Ramesh Chandra Tiwari (Supra)*** the issue was regarding the benefit of Rule 29 of the Rules, 1981. It is apparent from paragraph 1 of the reports that the case related to Head Master of Schools conducted and managed by the Uttar Pradesh Basic Education Board and it was not disputed that the teachers in the Institutions in question were governed by Rules, 1981 and, therefore, the benefit of Rule 29 was available to the said teachers. The judgement does not consider the case of teachers of Basic Schools, whose service conditions are not governed by Rules, 1981 and is, thus not a precedent for the present case. Thus, the judgements referred above do not help the case of the petitioner and are not applicable in the present case.

32. It is the prerogative of the employer to prescribe the service conditions of its employees. The said prerogative can be superseded by statutory rules which may prescribe the service conditions of the employees. There are no statutory Rules prescribing the retirement age or granting session benefit to a teacher of a Primary School which does not belong to or is not maintained by the Board or a local body as defined in Section 2(e) of the Act, 1972. In view of the aforesaid, the retirement age of the petitioner as well as her claim for session benefit can be decided only in terms of the C.F.S. Rules. It is the admitted case of the petitioner that the C.F.S. Rules do not grant session benefit to a teacher who retires in the mid of the academic session.

33. It is clarified that I have not expressed any opinion on the argument of the counsel for the respondents regarding Article 254 and the power of the Board or the State Government to enact rules governing the service conditions of the teachers of Schools managed by the Cantonment Boards but recognized by the respective Education Boards as they were not necessary to decide the present case.

34. For the reasons stated above, the petitioner is not entitled to the relief claimed by her.

35. The writ petition is accordingly dismissed.

(2021)03ILR A834
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.03.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Consolidation No. 56 of 1994

Jagram ...Petitioner
Versus
D.D.C. & Ors. ...Respondents

Counsel for the Petitioner:

M. Afzal, Mohiuddin Khan, Nagendra B. Singh, Nagendra Srivastava

Counsel for the Respondents:
C.S.C., Prabhakar Vardhan Chaudha

A. Civil Law – Consolidation – Validity of sale deed - The sale deed cannot be treated as invalid only on the plea that it was for inadequate consideration - The application of opposite party no. 2 could not have been rejected on the ground that total sale consideration was not paid because firstly it was not the case of the petitioner and secondly if it was not paid the same could have been claimed by the petitioner in accordance with law. (Para 11)

The remaining amount Rs. 2,000/-, which is being said not to have been paid to the petitioner, though it does not seem to be the case of the petitioner, the learned revisional court has rightly provided that the petitioner can claim the same by filing a suit. (Para 17)

B. Petitioner was not a minor at the time execution of sale deed, therefore the sale deed cannot be said to be illegal or void on this ground - The mother of the petitioner had submitted in her statement that the petitioner was two years younger to Mahadev and the age of Mahadev has been shown twenty years in the objection. In this way also the age of the petitioner comes to eighteen years therefore the sale deed cannot be said to be illegal or void on this ground. (Para 11)

After considering the evidence the learned Consolidation Officer has recorded a finding that the age of the petitioner has been shown as thirteen years in Khatauni of 1376 Fasli to 1378 Fasli and the sale deed was executed on 21.04.1976 i.e. 1383 Fasli as such at the time of execution of sale deed he was twenty years of age and was not minor. (Para 10)

It has been recorded that the petitioner had not appeared before Consolidation Officer for his evidence and cross-examination, whereas the statement of petitioner was recorded by the Assistant Consolidation Officer in which he had admitted his age as twenty one years. He never gave any evidence that the sale deed was executed by giving any allurement or forcefully. The petitioner has also not shown his age while filing objection in the revisional court. There is no provision that the Sub-registrar is obliged to record the majority or minority of the executant. This Court finds that none of the Courts below has recorded any finding that the petitioner was not major at the time of execution of sale deed. Therefore, the concurrent view of the Courts below is that the petitioner was major at the time of execution of sale deed. (Para 17, 18)

C. Task of comparing signatures /writings/thumb impressions - Where the court finds that the disputed finger impression and admitted thumb impression are clear and where the court is in position to identify the characteristic of finger prints, the court may record a finding on comparison, even in absence of an expert opinion. But where the disputed thumb impression is smuggy, vague or very light the court should not hazard a guess by casual perusal. But no such finding has also been recorded while comparing the thumb impression. (Para 13, 14)

Writ petition dismissed. (E-3)

Precedent followed:

1. Smt. Kilhati Vs Deputy Director of Consolidation (II) Basti & anr., 1975 RD 280 (Para 8, 13)

2. Thiruvendgada Pillai Vs Navaneethammal, AIR 2008 SC 1541 (Para 8, 13)

3. Ram Shakal & anr. Vs St. of U.P. & ors., 1987 (5) LCD 261 (Para 8, 14)

Precedent distinguished:

1. Mohori Bibee & anr. Vs Dharmodas Ghose, (1903) ILR 30 P.C. 539 (Para 5, 18)

2. Vishwambhar & ors. Vs Laxminarayan (Dead), Appeal (Civil) 554 of 1998, judgment and order dated 20.07.2001 (Para 5, 15)

3. Rangammal Vs Kuppuswami & anr., Civil Appeal no. 562 of 2003 (Para 5, 16)

Present petition challenges order dated 19.10.1993, passed by Deputy Director of Consolidation.

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

1. Heard, Shri Mohiuddin Khan, learned counsel for the petitioner and Shri P.V. Chaudhary, learned counsel for the opposite party no.2. The opposite party no.1 is the court concerned.

2. This writ petition has been filed challenging the order dated 19.10.1993 passed by the opposite party no.1 by means of which the revision filed by the opposite party no.2 has been allowed.

3. The brief facts of the case are that the petitioner was a Sirdar of the land in dispute i.e. Gata No.25 having area of 70 Biswa. The petitioner applied for Bhumidari rights. On the basis of bhumidhari rights, the petitioner executed the sale deed in favour of the opposite party no.2 on 21.04.1976. On the basis of the said sale deed the opposite party no.2 applied for mutation before the Consolidation Officer. The objection on behalf of the petitioner was filed by his mother Smt. Indra Devi on the ground that her son i.e. the petitioner was minor at the time of execution of sale deed and the sale deed was got executed by fraud and no consideration was paid. The Consolidation Officer rejected the objection of the opposite party no.2 vide order dated 29.01.1978 / 30.01.1978. The opposite party no.2 preferred an appeal before the Settlement Officer Consolidation, which too was rejected vide order dated 17.02.1979. Thereafter the revision was preferred by the opposite party no.2 which has been allowed by the Deputy Director of Consolidation i.e. opposite party no.1 on 19.10.1993, hence the present writ petition.

4. Submission of learned counsel for the petitioner was that the petitioner was minor at the time of execution of sale deed and it should have been recorded by the Sub-Registrar but it was not recorded. He further submitted that the petitioner has been shown as minor and Sirdar in 1376 Fasli but the revisional court has failed to consider it. He had also submitted that the evidence of the mother of the petitioner is of great evidentiary value, who had stated that the petitioner was minor at the time of execution of sale deed but it has not been considered. It is a settled proposition of law that the sale deed executed by a minor is void-ab-initio. The concurrent finding recorded by the Consolidation Officer and the Appellate Authority could not have been interfered by the Revisional Authority. Accordingly learned counsel for the petitioner submitted that the impugned order is not sustainable and is liable to be quashed and the writ petition is liable to be allowed.

5. Learned counsel for the petitioner has relied on ***Mohori Bibee and Another vs. Dharmodas Ghose; (1903) ILR 30P.C.539, Vishwambhar and Others Vs. Laxminarayan (Dead); Appeal (Civil) 554 of 1998*** (judgment and order dated 20.07.2001) and ***Rangammal Vs. Kuppuswami and Another; Civil Appeal No.562 of 2003*** (judgment and order dated 13.05.2019).

6. Per contra, learned counsel for the opposite party no.2 had submitted that the new number of plot in question is plot no.80 / 0-17-0. The petitioner was major and he was twenty years of age on 21.04.1976 i.e. the date of execution of sale deed. There is no provision for recording minority or majority of the executant by the Sub-Registrar. The Revisional Court has rightly considered the case on the basis of material available on record and the

evidence. He had also submitted that there was no concurrent finding by the Consolidation Officer and the Settlement Officer of Consolidation. The Consolidation Officer had also found that the petitioner was eighteen years of age at the time of execution of sale deed but the application was rejected on the ground that the application for mutation can not be allowed unless the total amount of consideration is paid and Rs.2,000/- is remained to be paid, whereas non-payment of total sale consideration, though it was paid, cannot be a ground for rejection of mutation application. This point was also neither specifically raised before the Consolidation Officer nor argued but the learned Consolidation Officer had rejected the application on the ground that total sale consideration has not been paid. However, he also submitted that inadequacy of sale consideration does not make the sale itself invalid and it has rightly been considered by the revisional court.

7. He had further submitted that before the Appellate Authority also neither the doubt regarding the thumb impression of the petitioner was raised nor any expert evidence was called but the Appellate Authority on his own, after comparing the thumb impression dismissed the appeal which could not have been done. He had submitted that in fact a compromise was also made between the parties before the Deputy Director of Consolidation in terms of which the petitioner had accepted the execution of sale deed on which the revision was allowed. But subsequently a recall application was moved. The petitioner denied his signature on recall application, the affidavit and 'Vakalatnama'. Accordingly learned counsel for the opposite party no.2 submitted that the revision has rightly been decided by the opposite party no.2 in accordance with law after considering the pleadings and records therefore the writ petition is misconceived and is liable to be dismissed.

8. Learned counsel for the opposite party has relied on ***Smt. Kilhati Vs. Deputy Director of Consolidation (II) Basti and Another; 1975 RD 280, Thiruvendgada Pillai Vs. Navaneethammal; AIR 2008 SC 1541 and Ram Shakal and Another Vs. State of U.P. and Others; 1987 (5) LCD 261.***

9. I have considered the submissions of learned counsel for the parties and perused the record.

10. The petitioner had executed a sale deed of the land in dispute in favour of the opposite party no.2 on 21.04.1976. Thereafter the opposite party no.2 moved an application for mutation on the basis of sale deed on 22.04.1976. It appears that the petitioner gave an affidavit, in which he admitted the execution of sale-deed as per his requirement and it was identified by an advocate on 28.06.1976. This compromise was entered into on 28.05.1976. However an objection was filed by the mother of the petitioner Smt. Indra Devi on 05.07.1976, on the ground that the petitioner was minor at the time of execution of sale deed and the opposite party no.2 has got executed the sale deed in his favour forcibly giving him allurement. Since there was an objection therefore the Assistant Consolidation Officer directed to adduce the evidence. The evidence of the mother of the petitioner was recorded in which she supported her objection. The petitioner was examined by Assistant Consolidation Officer in which he stated his age 21 years. After considering the evidence and material

on record the Consolidation Officer rejected the application of the opposite party no.2 on the ground that the sale consideration has been shown as Rs.4,000/- in the sale deed and the opposite party no.2 has accepted that he had purchased the land in Rs.4,000/- but payment of Rs.2,000/- has only been shown in the sale deed and the remaining Rs.2,000/- has not been paid and rejected the application on this ground. However after considering the evidence the learned Consolidation Officer has recorded a finding that the age of the petitioner has been shown as thirteen years in Khatauni of 1376 Fasli to 1378 Fasli and the sale deed was executed on 21.04.1976 i.e. 1383 Fasli as such at the time of execution of sale deed he was twenty years of age and was not minor.

11. The mother of the petitioner had submitted in her statement that the petitioner was two years elder than Mahadev and the age of Mahadev has been shown twenty years in the objection. In this way also the age of the petitioner comes to eighteen years therefore the sale deed can not be said to be illegal or void on this ground. The application of opposite party no.2 could not have been rejected on the ground that total sale consideration was not paid because firstly it was not the case of the petitioner and secondly if it was not paid the same could have been claimed by the petitioner in accordance with law. This Court in the case of ***Smt. Kilhati Vs. Deputy Director of Consolidation (II) Basti and Another (supra)*** has held that the sale deed can not be treated as invalid only on the plea that it was for inadequate consideration.

12. The opposite party no.2 had filed the appeal against the order passed by the Consolidation Officer rejecting his application on 30.01.1978. The Settlement Officer Consolidation had rejected the appeal by means of the order dated 17.02.1979 on the ground that the thumb impression of the petitioner does not tally with the thumb impression of the petitioner at the time of registration rather it tallies more or less with the thumb impression of the opposite party no.2 and also considered the ground on which the Consolidation Officer had rejected the application. It has been recorded that some other person was presented at the time of registration and thumb impression was obtained without any evidence or expert opinion in regard to the thumb impression. It could not have been done by the Court itself on his own without any expert opinion or assistance of any evidence. It was also not required because there was no dispute that the sale deed has not been executed by the petitioner. The mother of the petitioner has also admitted that the sale deed has been got executed from the petitioner. The dispute was only regarding age of petitioner at the time of execution of sale deed.

13. The Hon'ble Supreme Court in the case of ***Thiruvendgada Pillai Vs. Navaneethammal (Supra)*** has held that where the court finds that the disputed finger impression and admitted thumb impression are clear and where the court is in position to identify the characteristic of finger prints, the court may record a finding on comparison, even in absence of an expert opinion. But where the disputed thumb impression is smuggy, vague or very light the court should not hazard a guess by casual perusal. But no such finding has also been recorded while comparing the thumb impression. The relevant paragraph-15 is extracted below:-

*"**15**. 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 finger prints, 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. The decision in Muralilal (supra) and Lalit Popli (supra) 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."

14. This Court in the case of ***Ram Shakal and Another Vs. State of U.P. and Others (Supra)*** has held that the court should not take upon himself the task of comparing signatures in order to find out whether the two signatures or writings agree with each other or not. The relevant paragraph-9 is extracted below:-

"9. Thus, where an expert opinion is given, the court must see for itself and with the assistance of the expert's opinion come to its own conclusion whether it can safely be held that the two writings are by the same person, or the signatures appearing on record are of the same person for whom it is said that they put the signatures on the document in question. This would not amount to the court playing role of an expert. The court may accept or reject the expert opinion on the point and record his finding taking into consideration all facts and circumstances of the case. The court would, however, not resort to play role of an expert. The court should not take upon himself the task of comparing signatures in order to find out whether the two

signatures or writings agree with each other or not. The prudent course as observed by the Hon'ble Supreme Court in State (Delhi Administration) Vs. Pali Ram (Supra), is to obtain opinion and assistance of an expert."

15. The Hon'ble Supreme Court in the case of ***Vishwambhar and Others Vs. Laxminarayan (Dead); Appeal (Civil) 554 of 1998*** vide judgment and order dated 20.07.2001 has considered the period of limitation in filing a suit for cancellation of sale deed in the case of a minor after attaining the age of majority therefore this case is of no assistance to the case of petitioner.

16. The Hon'ble Apex Court in the case of ***Rangammal Vs. Kuppuswami and Another; Civil Appeal No.562 of 2003*** has considered the question of law "whether the sale deed executed by defacto guardian on behalf of the minor without the permission of the Court could be held to be valid ?" and as to whether the Court can shift the burden of proof on the defendant-appellant regarding the validity of the sale deed which was executed when the appellant was minor contrary to the pleadings of the plaint filed in a suit for partition and the question of limitation therefore this case is also of no assistance to the case of the petitioner.

17. The revision was filed by the opposite party no.2. It appears that the revision was decided on the basis of compromise through advocates entered into between the petitioner and the opposite party no.2 on 16.10.1979. Subsequently an application was moved by the petitioner alleging that the petitioner and his mother had not entered into any compromise. Considering the same the order dated 16.10.1979 was recalled. The said order was challenged in Writ Petition No.474 of 1985 which was decided on 05.09.1990 and thereafter the revision was decided. The revisional court considered the evidence and record and found that the mother of the petitioner had accepted in her objection that the sale deed was executed by the petitioner but since the petitioner was minor at the time of execution of sale deed, therefore the opposite party no.2 had got the sale deed executed forcibly by giving allurement to the petitioner. The age of the petitioner was recorded thirteen years in Khatauni of 1376 Fasli to 1378 Fasli therefore the petitioner was major on the date of execution of sale deed on 21.04.1976 i.e. in 1383 Fasli. It has been recorded that the petitioner had not appeared before Consolidation Officer for his evidence and cross-examination, whereas the statement of petitioner was recorded by the Assistant Consolidation Officer in which he had admitted his age as twenty one years. He never gave any evidence that the sale deed was executed by giving any allurement or forcefully. The petitioner has also not shown his age while filing objection in the revisional court. The revisional court also recorded that there is contradiction in the evidence of the mother of the petitioner and his only other witness Anant Ram. The revisional court after considering the evidence given by the mother of the petitioner in regard to his marriage and the birth of his elder brother Mahadev and difference of age between his elder brother and the petitioner and death of husband of the mother of the petitioner the revisional court came to the conclusion that the petitioner was definitely major at the time of execution of sale deed, which was also accepted by the Consolidation Officer and not interfered by the Settlement Officer Consolidation. Therefore the evidence of

the mother of the petitioner is not trust worthy and there is no provision that the Sub-registrar is obliged to record the majority or minority of the executant. This Court is in agreement with the findings recorded by the revisional court and does not find any illegality or error in it. As such the sale deed was not void and the mutation can not be denied. So far as the remaining amount Rs.2,000/- is concerned which is being said not to have been paid to the petitioner, though it does not seem to be the case of the petitioner, the learned revisional court has rightly provided that the petitioner can claim the same by filing a suit.

18. So far as the question of alleged concurrent finding recorded by the Consolidation Officer and the Settlement Officer Consolidation is concerned this court is of the view that there is no concurrent finding because the Consolidation Officer had accepted that the petitioner was major at the time of execution of sale deed but rejected the application merely on the ground that the total sale consideration has not been paid whereas the Settlement Officer Consolidation, without dealing the issue of the age of the petitioner at the time of execution of sale deed, recorded a finding of execution of sale deed by presenting some other person on the basis of tallying the thumb impression taken before him without any expert opinion and also considering the ground of mentioning of lesser cost of property, while it was not the case of petitioner. The mother of the petitioner had also not taken this objection. On the the other hand this Court finds that none of the Court's below has recorded any finding that the petitioner was not major at the time of execution of sale deed. Therefore in fact the concurrent view of the Court's below is that the petitoner was major at the time of executon of sale deed. This court is also in agreement with this view. Therefore the case of Mohori Bibee and Another vs. Dharmodas Ghose; (1903) ILR 30P.C.539, relied by learned counsel for the petitioner is of no assistance to him because it has been held that the contract made by a minor would be void whereas the petitioner was major on the date of execution of sale deed.

19. In view of above this court is of the considered opinion that the learned Revisional court has rightly considered and passed the impugned order dated 19.10.1993 in accordance with law by a reasoned and speaking order. There is no illegality or error in it. Hence this writ petition is misconceived and devoid of any merit and liable to be dismissed.

20. The writ petition is, accordingly, dismissed. No order as to costs.

(2021)03ILR A841
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.03.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Consolidation Nos. 543 of 2006 & 862 of 2006

Hari Nam Singh & Ors. ...Petitioners
Versus
D.D.C., Unnao & Ors. ...Respondents

Counsel for the Petitioners:
Nirankar Nath Jaiswal, Prashant Jaiswal

Counsel for the Respondents:
C.S.C., R.N. Gupta, Ramesh Kumar Srivastava

A. Civil Law – Consolidation – U.P. Tenancy Act - Section 205 - U.P.

Consolidation of Holdings Act, 1953- Sections 11(1), 48 - Consolidation of Holdings Rules, 1954 - Rule 109-A.

In the present case there is no clear evidence and issues of title and possession were not contested and there are no concurrent findings of all the courts below. This Court also found that the Consolidation Officer has allowed the objection without any evidence or sufficient material and contrary to contest. (Para 15)

The petitioners had not contested the issues regarding his claim as actual tenure holder and Bhumidhar with transferable rights on the basis of adverse possession. The only issue which was contested was, as to whether there is grove on the land in dispute? if yes, then effect? Therefore this court is of the view that the Consolidation officer had wrongly and illegally considered the claim of the petitioners on the land in dispute and declared the petitioners not only the grove holder but Bhumidhar with transferable rights u/s 18(1)(e) of the Act of 1952 merely on the basis of a copy of Khasra of 1347 Fasli and on the basis of alleged circumstantial evidence and the report of the Advocate Commissioner which are also not in favour of the petitioners and without any cogent evidence. (Para 12)

Since the grove was found on the land in dispute and the petitioners had not contested the issues of actual tenure holder and adverse possession, it has rightly been recorded in the name of Gram Sabha. (Para 13)

Since the petitioners' claim was not sustainable, the opposite party no. 2, who is claiming half of the land of Plot No. 798 on the basis of possession alongwith petitioners is also not sustainable. (Para 14)

B. Consolidation of Holdings Act, 1953 - Section 11(C) – U/s 11(C), it is provided that if CO., S.O.C., D.D.C. while hearing a case comes to the conclusion that any land vests in the State Government or Gaon Sabha then it shall be recorded in the name of State or Gaon Sabha even though no objection, appeal or revision has been filed by State or Gaon Sabha. Therefore even if the Gaon Sabha has not filed any objection, appeal or revision and the Revisional Authority, while examining the case u/s 48, finds that the land belongs to Gaon Sabha, it can direct to record in the name of Gaon Sabha in accordance with law. (Para 17, 18)

C. Consolidation of Holdings Act, 1953 - Section 48 - For exercising the power of revisional jurisdiction, party aggrieved may or may not invoke S.48 and in appropriate case, the Deputy Director of Consolidation can suo moto exercise his powers of revisional jurisdiction and he may make such order as he thinks fit. Therefore also, even if, the Goan Sabha had not made any application or revision and the Deputy Director of Consolidation finds that the land in dispute vests in the Gaon Sabha, State Government or any local authority he may make an order to vest it in the same. (Para 19, 20)

The Revisional Authority after considering the pleadings and evidence has found that the land in dispute belongs to Gram Samaj therefore even if the orders passed by the lower authorities were not sustainable and quashed, no fruitful purpose would have been served by remanding the case when the Revisional Authority itself has authority to pass the order under the statute. (Para 21)

Writ petitions dismissed. (E-3)

Precedent followed:

1. Dheeraj & anr. Vs Deputy Director of Consolidation, Gautam Budh Nagar & ors., 2009 (107) RD 695 (Para 18)

2. Ram Gopal Vs Deputy Director of Consolidation, Bahraich & ors., W.P. Consolidation No. 33557 of 2018 (Para 20)

Precedent distinguished:

1. Gram Sabha, Dhaniya Mau Vs Ram Manohar (Dead) by LRs & ors., (2010) 12 SCC 384 (Para 6, 15)

2. Muneshwar (Dead) By LRs Vs Raja Mohammad Khan & ors., (1998) 6 SCC 582 (Para 6, 15)

3. Hasan Ali & ors. Vs St. of U.P. & ors., 1992 Supp (2) SCC 70 (Para 6, 15)

Present petitions challenge the judgment and order dated 20.05.2006, passed by the Deputy Director of Consolidation.

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

1. Heard, Shri Prashant Jaiswal, learned counsel for the petitioners in Writ Petition No.543 (Cons) of 2006 and opposite parties no.5 to 8 in Writ Petition No.862 (Cons) of 2006 (here-in-after referred as the petitioners), Shri Ramesh Kumar Srivastava, learned counsel for the opposite party no.2 in Writ Petition No.543 (Cons) of 2006 and petitioner in Writ Petition No.862 (Cons) of 2006 (here-in-after referred as the opposite party no.2) and Shri Dilip Kumar Pandey, learned counsel for the Gaon Sabha in both the writ petitions. The office of the learned Chief Standing Counsel has accepted notice for opposite party no.1 in Writ Petition No.543 (Cons) of 2006 and for opposite parties no.1 to 3 in Writ Petition No.862 (Cons) of 2006.

2. The Writ Petition No.543 (Cons) of 2006 has been filed challenging the judgment and order dated 20.05.2006 passed by the Deputy Director of Consolidation and Writ Petition No. 862 (Cons) of 2006 challenging the same judgment and order dated 20.05.2006 to the extent of rejecting the title of the petitioners on trees and boring well as well as directing the Plot No.798 to be recorded in the name of Gaon Sabha. The dispute in Writ Petition No.543 (Cons) of 2006 relates to Plot Nos.642, 798 and 509 whereas the dispute in Writ Petition No.862 (Cons) of 2006 relates only to the extent of half share in Plot No.798.

3. On publication of records the father of the petitioners late Mahipal Singh had filed objection claiming the land of the Plot Nos.642, 798, 853/1, 853/2, 540 and 509 as his grove land and under his occupation and possession since the time prior to Zamidari Abolition. The Assistant Consolidation Officer transmitted it to the Consolidation Officer on an application moved by the petitioners. The Consolidation Officer after considering the objection and the evidence adduced before it rejected the claim of the petitioners in regard to Plot Nos.853 and 540 and allowed in regard to Plot Nos.642, 798 and 509 and declared him as grove holder Bhumidhar with transferable rights under Section 205 of U.P. Tenancy Act read with Section 18 (1) (e) of U.P. Consolidation of Holdings Act, 1953 (here-in-after referred as Act of 1953) since 1362 Fasli and directed to remove the entry of Usar/Banzar and record the name of the petitioners in the revenue records by means of the order dated 07.02.1996. On an application moved by the petitioners, under Rule 109-A of the Consolidation of Holdings Rules, 1954 (here-in-after referred as Rules of 1954), the Consolidation Officer directed to make entry in the revenue records by means of the order dated 13.02.1998.

4. The opposite party no.2; Barlam Singh filed an application for recall of the order dated 13.02.1998 passed on the application under Rule 109-A. The application was rejected by means of the order dated 08.07.2004. Being aggrieved the opposite party no.2 filed Appeal No.1548 under Section 11(1) of the Act of 1953 before the Settlement Officer of Consolidation which was dismissed by means of the order dated 08.12.2004. The opposite party no.2 had also preferred an application for recall of the order dated 07.02.1996 passed under Section 9 (A)(2)

of the Act of 1953 by the Consolidation Officer, which was rejected on 09.11.2004. The opposite party no.2 preferred three revisions before the Deputy Director of Consolidation. The Deputy Director of Consolidation, after considering the revisions and the material on records found that the land in dispute is of the Gram Samaj which was not disputed by the parties, allowed the revisions partly by means of the order dated 20.05.2006 in the interest of the Gram Sabha and directed the Plot Nos.642, 798 and 509 to be recorded in the account of the Gram Sabha as it was recorded earlier. Hence, the present writ petitions were filed challenging the same.

5. Submission of learned counsel for the petitioners was that the petitioners had filed the objections under Section 9(A) 2 of the Act of 1953 and the evidence was also adduced. After considering the same the objection in regard to Plot Nos.642, 798 and 509 was allowed and the petitioners were rightly declared the grove holder Bhumidhar with transferable rights and the name of the petitioners was recorded in the revenue records under Rule 109- A of the Rules of 1954. The opposite party no.2 had filed highly time barred and misconceived application for recall of the order passed under Rule 109-A which was rightly rejected. The application for recall against the order dated 07.02.1996 passed under Section 9-A(2) of the Act of 1953 was also rejected in accordance with law. The appeal was also dismissed having no merit. The Revisional Authority, without considering that no application or revision was filed by the Gaon Sabha and without affording any opportunity to the petitioners, partly allowed the revision and set-aside the orders challenged before it, but instead of remanding the case, in an arbitrary and illegal manner directed to record the Plot Nos.642, 798 and 509 in the account of the Gram Sabha without any application, revision or basis. Therefore the impugned order is not sustainable in the eyes of law and is liable to be quashed and the writ petition is liable to be allowed.

6. Learned counsel for the petitioners has relied on **Gram Sabha, Dhaniya Mau Vs. Ram Manohar (Dead) by LRs and Others; (2010) 12 SCC 384, Muneshwar (Dead) By LRs Vs. Raja Mohammad Khan and Others; (1998) 6 SCC 582 and Hasan Ali and Others Vs. State of U.P. and Others; 1992 Supp (2) SCC 70.**

7. Per contra, learned counsel for the opposite party no.2 had submitted that the opposite party no.2 was in possession since prior to the Zamidari Abolition alongwith petitioners on Plot No.798 (new number of which is 960 Kha) therefore he was also entitled for half share in Plot No.798 but the petitioners had filed the objection without impleading the opposite party no.2. The Consolidation Officer had also, without issuing any notice or affording opportunity to the opposite party no.2, passed the order on 07.02.1996 and thereafter got the same implemented by means of the order dated 13.02.1998. After coming to know about the order dated 13.02.1998, the opposite party no.2 filed the restoration application which was rejected in an arbitrary and illegal manner. He had filed an application for recall of the order dated 07.02.1996 also passed by the Consolidation Officer but the same was also rejected in arbitrary and illegal manner. The appeal was also rejected. Therefore three revisions were filed. Learned Revisional Authority, though found that the orders challenged in the revisions were not sustainable in the eyes of law and set-aside the same but without

any application or revision of the Gaon Sabha directed to record the Plot No.798 also in the account of the Gram Sabha. Therefore the order passed by the Revisional Authority is not sustainable to the extent of the direction to record the Plot No.798 in the account of Gram Sabha and the same is liable to be quashed.

8. Shri Dilip Kumar Pandey, learned counsel for the Gaon Sabha submitted that the name of the petitioners was not recorded in the revenue records on the date of vesting and thereafter in 1356 and 1359 Fasli also. The petitioners and the opposite party no.2 never raised any objection. It was only when the consolidation proceedings started, father of the petitioners filed the objection. He has failed to prove that he was entitled for the land in dispute or his possession was there. He also submitted that the lease of grove could not have been given by the Zamidar. The Consolidation Officer, without any proof, had allowed the objection of the petitioners in regard to the plots in question. The Revisional Authority has rightly passed the order in accordance with law. There is no illegality or infirmity in the revisional order impugned in the present writ petitions. The writ petitions are misconceived and lacks merit and are liable to be dismissed.

9. I have considered the submissions of learned counsel for the parties and perused orders and the record.

10. The dispute decided by the Revisional Authority is in regard to the Plot Nos.642, 798 and 509. The objection raised by the petitioners in regard to Plot Nos.853 and 504 was already rejected by the Consolidation Officer which was not challenged by the petitioners. The order passed by the Consolidation Officer indicates that the claim made by the petitioners was set up on the ground that the Plot Nos.642, 798 and 509 were given by the Zamidar to the petitioners for planting grove and with the permission of the Zamidar the grove was planted but the Consolidation Officer found that there is no evidence to this effect. However allowed the objection in regard to Plot Nos.642, 798 and 509 merely stating that the statement of the petitioners is proved by the circumstantial evidence and old grove on the basis of spot inspection. The spot inspection was got done on an application of the petitioners. In pursuance thereof a report dated 06.10.1989 was submitted by the Advocate Commissioner. The Advocate Commissioner found trees on Plot Nos.642, 798 and 509 and also found that the trees are so densed that the agriculture is not possible on the plots as such the Advocate Commissioner had only found that there is grove on the plots in question but there is no report regarding possession of the petitioners or the opposite party no.2 on the said plots or the grove. The petitioners had also filed only copy of Khasra No.1347 Fasli and some demand slips of irrigation and receipt of payment of revenue but it was not proved that they were of the same land therefore the Consolidation Officer has recorded a categorical finding that the petitioners are not entitled for any benefit of the same.

11. The Consolidation Officer had made three issues which are as under:-

"१- क्या वादी विवादग्रस्त भूमि का असल खातेदार है जैसी की उसकी आपत्ति है ?

२- क्या स्थल पर विवादग्रस्त भूमि बाग़ है? यदि हाँ तो प्रभाव ?

३- क्या वादी विवादग्रस्त भूमि का कब्ज़ा मुख़ालफाना के आधार पर संक्रमणीय भूमिधर है ?"

12. The petitioners had not contested the issues no.1 and 3 which were regarding his claim as actual tenure holder and Bhumidhar with transferable rights on the basis of adverse possession. The only issue no.2 was contested which was as to whether there is grove on the land in dispute? if yes, then effect? As such the petitioners had left their claim on the plots in dispute as actual tenure holder or on the basis of adverse possession, therefore only it was to be decided as to whether there is any grove on the land in dispute or not and what would be the effect of the grove. Therefore this court is of the view that the Consolidation officer had wrongly and illegally considered the claim of the petitioners on the land in dispute and declared the petitioners not only the grove holder but Bhumidhar with transferable rights under Section 18 (1) (e) of the Act of 1952 merely on the basis of a copy of Khasra of 1347 Fasli and on the basis of alleged circumstantial evidence and the report of the Advocate Commissioner which are also not in favour of the petitioners and without any cogent evidence.

13. The Revisional Authority, while considering the revisions, found that the land in dispute is of the Gram Samaj which is admitted to both the parties. This finding has not been challenged however a plea has been taken that the opposite party no.1 has also incorrectly appreciated the evidences on record and has incorrectly held that no body can be declared as the owner of the trees planted over the land belonging to Gaon Sabha but failed to disclose in any manner that the land in dispute is not of the Gram Sabha. In the arguments advanced before this Court also learned counsel for the petitioners and the opposite party no.2 could not show that the land in dispute does not belong to Gram Samaj. Therefore since the grove was found on the land in dispute and the petitioners had not contested the issues of actual tenure holder and adverse possession, it has rightly beem recorded in the name of Gram Sabha.

14. So far as the claim of the opposite party no.2 is concerned, this Court is of the view that since the petitioners' claim was not sustainable, the opposite party no.2, who is claiming half of the land of Plot No.798 on the basis of possession alongwith petitioners is also not sustainable.

15. So far as the cases relied by the learned counsel for the petitioners are concerned, this Court is of the view that they are not applicable on the facts and circumstances of the present case because in the case of **Gram Sabha, Dhaniya Mau Vs. Ram Manohar (Dead) by LRs and Others; (2010) 12 SCC 384**, the Hon'ble Supreme Court has held that concurrent finding of fact could not have been interfered by accepting the single piece of evidence. Similar is the judgment passed in the case of **Muneshwar (Dead) By LRs Vs. Raja Mohammad Khan and Others; (1998) 6 SCC 582**, in which it has been held that the concurrent finding should not have been interfered in the writ jurisdiction in the face of the clear evidence of possession and entries in the records of right. Similar view has been taken by the Hon'ble Supreme Court in the case of **Hasan Ali and Others Vs. State of U.P. and Others; 1992 Supp (2) SCC 70** and did not agree with the contrary conclusion by the High Court in face of the clear

evidence as against the concurrent finding recorded on the basis of correct appreciation of records and evidence. In the present case there is no clear evidence and issues of title and possession were not contested and there are no concurrent finding of all the courts below. This Court also found that the Consolidation Officer has allowed the objection without any evidence or sufficient material and contrary to contest.

16. The plea of the learned counsel for the petitioners and opposite party no.2 that the Gaon Sabha has neither made any application nor filed revision therefore the land could not have been directed to be recorded in the name of the Gram Samaj is totally misconceived and baseless. In this regard Section 11(C) of the Act of 1953 is very clear, which is extracted below:-

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

17. In view of Section 11 (C) in proceedings under Section 48, the Director of Consolidation may direct that any land which vests in the Gaon Sabha may be recorded in its name even though no objection or appeal or revision has been filed by the Gaon Sabha. Therefore even if the Gaon Sabha has not filed any objection, appeal or revision and the Revisional Authority, while examining the case under Section 48, finds that the land belongs to Gaon Sabha, it can direct to record in the name of Gaon Sabha in accordance with law. Therefore, this Court is of the view that the Revisional Authority has not committed any illegality or error in passing the impugned order and directing to record the land in dispute in the name of the Gaon Sabha as it was recorded earlier.

18. This Court, in the case of ***Dheeraj and Another Vs. Deputy Director of Consolidation, Gautam Budh Nagar and Others; 2009 (107) RD 695***, has held that under Section 11-C of the U.P. Consolidation of Holdings Act it is provided that if CO., S.O.C., D.D.C. while hearing a case comes to the conclusion that any land vests in the State Government or Gaon Sabha then it shall be recorded in the name of State or Gaon Sabha even though no objection, appeal or revision has been filed by State or Gaon Sabha.

19. Section 48 of the Act of 1953, wherein the power of revision has been provided, provides that the Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order passed by such authority in the case or proceedings and may make such order in the case or proceedings as he thinks fit. As such this right is not vested in the party concerned to invoke the revisional jurisdiction rather the jurisdiction vests in the Deputy Director of Consolidation to call for or examine the record of any case decided or proceeding drawn. So even if, a party aggrieved has not invoked revisional jurisdiction, the Deputy Director of

Consolidation can suo moto exercise powers of revisional jurisdiction and he may make such order as he thinks fit. Therefore also, even if, the Goan Sabha had not made any application or revision and the Deputy Director of Consolidation finds that the land in dispute vests in the Gaon Sabha, State Government or any local authority he may make an order to vest it in the same.

20. This Court in the case of ***Ram Gopal versus Deputy Director of Consolidation, Bahraich and Others; W.P. Consolidation No.33557 of 2018***, while considering the provisions of Section 11-C and Section 48 of the Act of 1953 has also held that for exercising the power of revisional jurisdiction, party aggrieved may or may not invoke Section 48 and in appropriate case, the Deputy Director of Consolidation can suo moto exercise his powers of revisional jurisdiction. The relevant portion is extracted below:-

"Section 11-C of the Act specifically provides that in the course of hearing of an objection under Section 9-A or an appeal under Section 11 or revision petition under Section 48, the consolidation authorities may direct that any land which vests in the State Government or Gaon Sabha may be recorded in its name, even though no objection, appeal or revision has been filed by such Government or Gaon Sabha or the local authorities is concerned. Section 11-C is reproduced herein below:-

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

Considering the nature of disputes raised during the consolidation operations, the legislature while enacting Section 11-C of the Act was conscious of the functions to be performed by the consolidation courts. Section 11-C was inserted by the legislature in the Act with a purpose and the purpose is apparent.

There may be a situation where many a times, on account of certain misgivings and for certain other reasons, the Land Management Committee or the Gram Pradhan for certain reasons may ignore to protect the interest of Gaon Sabha or the property vested in State Government.

It is for the aforesaid purpose of securing and protecting the land vested in Gaon Sabha or State Government that the legislature has consciously enacted Section 11-C of the Act and has thus cast a duty on the Consolidation Officer, Settlement Officer, Consolidation and the Deputy Director of Consolidation to pass orders recording such land in the name of State or Gaon Sabha even though no objection or appeal or revision under Section 9-A, Section 11 or Section 48 is preferred by the State Government or Gaon Sabha or the local authority concerned.

It is settled law that right to appeal is a statutory right which operates within the four corners of the statute which confers such right in a person or a party, however, so far as the jurisdiction of revisional court is concerned, specifically in the case of revisional court created under U.P. Consolidation of Holdings Act which exercises the revisional jurisdiction under Section 48 of the said Act, it is not a right

vested in the party concerned to invoke the revisional jurisdiction; rather Section 48 vests a jurisdiction in the Deputy Director of Consolidation to call for or examine the record of any case decided or proceedings drawn. Thus for exercising of revisional jurisdiction, a party aggrieved may or may not invoke Section 48 and in an appropriate case, the Deputy Director of Consolidation can suo motu exercise his powers of revisional jurisdiction."

21. The Revisional Authority after considering the pleadings and evidence has found that the land in dispute belongs to Gram Samaj therefore even if the orders passed by the lower authorities were not sustainable and quashed, no fruitful purpose would have been served by remanding the case when the Revisional Authority itself has authority to pass the order under the statute.

22. In view of above, this Court is of the considered opinion that there is no illegality or error in the impugned order passed by Deputy Director of Consolidation. The writ petitions are misconceived and devoid of any merit.

23. Both the writ petitions, are, accordingly, **dismissed.** No order as to costs.

(2021)03ILR A849
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.03.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Consolidation No. 1877 of 1979

Ayodhya (Died) substituted by LRs ...Petitioner
Versus
D.D.C. & Ors. ...Respondents

Counsel for the Petitioner:
A.K. Verma, Ajay Sharma, D.K. Rastogi, S.C. Misra, V. B. Singh

Counsel for the Respondents:
R.N. Srivastava, Dilip Kumar Pandey, Yogendra Nath Yadav

A. Civil Law – Consolidation – U.P. Consolidation of Holdings Act, 1953 - Section 9 - Uttar Pradesh Zamindari Abolition And Land Reforms Act, 1950 - Section 122-A - Code of Criminal Procedure: Section 145 – One cannot mature rights by adverse possession on Gaon Sabha land. It is not understandable as to how someone can mature rights by adverse possession if his name is not recorded continuously for a period of ten years in the revenue records. (Para 12)

In regard to the claim over the land in dispute on the basis of alleged allotment by the Gaon Sabha vide resolution dated 17.11.1963, indicates that it is not an allotment. The Gaon Sabha has only passed a resolution that it has no objection in recording name of Shri Ayodhya Prasad in 409, 410, 354, 353, 352 and there are trees of Aam, Mahua, Kathar, Amrood and Babul etc. It does not indicate even that these trees were planted by the petitioners. Therefore it is not an allotment and it is not approved by the Sub-Divisional Officer also. (Para 14)

B. U.P. Panchayat Raj Act, 1947- Section 34 - The Gaon Sabha cannot allot it's any property to anybody because the property is vested in Gram Panchayat u/s 34 of U.P. Panchayat Raj Act, 1947 in relation to direction, management and control and it's vesting in State is absolute. Therefore, the Gram Panchayat cannot give it to anybody as absolute right of ownership is not given to it. (Para 15)

Writ petition dismissed. (E-3)

Precedent followed:

1. Sumit Kumar Tyagi Vs St. of U.P. & ors., 2002 SCC OnLine All 399; 93 RD 623 (Para 12)

2. Rizwan & anr. Vs Deputy Director of Consolidation, Saharanpur & ors., (2003) 6 AWC 5065; (2003) 95 RD 714 (Para 13)

3. Vinod Kumar Pandey & ors. Vs St. of U.P., 2005 SCC OnLine All 641; (2005) 99 RD 490 (Para 15)

Present petition challenges judgment and order dated 06.03.1979, 19.07.1978, 09.09.1977, passed by opposite parties no. 1 to 3 respectively.

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

1. Heard, Shri Ajay Sharma, learned counsel for the petitioner, Sri Dilip Kumar Pandey, learned counsel for the Gaon Sabha/opposite party no.4 and learned Standing Counsel. None appeared for the private respondents.

2. This writ petition under Article 226 of the Constitution of India has been filed challenging the judgment and order dated 06.03.1979, 19.07.1978 and 09.09.1977, passed by opposite parties no.1 to 3 respectively.

3. The dispute relates to the plot nos.352 and 353 which were recorded as Talab in the basic year khatauni and plot nos.351, 354, 409 and 410 recorded as Banjar in basic year Khatauni. The land in question is situated in village Palti Khera, Pargana Sareni, Tehsil Dalmau, District Raebareli. The consolidation proceedings initiated in the year 1968. The petitioner i.e. late Ayodhya had filed an objection under Section 9 of the U.P. Consolidation of Holdings Act in respect of the aforesaid plots claiming as his grove on which more than 300 trees were planted by him and his ancestors with the consent of the landlord and he is in possession over the same for the last over 50 years. Two more objections were filed by Shri Anoop Singh and Shri Sheo Singh claiming to be grove holders of the said plots, in dispute. All the three objections were forwarded to the Consolidation Officer, who partly allowed the objection of late Ayodhya vide judgment and order dated 28.07.1969. Other two objections were rejected. Both the parties preferred appeals which were decided by a common judgment and order dated 30.04.1970 by means of which the appeal of Sheo Singh and others was rejected while the appeal of Late Ayodhya was allowed and the case was remanded to the Consolidation Officer for deciding afresh after making spot inspection. In pursuance thereof the Consolidation Officer made spot inspection on 03.04.1972 and partly allowed the objection of Late Ayodhya vide judgment and order dated 22.04.1972.

4. Late Ayodhya as well as Gaon Sabha challenged the judgment and order dated 22.04.1972 in appeal before the Settlement Officer Consolidation. Both the appeals were decided by a common judgment and order dated 26.09.1974 and the order dated 22.04.1972 of the Consolidation Officer was set aside. The case was remanded with a direction that the Consolidation Officer shall make an inquiry after spot inspection to ascertain as to which of the trees were planted prior to Zamindari Abolition and what was their nature at that time. After remand the Consolidation Officer decided the case afresh by means of order dated 19.09.1977 after spot inspection and rejected the objection of late Ayodhya and directed that the entry of basic year would continue. The Consolidation Officer held that the land in question is of the Gaon Sabha and late Ayodhya is not its bhumidhar.

5. Late Ayodhya filed an appeal against the order dated 19.09.1977. The appeal was partly allowed by means of the judgment and order dated 18.07.1978 after

spot inspection made by the Assistant Settlement Officer consolidation holding late Ayodhya to be bhumidhar of plot nos.409 and 410 and objection in respect of remaining plots was rejected. Aggrieved by the appellate order late Ayodhya preferred a revision which was dismissed by the Deputy Director of Consolidation by means of judgment and order dated 06.03.1979. Hence the present writ petition was filed. During pendency of this writ petition Ayodhya died, hence the present petitioners were substituted.

6. Submission of learned counsel for the petitioners was that after remand by the appellate authority by means of order dated 26.09.1974 the Consolidation Officer, without making local inspection and without giving opportunity to the petitioners, rejected the objection of the petitioners against the direction issued by the appellate authority, which could not have been done. He further submitted that the land in question was allotted to late Ayodhya by means of resolution dated 17.11.1963 passed by the Land Management Committee. The petitioners are in possession of the land in dispute since long, which is in the nature of grove. The trees planted by the predecessors in interest of the petitioners are there on the said land. Lastly learned counsel for the petitioners had submitted that the conclusions have been recorded contrary to the observations. Therefore the impugned orders are not sustainable and liable to be quashed and writ petition is liable to be allowed.

7. Learned counsel for the Gaon Sabha had submitted that the petitioners have no right on the land of Gaon Sabha as it was not allotted. He had submitted that the land of pond could not have been allotted on which there is no right of the petitioners. In regard to the land recorded as Banjar he had submitted that unless the lease is granted no right or hereditary right can be claimed. He had further submitted that no documentary evidence was adduced to show that the land in question was allotted to late Ayodhya. He had also submitted that the Land Management Committee has no right for giving any land to anybody because it has only right of management under Section 122-A of the Zamindari Abolition Act. It was also submitted that in case even if there was any proposal by the Land Management Committee, it was never accepted and approved by the Sub-Divisional Officer, as such the land was not allotted and no lease was given to the predecessor in interest of the petitioners. Therefore the petitioners cannot claim any right over the land in question. If the land in question was given on lease to the petitioners and it was in the nature of grove then it must have been recorded as such in the revenue records before the date of vesting and it should have also been recorded in the remark column. But it is not recorded as such, therefore also, the claim is not sustainable. In regard to plot nos.409 and 410 learned counsel for the Gaon Sabha had submitted that it could also not have been given to the petitioners though he admitted that the said part of the order has not been challenged by the Gaon Sabha. On the basis of above learned counsel for the Gaon Sabha submitted that the writ petition has been filed on misconceived and baseless grounds which is liable to be dismissed.

8. I have considered the submissions of the learned counsels for the parties and perused the record.

9. Indisputably Gata no.352 and 353 are recorded as Talab and Gata Nos.351, 354, 409 and 410 are recorded as banjar in

the Khataui of the basic year. After initiation of consolidation proceedings in the year 1968 the petitioner i.e. Late Ayodhya and two others namely Anoop Singh and Sheo Singh had filed objections separately under Section 9 of the U.P. Consolidation of Holdings Act claiming their rights over the land in Dispute alleging that they are in possession with the consent of the landlord and the land is in the nature of grove. The claim of late Ayodhya was that he and his predecessors had planted about 300 trees on the land in question. The objection of late Ayodhya was partly allowed by the Consolidation Officer after remand from the appellate authority. It was again allowed partly by means of judgment and order dated 22.04.1972 and the name of Ayodhya (now deceased) was directed to be recorded as grove holder and sirdar. On being challenged in appeal again by both the parties, the appeals were allowed and the matter was remanded by means of judgment and order dated 26.09.1974 to decide afresh after inquiry by making spot inspection and determining the age of the trees.

10. In pursuance thereof the Consolidation Officer considered the matter in detail and after considering the oral and documentary evidence filed by the petitioners and also the spot inspection made by the predecessor of the officer concerned and by himself, rejected the claim of the petitioner by means of the order dated 19.09.1977. Learned Consolidation Officer, on the basis of spot inspection, has recorded a categorical finding that there is a passage in between the land in question and pond also. It has also been recorded that the villagers have denied the possession of the petitioners. He has further recorded that the nature and manner of planting of trees does not indicate that it is in the nature of grove. Therefore the contention of the learned counsel for the petitioners that the order has been passed without spot inspection is misconceived. The land in dispute is recorded as banjar and Talab and in the remark column the trees are recorded but the possession of the petitioners is not recorded. Here it is also pertinent to note that during pendency of appeal the Assistant Settlement Officer Consolidation had also made an inspection of the plots in question himself and it is recorded in the order and allowed the appeal partly. Therefore it can not be said that orders have been passed without spot inspection.

11. The order was challenged by the petitioners in appeal. The appellate authority partly allowed the appeal in regard to plot nos.409 and 410 and rejected the claim in respect of rest of the plots by means of the judgment and order dated 19.07.1978 and directed to record the name of the petitioners in Gata nos.409 and 410 as on the basis of evidence it was found that both the plots are adjacent to each other and are in the nature of grove and late Ayodhya and his father had planted the trees on the said plots, though it is without any basis. It has also been recorded that the said land was also released in favour of the petitioners under Section 145 of the Cr.P.C. etc. On being challenged the revisional authority also found that it has rightly been recorded in the name of petitioners. Though learned counsel for the respondents had submitted that the Gata nos.409 and 410 also could not have been recorded in the name of the petitioners but it has not been challenged by the respondents for the reasons best known to them. In regard to rest of the plots learned revisional court found that the plots are recorded as Banjar

and Talab which was found in the spot inspection made by the Settlement Officer Consolidation also and accordingly rejected the revision. This court does not find any illegality or error in the findings recorded by the courts' below. The petitioners have failed to prove that the land or the trees were ever recorded in the name of predecessor in interest of petitioners.

12. It is settled proposition of law that one cannot mature rights by adverse possession on Gaon Sabha land. A Division Bench of this court considered it in **Sumit Kumar Tyagi Versus State of U.P. and others;2002 SCC OnLine All 399; 93 RD 623**, the relevant paragraphs 11 and 12 of which are extracted below:-

"11. It is not understandable as to how some one can mature rights by adverse possession if his name is not recorded continuously for a period of ten years in the revenue records. The judgment further shows that the learned DGC (Revenue) had argued that on account of the amendments made in U.P.Z.A. & L.R. Act in 1976 and 1977, the period of limitation prescribed thereunder for filing a suit against Gaon Sabha had been removed altogether and, consequently, no rights could accrue on Gaon Sabha land by adverse possession. Reliance had also been placed on a decision rendered by the Allahabad High Court in Chattar Singhv. Sahayak [1979 RD 226.] where this point had been examined threadbare and it was held that on account of amendments in the Act, no sirdari rights can accrue over Gaon Sabha land by adverse possession. However, the Board of Revenue brushed aside this argument and allowed the Second Appeal and decreed the suit and declared the plaintiff to be bhumbidar of the land in dispute. To say the least, the Board of Revenue could not have brushed aside an authority of High Court where this point had been specifically decided. The period of limitation for filing a suit by the Gaon Sabha has been amended several times and in such a manner that no one can mature rights over the Goan Sabha land by adverse possession. The last amendment which was made by U.P. Land Laws (Amendment) Act, 1976, before expiry of the period then prescribed for filing of the suit, reads as follows:

"For Section 210 of the principal Act, the following section shall be substituted andbe deemed always to have been substituted, namely,

"210. If a suit for eviction from any land under Section 209 is not instituted by a bhumidhar, Sirdar or asami, or a decree for eviction obtained in any such suit is not executed by him, within the period of limitation provided for the institution of such suit or the execution of such decree, as the case may be, the person taking or retaining possession shall:--

(i) where the land forms part of the holding of a bhumidhar or sirdar, become a sirdar of such land, and the rights, title and interest of an asami, if any, in such land shall be extinguished;

(ii) Where the land forms part of the holding of an asami, on behalf of the Goan Sabha, become an asami thereof holding from year to year."

12. The result of this amendment was that the effect of non-filing of the suit by the Gaon Sabha as contemplated in Section 209(1)(b) of the Act, which was provided in sub-section (iii) of Section 210, was taken away. It has been held by several decisions of this court that after the aforesaid amendment a person in possession for 12 years over the property of a Gaon Sabha would not acquire sirdari rights. It has been further held that the

effect of amendment having been given retrospective effect means that a trespasser even from July, 1952, could not acquire sirdari rights on the land belonging to Gaon Sabha (See Bhurey v.Board of Revenue, 1984 Revenue Decision 294, and Chatar Singh v. Sahayk Sanchalak, Chakbandi, U.P. Lucknow, 1979 Revenue Decision 226.) It is, therefore, obvious that the petitioner could not have matured any kind of rights over the Goan Sabha land. However, the Board of Revenue by a strange process of reasoning held that the petitioner had matured rights by adverse possession and had consequently become sirdar and thereafter bhumidar of the land."

13. Similar view has been taken by this court in **Rizwan and another Versus Deputy Director of Consolidation, Saharanpur and others; (2003) 6 AWC 5065; (2003) 95 RD 714**. The relevant paragraphs 5, 6 and 7 are reproduced below:-

"5. In the above fact-situation, the questions that boil down for consideration are (1) whether a person in unauthorised possession of Gaon Sabha property could acquire anybhumidhari right on grounds of adverse possession, and (2) whether an order passed by the authorities in a proceeding under Section 122B of the U.P.Z.A. and L.R. Act which culminated in dropping of proceedings could amount to a declaration of bhumidhari rights?

6. As regards the first question, reference may be made to amendment in Section 210 of the U.P.Z.A. and L.R. Act made by the U.P. Land Laws (Amendment) Act, 1976. The amendment having a bearing on the answer of the first question, may be excerpted below:

"For Section 210 of the Principal Act, the following section shall be substituted and be deemed always to have been substituted, namely:

"210. If a suit for eviction from any land under Section 209 is not instituted by abhumidhar, sirdar or asami, or a decree for eviction obtained in any such suit is not executed by him, within the period of limitation provided for the institution of such suit or the execution of such decree, as the case may be, the person taking or retaining possession shall:

(i) where the land forms part of the holding of a bhumidhari or sirdari become asirdar of such land, and the rights, title and interest of an asami. If any, in such land shall be extinguished;

(ii) where the land forms part of the holding of an asami, on behalf of the Gaon Sabha, became an asami thereof holding from year to year."

7. The amendment aforestated leaves no manner of doubt that it has been given retrospective effect the necessary Implication of which is that a person having been in unauthorised possession even from the date of enforcement of the U.P.Z.A. and L.R. Act,i.e., since, 1st July, 1952, would not acquire any bhumidhari right on Gaon Sabha property. The necessary consequence that flows from this amendment in essence is that even if a person had been in actual possession for 12 years or more and even if suit under Section 209 of the U.P.Z.A. and L.R. Act had not come to be filed, any person in occupation thereof cannot acquire bhumidhari rights on the land belonging to Gaon Sabha. In the perspective of the amendment aforestated made in Section 210 of the U.P.Z.A. and L.R. Act, the forceful contention pressed on behalf of the petitioners who have not adduced any documentary evidence to bolster up their rights or possession prior to

the date of vesting otherwise in accordance with law and have merely relied upon varg 4 entry besides oral evidence in vindication of their bhumidhari rights, will not have any cutting edge and falls to the ground. The view I am taking respecting question No. 1 is fortified by a Division Bench of this Court in Likhi Ram Moola v. State of U.P., 2000 (1) AWC 521 : 2002 (93) RD 126, in which the question raised before the Division Bench resembled the question involved in the instant petition."

14. In regard to the claim over the land in dispute on the basis of alleged allotment by the Gaon Sabha vide resolution dated 17.11.1963, the perusal of copy of resolution annexed with the affidavit dated 13.11.1986 indicates that it is not an allotment. The Gaon Sabha has only passed a resolution that it has no objection in recording name of Shri Ayodhya Prasad in 409, 410, 354, 353, 352 and there are trees of Aam, Mahua, Kathar, Amrood and Babul etc. It does not indicate even that these trees were planted by the petitioners. Therefore it is not an allotment and it is not approved by the Sub-Divisional Officer also.

15. The Gaon Sabha can not allot it's any property to any body because the property is vested in Gram Panchayat under Section 34 of U.P. Panchayat Raj Act, 1947 in relation to direction, management and control and it's vesting in State is absolute. Therefore, the Gram Panchayat cannot give it to anybody as absolute right of ownership is not given to it. The issue was considered in **Vinod Kumar Pandey and others Versus State of U.P.;2005 SCC OnLine All 641/(2005) 99 RD 490**, relevant paragraphs 13, 14 and 15 are extracted below:-

"13. This Court dwelled upon the submissions made by the learned Counsels' at length. The Additional Advocate General invited the attention of the Courts to section 34 of the U.P. Panchayat Raj Act, 1947. Section 34 of the said Act reads as under:

"34. Property vested in the (Gram Panchayat).--(1) Subject to any special reservation made by the State Government, all public property situated within the jurisdiction of a (Gram Panchayat) shall vest in and before to the (Gram Panchayat) and shall, with all other property which may become vested in the (Gram Panchayat), be under its direction, management and control."

14.A perusal of the aforesaid section indicates that all public property shall vest in and belong to the Gram Panchayat and such property would be under its direction, management and control. The question that arises for consideration is, as to what kind of vesting is contemplated under section 34. Whether such vesting is absolute or is limited for such time as required by the State Government? In my view, the language used in the provision and the context in which the vesting takes place has to be understood. The task of the Court has been reduced considerably, as in a similar matter, the Supreme Court had the opportunity to consider in a similar situation with regard to the vesting of the property in a Gaon Sabha. In the case of **Maharaj Singh v. State of U.P., [1977 (3) ALR 12 (Sum) : 1977 (1) SCC 155.]** the Supreme Court, while interpreting the provisions of section 117 of the U.P.Z.A. & L.R. Act, held that the vesting in the State was absolute, whereas the vesting in the Gaon Sabha was limited and that it was open to the State Government to divest the said property from the Gaon Sabha at any time. For an absolute vesting, there had to be a transfer of property as well as of

vesting. I have perused the Government Order dated 2.4.1999 as well as the Government Order dated 1.7.1999, which indicates that the State Government has only transferred the property for its management to the Gram Panchayat. There is no whisper in the Government Orders' that the property was to vest absolutely with the Gram Panchayat. Further, section 34 of the Panchayat Raj Act, indicates that vesting of the property to the Gram Panchayat is in relation to "direction, management and control". It is therefore, clear, that there is no absolute right given to the Gram Panchayat with regard to the ownership of the property and that the vesting is only confined to direction, management and control and that too, till such time as the State Government requires.

15.The Supreme Court in the case of Maharaj Singh (supra) held that the word "vesting" connotes different meanings and has to be interpreted in the manner and in the context as used in the provision. Therefore, while interpreting section 34 of the Act harmoniously, I am of the opinion, that the word "vest", used in section 34, means the enjoyment of the property so long as it last and that it is not an absolute vesting and is only a transfer of the property for a limited purpose, namely for a direction, control and management. Thus, the State Government was justified in issuing the order for transferring the property back to the parent department."

16. In view of above this court does not find any illegality or error in the impugned orders. The authorities have passed the reasoned and speaking orders on the basis of evidence and material on record. The writ petition is misconceived and lacks merit.

17. The writ petition is, accordingly, **dismissed**. No order as to costs.

(2021)03ILR A856
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.02.2020

BEFORE

THE HON'BLE KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 160 of 2011

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

Counsel for the Appellant:
Sri Anil Srivastava, Sri Amit Mishra, Sri Anadi Krishna Naraya, Sri D.K. Srivastava, Sri Dina Nath Joshi, Sri H.K. Singh, Sri Ramesh Pundir, Smt. Rekha Pundir.

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

A. Criminal matter-Code of Criminal Procedure,1973-Section 374(2) & Indian Penal Code,1860-Section 452,302-challenge to-conviction- Contradictions in deposition of PW-1 ,PW-2 & PW-3 - one deceased received five fire arm injuries and anther deceased received three gunshot wounds-Though six persons were involved, trial of the other accused brought acquittal to them- No other eye witness has testified in favour of the prosecution- There are major contradictions and no witness is testified that it was accused alone who had fired six times-The recovery of the pistol is also not proved-The evidence is so scanty as PW-6 cannot even recognise who had fired on deceased- The witnesses have not identified the accused- testimony of PW-1 though being a rustic villager does not inspire confidence- The incriminating

circumstances against the accused is only that he was named in the F.I.R.- just because the accused was named in the F.I.R., he could not have been convicted when on the same set of evidence, on the basis of the charge sheet and the evidence, the other co-accused, whose role was assigned by the witnesses, have been acquitted by the learned Judge.(Para 1 to 36)

The appeal is allowed. (E-5)

List of Cases cited:

1. Jagdish Prasad & Ors Vs St. of M.P.(1995) SCC (Cri) 160

2. Smt. Chintambaramma & Anr. Vs St. of Karnataka(2019) 3 JIC 560 SC

3. Vadivelu Thevar Vs St. of Madras(1957) AIR SC 614

4. Ravi Vs. St. (2008) 15 SCC 115

5. Ganesan Vs St. CRLA No. 680 of 2020

6. Ram Bihari Yadav Vs St. of Bih.(1998) AIR SC 1850

7. Badam Singh Vs St. of M.P.(2003) 12 SCC 792

8. Chunthu Ram Vs St. of Chhattisgarh(2020) 10 SCC 733

9. Subed Ali Vs. St. of Assam (2020) 10 SCC 517

(Delivered by Hon'ble Gautam Chowdhary, J.)

.1 . By way of this appeal the appellant has challenged the judgement and order dated 21.12.2010, passed by Additional Sessions Judge, Fast Track Court No.1, Baghpat, in Sessions Trial No. 488 of 2006 (State Vs. Virpal and others) and Sessions Trial No. 489 of 2006 (State Vs. Tejpal), whereby the accused- Tejpal was convicted and sentenced for commission of offence under Section 452 I.P.C. for three years rigorous imprisonment with fine of Rs. 5000/- and for commission of offence u/s 302 I.P.C. for life imprisonment with fine of Rs. *50,000/-*

2. The learned Judge acquitted all the other co-accused and convicted the present accused for commission of offence under Section 302 I.P.C. with fine of Rs. 50,000/- . The moot question which has been raised is could accused who were all facing charges under Section 302 I.P.C. could be acquitted on the same set of evidence led before the learned trial court.

3. Brief facts of this case are that an F.I.R. was lodged by the informant Jai Bhagwan against the accused/appellant alleging therein that on 18.9.2004 at about 10:30 am. when he was at his grocery shop, he heard firing at late Baburam's house. After hearing that sound, he was going to Baburam's house and at that time deceased-Ajay, nephew of the informant came running and shouting for help to the informant from Baburam's house. Accused-Tejpal and his three other companions came there following Ajay. All the four persons were armed with country-made pistols. On seeing the informant, the deceased asked for help and said that Tejpal had fired at him and he fell on the road (khadanja). Thereafter, all the four accused opened fire at the deceased- Ajay, whereupon he died on the spot. The informant went to Baburam's house where he found the dead body of Baburam's son, namely, Deepak @ Kale, covered in blood, on the cot in the living room. In that living room deceased Deepak and Ajay were there with other villagers when the accused Tejpal and three others opened fire at Deepak and Ajay. Deepak died on the spot

on cot and Ajay in order to save his life tried to flee away but the accused followed Ajay and by indiscriminate firing killed him. The incident took place in front of many villagers but nobody could dare to catch the accused persons. The accused ran away towards fields on western side, hurling threats that whosoever would try to find them, he too would be met with similar consequence.

4. After the investigation was over, charge-sheet was filed against the accused. As the case was exclusively triable by the court of sessions, the same was committed to the sessions court. Charges were framed by the trial court against all the accused/appellant who pleaded not guilty and claimed for trial.

5. The prosecution, in order to prove its case, examined 11 witnesses as under :-

1.	Jai Bhagwan	PW-1
2.	Sanjiv Kumar	PW-2
3.	Smt. Prembala Devi	PW-
4.	Sonu Upadhyay	PW4
5.	Dr. S.K. Tyagi	PW-5
6.	Rajendra @ Leelu	PW-6
7.	S.I. Rajendra Singh Yadav	PW-7
8.	Meerpal Singh	PW-8
9.	Sheelchand Tyagi	PW-9
10.	Jagdish Bhatnagar	PW-10
11.	S.I. Sethpal Singh	PW-11

6. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence

1.	Chik F.I.R.	Ex.ka.1
2.	Post mortem report of Ajay	Ex.ka.2
3.	Post mortem report of Deepak	Ex.ka.3
4.	Panchayatnama of dead body of Deepak	Ex.ka.4
5.	Photo nash	Ex.ka.5
6.	Chalan Nash	Ex.ka.6
7.	Letter to C.M.O.	Ex.ka.7 & Ex.ka.8
8.	Panchayatnama of dead body of Ajay Ex.ka.9	Ex.ka.9
9.	Sample of simple soil	Ex.ka.14
10.	Sample of blood stained cot	Ex.ka.15
11.	Recovery of live and empty cartridges	Ex.ka.16
12.	Sample of blood stained and plain soil	Ex.ka.17
13.	Site Plan	Ex.ka.18
14.	G.Diary	Ex.ka.22
15.	Chik entry	Ex.ka.23
16.	Charge Sheet	Ex.ka.25

7. We had deferred the judgement on 3.2.2021 as we wanted some clarifications which have been made by Sri D.K. Srivastava, learned counsel for the appellant.

8. Heard Sri D.K. Srivastava, learned counsel, assisted by Sri H.K. Singh, learned counsel for the appellant and Sri N. K. Srivastava, learned counsel for the State

9. Learned counsel for the appellant has submitted that learned Judge could not have convicted the accused when the evidence was scanty and when the other accused were held not guilty on the same set of evidence. All the accused were

exonerated for offence u/s 25 Arms Act. He has further submitted that recovery was also not proper and conviction of the accused on inculpatory statement was also not proper. Most of the witness testified that Tejpal as well as Pintu were causing injuries which is also borne out from the oral testimony of PW-1 and therefore, has asked for acquittal of the accused. Learned counsel for the appellant has placed reliance on judgements of Apex Court titled **(i) Jagdish Prasad and others Vs. State of M.P., reported in 1995 SCC (Cri) 160, (ii) Smt. Chintambaramma & Anr. Vs. State of Karnataka**, reported in 2019 (3) JIC 560 (SC) and (**iii) Vadivelu Thevar Vs. State of Madras**, reported in **AIR 1957 SC 614.**

10. Per contra learned counsel for the State has submitted that it has been conclusively proved that it was Tejpal alone who had caused death of both the deceased. The learned A.G.A. has placed reliance on the judgement of Apex Court in **Ravi vs. State,** reported in **(2008) 15 SCC 115** and **Ganesan vs. State** which is a recent judgement in **Crl. Appeal No. 680 of 2020**, decided on 14.10.2020.

11. Learned counsel for the appellants has advanced the following points to be discussed:

(i) whether the testimony of P.W.-1, namely, Jai Bhagwan, is beyond doubt and proves the case against Tejpal;

(ii) whether the testimony deposed by PW-1 is believable that all the injuries were caused by a single person;

(iii) whether the injuries mentioned in the post mortem report can be caused by single country made pistol (katta) and;

(iv) on same set of evidence which has been led before the trial court the appellants just because the accused was named in the F.I.R., he could be convicted when on the same set of evidence the other co-accused, whose role was assigned by the witnesses, have been acquitted by the learned Judge.

12. While discussing the first point it is relevant to mention that learned counsel for the appellant has drawn our attention to the statement of P.W.-1 who has stated in his statement recorded on 17.1.2008 as below:

*ष्उसी समय अजय भागता हुआ व शोर मचाता हुआ कि'' ताउ बचाओ, ताउ बचाओ '' मेरी तरफ आया। उसी समय उसके पीछे मेरे गांव का तेजपाल और मतानतन मर गांव का पिन्टू और दो अन्य आदमी अपने हाथों में तमंचे लिये हुये आये। **अजय ने मुझे देखते ही कहा कि ताउ मुझे बचा लें। तेजपाल ने मुझे गोली मार दी** हैं अजय मेरे पास खडंजे पर गिर पडा। मैंने अजय को उठाने की कोशिश की और मुल्जिमान को डाटा तो इन्होने मुझे गोली मारने की धमकी दी।ष*

Here the PW-1 is stating that Ajay told him that Tejpal had fired at him. Then the learned counsel has pointed out the statement of PW-1 recorded as under:-

ष्घटना से पन्द्रह दिन पहले भी तेजपाल से झगडा हुआ था। इसी रंजिश की वजह से तेजपाल व पिन्टू व इनके साथियों ने अजय व दीपक को मारा है। घटना की रिपोर्ट मैने थाने में करायी थी।ष

Here the PW-1 states that accused- Tejpal and Pintu along with other accused assaulted deceased Ajay and Deepak. First he said that deceased Ajay was shot by accused- Tejpal and now he is stating that both accused- Tejpal and Pintu along with other accused fired at him. Learned counsel has further drawn our attention to statement of PW-1 recorded as under:-

ष्जो तेजपाल व पिन्टू के साथ अन्य दो व्यक्ति थे उनको मैंने देखा नहीं था। मैं उनको सामने आने पर पहचान नहीं सकता हाजिर अदालत मुल्जिम ***संजय उर्फ पिन्टू को देखकर कहा कि यह घटना में शामिल नहीं था। आज से पहले मैंने इसको कभी नहीं देखा।ष***

Now here again the testimony of PW-1 is creating a doubt who states that he had not seen the other person.

13. On 27.2.2008 the PW-1 has stated as follows:-

. ष्यह घटना बाबूराम के घेर में हुई थी। घेर में जहां घटना हुई वहां सोनू व नरेन्द्र, लीलू निवासी सैंडथर और अजय, काले आदि थे इनके अलावा कोई और हो तो मुझे ध्यान नहीं है। मैं घेर में मौजूद नहीं था। इनको वहां बैठे हुये मैने नहीं देखा था। मैंने इनको भागकर मेरे पास आते देखा था। बाबूराम की बैठक से करीब आठ गज दूरी पर मैं था। मैं खडजे पर खडा था।

. बाबूराम की बैठक में पौडियां भी लगी है। मैं पौडियों तक नहीं गया था। पहले ही मेरा भतीजा अजय भागता हुआ आ गया था। मैंने बाबूराम की बैठक में चली गोलियां नहीं गिनी थी। आवाज सुनी थी। मेरे अलावा अन्य बैठे लोग भागकर अपने–अपने घरों पर चले गये थे। केवल मैं ही बाबूराम की बैठक की तरफ चला था।ष

Here he states that at the place of incident where first fire took place, he was not there and he again states that he had not seen the incident rather he was not present there. PW-1 has further stated as under:-

ष्अजय ने मुझे केवल यही कहा था कि ताऊ मुझे बचाओ। उसने मुझे यह भी कहा था कि मुझे तेजपाल व पिन्टू मार रहे है और इतना कहते ही वह मर गया था।ष

PW-1 is only stating that Ajay told him that Tejpal and Pintu were assaulting so he cannot be said to be eye witness at all as he was conveyed by Ajay. He is saying that this was told by Ajay and here again he is saying that there were four persons who caused this incident. Later he discloses that all four persons were firing. All these statements were deposed by the PW-1 on 27.2.2008.

14. Again on 11.3.2008 statement of PW-1 proceeded and at Page-44 of the paper he narrates:

ष्अजय ने मुझसे आकर कहा था कि ताऊ बचाइये कि मुझे मार दिया है। इसके बाद मुलजिमान ने अजय को गोली मारी तब अजय मरा था। पांच–चार गोली मारी थी। गवाह ने कहा कि गोली बारीक–बारीक थी। गवाह ने उंगली का इशारा करके बताया कि गोली चने के बराबर थी लेकिन इशारे से पौरवा के बराबर बताया। मुलजिमान ने मुझे गोली नहीं मारी थी। ये गोलियां चार–पांच केवल तेजपाल ने मारी थी। मेरे अलावा जगतसिंह पुत्र राजाराम, सूरजपाल पुत्र गोविंद, रामचन्द्र पुत्र भरतू ने भी गोलियां चलाते हुये तेजपाल को देखा था। मुलजिम पिन्टू सतानतनगर का है। ने बाहर गोलियां नहीं चलायी, लेकिन मकान के अंदर उसने गोलियां चलायी। गोलियां कितनी चलायी, ध्यान नहीं है।ष

Here he clearly states Ajay conveyed him. Here he says that all the accused fired at deceased as he is using the word 'mulziman' and not 'Mulzim'. 'Mulziman' is plural whereas 'Mulzim' is singular. Here he is disclosing that all the accused participated but in his cross-examination he comes up with a new story and states that only Tejpal fired and the rest accused were standing. Further he states in cross-examination as under:

ष्प्रश्न– हमारा यह कहना है कि अजय पर चारो मुलजिमान तेजपाल, वीरपाल, मनोज और पिन्टू ने एक–ए*क गोली चलायी थी न कि तेजपाल ने सारी गोलियां चलायी?*

उत्तर– मैंने गोलियां चलाते हुये तेजपाल को देखा था। बाकी लोग हथियार लिये हुये वहां खडे थे।ष

15. While discussing this part of the testimony, it appears that here PW-1 has taken U-turn and discloses that only Tejpal was firing and rest were standing which is

very hypothetical, from beginning he never stated that only Tejpal fired.

16. Now in conclusion we draw that the testimony of PW-1 is highly doubtful and it cannot be said to be beyond doubt as he is continuously changing his version.

17. On this point the appellant relied upon judgement of the Apex Court in **Jagdish Prasad and others vs. State of M.P**., reported in **1995 SCC (Cri) 160**, in which the Apex Court clearly has classified three types of testimony; one is wholly reliable, the other is wholly unreliable and third is neither wholly reliable nor wholly unreliable. Perused that in case of third category cases, the court has to be circumspect and has to look for corroboration in the material particularly by reliable testimony either direct or circumstantial. The relevant portion reads as follows:-

"As a general rule, a court can and may act on the testimony of a single witness though uncorroborated provided the testimony of that single witness is found out entirely reliable. In that case, there will be no legal impediment for recording a conviction. But if the evidence is open to doubt or suspicion, the court will require sufficient corroboration. In this connection, reference may be made to a decision of this Court in Vadivelu Thevar v. State of Madras, wherein this Court has classified the testimony of a witness into three categories. viz. (1) wholly reliable (2) wholly unreliable, and (3) neither wholly reliable nor wholly unreliable and observed that though in the first two categories of classification, there may not be any difficulty in coming to a conclusion either accepting or rejecting the testimony but 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 either direct or circumstantial."

18. While discussing second and third point when we go through the post mortem report. From perusal of the post mortem report there are five injuries. At one place PW-1 also says that it took one minute only, so it is vehemently argued by the learned counsel that it is not corroborating with the testimony of PW-1 as it is not possible for one single man to fire four or five shots within one minute by a country made pistol.

19. Now in the conclusion we are of the view that this. The testimony of PW-1 is not corroborating with the injuries.

20. While discussing the fourth point, we have gone through the judgement of the Court below and relevant part, which is required to be discussed, is at Page-123 of paper book which reads as under:-

ष्दौरान विवेचना विवेचक ने वादी जयभगवान यादव, बेगराज सिंह, राजू उर्फ संजीव व श्रीमती प्रेमवाला यादव व षडयन्त्र के सम्बन्ध में सोनू उपाध्याय, लीलू यादव द्वारा और गवाह पंचायतनामा रामू यादव, नरेन्द्र यादव, राजवीर रामछैल शर्मा का साक्ष्य एकत्र किया और उपरोक्त चक्षुदर्शी साक्षी के साक्ष्य के आधार पर अभियुक्तगण वीरपाल, मनोज, तेजपाल के विरूद्ध दिनांक 29–10–04 में आरोप पत्र प्रेषित किया व अभियुक्त धर्मेन्द्र उर्फ लाला पुत्र इन्द्रजीत व संजय उर्फ पिन्टू पुत्र श्री जयकरण के विरूद्ध दिनांक 21–01–05 में आरोप प्रेषित किया। एक अन्य अभियुक्त पिन्टू उर्फ राजवीर जिसका नाम दौरान विवेचना प्रकाश में आया। उसे पुलिस मुठभेड़ में दिनांक 13–12–04 में मार दिया गया।

घटना के चक्षुदर्शी साक्षी में वादी मुकदमा जयभगवान, राजीव कुमार, श्रीमती प्रेमबाला देवी को प्रस्तुत किया गया। साक्षी पी0डब्लू0–4 सोनू उपाध्याय ने अभियोजन पक्ष के कथानक के समर्थन में कोई साक्ष्य प्रस्तुत नहीं किया। इस साक्षी को अभियोजन पक्ष द्वारा पक्षद्रोही साक्षी घोषित किया गया। ष्ष

21. While discussing this question it is relevant to mention here that if all the shots were fired by accused Tejpal then question would arise where are the empty cartridges. In record it comes that one empty cartridge was recovered from the room where deceased- Deepak was shot. As story narrated by PW-1 become erroneous default and unproved as neither the pistol nor the empty cartridges were recovered from spot. It can be said that pistol may not be recovered but when the incident took place at one place and all the shots were fired by single accused then why the cartridges are recovered from the room where Deepak was shot and in his testimony the PW-1 clearly stated that he never visited the room where Deepak was shot dead or fire took place. From beginning he was stating that all four persons participated later he converted that only two persons were firing and at last he converted himself that only the accused Tejpal was firing.

22. We are unable to comprehend certain facts by going through the testimony of PW-1. We cannot hold that he is intact eye witness of fact. Adverted to oral testimony of PW-1, it is very doubtful whether he was, in fact, present at the place of occurrence. The decision of the Apex Court in the case of Vadivelu Thevar Vs. State of Madras, AIR 1957 SC 614, which is based on the fact that the contention that in a murder case, the Court should insist upon plurality of witnesses, is much too broadly stated. However, the later decision goes to hold that it is quality which matters and not quantity. In our case can it be said that accused and accused alone could be convicted when all the accused were charged for harbouring common intention. Prosecution story proceeded on the basis that the accused were conspirators but failed to prove the charge of conspiracy. Moreover, testimony of PW-1 cannot be said to be circumstantial evidence also as it not corroborates with the other evidence. As above it has been discussed that the testimony of PW-1 is not beyond doubt, hence after discussing all the records and perusing the judgement of the lower Court too as well as the case law, we are of the view that the appellant is not guilty.

23. PW-1 is changing version during his recording of evidence and that other witnesses only support him up to the extend that Ajay conveyed that accused had fired. None of the other witnesses clearly stated that the accused fired all the four gun shots on the deceased, rather they are only stating that they had heard that accused had fired. It appears that PW-1 has later been tutored. **In Smt. Chintambaramma & Anr. Vs. State of Karnataka,** reported **in 2019 (3) JIC 560 (SC),** the Apex Court has held that the prosecution must prove all the circumstances connecting unbroken chain of links leading to only one inference that the accused committed the crime. There is no continuous chain of evidence.

24. The finding of conviction of the sole appellant could not have been returned by the court below. It is the evidence of PW-1 which casts a shadow. Deceased Ajay received five fire arm injuries and Deepak received three gun shot wounds. Though six persons were involved, trial of the other accused brought acquittal to them. No other eye witness has testified in favour of the prosecution. There are major contradictions and no witness is testified that it was accused alone who had fired six times. The recovery of the pistol is also not proved. The evidence is so scanty as PW-6 cannot even recognise who had fired on deceased, Deepak or Ajay. The witnesses

have not identified the accused. The case diary also throws some light and even if we go by the submission of the learned A.G.A., accused- Tejpal had only instigated. It is nobody's case that gun shot injuries were caused by Tejpal. Other accused- Manoj Pal, Sanjay and Dharmendra were acquitted.

25. The judgements of the Apex Court relied by the learned counsel for appellant would come to the aid of the accused. The decision of the Apex Court in the case of **Ram Bihari Yadav vs. State of Bihar, AIR 1998 SC 1850** would come to the aid of the accused.

26. The fact that the legal position as set out cannot permit us to concur with the learned Judge who has convicted the accused on the premise that the F.I.R. disclosed the name of all the accused.

27. We have already held that testimony of PW-1 though being a rustic villager does not inspire confidence. Sanjiv Kuamr (PW-2) has been believed and Prembala Devi (PW-3) has also been believed. Though they have not supported the prosecution despite that much weightage is given to their testimony.

28. The recovery u/s 27 Arms Act was also not from Tejpal and, therefore, the interested witnesses have been examined. The learned Judge, after relying on the decision in **Badam Singh vs. State of M.P**., reported in **(2003) 12 SCC 792**, has come to the conclusion that no case is made out under Sections 149, 120-B, 148, 452, 302 I.P.C. against the other accused and also acquits the accused- Tejpal for commission of offence u/s 25 Arms Act but convicts him under Section 452 read with 302 I.P.C.

29. The discussion herein above and the evidence which we have perused and discussed at times in Hindi, will not permit us to concur with the learned Judge.

30. We can easily place reliance on **Chunthu Ram vs. State of Chhattisgarh**, reported in **(2020) 10 SCC 733**, wherein also in view of serious infirmities in prosecution evidence, the conviction of the sole appellant was reversed as in that case also recovery of alleged weapons, on the basis of statement of accused, was not linked to the crime. The vital forensic evidence was withheld by prosecution, there were infirmities in our case as to the oral testimony of the witnesses. The benefit of doubt will have to be given to the accused as it is not proved by the cogent evidence that the evidence adduced pointed to the guilt of accused and accused alone. In that view of the matter we also hold that accused could not have been convicted. The foundation of conviction on the basis of common intention and constructive liability have been summarised by the Apex Court in **Subed Ali Vs. State of Assam**, 2020 10 SCC 517

31. For the reasons to be recorded, we are convinced that the judgements relied by the learned counsel for appellant would enure for the benefit of the accused also.

32. The reason being of the same set of evidence which has been led before the trial court just because the accused was named in the F.I.R., he could not have been convicted when on the same set of evidence, on the basis of the charge sheet and the evidence, the other co-accused, whose role was assigned by the witnesses, have been acquitted by the learned Judge. The witnesses who have deposed their statements were recorded belatedly. The

incriminating circumstances against the accused is only that he was named in the F.I.R.

33. We have been taken through Page No. 123 of the paper book once again today. The judgement **of Rambali Vs. State of U.P**., on which heavy reliance has been placed by the State, the facts are different.

34. The judgement of **Ravi (supra)** also would not come to the aid of the State as Mallikarjun. The facts are entirely on a different canvas.

35. The judgement of this High Court and the Apex Court **in Jagdish Prasad (supra)** and **Smt. Chintambaramma (supra)** would go to show that once there is lack of common intention, no doubt if there are startling witnesses and the evidence, only then the accused can be convicted. In our case while going to the deposition of Jai Bhagawan (PW-1) and Sanjiv Kumar (PW-2) as well as Prem Bala Devi (PW-3), we find that there are certain contradictions which would go in favour of the accused.

36. We have no other option but to acquit the accused. The conviction is reversed.

37. The accused is in jail for more than 10 years. He be set free immediately, if not needed in any other offence.

38. Record and proceedings be sent back to the trial court.

39. We are thankful to learned counsel Sri D.K. Srivastava assisted by Sri H.K. Singh, learned counsel for the appellant and Sri N. K. Srivastava, learned counsel for the State for ably assisting this Court.

(2021)03ILR A864
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.02.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE SAURABH LAVANIA, J.

Criminal Appeal Defective No. 185 of 2021

Sageer Khan ...Appellant(In Jail)
Versus
State of U.P. & Anr. ...Opposite Party

Counsel for the Appellant:
Sheikh Mohammad Ali

Counsel for the Opposite Party:
G.A.

A. Criminal matter-Code of Criminal Procedure,1973-Section 372-maintainability of appeal- application filed on behalf of the victim for impleadment as an appellant-but it is supported by an affidavit of her father i.e. the existing appellant on whose behalf the appeal is not maintainable-The application is not supported by the affidavit of victim nor any reason has been given in this regard-guardian of victim has filed appeal while victim still survives, which is not in tune of Full Bench decision of this Court reported Manoj Kumar Singh v. State of U.P. and others-It is not the case of appellant where the victim, his daughter, is disabled- She is surviving and is married, therefore the appeal, if at all, could only be filed by her in her own name, whereas it has been filed by her father in his name- The guardian or legal heir would come into picture only if the victim is a minor or is absent or is unable to file an appeal on account of some disability-The legal heir would come into picture when the victim does not survive. (Para 2 to 11)

B. The word victim as occurring in Section 2(wa) Cr.P.C. means the actual sufferer of offence (receiver of harm caused by the alleged offence) and no person other than actual receiver of harm can be treated as victim of offence, so as to provide him/her right to prefer appeal under the proviso of Section 372, though, in his or her absence or disability, his "legal heir" or "guardian" would qualify as victim and have a right to appeal.(Para 4)

C. The proviso of section 372 is an exception to the general law and same confers on a victim a right to appeal against acquittal, which is subject to the grant of leave by the Court. The first part of the definition of "victim' as given under section 2(wa) (i.e. "Victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged), is required to be construed in its literal sense and no liberal interpretation is required, Accordingly, only such person would be treated as "victim', who is the subject-matter of trial being direct sufferer of crime in terms of loss or injury caused to his own body, mind, reputation and property and such loss or injury is one of the ingredient of the offence for which the accused person has been charged and, therefore, any other person cannot be accepted as victim within the first part of section 2(wa) for the purposes of maintaining appeal. The second part that is "includes his or her guardian and Legal Heir" would come into play when the actual sufferer is absent or suffers disability. (4 to 7)

The appeal is dismissed. (E-5)

List of Cases cited:

1. Manoj Kumar Singh Vs St. of U.P. & Ors (2016) 97 ACC 861

2. Edal Singh vs. St. of U.P. & 3 Ors. in Crl. Misc. Appl. No.172 of 2014

3. Chunni Lal Vs. St. of U.P. & 3 Ors,Crl. Misc. Appl. No. 166 of 2018

4. Mallikarjun Kodagali (Dead) Reprtd. Thru L.Rs.Vs. S. of Karnataka & Ors (2019) 2 SCC 752

(Delivered by Hon'ble Rajan Roy, J. & Hon'ble Saurabh Lavania, J)

1. We have perused the Office report dated 03.02.2021, according to which the limitation for filing instant appeal is 90 days and not 60 days, therefore, we treat the appeal as within limitation.

2. This appeal was filed by Sageer Khan informant and father of the victim. The victim on the date of alleged crime is said to have been a minor, however, learned counsel for the appellant fairly submits that on the date of filing of this appeal under Section 372 Cr.P.C. i.e. 28.01.2021, she had attained the age of majority and is surviving.

3. This Court on 04.02.2021 noticing the aforesaid defect passed the following order:-

"Learned AGA has pointed out defect in array of parties to the effect that guardian of victim has filed appeal while victim still survives, which is not in tune of Full Bench decision of this Court reported in [2016 (97) ACC 861]; Manoj Kumar Singh v. State of U.P. and others.

Counsel for appellant seeks time to rectify the defect.

List this appeal in next week as fresh."

4. The Full Bench in ***Manoj Kumar Singh Vs. State of U.P. & Ors., reported in 2016 (97) ACC 861,*** has considered the

meaning and purport of Section 2(wa) and 372 Cr.P.C., and has held as under:-

"70. From the discussions that have been made above, it is clear that the proviso of section 372 is an exception to the general law and same confers on a victim a right to appeal against acquittal, which is subject to the grant of leave by the Court. The first part of the definition of "victim' as given under section 2(wa) (i.e. "Victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged), is required to be construed in its literal sense and no liberal interpretation is required, Accordingly, only such person would be treated as "victim', who is the subject-matter of trial being direct sufferer of crime in terms of loss or injury caused to his own body, mind, reputation and property and such loss or injury is one of the ingredient of the offence for which the accused person has been charged and, therefore, any other person cannot be accepted as victim within the first part of section 2(wa) for the purposes of maintaining appeal. The second part that is "includes his or her guardian and Legal Heir" would come into play when the actual sufferer is absent or suffers disability.

71. In other words, victim means the actual sufferer of offence (receiver of harm caused by the alleged offence) and no person other than actual receiver of harm can be treated as victim of offence, so as to provide him/her right to prefer appeal under the proviso of section 372, though, in his or her absence or disability, his "legal heir" or "guardian" would qualify as victim and have a right to appeal. A person who claims himself to be "guardian' or "legal heir' of actual victim (direct sufferer), would be able to maintain appeal provided he establishes his claim as such before the Court in his application by disclosing his particulars; relationship with the direct sufferer; and the grounds on which such claim of being "legal heir" or "guardian" is based. In the light of the discussion made above, the ratio of Division Bench of this Court in the case of Edal Singh (supra) is in tune with the definition of "victim' as provided under section 2(wa) of the Code of Criminal Procedure. The reference is answered accordingly.

72. Let the order as well as the record be placed before appropriate Bench dealing with the "Leave to Appea1" application."

5. It opined that the word victim as occurring in Section 2(wa) Cr.P.C. means the actual sufferer of offence (receiver of harm caused by the alleged offence) and no person other than actual receiver of harm can be treated as victim of offence, so as to provide him/her right to prefer appeal under the proviso of Section 372, though, in his or her absence or disability, his "legal heir" or "guardian" would qualify as victim and have a right to appeal. Thereafter, it has delved into the question as to how the guardian or legal heir could file the appeal. It upheld the pronouncement of the Division Bench in ***Edal Singh vs. State of U.P. & 3 Ors. in Criminal Misc. Application under Section 372 Cr.P.C. (Leave to Appeal) No.172 of 2014*** and answered the reference made to it accordingly.

6. Learned counsel for the appellant relied upon an interim order dated 17.01.2019 passed by this Court in an appeal under Section 378 Cr.P.C. bearing No.166 of 2018 (***Chunni Lal Vs. State of***

U.P. & 3 Ors.), wherein the appeal by the informant was held to be maintainable in view of definition of victim under Section 2(wa) Cr.P.C. as well as law laid down by the Supreme Court in the case of ***Mallikarjun Kodagali (Dead) Represented Through Legal Representative Vs. State of Karnataka & Ors. (2019) 2 SCC 752.*** However, when we perused the said order we find no mention of the fact as to whether the victim in the said case was alive, was a minor or had attained the age of majority or whether she was surviving or not. Furthermore, when we go through the decision of the Supreme Court in ***Mallikarjun Kodagali (supra),*** we find that the victim therein had died, therefore, obviously the factual circumstance before the Hon'ble Supreme Court in the said case was different from the case at hand where not only the victim is surviving but she has also attained the age of majority on the date of filing the appeal. Therefore, in view of the Full Bench decision referred herein in above in ***Manoj Kumar Singh (supra)*** as also the language used in Section 2(wa) Cr.P.C. the informant who is the father of the victim can not maintain the appeal and it is prerogative of the victim of the case who alone can file this appeal.

7. Although, Full Bench has already considered the issue nevertheless it may be emphasized and reiterated that by defining the word victim under Section 2(wa) Cr.P.C. to mean a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged, it necessarily implies the person who has actually suffered the loss and a distinction has been drawn by the Legislature with regard to guardian or legal heir of such victim by including them in the definition clause separately by use of the word "includes his or her guardian or legal heir". The guardian or legal heir would come into picture only if the victim is a minor or is absent or is unable to file an appeal on account of some disability. The legal heir would come into picture when the victim does not survive.

8. There is another reason why we are persuaded to take this view, that is, assuming the victim does not wish to challenge the judgment of the Trial Court, but her father or any other relative misuses the process of law taking advantage of the words "guardian or legal heir" and files an appeal, for whatever reason, therefore, this mischief has also been warded off by the Legislature by making such a provision.

9. It is not the case of appellant before us that the victim, his daughter, is disabled. She is surviving and is married, therefore the appeal, if at all, could only be filed by her in her own name, whereas it has been filed by her father in his name.

10. Now when we peruse the application for impleadment allegedly filed on behalf of the victim for impleadment as an appellant, we find that it is supported by an affidavit of her father i.e. the existing appellant on whose behalf the appeal is not maintainable as already discussed. The application is not supported by the affidavit of victim nor any reason has been given in this regard. Moreover, we find that the victim has not engaged the learned counsel for filing this appeal as there is no Vakalatnama executed by her in his favour.

11. In view of aforesaid, the appeal is ***dismissed*** as not maintainable on behalf of the existing appellant the father of the victim. The application for impleadment is also not in order. For the reasons aforesaid it is also dismissed. However, it is always

open for the victim to herself file the appeal but only as per law.

12. Certified copies of the documents filed alognwith this appeal be returned to the appellant as per rules of the Court.

(2021)03ILR A868
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.03.2021

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE SHEKHAR KUMAR YADAV, J.

Criminal Appeal No. 261 of 2006

Krishna Pal & Ors. ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri K.K. Tripathi, Sri Adarsh Kumar, Sri B.K. Solanki, Sri Bansh Narain Rai, Sri Hardeo Singh, Sri K.S. Yadav, Sri Kamleh Kumar Tripathi, Sri Rajesh Dwivedi, Sri Rajive Ratn Singh, Sri Amit Saxena, Sri Ajay Kumar Mishra.

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

A. Criminal matter-Code of Criminal Procedure,1973-Section 374(2)- & Indian Penal Code,1860-Section 147, 323/149, 324/149, 302/149 & Arms Act,1959-Section 25/27-challenge to-conviction- accused had gone after abusing the complainant and again returned to the site in question with the preparedness to assault on the informant and others in which a young lad of 16 years has been done to death and two persons from complainant side received injuries and their injuries cannot be disputed- Even their injuries are fully corroborated by the medical evidence.-Thus, on the basis of the medical and ocular evidence- Both the witnesses (PW-1 & PW-2) clearly delineated the genesis and manner of attacks-the prosecution has been able to prove its case beyond reasonable doubt-It is also not a case where injured witnesses can be said to be planted one-Where the evidence is clear, cogent and creditworthy; and where the court can distinguish the truth from falsehood, the mere fact that the injuries on the person of the accused are not explained by the prosecution cannot, by itself, be a sole basis to reject the testimony of the prosecution witnesses.(Para 1 to 53)

B. As per the medical report, the injuries on the body of two accused persons were found to be `simple in nature'. On the other hand, we have a complete version of the prosecution, duly supported by two injured eye witnesses to the occurrence. The bone of contention between the parties was the lifting of cow dung forcefully by the accused persons and the verbal altercations that had taken violent turn. The prosecution story, as has been disclosed by the eye-witnesses, is trustworthy, reliable and entirely plausible in the facts and circumstances of the case. The mere fact that there is no specific explanation on record as to how two accused persons suffered injuries, would not vitiate the trial or the case of the prosecution in its entirety. Normal rule is that whenever the accused sustained injury in the same occurrence in which the complainant suffered the injury, the prosecution should explain the injury upon the accused. But, it is not a rule without exception that if the prosecution fails to give explanation, the prosecution case must fail. There is no dispute on the occurrence, time and place. Therefore, it can be said with certainty that the occurrence took place in the manner as alleged by the prosecution, which is supported with the testimony of two injured witnesses. (Para 41)

C. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely; errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. (Para 35)

The appeal is dismissed. (E-5)

List of Cases cited:

1. St. of U.P. Vs Naresh JT (2011) 3 SC 508

2. Tehsildar Singh & Anr Vs St. of U.P. (1959) AIR SC 1012

3. Pudhu Raja & Anr. Vs St. Rep. By Inspr of Police, (JT 2012) 9 SC 252

4. Lal Bahadur Vs St. (NCT of Delhi) (2013) 4 SCC 557

5. Sardul Singh Vs St of Haryana(2002) 8 SCC 372

6. Rajender Singh & Ors Vs St. of Bih.(2000) 4 SCC 298

7. Abdul Sayeed Vs St. of M.P.(2010) 10 SCC 259

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

1. Instant appeal arises out of a judgment of conviction and order of sentence dated 12.01.2006 passed by learned Addl. District and Sessions Judge, Court No. 6, District Kanpur Dehat in Sessions Trial No. 255 of 2001 (arising out of Case Crime No. 345 of 2000) (State Vs Krishna Pal Singh and Others) and Sessions Trial No. 417 of 2001 (arising out of Case Crime No. 357 of 200) (State Vs Amar Singh), whereby the accused Kaptan Singh, Mohan Trivedi, Vimal Singh and Anirudh Singh were acquitted of the charge under Sections 148, 323/149, 324/149,302/149, 504 IPC. Further, the appellants **Kamal Singh (Appellant No. 2), Amar Singh (Appellant No. 4), Narendra Singh (Appellant No. 5)** and Jai Karan Singh (Appellant No. 6) were convicted under Sections 148, 323/149, 324/149, 302/149, 504 IPC and further appellants Krishna Pal Singh and Nirmal Singh were convicted under Section 147, 323/149, 324/149, 302/149, 504 IPC. Further the appellant Amar Singh in Sessions Trial No. 417 of 2001 was convicted under Section 25/27 of Arms Act.

2. By the said judgement the **appellants Kamal Singh (Appellant No. 2), Amar Singh (Appelant No. 4), Narendra Singh (Appellant No. 5) and Jai Karan Singh (Appellant No. 6)** were convicted under Section 148 IPC and sentenced to three years RI and fine of Rs. 1000/- each, under Section 323/149 IPC and sentenced to one year R.I. and fine of Rs. 500/- each, under Section 324/149 IPC and sentenced to under go three years R.I. and fine of Rs. 1000/- each, under Section 302/149 IPC and sentenced to life imprisonment and fine of Rs. 5000/- each, under Section 504 IPC sentenced to six

months R.I. and fine of Rs. 500/- each along with default stipulation.

3. The appellants **Krishnapal Singh (Appellant No. 1) and Nirmal Singh (Appellant No. 3)** were convicted under Section 147 IPC and sentenced to undergo two years R.I. and fine of Rs. 500/- each, under Section 323/149 IPC sentenced to one year RI and fine of Rs. 500 each, under Section 324/149 IPC sentenced to three years R.I. and fine of Rs. 1000/- each and under Section 302/149 IPC sentenced to life imprisonment and fine of Rs. 5000/- each, under Section 504 IPC sentenced to six months R.I. and fine of Rs. 500/- each along with default stipulation.

4. The appellant **Amar Singh** in Sessions Trial No. 417 of 2001 was convicted under Section 25/27 Arms Act and sentenced to three years R.I. and fine of Rs. 2000/- with default stipulation.

5. All the aforesaid sentences were directed to run concurrently.

6. The appeal against **Krishna Pal Singh (Appellant No. 1)** has already been dismissed as abated vide order dated 28.09.2018 passed by another Co-ordinate Bench of this Court.

7. Adumbrated facts, as per the prosecution version are that the Informant Vinod Singh (P.W.-1) submitted a written report (Ex-Ka-1) on 30.11.2000 at P.S. Shivli, District Kanpur Dehat alleging therein that he used to tie the cattle in front of his house. It is alleged that the cow dung was forcibly taken away by the sons of accused Krishna Pal Singh. On 30.11.2000 at 6.00 a.m. the informant was standing outside his door and at that time accused Kamal Singh and Nirmal Singh both sons of Krishna Pal Singh (Village Pradhan) started taking away the cow dung, which was objected by the informant. At this, both the accused stated that since this Government Kharanja pertains to society, they would lift the cow dung forcibly. After abusing and threatening the informant they went away. Thereafter, on the same day at 8.00 a.m. when the informant was standing at his door, accused Krishna Pal Singh (village Pradhan) and both his sons namely Kamal Singh and Vimal Singh armed with Pharsa and Barchhi and accused Anirudh Singh and his brothers Kaptan Singh and Amar Singh and accused Narendra Singh armed with country made pistol, Addhi, Pharsa, Barchhi and Lathi advanced towards his door. Accused Kamal Singh assaulted the informant with Barchhi on his temple. In order to save his life, he raised alarm. Thereafter, his family members namely, Hari Shankar, Anil Singh, Randhir Singh reached there. On the exhortation of accused Krishna Pal Singh and Anirudh Singh, other accused persons started firing and assaulted with lathi, danda. In the incident, informant **Vinod Singh (P.W.-1), Hari Shankar (P.W.-2) and Anil sustained injuries.** At this, deceased Yogendra Singh arrived on the spot to rescue them and addressed his maternal uncle (Mama) Amar Singh why he was assaulting his uncle? At this accused Amar Singh retorted derisively that who is his Mama and fired shot upon Yogendra Singh with his country made pistol, who died instantaneously on the spot. The incident was witnessed by Randhir Singh, Amit son of the informant and several other villagers and they identified the assailants. Informant also stated that there were several other persons who had come with the assailants.

8. On the basis of said written report, the FIR (Ex-Ka-7) was lodged on 30.11.2000 at 9.30 a.m. same day vide

Case Crime No. 345 of 2000, under Sections 147, 148, 149, 302, 324, 323, 504 IPC. A Check report was carved out. Relevant entries were made in the General Diary (Ex-Ka-8) of the police station and the investigation was entrusted to Sub Inspector Sri Radhey Shyam Upadhyay (P.W.-5), who is said to have recorded the statements of the injured as the S.H.O. P.S. Shivli Sri Rajul Garg (P.W.-6) was not available at the Police Station at that time.

9. The injured **Vinod Singh (P.W.-1), Hari Shankar, Anil and one Randheer Singh** were taken to PHC, Shivli, District Kanpur Dehat, where they were examined by P.W.-4 Dr A. C. Dixit on 30.11.2000. The injured Anil received following injuries on his person:-

(i) Lacerated wound on right side head, 3 cm X 1 cm, bleeding present.

(ii) Abrasion on left leg in middle 2 cm X 2 cm.

(iii) Abrasion on right side of forehead 4 cm X 3 cm, 1 cm above right eyebrow.

Injuries are simple. Injury no. 1 is caused by hard and blunt object, Injury no. (ii) & (iii) are caused by friction. Duration fresh.

10. The injured Vinod Singh, received the following injuries:-

(i) pointed deep injury on the left side of face 0.5 cm X 0.5 cm .....of left ear. Bleeding present.

Injury kept under observation. Injury is said to have been caused by pointed object. Duration is fresh.

11. The injured Hari Shanker received the following injuries:-

(i) Lacerated wound on back of the head of 2 cm X 0.5 cm scale deep. Bleeding present.

(ii) Contusion on left shoulder 4cm X 3 cm,

(iii) Abraded contusion on right side of back of chest 3 cm X 2 cm .5 cm below back border of right scapula.

(iv) Contusion right hip joint front 2 cm X 2 cm red in colour.

All injuries are simple and caused by hard and blunt object. Duration fresh.

12. The injured Randheer Singh received the following injuries on his person:-

(I) Contusion over head 2 cm X 2 cm

(ii) Contusion over front of chest right side 4 cm X 3 cm red.

Injuries are simple and caused by hard and blunt object. Their injury reports of all the injurds are available on record and marked as Ex-ka-3 to Ex-ka-6.

13. The subsequent Investigating Officer P.W.-6 Sri Rajul Garg, took over the investigation and prepared inquest (Ex-Ka-13), site plan (Ex-ka-23) and obtained the samples of blood stained earth and simple earth from the place of incident and prepared recovery memo, which is available on record as Ex-Ka-11. The recovery memo of four empty cartridges from the place of incident was also

prepared, which is available on record as Ex-Ka-10.

14. The dead body of deceased was sent for postmortem through constables Awadhesh Kumar Tiwari and Arvind. The postmortem was conduced by P.W.-3 Dr Akhilesh Shukla on 1.12.2000 at 1.00 p.m. The postmortem report (Ex-ka-2) was prepared and following anti mortem injuries were reported on the person of deceased Yogendra Singh (16 years), which is reproduced as under:-

(i) Fire arm wound of entry-1 cm X 1 cm on the left lateral side of abdomen, 14 cm lateral to mid line and 5 cm above left abdominal cavity deep, margins inverted, charring present around the wound.

(ii) Fire arm wound of exit-2 cm X 2 cm on the right lateral side of abdomen 11 cm lateral to left line and 8 cm above the right iliac crust. Margins inverted, abdominal cavity deep.

15. As per opinion of the Dr Akhilesh Shukla, (P.W.-3) death was caused by haemorrhage and shock due to anti-mortem fire arm injury.

16. The assault weapon Barchhi, country made pistol and cartridges stated to have been used in the murder of deceased was recovered at the instance of appellant Amar Singh on his arrest on 17.12.2000. This memo of recovery is available on record as Ex-Ka-20. Thereafter, an FIR vide Case Crime No. 357 of 2000, under Sections 25/27 Arms Act was registered against the appellant Amar Singh on 17.12.2000, copy of which is available on record as Ex-Ka-21. The accused Mohan Trivedi, Kaptan Singh and Shyam Baran Singh are said to have been arrested on 1.12.2000 and on their arrest, recovery memo of one S.B.B.L. Gun, Ten live cartridges recovered from accused Mohan Trivedi and one country made pistol 12 bore with two cartridges said to have been recovered from accused Shyam Baran and a farsa recovered from accused Mohan Trivedi, was prepared. The empty cartridges, recovered Gun and other materials e.g., blood soaked soil and the clothes etc. of the deceased were sent to the Forensic Science Laboratory, Agra for chemical analysis.

17. After completing the investigation, the Investigating Officer (P.W-6) Sri Rajul Garg filed charge sheet (Ex Ka-19) against the accused persons namely Krishna Pal Singh, Kamal Singh, Vimal Singh, Nirmal Singh, Anirudh Singh, Kaptan Singh, Amar Singh, Narendra Singh, Jai Karan Singh, Mohan Trivedi and Shyam Baran Singh under Sections 147, 148, 149, 302, 323, 504, 324 IPC on 19.2.2001 in Case Crime No. 345 of 2000. Another Investigating Officer Sri Satya Prakash Yadav (P.W.-7) filed charge sheet against appellant Amar Singh under Section 25/27 Arms Act (Ex-Ka-25). Accused Shyam Baran Singh died before commencement of trial.

18. The Addl. Sessions Judge framed charges against rest of the appellants, namely, Krishna Pal Singh, Kamal Singh, Vimal Singh, Nirmal Singh, Anirudh Singh, Kaptan Singh, Amar Singh, Narendra Singh, Jai Karan Singh, Mohan Trivedi under Sections 147, 148, 149, 302, 323, 324, 504 IPC on 9.8.2001. Again, Addl. Sessions Judge, Room No. 1, Kanpur Dehat framed charge against accused appellants namely Kamal Singh, Vimal Singh, Anirudh Singh, Kaptan Singh, Amar

Singh, Narendra Singh, Jai Karan Singh, Mohan Trivedi under Section 148, 323/149, 324/149, 302/149, 504 IPC on 1.2.2003. The Addl. Sessions Judge, framed charge against appellant Krishna Pal Singh and Nirmal Singh under Section 147, 323/149, 324/149, 302/149, 504 IPC on 1.2.2003.

19. The charge against accused Amar Singh in Sessions Trial No. 417 of 2001, under Sections 25/27 Arms Act was framed on 21.09.2001 by Addl. Sessions Judge, FTC No. 1, Kanpur Dehat. All the appellants denied the charge and claimed to be tried.

20. Prosecution has adduced evidence of informant Vinod Singh (P.W.-1), Hari Shanker (P.W.-2), Dr Akhilesh Shukla (P.W.3), Dr. A. C. Dixit (P.W.-4), S.I. Radhey Shyam Upadhyay (P.W.-5), Sub Inspector Rajul Garg (P.W.-6), S.I. Satya Prakash Yadav (P.W.-7) in support of its case.

21. Statements of the accused were also recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, and pleaded innocence and false implication on account of enmity. However, they have not produced any evidence in their defence.

22. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the accused/appellants herein as mentioned above. Hence present Criminal Appeal.

23. We have heard Heard Sri Adarsh Kumar, learned counsel for appellant no.4, Sri Hardeo Singh, learned counsel assisted by Sri Kamlesh Kumar Tripathi, learned counsel for appellants nos.2, 3, 5 & 6 and Sri A.N. Mulla, Sri L.D. Rajbhar and Sri Prem Shankar Mishra, learned A.G.A. for the State and perused the entire material on record.

24. Attacking the prosecution case and the verdict of conviction, it is mainly contended that by not explaining the injuries on the person of the accused, the prosecution has suppressed the real occurrence, therefore, the accused would be entitled to be given the benefit of doubt. Further the prosecution did not examine the independent witnesses who were actually present at the time of occurrence of the incident, which casts a doubt on the prosecution case. According to the prosecution, PW-1 and PW-2 both injured eye-witnesses are interested witnesses and, therefore, their depositions cannot be relied upon by the Court. It is further submitted that even if the entire prosecution story is assumed to be correct, even then it does not constitute an offence under Section 302 IPC. In the facts and circumstances of the case, at the worst, the accused could be held guilty of an offence punishable under Section 304, Part-I, IPC. It is further submitted that the deceased had only one gun shot injury, therefore, the story that several accused armed with several weapons took part in the assault is not physically possible. Thus, it creates a specific doubt in the story of the prosecution.

25. It is further submitted that accused Kaptan Singh, Mohan Trivedi, Vimal Singh and Anirudh Singh against whom similar evidence was tendered have been acquitted. Therefore, it would not be proper and legal to convict rest of accused persons on the same set of evidence. Benefit of doubt

should be given on account of co-accused's acquittal. It is further submitted that the evidence is inadequate to fasten guilt, and, therefore, prosecution cannot be said to have established its case beyond all reasonable doubt.

26. Learned A.G.A. has submitted that case of prosecution revolves around the injured witnesses P.W.1 & P.W.-2, whose testimony stands on a higher footing. He has submitted that these injured witnesses had no reason to falsely implicate the accused persons or to shield the real culprit. Learned A.G.A. argued that non explanation of injuries sustained by accused person is also not a ground to outrightly reject the evidence of the prosecution witnesses.

27. The undisputed facts are that in the alleged incident a lad of 16 years has been done to death and two persons from informants' side allegedly sustained injuries.

28. The prosecution case primarily depends upon the testimony of two injured witnesses namely P.W.-1 & P.W-2. It is not in dispute that P.W.-1 an P.W.-2 have sustained injuries in the alleged incident, which is well corroborated by the medical evidence on record and the doctor P.W.-6, who has stated that all injuries sustained by them are simple and caused by hard and blunt object could also probabilise the occurrence of incident as alleged by the prosecution. Very cogent and convincing grounds would be required to discard the testimony of the injured Witnesses.

29. Vinod Singh, who has been examined in the instant case as P.W.-1 is the first informant and is one of the injured. He in his examination in chief has deposed that incident is of 30.11.2000 at 8.00 a.m. It is deposed that at about 6.00 a.m., sons of accused Kishanpal Singh, namely, Kamal Singh and Vimal Singh were taking away forcibly the cow dung and at that time informant was standing outside his door and when objected, accused started abusing and went out and again at 8.00 a.m. accused Kishanpal, Kamal, Vishal, Aniruddh Singh, Kaptan Singh, Amar Singh, Narendra Singh and some others came there and attacked the informant. Accused Kamal Singh assaulted the informant with Barchhi at his left temporal region and on an alarm being raised by him, Hari Shanker, Randheer Singh, Anil Singh reached there and on the exhortation of accused Kishanpal Singh and Anirudh Singh, all the accused persons started firing and abusing them and also made assault upon Hari Shanker, Randheer Singh and Anil Singh. In the incident, informant Vinod Singh (P.W.-1), Hari Shankar (P.W.-2) and Anil sustained injuries. Accused Amar Singh shot at deceased with firearm which hit him in his abdomen as a result of which he fell down and thereafter succumbed to his injury. Anil was beaten by accused Kaptan Singh and Vimal. Harishanker was beaten by accused Narendra Singh and Randheer Singh was beaten by accused Kishanpal Singh.

30. In his deposition, he has specifically mentioned that accused Kishanpal was wielding Lathi, accused Kamal was wielding Barchhi, Vimal, Aniruddh, Kaptan Singh were having Farsa and accused Amar Singh and Narendra Singh were having country made pistols.

31. In the same way, P. W. 2 Hari Shanker, the second injured witness also supported the prosecution case. Both the witnesses have clearly delineated the

genesis and manner of attacks. In our considered opinion, the evidence of P.Ws. 1 and 2, is credible and there is no major deviation or discrepancy.

32. A detailed and searching cross-examination has been conducted with both P.W.- 1 and P.W.- 2 yet nothing material could be extracted from them. We believe that testimony of both these witnesses is natural, consistent with normal human conduct and trustworthy.

33. Trial court has also noted that the testimony of injured witnesses is reliable and worthy of credence. It is pertinent to point out that P.W.-1 & P.W-2 both sustained injuries in the incident, therefore, their testimony cannot be rejected outrightly, especially in the light of facts that they have narrated the entire prosecution version in a trustworthy manner. If the evidence of a witness is trustworthy, reliable and worthy of credence then the court can act upon such evidence.

34. Moreover, further perusal of the evidence of these two prosecution witnesses indicates that in their testimony they have completely denied to have seen the accused having received the injuries during the course of occurrence, which as per defence are material discrepancy and renders their version doubtful. We are afraid that such discrepancies by themselves do not necessarily create doubt about the prosecution story in all eventualities. It is the nature and circumstances of the discrepancies which has to be taken into account. If there are minor discrepancies in the depositions of the witnesses, they have to be ignored for the simple reason that all witnesses cannot be expected to give depositions without minor and normal discrepancies. If the discrepancies are minor and do not affect the core of prosecution story adversely than they have to be ignored. In the case in hand where the assailants are in large numbers and the fight took place like a melee attack, then in such eventualities it could not possible for any member of either side to see as to how many persons received what nature of injuries.

35. Hon'ble the Apex Court in the case of **State of U.P. Vs. Naresh reported in JT 2011 (3) SC 508** has held as under:-

"In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely; errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility. Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the

same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited."

36. A similar view has been reiterated by this Court in **Tehsildar Singh & Anr V. State of U.P., [AIR 1959 SC 1012]; Pudhu Raja & Anr. V. State, Rep. By Inspector of Police, [JT 2012 (9) SC 252]; and Lal Bahadur v. State (NCT of Delhi), [(2013) 4 SCC 557)].** Thus, it is evident that in case there are minor contradictions in the depositions of the witnesses the same are bound to be ignored as the same cannot be dubbed as improvements and it is likely to be so as the statement in the court is recorded after an inordinate delay. In case the contradictions are so material that the same go to the root of the case, materially affect the trial or core of the prosecution case, the court has to form its opinion about the credibility of the witnesses and find out as to whether their depositions inspire confidence.

37. Hon'ble the Apex Court in the case of **Sardul Singh v. State of Haryana reported in (2002) 8 SCC 372** has observed as under:

"There cannot be a prosecution case with a cast iron perfection in all respects and it is obligatory for the courts to analyse, sift and assess the evidence on record, with particular reference to its trustworthiness and truthfulness, by a process of dispassionate judicial scrutiny adopting an objective and reasonable appreciation of the same, without being obsessed by an air of total suspicion of the case of the prosecution. What is to be insisted upon is not implicit proof. It has often been said that evidence of interested witnesses should be scrutinized more carefully to find out whether it has a ring of truth and if found acceptable and seem to inspire confidence, too, in the mind of the court, the same cannot be discarded totally merely on account of certain variations or infirmities pointed or even additions and embellishments noticed, unless they are of such nature as to undermine the substratum of the evidence and found to be tainted to the core. Courts have a duty to undertake a complete and comprehensive appreciation of all vital features of the case and the entire evidence with reference to the broad and reasonable probabilities of the case also in their attempt to find out proof beyond reasonable doubt."

38. It is, therefore, clear that the argument of the learned counsel for the appellants that the discrepancies in the depositions of witnesses indicate improvements and, therefore, testimonies of these witnesses should be discarded, cannot be accepted. In any case, no material discrepancies or contradictions have been shown by the learned counsel for the appellants.

39. So for as the another argument that the prosecution has also not explained the injuries caused to the two accused persons to say that the attack was in exercise of self-defence and the failure of the prosecution to explain injuries on the person of two accused persons is a circumstance which creates a serious doubt in the story of the prosecution.

40. It is not a case where the circumstances, even remotely, can be construed to have satisfied the ingredients of self-defence. From the record, it

appears that the alleged incident took place in the early morning, when the informant was standing outside his door and at that time accused Kamal Singh and Nirmal Singh both sons of Krishna Pal Singh (village Pradhan) started taking away the cow dung forcibly, which he had forbade. There was verbal altercation between the parties, and as a result some assault took place between the parties in which a person from informant side sustained fire arm injury and died instantaneously, and some received injuries and in the said scuffle two persons from the accused side also received injuries. But the persons received injuries from defence side did not examine a single witness in their defence to prove that they were attacked by the informant side and no doubt, two accused persons were subjected to medical examination by the Medical Officer vide paper application 88 Kha-1 & 2, which has not been exhibited. This would show that two accused persons namely Kamal singh and Vimal Singh had suffered some injuries but where and how these injuries were suffered, was for them to establish, particularly when they had taken a specific stand that the complainants' side were at fault and were aggressors in their defence statement and have admitted the occurrence. It is a settled canon of evidence jurisprudence that one who alleges a fact must prove the same. It is also their case that the prosecution has not explained the injuries on their person or the same being not exhibited at the most can be said to be lapses on the part of the prosecution, and, therefore, the argument impressed upon the Court is that the failure of the prosecution to explain injuries on the person of accused is a circumstance which creates a serious doubt in the story of the prosecution. We are not impressed with this contention primarily for the reasons that when a person claims exercise of private self-defence, the onus lies on him to show that there were circumstances and occasions for exercising such a right. In other words, these basic facts must be established by the accused. Just because one circumstance exists amongst the various factors, which appears to favour the person claiming right of self-defence, does not mean that he gets the right to cause the death of a person. Even the right of self-defence has to be exercised directly in proportion to the extent of aggression.

41 . As per the medical report, which is available as paper application 88 Kha-1 & Kha-2, the injuries on the body of two accused persons were found to be `simple in nature'. On the other hand, we have a complete version of the prosecution, duly supported by two injured eye witnesses to the occurrence. The bone of contention between the parties was the lifting of cow dung forcefully by the accused persons and the verbal altercations that had taken violent turn. The prosecution story, as has been disclosed by the eye-witnesses, is trustworthy, reliable and entirely plausible in the facts and circumstances of the case. The mere fact that there is no specific explanation on record as to how two accused persons suffered injuries, would not vitiate the trial or the case of the prosecution in its entirety. Normal rule is that whenever the accused sustained injury in the same occurrence in which the complainant suffered the injury, the prosecution should explain the injury upon the accused. But, it is not a rule without exception that if the prosecution fails to give explanation, the prosecution case must

fail. There is no dispute on the occurrence, time and place. Therefore, it can be said with certainty that the occurrence took place in the manner as alleged by the prosecution, which is supported with the testimony of two injured witnesses.

42. Where the evidence is clear, cogent and creditworthy; and where the court can distinguish the truth from falsehood, the mere fact that the injuries on the person of the accused are not explained by the prosecution cannot, by itself, be a sole basis to reject the testimony of the prosecution witnesses and consequently, the whole case of the prosecution. Reference in this regard may be had to **Rajender Singh & Ors. v. State of Bihar, [(2000) 4 SCC 298].**

43. The other argument raised on behalf of the appellants is that P.W.-1 & P.W.-2 are the interested witnesses, and, their testimony cannot be relied upon in absence of corroboration of their version with any independent witnesses, and, therefore, the prosecution has failed to establish its case beyond reasonable doubt. This argument is again without any substance.

44. Normally, an injured witness enjoys greater credibility because he is the sufferer himself and thus, there will be no occasion for such a person to state an incorrect version of the occurrence, or to involve anybody falsely and in the bargain, protect the real culprit.

45. We need not discuss more elaborately the weightage that should be attached by the Court to the testimony of an injured witness. In fact, this aspect of criminal jurisprudence is no longer res-integra, as has been consistently stated by Apex Court in its various pronouncements.

46. In the case of **Abdul Sayeed Vs State of Madhya Pradesh [(2010) 10 SCC 259**], wherein it has been held by Hon'ble Supreme Court as under:

"28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court.

Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness."

29. While deciding this issue, a similar view was taken in **Jarnail Singh Vs State of Punjab,** where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)

"28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tube-well. In **Shivalingappa Kallayanappa Vs State of Karnataka** this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene

stands established in case it is proved that he suffered the injury during the said incident.

29. In **State of UP Vs Kishan Chand**, a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide Krishan v. State of Haryana). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below."

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein."

47. So far as the argument that no independent witnesses were examined despite their presence on the spot and the entire prosecution story being based upon the statements of PW1 and PW2, who are the interested witnesses, makes the entire prosecution story doubtful.

48. Again, we are not impressed by this contention, primarily for the reason that non-examination of any independent witness is not fatal to the case of the prosecution because in this case there are two injured witnesses, whose testimony is trustworthy and cogent, therefore, there is no need of examination of any independent witnesses.

49. During the course of argument, the learned counsel for the appellants also tried to take advantage of the fact that the deceased ought to have suffered a number of injuries, if seven accused along with others all armed with different weapons participated in the incident but the deceased had actually received only one fire arm injury. Thus, the story of the prosecution is highly improbabilise.

50. We have no hesitation in rejecting this argument, primarily for the reason that because besides the deceased, injured witnesses also received injuries, which are said to have been authored by the accused side.

51. At last, learned counsel for the appellants has contended that this was a fight at the spur of the moment and the conviction of the appellants could be converted into that under Section 304-I of the IPC. This argument of the appellants also cannot be accepted to the facts of the present case. In the present case, dispute did not arise at the spur of the moment as the evidence clearly shows that the accused had gone after abusing the complainant and again returned to the site in question with the preparedness to assault on the informant and others in which a young lad of 16 years has been done to death and two persons from complainant side received injuries and their injuries cannot be

disputed. Even their injuries are fully corroborated by the medical evidence. Thus, on the basis of the medical and ocular evidence, we are fully satisfied that the prosecution has been able to prove its case beyond reasonable doubt. It is also not a case where injured witnesses can be said to be planted one.

52. We have carefully perused all the evidence on record. We are convinced that prosecution evidence is trustworthy and prosecution has brought home the guilt of all the appellants by cogent, credible and trustworthy evidence.

53. In the light of the aforesaid discussion, we do not feel that any interference is warranted. Impugned judgment of conviction is hereby affirmed. Accordingly, the instant criminal appeal is dismissed. Appellants, who are on bail, are directed to surrender immediately. Their bail is cancelled and sureties are discharged. Trial court is also directed to get them arrested and send them to jail to serve out the sentence awarded by trial court and affirmed by this judgment.

54. Let a copy of the judgment be sent to the court concerned through Sessions Judge, within fifteen days. The trial court shall thereafter report compliance within one month.

(2021)03ILR A880
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.03.2021

BEFORE

THE HON'BLE RAMESH SINHA , J.
THE HON'BLE RAJEEV SINGH, J.

Criminal Appeal No. 348 of 1984

The State of U.P. ...Appellant(In Jail)
Versus
Kalim Ullah & Ors. ...Opposite Party

Counsel for the Appellant:

Counsel for the Opposite Party:
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A. Criminal matter-Code of Criminal Procedure,1973-Section 374(2) & Indian Penal Code, 1860-Sections 147, 148, 302, 149-challenge to-conviction- dying declaration of the deceased which has been recorded by P.W. 3 suffers from many infirmities on fact and law- dying declaration of the deceased is a forged and fabricated document-The trial Court has given cogent and good reasons to disbelieve the said dying declaration as the same has not been recorded in the presence of a Magistrate.-Moreover, there is no fitness certificate given by the doctor showing whether the deceased was conscious to give such a dying declaration-deceased, who was Ex. Chairman of town area was a political person and was having some inimical relationship-the evidence of P.W. 1, and 2 are concerned, the incident is said to have taken place at 10:30 p.m. in the night and the reason given for being present at the place of occurrence of P.W. 1 and 2 and other persons, who were sitting at the door of the deceased for discussing about the meeting of town area and while discussion being going on, the deceased went to his workshop which was at 200 paces to see the repair work and when the deceased did not return for sometime, P.W. 1 and 2 and some other went to search the deceased at his workshop and they saw the incident, is not a reliable one- the Investigating Officer, who reached the place of occurrence did not find any repair work going on in the workshop nor any labourers or persons of the area gathered at the place of occurrence at the time of incident-The story for having conversation with the deceased at his door, appears to be cooked up-on the appraisal of evidence, the lower appellate court rightly passed the judgment of acquittal.(Para 1 to 49)

B. While exercising the powers in appeal against the order of acquittal the court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the court of appeal would not take the view which would upset the judgment delivered by the court below. However, the appellate court has a power to review the evidence if it is of the view that the view arrived at by the court below is perverse and the court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate court, in such circumstances, to reappreciate the evidence to arrive at a just decision on the basis of material placed on record to find out whether any of the accused is connected with commission of the crime he is charged with.(Para 45)

The appeal is dismissed. (E-5)

List of Cases cited:

1. Laxman Vs St. of Mah. (2002) AIR SC 2973

2. Balbir Singh & OrsVs St. of Punj. (2006) AIR SC 3221

3. Munni Devi & Ors. Vs St. of U.P. (2020) 5 ALJ 653

4. Mrinal Das & Ors. Vs St. of Tripura (2011) AIR SC 3753

5. Basappa Vs St. of Karnataka (2014) II ACC 1 SC

6. St. of U.P. Vs Moti Lal Srivastava & Ors (2016) 94 ACC 817

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

1. This criminal appeal has been filed by the State against the judgment and order dated 19.01.1984 passed by IInd Additional District & Sessions Judge, Barabanki by which the accused-respondents have been acquitted for the offence under sections 147, 148, 302, 149 I.P.C. in S.T. No. 410 of 1982.

2. Out of five accused persons three accused-respondents, i.e., respondent nos. 1, 2 and 5, namely, Rafiullah, Naimullah, Kalimullah have died during the pendency of the appeal and the appeal on their behalf has already been ordered to be abated by Co-ordinate Bench of this Court vide order dated 19.10.2020. Hence this Court proceed to hear the appeal with respect to accused-respondent nos. 3 and 4, namely, Habibullah and Mohammad Ansar only.

3. The brief facts of the case are that an F.I.R. was lodged by one Haji Fazal-ur-rahman at police station Zaidpur, District Barabanki stating that his brother Misbah-ur-rahman was Chairman of town area Zaidpur. He was having enmity with one Dr. Habiullah and Sajid Ali with respect to election of town area and also with one Naimullah with regard to auction of a house. Rafiullah and Ansar Ahmad also belong to his party. On 30.5.1982 at about 9:30 p.m., Misbah-ur-rahman had gone to his old workshop (Karkhana) in which these days, Hakim Fatehpuri is residing. The informant, who is the cousin of Sri Misbah-ur-rahman, was sitting at the door of Misbah-ur-rahman along with Mohammad Sabir, Mohammad Muslim, Sultan Ahmad, Ali Mohammad and Atiq. When Misbah-ur-rahman did not return for a long time then the informant along with the said persons sitting at door of Misbah-ur-rahman, had gone in his search towards his workshop *(Karkhana*). When they reached on the road at the door of Mohammad Yaseen, they heard the shriek

of Misbah-ur-rahman, i.e., 'bachao-bachao' on which they rushed towards the direction from where the shriek of Misbah-ur-rahman come and reached in front of the house of one Ramzan where they saw that Ansar Ahmad had tightly caught hold the neck of Misbah-ur-rahman from behind and one Rafiullah s/o of Rahmatullah fired shot at the chest of Misbah-ur-rahman from a close range. On the alarm raised by the informant and other persons, Dr. Habibullah, Kaleemullah and Naimullah, who were standing under the Pakar tree had threatened them for dire consequences in case they intervened, hence on account of fear, they did not move and Rafiullah and Ansar Ahmad fled away. Thereafter, Dr. Habibullah, Kaleemullah and Naimullah also fled away on a motorcycle. On the basis of said written report of Fazal-ur-rahman, an F.I.R. was registered at police station Zaidpur, District Barabanki as case crime no. 38 of 1982 under section 307 I.P.C. against five accused persons, namely, Rafiullah, Ansar Ahmad, Dr. Habibullah, Kaleemullah and Naimullah.

4. Just after the incident, the injured was taken to Primary Health Centre, Zaidpur at 11:05 p.m. by the informant and other persons where P.W. (3) Dr. Muneeruddin, the then Medical Officer, P.H.C., Zaidpur, had conducted medico-legal examination of the injured and had provided first aid to him. The doctor had also recorded the dying declaration of Misbah-ur-rahman in the presence of certain witnesses which has been marked as Ex. Ka-3. Since the condition of the injured was very serious, he was taken to Civil Hospital, Barabanki where P.W. (6) Dr. Shahjahan has given treatment to Misbah-ur-rahman at about 12:05 A.M., on 31.06.1982. As the condition of the injured was deteriorated, he was taken to Balrampur Civil Hospital, Lucknow where unfortunately at about 3:00 a.m., on 31.05.1982, he succumbed to his injuries.

5. P.W. (1) Haji Fazal-ur-rahman had informed the concerned police station about the fact that injured Misbah-ur-rahman had died at Balrampur Civil Hospital, Lucknow.

6. Sri S.N. Singh, the then Station Officer of police station, Zaidpur, who was entrusted with the investigation of the case, had completed the investigation and submitted charge-sheet against all the accused persons before the Court concerned.

7. The case was taken up by the then Chief Judicial Magistrate Barabanki and has committed the case to the Court of Session.

8. On 03.08.1982, the Session Judge, Barabanki framed charges against all the accused persons for the offence under sections 147, 148, 302 read with section 149 I.P.C.

9. Since, all the accused persons denied the allegations and charges and had claimed trial, the prosecution was called upon to lead evidence in support of the charges.

10. Prosecution in support of its case has examined P.W. 1 Haji Fazal-ur-rahman, P.W. 2 Mohammad Muslim, P.W. 3 Dr. Muneeruddin, P.W. 4 S.I. Shiv Narain Singh, P.W. 5 Dr. S.C. Srivastava, P.W. 6 Dr. Shahjahan.

Ram Balak Mishra was examined as Court witness.

11. The accused persons were examined and their statements were recorded under section 313 Cr.P.C. All of them denied the allegations and had

pleaded their false implication in the present case on account of enmity and claimed their trial.

12. The accused persons were called upon to lead evidence on which they filed certain documents in support of their case.

13. P.W. 1 Haji Fazal-ur-rahman, who was the informant of the case and cousin brother of the deceased, had reiterated the present case as has been stated by him in the F.I.R. He stated about the enmity between the deceased and accused-Dr. Habibullah on account of election of town area. He also stated about the enmity between the deceased and accused Naimullah which was with respect to auction of a house. He deposed before the trial Court that on the day of incident, while sitting at the door of Misbah-ur-rahman, he was having conversation with the deceased and Mohammad Sabir, Mohammad Muslim, Sultan Ahmad, Ali Mohammad and Atiq for convening a meeting of town area. It was moon light and after informing the informant and other persons with whom he was having conversation, the deceased went to see his workshop (Karkhana) where some repair work was going on. The deceased told them that he would return after some time and talk to them. The distance of the workshop of the deceased from his house was about 200 paces. He stated that when the deceased did not return for about 45 minutes, then the informant along with the said persons sitting with him, went towards the workshop of the deceased to talk to him and when they reached on the road near the house of Yaseen, they heard the shriek of the deceased, i.e., 'bachao-bachao' on which they rushed towards the direction from where the shriek came and on reaching near the house of one Ramzan, they saw the incident taking place in front of the house of one Abdul Hai. The witness stated that he saw that accused Ansar caught hold the neck of the deceased from behind and accused Rafiullah had shot the deceased by country made pistol from a close range and when the witness and other person tried to save the deceased, accused Dr. Habibullah, Kaleemullah and Naimullah, who were standing under the Pakar tree, had threatened them for dire consequences in case they come forward. The incident had taken place on the road near the house of Ramzan. After the incident, accused Rafiullah and Ansar Ahmad fled away towards West and accused Dr. Habibullah, Kaleemullah and Naimullah, who were standing under the Pakar tree, had fled away on a motorcycle towards South. The witness identified all the five accused persons, who were present in the Court, to be of his locality. The witness stated that he along with other persons reached the place of occurrence where the deceased was lying holding his wound with his hand. The witness along with other persons took him to P.H.C. Zaidpur where the doctor took him in his room for providing first aid and after 15-20 minutes, the doctor asked them to take the deceased to Civil Hospital, Barabanki on which the witness and other persons took him to Civil Hospital Barabanki. There he got a report about the incident written by Mohammad Shamim and after reading over the same, he found that Mohammad Shamim wrote the same what he dictated to him. Thereafter, he put his signature on the same which is marked as Ex. Ka-1. The deceased remained alive in Primary Health Centre, Zaidpur, Civil Hospital Barabanki and Balrampur Hospital, Lucknow and on the next day at 3:00 a.m. in the morning, he succumbed to his injures at Balrampur Hospital, Lucknow.

14. In his cross examination, the witness has stated till the time when he was present at the place of occurrence, no labourer or Hakim Fatehpuri, who had taken one portion of the workshop (karkhana) of the deceased on rent, had arrived at the place of occurrence. He also did not meet them in the hospital though many other persons have gathered and on the next day when the dead body of the deceased was brought to Lucknow for cremation then the labourers and Hakim Fatehpuri along with other persons had come. The witness further deposed that as per his knowledge, the deceased was not having any litigation with any other person except the accused persons with whom he was having two litigations. He admitted the fact that in the year 1977 proceedings under section 107 Cr.P.C. was initiated against the deceased but he was not aware of the fact whether the witnesses Sabir and Sultan Ahmad were party in the said case or not. He further deposed that the deceased while being injured was taken from his workshop (karkhana) to the hospital till then the ladies of the family had not come either at the place of occurrence or at the hospital. 30-40 persons have reached the hospital. He stated that the neck of the deceased was caught hold by accused Ansar by one hand and by other hand he caught the hand of the deceased. The accused Ansar did not have any weapon in his hand. He stated that accused Rafiullah had shot at the deceased from a close range, i.e., 4-5 finger-breadth and in his report, he has written that the deceased was shot at his chest from point blank range as it was equal distance. In the report, he had written that the neck of the deceased was caught hold from behind. It was rightly written. He further deposed that he had written in his report that the deceased had received one single shot as he had witnessed the same. It has not come in his knowledge that the doctor has mentioned only one injury. There was no conversation between him and the doctor regarding the fact that the deceased has received only one injury and did not receive any second injury. The witness further stated that on the third day of the incident, he came to know that the doctor had taken the statement of the deceased. He did not go to the hospital to see the said statement. He came to know that the deceased had given statement against two accused persons and so far as other three accused are concerned, he could not recognize them. He denied the suggestion that the deceased was not taken in the room of the doctor and was seen by the doctor in the corridor (Varandah). He denied the suggestion that in collusion with the doctor and the police, the statement of the deceased was fabricated. The deceased knew English and he could also sign in English and he occasionally used to put his signature in short in English and some time in full. It was deposed by the witness that he did not have any conversation with the deceased while he was being taken to the hospital from the place of occurrence till he reached the hospital nor any other persons had talked to him. Till the time, he reached, P.H.C. Zaidpur, he did not disclose to anyone the name of the accused. He denied the suggestion that he did not see the incident. He further denied the suggestion that the place where the deceased was done to death is not the one which was stated but the other one. He also denied the suggestion that in collusion with the doctor and the police, he got a false report written. He also denied the suggestion that the fact with respect to conversation regarding meeting and the documents have been fabricated under some legal advise just to create evidence against the accused persons. He admitted the fact that he and

the deceased are the sons of one mother though their fathers are different.

15. P.W. 2 Mohammad Muslim in his deposition before the trial Court has supported the prosecution case as has been stated by P.W. 1 in his examination in chief, hence is not repeated for the sake of brevity.

16. He denied the suggestion that he had not seen the incident and is falsely deposing against the accused persons.

17. P.W. 3 Dr. Muneeruddin in his deposition before the trial Court has stated that on 30.05.1982, he was posted as Medical Officer at P.H.C. Zaidpur, District Barabanki. On the said date at about 11:05 p.m., he had examined the injured Misbah-ur-rahman son of Hidayat Rasool and found the following injury on his person:-

"Injury no. 1:- An abraded fire arm wound 2.0 cm. x 2.0 cm. x intra abdomiinal with blackening of margin 6.0 cm. x 8.0 cm. situated in epigastrium. C/o severe pain in abdomen."

18. He stated that the said injury could be caused on 30.05.1982 at about 10:30 p.m. by fire arm such as country made pistol. He recorded the dying declaration of the deceased and he has written the same word by word what was stated by the deceased. After writing the same it was also read over to the deceased and thereafter, the deceased put his signature on the same. He has proved his hand writing and signature on the dying declaration which has been marked as Ex. Ka-3.

19. In his cross examination, he has stated that when the injured was brought before him, there were 4-6 persons along with him and there was neither any police constable nor S.I. On the said date, he did not meet the S.I. till the injured was in his hospital. At the time of medical examination, no outsider is allowed to come. Generally 2-4 persons of the Qasba beside his staff were present at that time. At the time of medical examination, he had directed some persons to remain inside his room and rest were asked to go outside. The reason for keeping injured under observation was different. He could not ascertain the nature of injury. He stated that the reason for keeping the injured under observation is that whether the injured could survive and according to his observation, the injured could survive for about two hours but he did not either mention the same or told anyone about the said fact. He did not know as to what time, the injured died. Subsequently, he came to know that on 31.05.1982, he died. According to the witness, if the injured could have been operated in emergency at Barabanki hospital and proper medicine would have been given to him, he could survive. In preparing the injury report of the injured, he took about half an hour. It took ten minutes to record the dying declaration. He admitted the fact that prior to recording the said dying declaration, he did not record any dying declaration. As it was night and there was no conveyance, he did not immediately send the injured to Barabanki Sadar Hospital but he told the family members of the injured that he may be taken to Barabanki as his treatment is not possible there. The deceased was known to the witness prior to the incident. From the person, who have brought the injured to the hospital, he came to know that no report about the incident had been lodged at the police station. He was well aware of the fact that cognizable offence

has taken place, hence information to the police is necessary but he did not inform about the same either to the police Chauki or police station on his own as the persons, who brought the injured to the hospital had stated that they would go to the police station. He did not know the name of the person, who has stated that he is going to lodge the report as he did not return again. He could not tell much about the person, who told him that he is going to lodge the report. On the next day of incident at about 7-8 a.m., he came to know that a report of the incident has been lodged at the police station and from whom, he came to know about the said fact, he did not know. He had received an application from the police asking for injury report of the injured from which he came to know that report of the incident has been lodged. By the said application, the injury report and the dying declaration were asked from him. The said application was brought by one constable. He did not meet Station Officer Sri S.N. Singh either on 31.05.1982 or any other day. He had kept the said application in the register of the injury report and given to the constable, who has brought said application. He had also taken a receiving of the injury report and dying declaration in the register by the said Constable. He was not aware of the fact that the dying declaration was to be sent directly to the Magistrate. He had kept the dying declaration in an envelope and sealed the same and sent to the police as he thought that the police would require the same with respect to investigation of the case. On the dying declaration, he did not get any signature of the police personnel. The Investigating Officer has recorded his statement under section 161 Cr.P.C. From the person, who have brought the injured to him, he had asked to bring two respectable persons before recording the dying declaration then they put forwarded two persons and said that they are respectable persons. The witness stated that out of said two witnesses of the dying declaration, he only recognize Afzul-ur-rahman as he know him from before by his face as well as by name but so far as the other witness of the dying declaration, namely, Ashfaq is concerned, he was not known to him either by name or by face and only on the asking of Afzal-ur-rahman, he has made him as witness of the dying declaration. In P.H.C., Zaidpur though there was electricity connection but at the time of examination of injury, the electricity supply of the area was disconnected and till the medical examination was being conducted, the electricity supply did not resume, hence the entire exercise was conducted in the light of lantern and torch. A car had come at the hospital in his presence which took the injury to Barabanki hospital. The said car belong to Haji Daroga and the said car had arrived before he completed the injury report. After completing the injury report, he immediately let the injured go. As the injured himself was complaining about pain and suffered pain, therefore, he wrote the same. After completing the entire exercise no respectable person had come to him either in the night or in the morning. He denied the suggestion that as the injured was in much pain, he did not get his signature on the injury report and got his thumb impression on the same. He stated that in the injury report only thumb impression are being affixed in order to fix the identity. As in the dying declaration, he had got the signature of the injured, hence he did not get his thumb impression on the same. He stated that as the injured was in such a condition that he could put his signature, hence he got his signature on the dying declaration. At the time of recording of the dying declaration, it did not click in

his mind that while recording dying declaration, a certificate has to be given that the person whose dying declaration is being recorded is in a fit state of mind and is conscious. He denied the suggestion that the dying declaration is fabricated one with malafide intention. He also denied the suggestion that in the dying declaration a forged signature of the deceased got done. He also denied the suggestion that till 31.05.1982, no dying declaration was written, hence the same was not send to the Magistrate. He told the persons, who have come with the injured, that the injury is grievous in nature but he did not remember whether he told them that the injury was of fire arm or not.

20. On the query made by the Court, the witness had stated that there is practice for getting thumb impression on the injury report and on this issue whether there is any direction or rule, he is not aware of the same.

21. P.W. 4 Shiv Narain Singh in his examination in chief before the trial Court has stated that from May, 1982 to July, 1982, he was posted as Station Officer at police station Zaidpur, Barabanki. On 30.5.1982, written report of present case (Ex. Ka-1) was submitted at the police station on the basis of which chik report was prepared by Head Moharir Satya Narain Tiwari on which he has put his signature. He identified the hand writing and signature of the said Head Moharir and proved the same as Ex. Ka-4. In G.D. No. 29, Head Constable Brij Bhawan Singh has endorsed the registration of the F.I.R. in his presence which is in the hand writing and signature of Constable Brij Bhawan Singh as he is acquainted with the same. A carbon copy of which is marked as Ex. Ka.-5 on which he has also put his signature. The F.I.R. of the present case was registered under section 147, 148, 149, 307 I.P.C. The injured had not come to the police station in his presence. On 31.05.1982, he along with S.I. Bharat Tiwari, Constable Tej Bahadur Singh, Mathura Prasad Chaubey, Harnam Singh and Mukesh Singh reached the place of occurrence in Mohalla Badapur, Qasba Zaidpur and recorded the statement of the informant Haji Fazal-ur-rahman and at his pointing out he had made a spot inspection of the place of occurrence along with him and prepared site plan. He proved the same as Ex. Ka-6. He arrested accused Naimullah and Kalimullah from their house. They were hiding in their house and on getting the door of their house opened, they made an attempt to flee away from there but were arrested. On the same day, he brought the said two accused and lodged them in police lock-up for which he himself made an endorsement in G.D.-14 dated 31.05.1982. The original G.D. which was in his hand writing and signature is before him. Copy of which he had filed in the Court, is marked as Ka-7. On the same day, he received an application from Fazal-ur-rahman regarding the death of Misbah-ur-rahman-the deceased for which an endorsement was made in G.D. No. 6 by Constable Moharir Brij Bhawan Singh and the case was converted under section 302 I.P.C. The original G.D. which was before him was written by Brij Bhawan Singh-Constable Moharir in his hand writing and signature. He proved the same as he was acquainted with his hand writing and signature, carbon copy of the which is marked as Ex. Ka.-2. On the same day, he recorded the statement of the witnesses, namely, Mohammad Sabir, Mohammad Muslim and Sultan Ahmad under section 161 Cr.P.C. He had sent Constable Mathura Prasad Chaubey to P.H.C. Zaidpur calling for the injury report

and the dying declaration of the deceased so that there may not be any interpolation in the same. He had put his signature on the dying declaration so that there may not be any manipulation or changes in the same. He also perused the injury report and had send the dying declaration to the Court of C.J.M. in pursuance of the order of the Court. He also recorded the statement of the witnesses of the dying declaration, namely, Afzal-ur-rahman and Ashfaq on 1.6.1982. He further made search for the accused but they could not be traced. On 2.6.1982, he took the statement of Dr. Muneeruddin of P.H.C. Zaidpur under section 161 Cr.P.C. On 3.6.1982, he made search in pursuance of warrant issued against accused Habibullah, Rafiullah and Ansar Ahmad but they could not be traced. On 4.6.1982, he after getting order for initiating proceedings under section 82 and 83 Cr.P.C. reference of which has been made in G.D. No. 19, he got the attachment proceedings under section 82 Cr.P.C. of the house of accused Habibullah done in the presence of witnesses and list of articles which were recovered from his house was prepared and copy of the same was given to the father of accused Habibullah, namely, Siraj Ahmad. The articles which were attached were submitted in the Malkhana of the concerned police station along with G.D. No. 30. He has also proved G.D. No. 9-30 prepared by Constable Brij Bhawan Singh which was in his hand writing and signature and has filed a copy of the same in his signature marked as Ex. Ka-10. He has further proved the attachment proceedings against accused Rafiullah and Ansar Ahmad executed on 5.6.1982 under his writing and signature and proved as Ex. Ka-11 and 12. The attachment of properties of two accused was submitted in police Malkhana endorsement of the same has been mentioned in G.D. No. 14. The original G.D. was in the hand writing and signature of Brij Bhawan Singh. He filed a copy of the same and proved as Ex. Ka-13. On 10.06.1982, he submitted charge-sheet against accused Rafiullah, Ansar Ahmad and Dr. Habibullah. He has proved the charge-sheet which is in his hand writing and signature as Ex. Ka-14. He proved the Ex. Ka-15, i.e., sealed packets by which some pellets, panchayatnama and postmortem were submitted by S.I. Raj Bahadur Singh endorsement of which is made in G.D. No. 21 which was prepared by Constable Moharir Laxman Yadav in his writing and signature. He has also proved Ex. Ka. 16-24 and further a sealed envelope in which some pellets were kept which were recovered from the body of the deceased, received at the police station from the doctor, who had conducted the post mortem of the deceased at Lucknow as material Ex. Ka-1. On opening of the said envelope 22 pellets and one tikli were received. The pellets have been marked as material Ex. Ka.-2 whereas Tikli has been marked as material Ex. Ka-3. On the information given by the informant Haji Fazal-ur-rahman about the death of the injured, there is signature of Fazal-ur-rahman. He has proved the same as Ex. Ka-4. The S.I. Ram Chandra Gupta had interrogated the accused in jail.

22. In his cross examination, he has stated that on the Western side of the road which goes to the hospital from the workshop of the deceased, police station Zaidpur is at a distance of one and half farlong. On the date of incident he returned to the police station between 9:30-10:00 p.m. and remained in the police station whole night. The deceased was known to him. At 11:50, the information about the incident was received at police station. The informant stated that the injured has been

sent to Barabanki. On receiving the information, he went to the place of occurrence but he could not receive any information about the incident. Till night, the witness did not make any report of the incident and only made efforts to search the accused. The informant had not informed him that a dying declaration of the injured was recorded by the doctor at P.H.C. Zaidpur. He was not aware of the fact about the dying declaration whole night. On 31.05.1982, at morning, he came to know about the fact that the doctor at P.H.C. Zaidpur had recorded the dying declaration of the deceased. He sent Constable Mathura Prasad to the doctor for getting the dying declaration and prior to it he had recorded the statement of the informant under section 161 Cr.P.C. He admitted that in spite of the fact that he is an experienced S.I., he did not have any knowledge about the fact that the person, who write the dying declaration is obligated to send the same to the Court concerned. He called upon the dying declaration so that there may not be any interpolation in the case and the doctor may not make any changes in the same as generally doctors make changes in the dying declaration, hence he had called upon the same immediately. It was in a sealed cover. He opened the dying declaration and put his signature on the same but inadvertently he could not mention in the case dairy that he had broke open the seal of the envelope and taken out the dying declaration. After breaking the seal put on the envelope, he did not either kept the same or its sample seal safely with him. He sent the envelope in which dying declaration was sent to him by the doctor, to the Court which is on record. He did not send the dying declaration immediately to the Court as he thought that the same was a part of investigation. He is not aware of the fact that any application was given to the S.P. Barabanki that he in collusion with the doctor of P.H.C. Zaidpur and S.O. of Zaidpur police station, had prepared a forged fabricated dying declaration. On receiving the order of the Court, he sent the dying declaration on 31.05.1982. In the case dairy, there is no endorsement that when, how, by whom and where the dying declaration was sent. He told the fact about sending the dying declaration on 31.05.1982 as per his memory. He denied the suggestion that he had told to the Court that he had sent the dying declaration on 31.05.1982 just to make out a case. On 01.06.1982, he has sent all the documents which were prepared by him during the course of investigation upto 31.05.1982, to S.P. Barabanki. He has not mentioned about sending of documents on 1.6.1982 in the case dairy and he is making the said statement as per his memory. Though in the case dairy, he had written that he has sent papers to S.P. Barabanki on 31.05.1982 but actually it was sent on 1.6.1982. Again the witness has stated that he cannot tell whether the documents which were prepared upto 31.05.1982, were sent to S.P. Barabanki from police station between 1.6.1982 to 4.6.1982 or not as the dispatch register is not before him. On 31.05.1982, he has given the disputed dying declaration in his office so that the same may be sent in pursuance of the order of C.J.M. as there is an order of the C.J.M. that if there is any dying declaration the same may be sent immediately. He proved paper no. 14 which was on the committing file of the present case. It was in the hand writing and signature of the witness. It was circled by red ink which is marked Ex. Kha.-1. He stated that whatever written in red circle is correct. He stated that he cannot tell whether the dying declaration was submitted by him or someone else had submitted the same. After receiving the

order of the C.J.M., he submitted the disputed dying declaration. In the case dairy, he has not mentioned whether the order was a written order or oral. The date on which the order of a Court is received, its endorsement is made on the same day in the G.D. The G.D. of 31.05.1982 was before the witness in which there is no mention of any order of the C.J.M. The G.D. dated 1.6.1982 was before the witness in the same also there is no endorsement of any order of the C.J.M. Similarly the G.D. of 2.6.1982 and 3.6.1982 were before the witness in which also there was no mention about the order of the C.J.M. He cannot tell when the first paper (parcha) of the case dairy reached to the Office of Circle Officer. The first Parcha is dated 1.6.1982 which is bearing the seal but who has signed the same he cannot tell. He is not at all conversant with the signature of the then C.J.M. He denied the suggestion that on 31.05.1982, he did not receive the order of the C.J.M. At that time Harbaksh Singh was Pairokar in his police station and he also cannot identify his signature. The witness further stated that on 6.6.1982, he had gone to workshop of the deceased where he met Hakim Mohammad Rafi and prior to it he did not go to the said workshop, hence there was no question to meet Hakim. During the course of investigation, he could not come to know that to make the workshop of the deceased running there was any repair work going on on the day of incident. Near the place of occurrence, he had not taken the statement of witness and only recorded the statement of Ramzan. He has arrested accused Naimullah and Kalimullah from their residence at 11:15 a.m. and as because of the incident there was tension prevailing, the said two accused were not sent to Sadar on the same day. On 31.05.1982 at 7:30 a.m. in the morning, the information about the death of the deceased was received at the police station. He did not record the statement of Mohammad Shamim, who was the scribe of the both the F.I.R. as well as the information about the death of the injured as he did not feel it necessary. He did not recover anything relating to the incident from the place of occurrence. He did not found any blood on the place of occurrence. 2-3 months prior to the incident, he had heard rumor that he would be transferred from police station Zaidpur. He also heard that in order to get his transfer stop a rally had gone to meet the S.P. Sadar thereafter he did not hear the rumor regarding his transfer. The deceased and his family members were influential persons of the Qasba. He did not know that the deceased and his family members belong to any party. He denied the suggestion that the said rally which was taken out was at the instance of family members of the deceased. He denied the suggestion that the report of the incident was prepared on 31.05.1982 with his consultation and thereafter a forged and fabricated dying declaration was prepared in collusion with the doctor. The site plan and other papers were also concocted and fabricated in collusion with the informant. He further denied the suggestion that the case dairy of the present case and other papers are all fabricated and concocted.

23. P.W. 5 Dr. S.C. Srivastava in his deposition before the trial Court has submitted that on 31.05.1982, he was posted as Medical Officer in Civil Hospital Lucknow and on the said date he was on duty for conducting the post mortem. On the said date at 1:30 p.m. in the afternoon the dead body of Misbha-ur-rahman son of Hidayat Rasool was sent for post mortem by S.O. Wazeerganj, Lucknow to him which was brought in a sealed condition by

Constable Ambrish Singh. He broke open the seal and identify the dead body. The deceased had died in Balrampur Hospital, Lucknow on 31.05.1982. He found following ante mortem injuries on the dead body of the deceased:-

"Injury no. 1:- fire arm wound on the front of the chest 2 cm. x. 2cm. margins (wound of entry) 1.5 cm. above xiphisternum. Blackening and tattoing present around the wound 9 cm. x. 7 cm..

Injury no. 2:-Contusion on the left side abdomen 14 cm. x 12 cm. at the level of embolism & 13 cm. left to it"

24. On internal examination of the dead body of the deceased, it was found that the stomach was lacerated and 12 pellets and one tikli were recovered from the body which were kept in an envelope and has been marked as Material Ex. Ka-1. The 12 pellets and tikli which were recovered he identified and proved the same as material Ex. Ka-2 and 3. The deceased wearing Kurta, Pajama, Underwear, Baniyan and in all four clothes which were recovered from the dead body of the deceased were sealed and handed over to the Constable for being deposited in the Malkhana. He proved the same as Ex. 5, 6, 7, and 8.

25. In the opinion of the doctor, the deceased died as a result of shock and hemorrhage due to injury no. 1. He stated that the deceased after receiving the injuries could be conscious for about few hours and remained alive. Injury no. 1 may be caused by country made pistol and was sufficient in ordinary course of nature to cause death. Injury no. 2 may be caused after causing of injury no. 1 by fists.

26. In his cross examination, he stated that injury no. 2 was not in the bony part and the same could be caused by blunt object as it is 14 cm. in width. If a person is hit by hard object then the nature of injury which is injury no. 2 positively be caused and if the same is caused by fists, injury no. 2 is possible and because of the said injury it is not necessary that the sign of fingers would be made. The injury which has been caused in the abdomen is as a result of injury no. 1 and not from injury no. 2 and because of laceration of the abdomen, there could be great pain. It is not necessary that because of tearing of the abdomen, a person would become unconscious and there is also no possibility of he being unconscious. He did not try to know that as to when the deceased died prior to conducting the post mortem as the same was noted in the Balrampur hospital.

27. P.W. 6 Dr. Shahjahan has stated in his examination before the trial Court that on 31.05.1982 he was posted in District Hospital Barabanki in emergency duty. At 12:15 a.m. Misbah-ur-rahman was referred from P.H.C. Zaidpur and brought there along with him there was a reference slip of P.H.C. Zaidpur and according to the reference slip, the injured has received gun shot injury on A.P. gastric region and his dying declaration and medico legal examination had already been conducted at Zaidpur hospital. The injured after being given emergency medical treatment was referred by him to Balrampur Hospital, Lucknow. The emergency register of that time which is from 11.4.1982 to 12.6.1982 was before him. At pages-190-191 there was serial no. 2020 and number of emergency slip was E/1754. The endorsement dated 31.05.1982 was made

by him in his hand writing and signature. He proved the same as Ex. Ka.30.

28. In his cross examination, the witness has stated that in the aforesaid endorsement which was made on 31.05.1982, it was not written that in the reference slip which had come from the said hospital that any dying declaration of the injured was recorded or his medico legal examination had been conducted. The reference slip of Zaidpur hospital was sent by the witness along with its reference to Balrampur Hospital. He admitted the fact that he had not recorded any dying declaration at any point of time nor had sent for recording the same to any Magistrate as at that time it did not occur to him to record the dying declaration but as it was written in the reference slip of Zaidpur, hence he did not mention the same. As per his understanding, the dying declaration is to be recorded only once and if any higher authority states that the first dying declaration is a wrong one then the second dying declaration is to be recorded. The persons, who have come along with injured had not told him that the first dying declaration was a wrong one, hence it may be recorded again. How long the injured remained with him, he did not remember. He had endorsed the time of entry of the injured but not at what time he left. The injured was attended by the witness and referred to Balrampur hospital. In the register which was produced by the witness there was no column indicating that at what time and where from the injured was referred or discharged. He is not aware of the format of the said register and there is no heading of the said register. He did not remember as to what first aid was given to the injured at Zaidpur hospital and he had not endorsed the same in the said register. The injured was with him for about 30-40 minutes and when the vehicle was arranged, he was taken from hospital. At that time there was Ambulance in the hospital. He did not remember by which vehicle, the injured was taken to Balrampur hospital. There was no endorsement made in the night of 31.05.1982 or after 12 hours till 7:15 in the morning. He denied the suggestion that no reference slip had been sent from Zaidpur hospital. The injured, who has been brought in emergency at that time he has not enquired from him as to how he received the injuries or he has been medically examined earlier or not. If the injured is an literate person then the information is endorsed in his hand writing and if he is illiterate then the persons bringing him are made to write the said details. In the said column of emergency register, the thumb impression of a illiterate person is being affixed. He did not ask the injured as to how he received injuries. He could not tell the reason as to why he did not ask him about the same. He denied the suggestion that the disputed endorsement made by him on 31.05.1982 in the morning. He had fabricated and concocted the same.

29 . On a query being made by the Court, the witness stated that the allotment of the duty is done by the Superintendent and the Superintendent occasionally examines the register.

30. C.W. 1 Ram Balak Mishra in his deposition before the trial Court has stated that he had brought the register of the proceedings from 5.6.1968 to 2.1.1984 under the orders of the Court. He has brought the same in the condition in which it was with him and has produced the same before the Court. Beside the same, he has also brought the agenda register which is from 10.7.1970 to 3.7.1974 in which the

proceedings of 1971 to 1973 are included and the same is of the year when the deceased Misbah-ur-rahman was Chairman of the town area Zaidpur. In the proceeding register the signature of Misbah-ur-rahman is in English and again at some place it is in Urdu and in rest of the place it is in English. The witness stated that when Misbah-ur-rahman was Chairman, he was not posted.

31. The trial Court after scrutinizing the evidence led by the prosecution and the defence has come to the conclusion that the prosecution has failed to prove its case beyond reasonable doubt against the accused-respondents and has acquitted them of the charges levelled against them.

32. Aggrieved by the impugned judgment and order passed the trial Court, the State has preferred the present appeal challenging the same.

33. Heard Ms. Smirti Sahai, learned A.G.A. for the State-appellant, Sri Sudhir Kumar Singh, learned counsel appearing for accused-respondent nos. 3 and 4 and perused the impugned judgment and order and the lower Court record.

34. Learned A.G.A. for the State has vehemently argued that the trial Court has erred in coming to the conclusion that the prosecution has failed to prove its case beyond reasonable doubt and has acquitted the accused-respondents Ansar Ahmad and Habibullah though there was cogent evidence against them. It was argued by learned A.G.A. that the F.I.R. of the incident was lodged under sections 147, 148, 149, 307 I.P.C. on 30.5.1982 and the deceased Misbah-ur-rahman soon after the incident was taken to P.H.C. Zaidpur where he was given medical treatment by Dr. Muneeruddin-P.W. 3 on 30.05.1982 at 11:05 p.m. in the night and his dying declaration was also recorded by the said doctor which has been marked as Ex. Ka. 3 in which he has categorically stated that accused Ansar Ahmad had caught hold his neck and accused Rafiullah had shot him with pistol. The incident had taken place at 10:35 p.m. near the house of Abdul Hai and three other accused persons, who were present along with the said two accused, he could not identify them and they have fled away from the place of occurrence. She submitted that no doubt the main accused Rafiullah, who had caused injuries to the injured by country made pistol, died during the pendency of the appeal but so far as accused Ansar Ahmad is concerned, he is liable to be convicted and sentenced by this Court in view of the dying declaration of the deceased as the same is a reliable one and does not suffer from any illegality. The trial Court committed gross illegality in disbelieving the same to be not in accordance with law and has acquitted accused Ansar Ahmad in spite of there being a dying declaration against him. She further submitted that so far as the other accused Habibullah is concerned, he is named in the F.I.R. along with four other accused persons and there is eye witness account of the incident, i.e., P.W. Haji Fazal-ur-rahman, who is cousin brother of the deceased and P.W. 2. Mohammand Muslim, who is another eye witness of the incident and they have categorically stated before the trial Court that the said accused along with two other accused were present at the place of occurrence and when the incident was being committed by accused Ansar and Rafiullah, they tried to holdup the informant and other persons along with him and threatened for dire consequences of life if they intervened because of which the deceased, could not be saved by them

and they only witnessed the said incident. She next submitted that the reasoning given by the trial Court in disbelieving dying declaration of the deceased and the eye witness account of P.W. 1 and 2, is not a sound one, hence the judgment of the trial Court is liable to be set aside by this Court as the same suffers from perversity and misleading of evidence. The appeal be allowed and the accused-respondents be convicted and sentenced accordingly for the murder of the deceased.

35. Learned A.G.A. with respect to her argument regarding the reliability of the dying declaration has placed reliance on the judgment of the Apex Court in the case of ***Laxman vs. State of Maharashtra; AIR (2002) SC 2973*** in which it has been held by the Apex Court that no certificate of a doctor is required stating that the person making the dying declaration is in a fit mental state to make such declaration and further there is no requirement that the dying declaration ought to be recorded by a Magistrate. Further she relied upon another judgment of the Apex Court in the case of ***Balbir Singh & Ors. vs. State of Punjab; AIR 2006 SC 3221*** in which it has also been held by the Apex Court that the dying declaration even though not recorded by the Magistrate, should not be a ground to disbelieve the entire prosecution case. There is no requirement of law that a dying declaration must necessarily be made before a Magistrate. The reliability of such declaration could be suspected only if the statements are inconsistent and contradictory.

36. Learned counsel appearing for the accused-respondents has vehemently opposed the arguments of the learned A.G.A. and submitted that the finding recorded by the trial Court in acquitting the accused-respondent, does not suffers from any perversity and it is well considered judgment of the trial Court and the accused-respondents have been rightly acquitted by the trial Court. He submitted that the dying declaration of the deceased which has been recorded by P.W. 3 suffers from many infirmities on fact and law. He argued that the dying declaration of the deceased is a forged and fabricated document and cannot be relied upon to convict the accused-respondents. The trial Court has given cogent and good reasons to disbelieve the said dying declaration as the same has not been recorded in the presence of a Magistrate. Moreover, there is no fitness certificate given by the doctor showing whether the deceased was conscious to give such a dying declaration. He pointed out that the two witnesses mentioned in the dying declaration in whose presence it was recorded, have been withheld by the prosecution and no satisfactory reason has been given by the prosecution for withholding them. He argued that the deceased, who was Ex. Chairman of town area Zaidpur was a political person and was having some inimical relationship with others, who have committed the murder of the deceased. The accused-respondents, who were not in good terms with the deceased have been falsely implicated by P.W. 1 in collusion with the police and P.W. 3-Dr. Muneeruddin, who recorded the dying declaration of the deceased. It was next submitted that as per the dying declaration of the deceased, accused-respondent Ansar Ahmad is said to have caught hold the neck of the deceased whereas accused Rafiullah had shot the deceased, who as per the post mortem report died on account of ante mortem fire arm injury sustained by him. He submitted that it is highly improbable and beyond imagination that the accused would caught hold the deceased, who was shot

from point blank range without there being any apprehension that he would also suffer injuries which is a fire shot, as around the injury received by the deceased blackening and charing present. He submitted that the trial Court on several count had disbelieved the dying declaration of the deceased and there is no reason to disturb the finding of acquittal of accused-respondents recorded by the trial Court. He also pointed out that so far as the evidence of P.W. 1, and 2 are concerned, the incident is said to have taken place at 10:30 p.m. in the night and the reason given for being present at the place of occurrence of P.W. 1 and 2 and other persons, who were sitting at the door of the deceased for discussing about the meeting of town area and while discussion being going on, the deceased went to his workshop which was at 200 paces to see the repair work and when the deceased did not return for sometime, P.W. 1 and 2 and some other went to search the deceased at his workshop and they saw the incident, is not a reliable one. It has come in the evidence that the Investigating Officer, who reached the place of occurrence did not find any repair work going on in the workshop nor any labourers or persons of the area gathered at the place of occurrence at the time of incident. The present story for having conversation with the deceased at his door, appears to be cooked up. He has drawn the attention of the Court towards the finding recorded by the trial Court in disbelieving the evidence of P.W. 1 and 2 regarding their presence to be doubtful and argued that the same is a reasonable one. On the strength of the said arguments, learned counsel for the accused-respondents stated that the appeal filed against the acquittal of the accused-respondents is liable to be dismissed.

37. Having considered the submissions advanced by learned counsel for the parties and perused the impugned judgment and order as well as the lower Court record.

38. It is an admitted fact that the incident had taken place at 10:30 p.m. in the night and the deceased died on account of fire arm injuries and injury no. 1 is a fire arm injury which is caused on the chest and injury no. 2 is on his abdomen which is contusion 14 c.m. x 12 cm. The incident is said to have been witnessed by the witnesses in the moon light. The deceased was Ex. Chairman of town area Zaidpur and it has been stated by the informant that on account of election of town area there was bad blood between the parties and further there was enmity between the deceased and accused Dr. Habibullah with respect to election of town area and with one Naimullah with respect to auction of a house due to which it is stated that the deceased was done to death by the accused persons. The prosecution in support of its case has relied upon the dying declaration which was recorded by P.W. 3 Dr. Muneeruddin on 30.5.1982 at 11:05 p.m. at P.H.C. Zaidpur when the deceased was brought in injured condition by P.W. 1 and others in which he has categorically stated that accused Ansar had caught hold his neck whereas Rafiullah had shot him with a pistol and the incident had taken place near the house of Ramzan at 10:35 p.m. The said dying declaration (Ex. Ka-3) had been disbelieved by the trial on the following count which are reproduced hereinbelow:-

"(a) Dying declaration, Ext. Ka-3, contains signatures of two witnesses. One Sri Afzul-ur-rahman and the second Sri Mond. Ashfaq. Both these witnesses have not been examined. No explanation for withholding them has been tendered in the Court. Though it is not necessary that

dying declaration must be witnessed by the witnesses yet it is very necessary for bonafide case that if witnesses were present, they should be examined or there must be satisfactory reason for not examining them. Why witnesses have been withheld without any reason is very material and creates set of doubt in the truthfullness of dying declaration.

It has come in the evidence of P.W.(1) Fazal-ur-Rahman and P.W.(2) Mohd. Muslim that injured Sri Misbah-ur-rahman was brought to the hospital by them and by certain other persons. P.W. (3) Dr. Muneeruddin has stated that the witnesses were brought forward by the persons, who had brought the injured to the hospital. P.W.(3) Dr. Munoeruddla has stated that there were certain persons in the room where he was conducting medico legal examination and recording the dying declaration., Had the dying declaration been recorded in the hospital in the manner as suggested by the P.W. (3) Dr. Muneeruddin, P.W. (1) Fazal-ur-rahann and P.W. (2) Mohamammad Muslim must have been aware of the fact of recording dying declaration by P.W.(3) Dr. Muneerudain. Both the witnesses P.W.(1) Fazlurrahman and P.W.(2) Mohammad Muslim have not stated anywhere that dying declaration was recorded by the doctor concern at the relevant time. On the contrary, P.W.(1) Fazal-ur-rahaan has stated that page 25 para 45 that after three days of the incident, he could learn that same dying declaration was recorded. First information report was lodged in the police station by P.W. (1) Fazal-ur-rahman. In the report, surprisingly there is no mention of this dying declaration. The witness did not state that he has disclosed to the investigating officer during investigation that some dying declaration was ever recorded.

(b) Conduct of the Investigating officer is highly doubtful. Sri S.N. Singh. S.I., was posted as Station officer police station Zaidpur, He has resumed the investigation. He has stated on oath that he has sent the dying declaration on 31.5.82 to the Court of the Chief Judicial Magistrate in compliance of the C.J.M's order but this statement is absolutely false. The C.J.M. concerned has passed the order requiring the Station officer to file the dying declaration on 2.6.82. It is also clear from Ext. Kha-l that the station officer Sri S.N. Singh has submitted the dying declaration on 4.6.82. The first PARCHA by the investigating officer falsely shows that he has sent the dying declaration alongwith other papers on 31.582. It appears that dying declaration was prepared much after the order of the Chief Judicial Magistrate on 2.6.82. These circumstances go to show that dying declaration was never recorded on the date and time as alleged by the prosecution in 30.5.82, at about 11.05 P.M. It has been urged by the prosecution that the first PARCHA was seen by the In-charge C.J.M. and mention of time of dying declaration in first parcha makes it sure that the dying declaration was ever recorded on 30.5.82, at 11.05 p.m. But this argument is not at all tanable. The reason is that there is no proof that the C.J.M. has seen the first PARCHA,. There is also no proof that the last page in which a mention of dying declaration has been by the C.J.M. The total outcome of these circumstances is that the dying declaration appears to have been manufactured by the investigating officer for his ulterior motive. It has been suggested by the defence to P.W.(1) Fazal-ur-rahman that there was some rally in favour of investigating officer Sri S.N. Singh led by the deceased Misbah-ur-rahman. It has been also suggested that the counter rally was arranged by the accused Habibulla against the investigating officer. The suggestion has been denied by the

witness P.W.(1) Fazal-ur-rahman, yet the dubious character as clear from the above circumstances indicates that there has been some such rallies and it was this fact that must have motivated the investigating officer for manufacturing the dying declaration in collusion with the medical officer. Thus, dying declaration appears to be very very suspicious.

(c) Signature of late Sri Misbah-ur-rahman on the alleged dying declaration appears to be forged. Court has summoned proceeding register and the agenda book from the twon area Committee Zaidpur covering the period when late Sri Misbah-ur-rahman has been the Chairman of the town ares, Sri Ram Balak Mishra C.W. (1), Baksi of town area Zaidpur has brought both these records on 19.1.84. He has stated on oath that all the signatures in the agenda book are also in the English language except one signature which is made in Urdu language. I have personally checked these tw records and I am fully satisfied that the statement of the witness is quite correct. Thus, it has become clear that Misbah-ur-rahman was in the habit of making his signature in English. Nowhere he has made a signature in Hindi. Making of signature in English was his habit. Now the signature in Hindi made by Misbah-ur-rahman at the time of critical position when he was on death bed is surprising. At the time of emergency, natural flow of a particular man automatically comes into picture. Neutral flow of his signature was in English. This circumstances demolishes the whole story of dying declaration. Signature in Hindi of deceased tally with the hand writing of dying declaration and are made by one hand.

(d) Doctor concerned, P.W.(3), Sri Muneeruddin appears to have acted in haste hurry, He has not noticed injury no. 2 as was noticed by the Dr. S.C. Srivastava, P.W.(4) who has conducted the post-mortem in the civil hospital at Lucknow. Injury no.1 gun-shot injury is apparent from above. It was noticeable even by a lay man, He has admitted that Sri Fazal-ur-rahman was known to him from before. Since Misbah-ur-rahman has been the chairman of town area, it is expected that he would have commanded influence even on the doctor. When injured Misbah-ur-rahman was brought to the hospital, the doctor concerned must have paid heed to the serious injury no.1 and must have made up his mind to provide first aid so that life of Sri Misbah-ur-rahman may be safe. P.W. (3) Dr. Muneeruddin has stated that he has conducted medico-legal examination and has provided first aid. Medico-legal is highly negligent as the Injury no. 2 was not noticed. Dr. Muneeruddin, P.M.(3), has stated that while examiing the injuries and providing the first aid, he had asked fellow men of Sri Misbah-ur-rahman to manage some vehicle so that Sri Misbah-ur-rahman may be brought to Barabanki for better checkup and treatment. He has again stated that soon after this process the vehicle was arranged and Sri Misbah-ur-rahman was sent to Barabanki Hospital. Primary automatic duty of a medical officer is to take step for saving life of the seriously injured person. It would never come in his mind that certain papers must be prepared for litigation. The doctor concerned has not recorded the dying declaration at any time so far. Thus, the idea of recording dying declaration must not have come in his mind. These circumstances go to show that there was no occasion for recording the dying declaration.

(e) Time of dying declaration and time of medico-legal examination as

mentioned by the doctor concerned is 11.05 P.M. Dr. Muneeruddin has stated on oath that he has taken about half hour in medico-legal examination and 10 minute in recording the dying declaration. Since as soon as the injured brought, the doctor takes automatic step for first aid, and since doctor has sent Misbah-ur-rahman to Barabanki immediately after providing medico-legal examination and first aid, he must have conducted medico-legal first. The time being 11.05 P.M. written on the Injury report Ext, ka .. is correct but 11.05 P.M, written on the dying declaration is absolutely wrong. When he has devoted about half hour in medico-legal examination, naturally the time of dying declaration must be different. Had he recorded dying declaration first, then time of medico-legal examination must be at least 11.15 p.m. as he has according to his statement devoted about 10 minute in medico-legal examination. It appears that the dying declaration was recorded much after and the doctor concerned has un-mindfully mentioned the time 11.05 P.M. on the dying declaration. It is humanly impossible for a man to do two things at the very same time. Thus, conduct of medical officer concerned is highly dishonest.

(f) Dying declaration, Ext. Ka--3, mentions names ofactual assailants, time of incident, manner of assault and place of occurrence. These circumstances go to show that declarant was in a position to narrate all particulars about the incident. He appears to be fully conscious of all the circumstances. There in no mention of injury no.2 in the dying declaration. Dr. S.C. Srivastava, P.W.(4), conducting the post-mortem report has mentioned that there is a contusion covering 14 CM. X 12 CM., on the stomach. This injury is also very important. How a fully conscious man can ignore this injury is very surprising. Had the dying declaration been made by Sri Misbah-ur-rahman, this injury must never have been missed. It appears that the dying declaration was prepared by a person who had no knowledge about injury no.2. Dr. Muneeruddin, P.W.(3), who has first conducted the medico legall examination of Misbah-ur-rahman, did not know injury no. 2 as is clear from the injury report, Ext. Ka-2. It appears that the dying declaration is the outcome of his mind in collusion with the Investigating Officer.

(g). It is clear from the evidence that one accused has tightly caught hold the neck of Misbah-ur-rahman from behind and the other has fired from the front. Injury no. 1 has proved fatal. As soon as Misbah-ur-rahman received gun shot injury n. 1, it was usual for him to have got much perplexed under that surcharged atmosphere, it does not appeal to reason that he had recognized the person holding his neck tightly from behind. Since there is a mention of that assailant also, it appears that implication of such person is highly improbable.

(h) Dying declaration does not contain any certificate by the doctor concerned that the declarant was fully conscious and was in a position to depose something. Dr. S.C. Srivastava, P.W. (4), has stated on oath that due to the gunshot injury no.1, stomach of Misbah-ur-rahman was damaged. He has again stated that due to damage of stomach there must have been very very severe pain. Dr. Muneeruddin, P.W.(3), has noticed that pulse rate was 80, normal pulse rate is 72. Thus, Misbah-ur-rahman was not fully conscious. Due to severe pain in the stomach, it is not expected that he would be in a position to

depose something. The doctor concerned has written in the injury report, Ext, ka 2, that Sri Misbah-ur-rahman was fully conscious. Why he has not written on the dying declaration is surprising. Dying declaration and injury report were recorded at most at the same time. Due to severe pain and abnormal pulse rate fatally injured person is not expected to be in a position to depose the dying declaration. Thus, dying declaration appears to be highly doubtful.

(i) Why the doctor concerned has sent the dying declaration to the police station is very material. The doctor concerned has stated that he has sent the dying declaration in reply to the letter sent by the police. He stated that he has taken the signature of the constable who has brought the letter of requisition and who has taken the dying declaration alongwith injury report. But this type of conduct does not get any support in record. First information report does not mention dying declaration. No public witness has informed to the police that the dying declaration was recorded. The doctor concerned says that he has not disclosed it to the police. Doctor says that he knew it very well that dying declaration is always sent to the Court. Why under these circumstances, the doctor concerned had handed over the dying declaration to the police is not clear. When the police was not in the knowledge of dying declaration, the natural conduct of the doctor was to send the dying declaration direct to the Court. There is unnatural conduct on his part. Conduct becomes unnatural when there is some sort of bungling in the affair. This circumstances goest to show that the dying declaration is highly doubtful.

(j) Dr. Shahjahan, P.W.(6), has stated that he has received Misbah-ur-rahman on reference from Zaidpur P.H.C.. He has again stated that there was a reference slip in which there was a mention that dying declaration was recorded and medico legal examination was done. Conduct of Dr. Shahjahan is also very doubtful. There is no mentioned of number of the reference slip in the register. The prosecution has not submitted the reference slip from the hospital at Lucknow. When any patient is referred to any superior hospital, the reference slip does contain the number of the register. Without such number, reference cannot be complete. This is the usual practice stated by Dr. Shahjahan that he has sent that reference slip to Lucknow hospital with Misbah-ur-rahman but that reference slip has not been filed before me. Dr. Shahjahan has conducted the first aid at 12:05 a.m., on 31.05.1982. The next entry in the refister is at 7:00 a.m. on 31.5.82. Misbah-ur-rahman had died in the civil hospital at Lucknow at 3:00 a.m., on 31.5.82. It is just possible that after his death all these things were manufacture. Dr. Shahjahan has stated that there is no column in the register to show as to what has been done in the previous hospital. He has admitted that there is a column to show that injuries, cause of injures. He has again stated that this column is filled by the injured himself or by his attendant. Register does not show that this column has been filled in this manner. Thus, Dr. Shahjahan has not discharged his duties properly. Improper discharge of duties is indication of some guilty intention."

39. Thus, from the above reasoning given by the trial court for disbelieving the dying declaration that the two witnesses of dying declaration, namely, Afzul-ur-rahman and Mohammad Ashfaq have not been examined and the prosecution has not

given any cogent reason for withholding the same which creates doubt about the truthfulness of the dying declaration. The dying declaration appears to have been manufactured by the Investigating Officer for his oblique motive as the deceased was known to him. The deceased and his family members had got his transferred stopped by taking out a rally against his transfer. The alleged dying declaration was not sent by the Investigating Officer on 31.05.1982 to the Court of C.J.M. though he made the statement that he had sent the same which was found to be false as the C.J.M. has passed an order requiring Station Officer to file the dying declaration on 0.2.06.1982 which is evident from Ext. Kha-1 and the Investigating Officer has submitted the dying declaration on 04.06.1982 in pursuance of the order of the C.J.M. P.W. 3 Dr. Muneeruddin, who is said to have recorded the dying declaration of the deceased, from his statement also it is evident that he had not recorded any dying declaration earlier to the present one and for the first time he recorded the present dying declaration of the deceased as the deceased was known to him from before and when the deceased was brought to him soon after the incident at P.H.C. Zaidpur, he only found one single injury on his person whereas P.W. 5 Dr. S.C. Srivastava found two injuries on the person of the deceased. It has been admitted by P.W. 3 Dr. Muneeruddin that he examined the injuries of the deceased at 11:05 p.m. and also recorded the dying declaration of the deceased at the same time. At the time of medical examination and recording of dying declaration the electricity of P.H.C. Zaidpur was disconnected. Dr. Muneeruddin in his evidence before the trial court has stated that it had not occurred in his mind that any fitness certificate is to be given before recording the dying declaration of a person, hence the trial court raised suspicion about the recording of the dying declaration of the deceased and recorded the finding that it appears to be a manipulated document and an afterthought in collusion with the S.H.O. P.W. 4 and P.W. 3 Dr. Muneeruddin. The Apex Court has expounded definition of the dying declaration and its condition which are required at the time of accepting it as an evidence was considered by this Court in the case of **Munni Devi & Ors. vs. State of U.P.; 2020 (5) ALJ 653. Paras-33, 36 and 39** of the said judgment which are relevent to note are reproduced hereunder:-

"33. ... 22. The legal position about the admissibility of a dying declaration is settled by this Court in several judgments. This Court in Atbir v. Government of NCT of Delhi - 2010 (9) SCC 1, taking into consideration the earlier judgments of this Court in Paniben v. State of Gujarat - 1992 (2) SCC 474 and another judgment of this Court in Panneerselvam v. State of Tamilnadu - 2008 (17) SCC 190 has given certain guidelines while considering a dying declaration:

1. Dying declaration can be the sole basis of conviction if it inspires full confidence of the Court.

2. The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

3. Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

4. 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 corroborative. The rule requiring corroboration is merely a rule of prudence.

5. Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

6. A dying declaration which suffers from infirmities, such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

7. Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

8. Even if it is a brief statement, it is not to be discarded.

9. When the eye-witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

10. If after careful scrutiny the Court is satisfied that it is free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration.

36. In the aforesaid judgment of Sudhakar (Supra), the Hon'ble Supreme Court has discussed the concept of dying declaration in detail in paragraph 18 by considering the case of Laxman vs. State of Maharashtra reported in (2002) 6 SCC 710 which is quoted below

"18. In the case of Laxman (supra), the Court while dealing with the argument that the dying declaration must be recorded by a Magistrate and the certificate of fitness was an essential feature, made the following observations. The court answered both these questions as follows:

"3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the

medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

39. For accepting the dying declaration, the Hon'ble Supreme Court has expounded the conditions which are necessarily to be followed. In State of Gujarat v. Jayrajbhai Punjabhai Varu reported in (2016) 14 SCC 152, the Supreme Court held in paragraph nos. 15, 17, 19 & 20 as under :

"15. The courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross- examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration.

17. A number of times the relatives influence the investigating agency and bring about a dying declaration. The dying declarations recorded by the investigating agencies have to be very scrupulously examined and the court must remain alive to all the attendant circumstances at the time when the dying declaration comes into being. In case of more than one dying declaration, the intrinsic contradictions in those dying declarations are extremely important. It cannot be that a dying declaration which supports the prosecution alone can be accepted while the other innocent dying declarations have to be rejected. Such a trend will be extremely dangerous. However, the courts below are fully entitled to act on the dying declarations and make them the basis of conviction, where the dying declarations pass all the above tests.

19. ..... A dying declaration is entitled to great weight. The conviction basing reliance upon the oral dying declaration made to the father of the deceased is not reliable and such a declaration can be a result of afterthought. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. 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.

20. The burden of proof in criminal law is beyond all reasonable doubt. The prosecution has to prove the guilt of the accused beyond all reasonable doubt and it is also the rule of justice in criminal law that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other towards his innocence, the view which is favourable to the accused should be adopted."

40. Hence in view of the conclusion drawn by the trial court in disbelieving the dying declaration and the law enunciated by the Apex Court as has been referred above, we do not find any infirmity or perversity in the impugned judgment and order passed by the trial court in disbelieving the said dying declaration of the deceased.

41. Similarly, so far as the direct evidence led by the prosecution in the nature of P.W. 1 and 2, who are the two eye witnesses of the incident, the trial Court has found the presence of the said two eye witnesses at the place of occurrence also doubtful because of the following reasons which are reproduced hereinbelow:-

"Direct evidence in the case is also not worthy of belief for the following reasons

(a) Presence of the witnesses both at the door of Misbah-ur-rahman, at about 9.30 P.M. and also near the spot at about 10.30 P.M. is highly improbable. P.W. (1) Sri Fazal-ur-rahman and P.W.(2) Mohammad Muslim have stated on oath that they were present at the door of late Misbah-ur-rahman to work out as to how the management of Madarsa Islamia Imdadul Uloom could be properly conducted in future. P.W.(1) Fazal-ur-rahman has again stated that he usually sits at the door of Misbah-ur-rahman for purposes of inhaling fresh air and during that time, person were discussing some ways and means of better management of the school. It has been again stated that there was a meeting on 14.4.82 and in that new officer were elected for better management of the school. Why on 30.5.82 meeting was sitting is very doubtful. First there is no document to show that there was some meeting on 14.4.82. Usually procedings of some Committee are drawn in the register. In absence of such register, conference of meeting is unthinkable. Further more, there is no indication that even after 14.4.82, there was some mismanagement

in the school. If so, there is no reason to call the next meeting on 30.5.82. In usual circumstances, meetings are summoned by a notice in advance. The notice may be in writing or in oral, There is no indication in the statement of both the eye-witnesses allegedly were present in the meeting of 30.5.82 that there was a written or an oral notice in advance. Thus, meeting on 30.5.82 at the door of Misbah-ur-rahman is highly unthinkable.

Even if it is taken for granted for the argument sake that some meeting has held on 30.5. 82, it is unnatural that the deceased Misbah-ur-rahman would leave the meeting and go for his private affairs. It is again unnatural for the members of the meeting to go in block to a place where Misbah-ur-rahman had gone for completing the rest of the talk. If there was an emergent meeting without notice, naturally some important matters must have there. Sri Misbah-ur-rahman was regularly going to supervise the work in his KARKHANA. It is not natural for such a person to leave the important matter being discussed at his door and to go for such private supervision of the work. It has come in the evidence of P.W. (1) Fazal-ur-rahman that son of late Misbah-ur-rahman is bold enough serve tea, water or make arrangement for sitting. Thus, this boy could have been sent to call Sri Misbah-ur-rahman from the factory. In the alternate, any one of the members of that alleged meeting could have gone to Misbah-ur-rahman back for further discussion or in the alternate, meeting must have been disbursed for discussion at the next day. But all natural conduct was abandoned and all members sitting at his door had started to go a place where Misbah-ur-rahman has gone. Unnatural conduct is indicative of guilty mind.

In the towns and villages, it is the usual habit of taking dinner at about 9 or 9.30 P.M. There is no mention that members of the committee including Late Misbah-ur-rahman had taken their dinner. A person can sit for inhaling fresh air in the summer after dinner and not before it. Post mortem report does not show that there was undigested food in the stomach of Misbah-ur-rahman. Thus, this circumstance also shows that persons were not sitting at about 9 or 9.30 P.M. on that day.

First information report does not mention that the witnesses were sitting at the door of Misbah-ur-rahman in connection with some meeting. Had this been true, detailed FIR must have contained this fact also. There is a reference of word 'तलाश करने' in the F.I.R. Ex. Ka-1.

The term 'TALASH' (search) indicates that someone is missing without whereabouts. When Misbah-ur-rahman was to be searched, this means his whereabouts were not known to the witnesses and other persons sitting at his door. This circumstance also shows that these persons were not sitting at his door and Misbah-ur-rahman has not gone in their presence. P.W. (1) Fazal-ur-rahman has stated on oath that he has not disclosed any body that Misbah-ur-rahman has told him that he was going to supervise the work to KARKHANA. He has not told in Court that this fact was disclosed to the Investigating Officer. Thus, his statement about this fact in the Court is after thought.

There is no evidence to show that there was in fact any repair work in the KARKHANA, Had there been any repair

work in the KARKHAN, workers of KARKHANA could have been examined.

The total outcome of the above discussion is that it is highly unthinkable that witnesses were sitting in the door in the manner they have narrated here. When they were not so sitting, it is again improbable for them to have gone in the direction of the incident.

(b) Injury no.2 was not seen by the witnesses. Both the witnesses P.W. (1) Fazal-ur-rahman and P.W.(2) Mohd. Muslim have not explained as to who and when injury no.2 was received by the deceased Misbah-ur-rahman. Dr. S.C. Srivastava, P.W. (4), has been suggested a very dangerous question by the prosecution. The A.D.G.C.(I) Sri A.K. Jain has put a suggestion that injury no.2 could be caused by blow after injury no.1. Doctor concerned has repleid this question in the affirmative. Thus, it becomes clear that injury no. 2 was caused soon after the injury no.1. Both the prosecution witnesses were present since the time of fire till the injured Misbah-ur-rahman was brought to the hospital. Thus, witnesses should have seen the accused causing injury no. 2 also. The witness has said that the injury no. 2 was caused in their presence. It appears that witnesses were not present at the spot. There is no contusion of abrasion on the fact including nose, on the chest and on the knees. This circumstance shows that the injured had not fallen down keeping the face downward. Thus, the injury no. 2 has not come due to fall. But the injury no. 2 has been intentionally caused by some one. Non explanation of the injury no. 2 by both the prosecution witnesses shows that the witnesses were not present at the spot.

(c) Both the prosecution witnesses have stated that the injured has not fallen down after receiving gun-shot injury. Dr. S.C. Srivastava, P.W. (4), has stated that damage of stomach causes severe pain. It is common experience that a person must fall on the ground after receiving a gun shot injury on the chest. Since there was severe pain due to gun shot injury in the person of Misbah-ur-rahman, it is highly probable that he should have fallen on the ground. Both the witnesses have stated that he has not so fallen, Their statement is unnatural. This shows that they were not present at the spot.

(d) It has come in the evidence of the eye-witnesses P.W. (1) Fazal-ur-rahman and P.W. (2) Mohd. Muslim that one accused had caught hold of Misbah-ur-rahman from behind and the other accused has fired at the chest from the very close range. This is also improbable. When one assailant is holding Misbah-ur-rahman from behind, there is all possibility that gun shot might hit the fellow-assailant who is holding Misbah-ur-rahman from behind. There are cases where pellets cross the body and thus, there is all possibility that the fellow-assailant holding Misbah-ur-rahman from behind might be injured. Furthermore, Misbah-ur-rahman was injured with the help of a fire-arm. The fire-arm could be shot from some distance. Purpose of assault could have been thus fulfilled and thus, there was no necessity of catching hold of Sri Misbah-ur-rahman. It appears that for purposes of raising the voice of 'BACHAO-BACHAO', this type of catching hold has been put forward.

Witnesses are said to have come from the side of East and they were standing at about 20 paces in North of the place of incident. Injured was coming from the side of South. Thus, one accused caught hold of Misbah-ur-rahman from the side of

South and one accused fired from the side of North. On alarm being raised by the witnesses, the assailants have run away towards the West. During the confused atmosphere, it is not possible for the witnesses to have recognized both the assailants. At the most, they could recognize only that who was holding Sri Misbah-ur-rahman.

It has come in evidence that accused Naimullah, Kaleemullah and Habibullah were standing under the PAKAR tree near the Masjid in the West of the place of incident. It clear from the experience that 30.5.82 was the 'Ashtmi night'. At about 10.30 P.M., moon was likely to set in the West. Month of May is not the autumn season. Thus, there must have been leaves of PAKAR tree. Moon was likely to set in the West. It is highly probable that shade of Mosque must be falling on the PAKAR tree. The 'PAKAR' tree had already its own shade. Witnesses standing at some distance must not be in position to recognize the features of the standing persons under this shade of PAKAR tree.

It has come in the evidence of both the witnesses that the persons sitting under the PAKAR tree had challenged that witnesses would suffer the dire consequences in case they marched forward. It has not come in the evidence that such persons under the tree were holding any arms and ammunition. When such persons had gone there to ward off any disturbance in the crime, it is very natural for them to have held certain arms and ammunition with them. Persons so standing would naturally hold the arms and ammunition also for their own safety because there would all possibility that they would be attacked by fellow men of the injured at the hue and cry. Under these circumstances, had such persons been standing for such intention under the tree, they must be holding such arms and ammunition. No witness has said that they were holding such arms and ammunition. This fact gives out two results. One is that witnesses were not in a position to see things at that distance. The second reason is that there were no such persons standing under the tree with arms and ammunition.

Under the above discussion, I am of the definite opinion that the presence of the so called witnesses both at the door of Misbah-ur-rahman at about 9.30 P.M, and at the place of incident at about 10.30 P.M. is highly improbable. If so, accused persons must not be held guilty."

42. As regard the view taken by the trial court in disbelieving the evidence of P.W. 1 and 2, who are alleged eye witnesses of the incident is concerned, the trial court has arrived at a conclusion that their absence at the place of occurrence appears to be doubtful on the ground that occasion for them to be at the door of the deceased along with the deceased and other persons for having conversation regarding convening of a meeting for better management of the school, at 9:30 p.m. in the night was highly doubtful. It also found that the deceased, who was discussing the issue with P.W. 1 and 2 and others, who had assembled at the door of his house and suddenly he went to inspect his workshop which was some distance from his house, shows his unnatural conduct and thereafter the witnesses P.W. 1 and 2 went in search of the deceased, who had not returned for a long time and hear the alarm of the deceased to save him and saw the accused Ansar catching his neck from behind and accused Rafiullah shot at the deceased and

other accused persons, namely, Habibullah, Kalimullah and Naimullah, who were standing under the Pakar tree threatened them not to move forward, appears to be quite unnatural. The trial court further recorded a finding that if the said two witnesses had seen the incident, they would have definitely mentioned in their evidence that the deceased received two injuries on his person one by fire arm and other by the person, who assaulted the deceased with fists or hard and blunt object. The trial court also found that the time and place of occurrence of the incident could not be established, hence has acquitted the accused-respondents of the charges levelled against them. Thus, the reasoning given by the trial court for acquittal of the accused-respondents, cannot also be said to be perverse one which may call for any interference by this Court in the present appeal.

43. The law has been settled by the Apex Court in its catena of decisions regarding interference of the High Court in the case of order of acquittal in an appeal.

44. Some of the judgments of the Apex Court which we would like to refer are quoted below:-

45. Paras-6, 7 and 8 of the judgment of the Apex Court in the case of ***Mrinal Das & Ors. vs. State of Tripura; AIR 2011 SC 3753*** are reproduced hereunder:-

"(6) In State of Goa vs. Sanjay Thakran & Anr. (2007) 3 SCC 755, this Court while considering the power of appellate court to interfere in an appeal against acquittal, after adverting to various earlier decisions on this point has concluded as under:-

"16.....while exercising the powers in appeal against the order of acquittal the court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the court of appeal would not take the view which would upset the judgment delivered by the court below. However, the appellate court has a power to review the evidence if it is of the view that the view arrived at by the court below is perverse and the court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate court, in such circumstances, to reappreciate the evidence to arrive at a just decision on the basis of material placed on record to find out whether any of the accused is connected with commission of the crime he is charged with."

7) In Chandrappa and Others vs. State of Karnataka (2007) 4 SCC 415, while considering the similar issue, namely, appeal against acquittal and power of the appellate court to reappreciate, review or reconsider evidence and interfere with the order of acquittal, this Court, reiterated the principles laid down in the above decisions and further held that:-

"42.....The following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and

reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court." The same principles have been reiterated in several recent decisions of this Court vide State of Uttar Pradesh vs. Jagram and Others, (2009) 17 SCC 405, Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi) (2010) 6 SCC 1, Babu vs. State of Kerala, (2010) 9 SCC 189, Ganpat vs. State of Haryana and Others, (2010) 12 SCC 59, Sunil Kumar Sambhudayal Gupta (Dr.) and Others vs. State of Maharashtra, (2010) 13 SCC 657, State of Uttar Pradesh vs. Naresh and Others, (2011) 4 SCC 324, State of Madhya Pradesh vs. Ramesh and Another, (2011) 4 SCC 786.

8) It is clear that in an appeal against acquittal in the absence of perversity in the judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. However, if the appeal is heard by an appellate court, being the final court of fact, is fully competent to re- appreciate, reconsider and review the evidence and take its own decision. In other words, law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court. If two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal. There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is found and to come to its own conclusion. The appellate court can also review the conclusion arrived at by the trial Court with respect to both facts and law. While dealing with the appeal against

acquittal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and only by giving cogent and adequate reasons set aside the judgment of acquittal. An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference. When the trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts etc., the appellate court is competent to reverse the decision of the trial Court depending on the materials placed."

46. Para-8 of the judgment of the Apex Court in the case of ***Basappa vs. State of Karnataka; II (2014) ACC 1 (SC)*** reproduced hereunder:-

"8. The High Court in an appeal under Section 378 of Cr.PC is entitled to reappraise the evidence and conclusions drawn by the trial court, but the same is permissible only if the judgment of the trial court is perverse, as held by this Court in Gamini Bala Koteswara Rao and Others v. State of Andhra Pradesh through Secretary[1]. To quote: "14. We have considered the arguments advanced and heard the matter at great length. It is true, as contended by Mr Rao, that interference in an appeal against an acquittal recorded by the trial court should be rare and in exceptional circumstances. It is, however, well settled by now that it is open to the High Court to reappraise the evidence and conclusions drawn by the trial court but only in a case when the judgment of the trial court is stated to be perverse. The word "perverse" in terms as understood in law has been defined to mean "against the weight of evidence". We have to see accordingly as to whether the judgment of the trial court which has been found perverse by the High Court was in fact so." (Emphasis supplied)"

47. This Court in para-23 of the case of ***State of U.P. vs. Moti Lal Srivastava & Ors.; 2016 (94) ACC 817*** has followed and considered the dictates and judgment of the Apex Court with respect to scope of interference by the High Court in the case of acquittal which is reproduced hereunder:-

"23. The Apex Court in the case of State of Rajasthan Vs. Darshan Singh, SCC 2012 (15) 789 has laid down the scope of interference in the appeal against acquittal and held that appellate court interferes with order in acquittal only in compelling circumstances and when the impugned order is found to be perverse, the appellate court should bear in mind presumption of innocence of accused. Interference in a routine manner where another view is possible should be avoided, unless there are good reasons for interference. "

48. In view of the foregoing discussion, we find on the appraisal of evidence as discussed by the lower appellate court that the judgment of acquittal was rightly passed. We find no merit in this appeal.

49. This appeal is dismissed accordingly.

50. It transpires from the record that the C.J.M. Barabanki vide his report dated 10.11.2020 has reported that in compliance of the order of this Court dated 19.10.2020, accused-respondent nos. 3 and 4, namely,

Habibullah and Mohammad Ansar have surrendered before the Court on 9.11.2020 and have been released on bail on the same day on their furnishing personal bonds of Rs. 25,000/- each and two sureties of the like amount. It is directed that the said personal bonds and sureties of the said accused-respondent nos. 3 and 4 shall not be cancelled/discharged till the period of limitation for filing the appeal against the present judgment and order as provided under the law, is expired.

50. Let the lower court record along with the present order be transmitted to the trial court concerned for necessary information and compliance.

(2021)03ILR A910
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.02.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.

Criminal Appeal No. 438 of 2013

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

Counsel for the Appellant:
Sajid Raza Rizvi, Manish Bajpai, Siddharth Lal Vaish

Counsel for the Opposite Party:
Government Advocate

A. Criminal matter-Code of Criminal Procedure,1973-Section 374(2) & Indian Penal Code, 1860-Sections 498-A, 304B,302 -Dowry of Prohibition Act,1961-Section ¾-challenge to-conviction-deceased was the wife of the appellant and she was found dead in an unnatural circumstances in her matrimonial home where the appellant was also living with her- deceased was cruelly treated, harassed and tortured by the appellant for additional dowry and for non-fulfilment of the said demand, she was mercilessly beaten to death by the appellant-The argument he had informed about the incident to the PW 2 and remained present throughout the inquest proceedings and also accompanied the dead body to hospital, goes to show that he is innocent, is also of no consequences as the appellant is not being able to discharge his burden in view of Section 106 of the Evidence Act, 1872 as it was his duty to explain the death of his wife, who died an unnatural death in his house and his presence there is also proved from the statement of P.W. 2-From the perusal of the ante-mortem injuries found on the person of the deceased, it is apparent that the deceased has received as many as seven injuries on her person on different parts of her body which includes head, chest and abdomen and it cannot be said to be self -inflicted injuries and the said injuries could be caused by some hard blunt object- The cause of death in the opinion of PW 4- Doctor, who conducted the Post Mortem is that the injuries which were caused to the deceased were sufficient in the ordinary course of nature to cause death.(Para 1 to 48)

B. The provisions of Section 106 of the Evidence Act 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 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. (Para 39,40)

The appeal is dismissed. (E-5)

List of Cases cited:

1. Harbans Lal Vs St. of Punj. (1996) 2 SCC 350

2. Shambhu Nath Mehra Vs St. of Ajmer (1956) SCR 199

3. St. of Raj. Vs Kanshi Ram JT (2006) 12 SCC 254.

4. P. Mani Vs St. of T.N. (2006) 3 SCC 161

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

(1) The present Criminal Appeal has been preferred by the appellant against the judgment and order dated 04.02.2013 in S.T. no.670 of 2009, arising out of Case Crime no.680 of 2009, Police Station Phool Behar, District Lakhimpur Kheri, passed by Additional Sessions Judge, Court no.1, Lakhimpur Kheri, whereby the appellant has been convicted for offence under Section 498-A I.P.C. and sentenced for rigorous imprisonment for a period of three years with a fine of Rs.5,000/- and in default of payment of fine to further undergo three years of simple imprisonment, convicted for offence under Section 302 I.P.C. and sentenced for life imprisonment with a fine of Rs.10,000/- and in default of payment of fine to further undergo one year of simple imprisonment and convicted for offence under Section ¾ of the Dowry Prohibition Act and sentenced to two years rigorous imprisonment with a fine of Rs.5,000/- and in default of payment of fine to undergo simple imprisonment for a period of three months and all the above mentioned sentences were to run concurrently.

(2) The prosecution case in nutshell is that an FIR was lodged by informant- Awdhesh Kumar- PW 2 at the concerned Police Station alleging that his sister, namely, Gudda aged about 25 years at that time, was married to the appellant Mahesh s/o Gobardhan, resident of village- Khostawa, Police Station Phool Behar, District Lakhimpur Kheri six years ago, i.e., in the year 2003 in accordance with Hindu rites and traditions. After one and a half years of marriage Mahesh frequently harassed her and demanded an additional dowry of Rs.50,000/-. She had informed about this demand to her family members twice or thrice but on the conciliation by the relatives Mahesh kept quiet. After few days his sister had called him on phone and told that Mahesh was demanding Rs.10,000/- out of remaining dowry amount from her immediately and was also threatening for her life and had beaten her with kicks and fists, on which the informant called Mahesh on phone and tried to pacify him by saying that he will come in three to four days and settle the matter himself. On 31.05.2009 he was informed that his sister Gudda has been done to death by Mahesh by mercilessly beating her on account of non-fulfillment of additional amount of dowry as demanded by Mahesh. The informant went to Khostawa and found dead body of her sister lying in her room.

(3) On the basis of the said written complaint (Ex- Ka 1) being made by PW 2, Awdhesh Kumar at the Police Station Phool Behar, District Lakhimpur Kheri about the incident dated 31.05.2009, investigation was carried out and an FIR (Ex- Ka 9) was lodged against the accused/appellant- Mahesh as Case Crime no.680 of 2009 under Sections 498-A, 304-B I.P.C. and ¾ Dowry Prohibition Act, Police Station Phool Behar, District Lakhimpur Kheri.

(4) After investigation charge sheet (Ex- Ka 12) was submitted against accused/appellant- Mahesh before the Competent Court and the case was

committed to the Court of Sessions on 10.08.2009 by the learned Magistrate.

(5) On 14.05.2010 the learned Sessions Judge, Lakhimpur Kheri framed charges against the appellant- Mahesh for offences under Sections 498-A, 304-B (alternate charge under Section 302 I.P.C) I.P.C. and Section ¾ Dowry Prohibition Act respectively.

(6) The accused denied the charges and claimed his trial.

(7) The prosecution in support of its case has examined PW 1- Rajkaran, PW 2- Awdhesh, PW 3- Rakesh Kumar Maurya, PW 4- Dr. H.B. Singh, PW 5-Chhotelal Mishra and PW 6- Basantlal.

(8) The statement of the accused was recorded under Section 313 Cr.P.C., wherein he denied the prosecution evidence. The accused-appellant Mahesh has taken a plea that the witnesses have falsely deposed against him and the charge sheet which was submitted against him is a wrong one and the case which has been alleged against him is on account of enmity and that he is innocent.

(9) PW 1- Rajkaran in his deposition before the trial Court has submitted that Gudda Devi is his sister. He got her married in 2003 to accused- Mahesh according to Hindu rites and traditions and dowry was also given. She died in her matrimonial home.

(10) After two-three years of marriage Mahesh started demanding Rs.50,000/- as an additional amount of dowry for which he used to harass and beat her and troubled her for food and clothing. Mahesh also demanded Rs.50,000/- from her and her family members. He along with his family members even tried to pacify Mahesh but he did not pay any heed to their request. One month prior to incident, Mahesh immediately demanded Rs.10,000/- from her sister about which she told him but he refused her because his younger brother was about to get married. Ten days prior to the incident she came to her parental house for the last time when his younger brother's marriage was being solemnized and told her family about how Mahesh was harassing and beating her for not fulfilling his demand of additional dowry of Rs.50,000/- and he has also demanded Rs.10,000/- immediately. It was her last visit there and thereafter she never met them. Whenever she used to come to his house she used to complain about the torture and harassment done by Mahesh on her to meet the demand of Rs.50,000/-. He further stated that the information about the death of his sister was given by a person from Mahesh's village on phone. He along with his brother, mother and other people went to her sister's in-laws' house and saw her dead body in her room. On her body there were marks of injuries. His brother Awdhesh Kumar- PW 2 had gone to police station and reported this incident and thereafter, police arrived and sealed the dead body of her sister and sent it for Post Mortem.

(11) He further stated that Mahesh had murdered his sister for non-fulfillment of additional demand of dowry of Rs.50,000/-. The witness supported the prosecution case and held appellant/accused Mahesh responsible for the death of his sister.

(12) On cross examination PW 1 deposed that seeing the prosperity of Mahesh he married his sister to him on

05.05.2002 and "Bidai' took place on 06.05.2002. After her marriage she used to complain about Mahesh but he took no action. On the date of incident at around 3 p.m. he was informed through phone that his sister has died. He along with his brother, mother and other people went to his sister's house and found her dead body in her room. There was blood where she was found. He remained the whole night at the place of occurrence. The police arrived at 10 p.m. and had conducted the Panchayatnama on the body of the deceased at night and had sent the same to Lakhimpur Kheri for its Post Mortem and all of them went in the night to Lakhimpur Kheri along with the dead body. The Police arrested Mahesh on that night only. He stated that he was unaware of the fact that Mahesh's grandmother's home was in Parehara where there was "Mundan' ceremony. He in his cross examination had admitted that Mahesh did not demand any dowry from him but he used to demand the same from his sister. He further submitted that the last rites of the deceased was performed in his presence by him and not by her family members (in-laws).

(13) PW 2- Awdhesh Kumar, who is the informant in the case, is the elder brother of PW 1 and deceased. He was examined by the trial Court and he has supported the prosecution case as averred in the FIR as well as statement given by PW 1 and for the sake of brevity the same is not reiterated. He in his deposition has stated that he has received the phone call from his sister and she told him that Mahesh is demanding Rs.10,000/- immediately and had also assaulted her with kicks and fists and threatening for dire consequences of her life, but on receiving the said information he could not go to meet his sister and thereafter he received the information about her death. His sister had lastly come to her house 10 days before the marriage of his younger brother and there she told her family members about the demand of Rs.50,000/- as additional dowry being made by Mahesh and how he harassed her for non-fulfillment of the same. He has further stated in his evidence that the information about the death of her sister was given by one Om Prakash Awasthi, on which he had gone to her in-laws' house. Her sister was lying dead in the room and he saw the marks and injuries on her body. He has informed the police station Phool Behar about the incident and the report was written by Om Prakash Awasthi. He dictated the incident to him and he wrote what was dictated to him and thereafter, he put his signature on the written report (Ex- Ka 1). He had submitted the said report to the Police Station and he was given a copy of the FIR by the Constable Clerk of the said Police Station. The Panchayatnama, which was conducted on the dead body of the deceased, was performed in the presence of Naib Tehsildar and Police personnel. The dead body was sealed in his presence and he has signed the inquest report and has proved the same as Ex- Ka 2.

(14) In his cross examination PW 2 stated that Mahesh had started harassing his sister after one and a half years of marriage. The name of his sister is Gudda Devi alias Shanti Devi. Her marriage was solemnized on 05.05.2002, which was Sunday and the "Bidai' ceremony was on 06.05.2002, which was Monday. His sister died on 30.05.2009 and he received the information on 31.05.2009 at 3 p.m. in afternoon on his mobile. He further admitted the fact that the information was given by Mahesh on his phone on which he reached the house of in-law's house of his sister. Mahesh reached

the place of occurrence at 6.45 p.m. He stated that after the inquest the dead body of his sister was sent for Post Mortem to Lakhimpur Kheri. Mahesh along with his mother had accompanied the dead body to police station, after this where Mahesh went away he had no idea. He further deposed that last rites were performed in Lakhimpur Kheri by him. The place where the dead body was found blood was also there. He further deposed that the Investigating Officer had not taken his statement at any point of time and when the Investigating Officer visited the place of occurrence he showed him where the dead body was and blood near it. The Investigating Officer took out the dead body to the courtyard and after last rites were performed, neither did he return to the place of occurrence nor any police officials met or interrogated him.

(15) PW 3, Rakesh Kumar Maurya, Naib Tehsildar, Tehsil Palia, District Lakhimpur Kheri deposed that he was posted as Naib Tehsildar in District Lakhimpur Kheri since June, 2009. On 01.06.2009 he conducted the Panchayatnama of the deceased and he visited the house of the deceased, i.e., place of occurrence, under the orders of the District Magistrate, Sadar, Lakhimpur Kheri. When he reached the house of Mahesh to conduct Panchayatnama, SI Ram Nath Singh, SO Pramod Kumar Singh, Constable Shivdeen Verma along with other villagers including in laws of the deceased were already present there. Panchayatnama and related papers were prepared by SI Ram Nath Singh on his dictation. The dead body of the deceased was examined and several injuries were found on it and thereafter the dead body was sealed and sent for Post Mortem. He has proved the inquest report of the deceased as Ex- Ka 2, which was prepared by SI Ram Nath Singh and it bears signature of PW 3. PW 3 also proved the Photo Lash, Sample Seal, letter to CMO, letter to R.I., Chalan Lash, which were prepared by SI Ram Nath Singh and it bears the signature of PW 3 as Ex- Ka 3 and Ka 7.

(16) PW 4- Dr. H.B. Singh in his deposition before the trial Court has stated that on 01.06.2009 he was posted as Consultant Chest Physician, Balrampur Hospital, Lakhimpur Kheri and at 3.30 p.m. he performed autopsy of the dead body of Smt. Gudda, which was sent in by Naib Tehsildar in a sealed condition and identified by Constable Shivdeen Verma. The dead body was sealed and was opened in his presence. During the time of autopsy Dr. S.P. Singh was present along with him. The following Ante Mortem **injuries** were found on the body of the deceased which are enumerated as follows:-

1. Contusion 6 cm X 3 cm over right side head 2 cm above right ear on dissection tissues brain ecchymosed and extracted and subdural haematoma present over brain.

2. Contusion 10 cm X 6 cm over right shoulder and upper arm.

3. Constusion 15 cm X 6 cm over left forearm.

4. L.W. 5 cm X 1 cm X bone deep over front of right index, middle and ring fingers just above base of fingers.

5. Contusion (Multiple) in an area of 60 cm X 20 cm over front of right thigh and leg.

6. Contusions in an area of 50 cm X 20 cm over front of left thigh.

7. Contusions in an area of 40 cm X 30 cm over back of chest and abdomen.

(17) In the opinion of Dr. H.B. Singh, the cause of death is due to coma as a result of ante mortem head injuries. He further stated that the injuries received by the deceased were sufficient in the ordinary course of nature to cause death and the death of the deceased occurred on 31.05.2009 at about 10 a.m. and the injuries which have been caused to the deceased was possible by a hard blunt object. The witness stated in his cross examination that the death of the deceased could have occurred 36 hours prior to Post Mortem. He has proved the Post Mortem report as Ex- Ka 8.

(18) PW 5- Constable Chhotelal Mishra has deposed before the trial Court that on 31.05.2009 he was posted as Constable Clerk, Police Station Mahrajpur, District Kanpur Nagar and on that day informant- Awdhesh Kumar came to the police station and gave written complaint on the basis of which he had prepared Chik FIR no.121 of 2009 (Case Crime no.680 of 2009) and registered the same for offences under sections 498-A, 304-B I.P.C. and ¾ Dowry Prohibition Act in his handwriting and signature and proved the same as Ex- Ka 9 and stated that the said FIR was lodged in pursuance of the written report submitted by the Awdhesh Kumar- PW 2, which is Ex- Ka 1.

(19) He has further deposed that he endorsed the fact of lodging of FIR in GD on 31.05.2009 at 20.10 hours in GD no.33 in his handwriting and further also prepared the carbon copy of the GD and proved the same as Ex-9 and Ex-10.

(20) PW 6- Basantlal in his examination before the trial Court has stated that he was posted as the Circle Officer in June, 2009 in Dhaurehra and he was entrusted with the investigation of the case on 01.06.2009 and he had started the investigation on the very same day. He prepared the site plan of the place of occurrence and proved the same as Ex- Ka 11 and recorded the statement of the Panchayatnama witnesses, namely, Om Prakash, Rampal, Ram Kishore and also recorded statement of Constable Shivdeen Verma, Naib Tehsildar Rakesh Kumar Maurya and Dr. H.B. Singh. On 02.06.2009 Station House Officer, Pramod Kumar Singh arrested Mahesh on his directions and recorded his statement.

(21) On 03.06.2009 he submitted the charge sheet bearing Charge Sheet no. 124 against accused- Mahesh in Case Crime no.680 of 2009 under sections 498-A, 304-B I.P.C. and ¾ Dowry Prohibition Act, Police Station Phool Behar, District Lakhimpur Kheri and he signed and proved the same as Ex- Ka 12. He in his cross examination has stated that at the place of occurrence he recorded statement of accused- Mahesh, the informant of the case, witnesses- Subhash, Rajkaran, Smt. Jaydevi, witnesses of Panchayatnama, namely, Omprakash, Rampal, Ram Kishor, neighbours of Mahesh, namely, Sehej Ram, Ramavtar, Ramakant and Alijan.

(22) He further deposed that family members of accused- Mahesh, were not present at his house and he did not know whether the in-laws of the deceased accompanied her to Lakhimpur Kheri Hospital or not. He further deposed that on 02.06.2009 accused- Mahesh was arrested by Station House Officer but was not aware

of the fact that the deceased was done to death in an incident of dacoity or not.

(23) The defense has given a suggestion to the witnesses that the murder of the deceased was committed in the incident of dacoity but there was no evidence produced by the defense in this regard.

(24) The trial Court after examining the prosecution and defense evidence acquitted the appellant- Mahesh for offence under Section 304-B I.P.C., but convicted and sentenced him under Section 498-A, 302 I.P.C. and ¾ Dowry Prohibition Act by the impugned judgment and order. Aggrieved by the same the appellant has preferred the instant Appeal.

(25) Heard Shri Manish Bajpai, learned counsel for the appellant and Shri Dhananjay Kumar Singh, learned AGA appearing for the State of U.P. and perused the impugned judgment and order of the trial Court along-with lower Court record.

(26) It has been argued by learned counsel for the appellant that the deceased, who was the wife of the appellant, was done to death in a dacoity which took place in his absence as he had gone with his mother to his maternal grandmother's house. He further argued that as soon as he came to know about the incident he informed the concerned Police Station which arrived and conducted the Panchayatnama /inquest proceedings on the dead body of the deceased. He argued that if the appellant had been responsible for the offence in question for the murder of his wife, then he would not have been present at his house and would have fled away. He further argued that so far as the demand of dowry for which it is alleged that the deceased was murdered, is absolutely a false one as is evident from the statement of PW 1, who is the brother of the deceased, namely, Raj Karan, who admitted the fact that the financial position of the appellant was good as he had landed property and in the said circumstances to demand dowry from the deceased and her family members is absolutely false, frivolous and baseless and further on the other hand, the financial position of the family members of the deceased was not such that any demand made by the appellant could be met by PW 2. The appellant informed about the death of his wife to PW 2 which has been admitted by him in his statement.

(27) The appellant along with his mother accompanied the dead body of the deceased to Lakhimpur Kheri where the Post Mortem of the deceased was conducted. Thus, he submitted that the trial Court committed error in convicting the appellant under Section 302 I.P.C. for life imprisonment while acquitting him under Section 304-B I.P.C. as it did not find a case of dowry death.

(28) Learned counsel for the appellant further argued that statement of PW 1 and PW 2 cannot be relied upon as they are interested and partisan witnesses, being the real brothers of the deceased.

(29) Learned counsel for the appellant in support of his argument has further relied upon judgment of Apex Court in ***Harbans Lal vs. State of Punjab; (1996) 2 SCC 350*** and argued that merely the recovery of the dead body from the house of the appellant is not sufficient to hold the appellant guilty. It is not conclusive in nature and is not compatible only with the guilt of the appellant and wholly

incompatible with his innocence. This circumstance can only create suspicion about the complicity of the appellant but suspicion cannot be allowed to take the place of proof.

(30) Learned AGA on the other hand has opposed the argument of learned counsel for the appellant and submitted that he deceased was found dead in her matrimonial home where the appellant was also residing and she died an unnatural death and from the Post Mortem report of the deceased it is apparent that she received as many as seven injuries on her person which included contusion and lacerated wounds and the cause of death as per Post Mortem Report was coma as result of ante-mortem head injuries. It was further submitted that the argument of learned counsel for the appellant that the deceased was done to death in a dacoity which was committed in his house, has no legs to stand as the appellant has not taken any defense in his statement recorded under Section 313 Cr.P.C. in the trial Court. Moreover, no evidence has been adduced by the appellant to show that any articles, etc. were looted by the dacoits while committing the murder of the deceased.

(31) So far as the conduct shown by the appellant that he informed the informant about the incident on his phone and further he remained present throughout at the time of conducting the inquest proceedings of the deceased on the dead body of the deceased and accompanied with his mother for Lakhimpur Kheri where the post mortem of the deceased was conducted, cannot be a ground for acquittal as the appellant has failed to explain the death of his wife who died in an unnatural circumstances in his house and at the time of incident the appellant was also found to be at the place of occurrence.

(32) We have given a thoughtful consideration to the submissions advanced by learned counsel for the parties and perused the impugned judgment and order passed by the trial Court as well as lower Court record.

(33) It is an admitted fact that the deceased was the wife of the appellant and she was found dead in an unnatural circumstances in her matrimonial home where the appellant was also living with her.

(34) There has been a consistent demand of dowry from the deceased by the appellant of Rs.50,000/- as additional dowry and for which she was being cruelly tortured and harassed by the appellant. On being assaulted by Mahesh she made a complaint about this to her family members time and again and also when she visited her parental home in her younger brother's marriage she told her family members about the harassment being caused to her by her husband for non-fulfillment of the demand of additional dowry.

(35) The information about the death of the deceased was received by PW 2 on his mobile phone from a person residing in Mahesh's village and also by Mahesh, on which he went to the appellant's house and found the deceased in a dead condition in her room. PW 2 along with his family members and other persons of the village saw several injuries on the dead body of the deceased which was also detected by witnesses when the inquest report/ Panchayatnama of the dead body of deceased was conducted in the presence of

PW 3, Rakesh Kumar Maurya, Naib Tehsildar by the police.

(36) Learned counsel for the appellant contended that the accused- Mahesh is not at all responsible for the death of his wife as the injuries which were found on the dead body of the deceased, the same were received by her in a dacoity in his house when the appellant was not even present there, i.e., at the time and place of occurrence, as he had gone to his maternal grandmother's house along with his mother.

(37) The aforesaid argument of learned counsel for the accused-appellant is not acceptable at all as the appellant has not taken any such defense in his statement recorded under Section 313 Cr.P.C. nor has he produced any oral or documentary evidence recording the same to prove that the deceased was murdered in a dacoity committed in his house. Moreover, no articles, etc. were found looted by the dacoits/ murderers from the house of the appellant.

(38) So far as the second argument of learned counsel for the appellant that he had informed about the incident to the PW 2 and remained present throughout the inquest proceedings and also accompanied the dead body to Lakhimpur Kheri goes to show that he is innocent, is also of no consequences as the appellant is not being able to discharge his burden in view of Section 106 of the Evidence Act, 1872 as it was his duty to explain the death of his wife, who died an unnatural death in his house and his presence there is also proved from the statement of P.W. 2. From the perusal of the ante-mortem injuries found on the person of the deceased, it is apparent that the deceased has received as many as seven injuries on her person on different parts of her body which includes head, chest and abdomen and it cannot be said to be self inflicted injuries and the said injuries could be caused by some hard blunt object.

(39) In ***Shambhu Nath Mehra v. State of Ajmer; 1956 SCR 199,*** Hon'ble Apex Court dealt with the interpretation of Section 106 of the Evidence Act, 1872 and held that the section is not intended to shift the burden of proof (in respect of a crime) on the accused but to take care of a situation where a fact is known only to the accused and it is well nigh impossible or extremely difficult for the prosecution to prove that fact. It was said:

"This [Section 101] 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 pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not."

(40) The applicability of Section 106 of the Evidence Act has been lucidly explained by the Hon'ble Apex Court in case of ***State of Rajasthan v. Kanshi Ram, JT; 2006 (12) SCC 254.***

"*The provisions of Section 106 of the Evidence Act 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 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."*

(41) Similarly in case of ***P. Mani vs. State of Tamil Nadu; 2006 (3) SCC 161*** Hon'ble Apex Court held thus:-

"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 seen together inside 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."

(42) The cause of death in the opinion of PW 4- Dr. H.B. Singh, who conducted the Post Mortem is that the injuries which were caused to the deceased were sufficient in the ordinary course of nature to cause death. From the evidence of PW 2 it is also clear that the last rites of the deceased were performed by PW 2 and his family members and not by the appellant. The trial Court has acquitted the appellant under Section 304-B I.P.C. as it found during the course of evidence that the marriage of the appellant with the deceased was solemnized beyond seven years ago and it was not a case of dowry death but on the alternate charge framed by the trial Court it came to the conclusion from the evidence on record that the deceased was cruelly treated, harassed and tortured by the appellant for additional dowry and for non-fulfillment of the said demand, she was mercilessly beaten to death by the appellant. Hence, the trial Court convicted the appellant under Section 302 I.P.C. for life imprisonment along with offence under section 498-A I.P.C. and ¾ Dowry Prohibition Act.

(43) The case law which has been cited by learned counsel for the appellant in **Harbans Lal (supra)** is support of his argument is different from the facts and circumstances of the case, as in the said case the accused has categorically taken a defense in his statement under Section 313 Cr.P.C. that on account of strained relations with his wife, he used to sleep at the shop and not in the house and that after he learnt about the death of his wife at about 10/11 a.m. on 17.10.1981, he sent information to the relations of his wife.

(44) In the present case the appellant has not taken any such defense in his statement under Section 313 Cr.P.C. and he has only stated that the charge sheet which has been submitted against him was wrong one and the witnesses have falsely deposed against him and implicated him on account of enmity and he is innocent. Thus, argument which has been taken by the learned counsel for the appellant, that the deceased was done to death in the house of the appellant when the dacoity was

committed, there appears to be no basis and has no legs to stand.

(45) Moreover, a casual suggestion about the said fact has been given to PW 2 by the defense regarding the presence of the appellant at the place of occurrence and that some unknown miscreants have entered in the house of the appellant and the deceased has identified them and she was killed which has also been categorically denied by PW 2- Awdhesh Kumar, who is the informant of the case and brother of the deceased.

(46) Thus, the case law relied upon by learned counsel for the appellant referred above is of no help to him as it is distinguishable from the facts and circumstances of the present case.

(47) In view of the foregoing discussions we do not find any illegality or infirmity in recording the finding of the conviction and sentence recorded by the trial Court against the accused- Mahesh for the offences under section 498-A, 302 and ¾ Dowry Prohibition Act, hence the impugned judgment and order passed by the trial court is hereby upheld.

(48) The Appeal lacks merit and is accordingly **dismissed.**

(49) The appellant is stated to be in jail. He shall serve out the sentence as awarded by the trial court.

(50) Office is directed to transmit the lower Court Record along with certified copy of this order to the Court concerned forthwith for necessary information and follow up action, if any required.

(2021)03ILR A920

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.03.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE RAJEEV SINGH, J.

Criminal Appeal No. 507 of 2010
with
Criminal Appeal No. 859 of 2010

Rajan Yadav ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Subodh Kumar Shukla, Amrit Kumar Tiwari, Maya Ram Yadav, Santosh Kumar Srivastava

Counsel for the Opposite Party:
Government Advocate

(A) Criminal Law - Appeal against conviction - Indian Penal Code, 1860 - Section 323/34 , 364 , 302/34 , 201 - U.P. Gangster and Anti Social Activities (Prevention) Act, 1986 - Section 3(1) - Arms Act, 1959 - Section 3/25 - The Code of criminal procedure, 1973 - Section 161, 313 - motive - circumstantial evidence - Confessional statement - last seen theory - evidence of last seen of PW1 - victim abducted and taken away by the two appellants - dead body found after 9 days of the incident by PW1 - his belief that victim was done to death by the appellants - same cannot be a reliable piece of evidence as there is no proximity between the point when the accused appellants and deceased were seen together and when the deceased was found dead. (Para -106)

(B) Evidence Law - Indian Evidence Act, 1872 - Section 27 - How much of information recieved from accused may be proved - recovery made at the pointing out of the appellant cannot be admissible under Section 27 of the Evidence Act -

appears to be a false one and afterthought just to improve the prosecution case against the appellant - recovery of remains of burnt clothes of the deceased at the pointing out of the accused appellant from an open place which is accessible to all along with his confessional statement appears to be doubtful. (Para - 108)

(C) Evidence Law - Indian Evidence Act, 1872 - where the prosecution rests on the circumstantial evidence - prosecution must place and prove all the necessary circumstances, which would constitute a complete chain without a snap and pointing to the hypothesis that except the accused, no one had committed the offence, which in the present case, the prosecution has failed to prove. (Para - 111)

Incident had taken place on 21.12.2004 at about 9:00 p.m. in the night - FIR registered by brother of the deceased - information given by PW1 about the recovery of the dead body of the deceased at the concerned police station - Sections 302, 201 I.P.C. added in the present case.(Para - 93)

HELD:- The conviction and sentence of the appellants under Sections 323/34, 364 I.P.C. and 3(1) of the U.P. Gangster and Antisocial Activities (Prevention) Act, 1986 by the trial Court is hereby upheld. The conviction and sentence of the appellants under Sections 302/34 and 201 I.PC. is not sustainable as it is against the evidence on record. The appellants are entitled for the benefit of doubt for the murder of the deceased, hence, the conviction and sentence of the appellants under Sections 302/34 and 201 I.P.C. are hereby set aside. (Para - 112)

Appeal partly allowed. (E-6)

List of Cases cited:-

1. Koli Lakshmanbhai Chanabhai Vs St. of Guj. , (1999) 8 SCC 624

2. Mallikarjun & Ors. Vs St. of Karnataka , (2019) 8 SCC 359

3. Dharam Deo Yadav Vs St. of U.P. , (2014) 5 SCC 509

4. Rameshbhai Mohanbhai Koli & Ors. Vs St. of Guj. , (2011) 11 SCC 111

5. Shailendra Rajdev Pasvan & Ors. Vs St. of Guj. & Ors., 2020 (1) SCC 537

6. Mukesh & Ors. Vs St. of NCT of Delhi & Ors. , (2017) 6 SCC1

7. Navaneethakrishnan Vs The St. by the Inspector of Police , (2018) 16 SCC 161

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

1. Since both the appeals arise out of a common order, hence, with the consent of learned counsel for the parties, both the appeals are being decided by a common order.

2. The present two Criminal Appeals have been preferred by the appellants-Rajan Yadav & Teja @ Tej Prakash Yadav against the judgment and order dated 30.01.2010 passed by Special Judge, Gangster Court, Faizabad in Gangster Case No.211 of 2005 (State Vs. Teja alias Tej Prakash Yadav and Another),convicting and sentencing and appellants under Section 323/34 I.P.C. to 1 year R.I., under Section 364 I.P.C. to 10 years R.I. and fine of Rs.2000/- each and in default payment of fine, further 6 months R.I., under Section 302/34 I.P.C. to life imprisonment and fine of Rs.3000/- each and in default of payment of fine further 1 year R.I., under Section 201 I.P.C. to 5 years R.I. and fine of Rs.1000/- each and in default of payment of fine further imprisonment of 6 months R.I. and under Section 3(1) U.P. Gangster and Anti Social Activities (Prevention) Act, 1986 to 4 years R.I. and fine of Rs.5000/- each and in default of payment of fine further imprisonment of 1

year R.I. Further, convicting and sentencing the appellant-Teja @ Tej Prakash Yadav under Section 3/25 Arms Act to 2 years imprisonment and fine of Rs.1000/- and in default of payment of fine 6 months further imprisonment. All the sentences were directed to run concurrently.

3. The prosecution case in brief is that a written report was lodged by the informant Jairaj Yadav, son of Sitaram, stating therein that his brother, namely, Sewaram who was a contractor and used to ply boat on rent in river and used to get the people crossed through the river on the either side. Two moths prior to the incident, his brother had some dispute with Teja @ Tej Prakash, son of Hari Ram and Rajan Yadav, son of Amrit Lal, resident of Ghasiyari Tola, Police Station Kotwali Tanda, District Ambekdarnagar regarding the money charged for the said purpose, on account of which Rajan Yadav and Teja @ Tej Prakash bore enmity with his brother. On 21.12.2004 at about 9:00 p.m. in the night, the informant along with his brother Sewaram and Lal Bahadur Yadav, son of Hari Prasad, resident of Phoolpur, were going to Duhia by passing Alibagh Ghat Kasba Tanda through Nagar Palika and near Nagar Palika, Rajan Yadav and Teja @ Tej Prakash who were armed with hockey, met them. Rajan Yadav and Teja @ Tej Prakash caught-hold his brother Sewaram and dragged him in the premises of Nagar Palika. Thereafter, the informant and Lal Bahadur rushed to save him, then both of the accused assaulted Lal Bahadur with hockey sticks and beaten him mercilessly and thereafter they ran towards him also to assault him, on which the informant along with Lal Bahadur ran to save their lives. Accused Rajan Yadav and Teja @ Tej Prakash dragged his brother Sewaram towards river after beating him. The informant and Lal Bahadur raised alarm, but none had came to rescue them.Thereafter, the informant and Lal Bahadur went on foot and reached the Village Duhia and informed about the incident to his family members as well as to the villagers. They searched Sewaram on both sides of the river, but his whereabouts could not be traced out. The informant had a strong belief that his brother Sewaram had been abducted by Rajan Yadav and Teja @ Tej Prakash with an intention to kill him. Since, the accused Rajan Yadav and Teja @ Tej Prakash are the men of criminal antecedents, hence, he submitted a report at the concerned police station against them for appropriate action.

4. On the basis of the written report submitted by the informant Jairaj Yadav, the F.I.R. of the incident was registered at Police Station Kotwali Tanda, District Ambedkarnagar on 22.12.2004 against the accused Rajan Yadav and Teja @ Tej Prakash which was registered as Case Crime No.350 of 2004, under Sections 323, 364 I.P.C.

5. The scribe of the F.I.R. is Vijay Kumar Yadav, son of Sri Ram Bahal Yadav, resident of Village Duhia, Police Station Kotwali Tanda, District Ambedkarnagar.

6. The investigation of the case commenced and during the course of investigation on 29.12.2004, an information about the recovery of the dead body of the deceased Sewaram from the river-bed was given by the informant Jairaj Yadav to the police station. During the course of investigation, it has come that the accused in order to get the pecuniary benefits and to terrorize the society used to commit the

crime by making a gang of criminals. Hence, after investigation separate charge sheets for the offence under Sections 323, 364, 201 I.P.C. and 3(1) U.P. Gangster and Anti Social Activities (Prevention) Act, 1986 were submitted against the appellants, namely, RajanYadav and Teja @ Tej PrakashYadav and also against the appellant Teja @ Tej Prakash under Section 3/25 Arms Act before the competent Court and the Court in pursuance of the same took cognizance of the offence.

7. The charges were framed against the appellants under Sections 323/34, 364, 302/34, 201 I.P.C. and 3(1) of U.P. Gangster Act and also the charge was framed against the appellant Teja @ Tej Prakash for the offence under Section 3/25 of the Arms Act. The appellants denied the charges and claimed their trial.

8. The prosecution in support of its case has examined PW1-Jairaj Yadav (informant), PW2-Lal Bahadur, PW3-Guddu, PW4-Rampal, PW5-Dr. Vivek Gupta, PW6- Constable 181 Virendra Yadav, PW7-Vinod Kumar Yadav, PW8-Dr. Atal Bihari Verma, PW9-Arvind Kumar Pandey, PW10 S.I. Ramesh Chandra Yadav, PW11-S.I. Rajendra Prasad Kannaujia & PW12 Constable Kailash Singh.

9. The statements of the accused were recorded under Section 313 Cr.P.C. in which they have stated that the informant in collusion with the local police and under the influence of their rivals, have lodged the F.I.R. for an incident which is a cooked-up story.

10. The accused in their defence has examined DW1-Suresh Kumar Srivastava.

11. PW1-Jairaj Yadav, in his deposition before the trial Court, has reiterated the prosecution case, as has been stated in the F.I.R. and submitted that on 22.12.2004 he lodged a report and when he had lodged the report, a day prior to the incident, his brother Sewaram was beaten by the accused Rajan Yadav and Teja @ Tej Prakash. About one month prior to the incident, some altercation took place between his brother Sewaram and Rajan Yadav and Teja @ Tej Prakash, on account of which the accused bore enmity with his brother. The incident had taken place at 9:00 p.m. in the night. When his brother Sewaram was passing through near Nagar Palika Tanda, then accused Rajan Yadav and Teja @ Tej Prakash met him, who were armed with hockey and after assaulting Sewaram they dragged him towards North. When this witness along with Lal Bahadur ran to save him, then the said accused also assaulted Lal Bahadur. Thereafter the informant fled away from there, came to his village and informed about the incident to the villagers. As this witness became afraid, hence, did not go to the police station and on the next day he got a report written by Vijay Kumar Yadav to whom he dictated about the incident. In pursuance of which, the First Information Report was registered at the concerned police station. He has proved the written report as Ext. Ka.1 and has identified his signature on the same.

12. The investigating Officer recorded his statement on the same day and thereafter the Investigating Officer had come to his village after 6-7 days and along with him there were 5-6 police constables also. The Investigating Officer had told him that the investigation has to be done and this witness was also told by the Investigating Officer that near pontoon

bridge the dead body of his brother could be recovered and also there is possibility of the accused to be present there.

13. This witness and others along with the police team went near the pontoon bridge. Thereafter, the police went towards East to Karwari and near the Marahi the accused Rajan Yadav was found. He tried to flee after seeing the police but the police apprehended him. After being apprehended, the accused Rajan Yadav told that he along with Teja @ Tej Prakash carried Sewaram on a boat across the river and in the mids of the river his brother Sewaram was shot at by the accused Teja @ Tej Prakash with country-made pistol and killed. Thereafter, all the clothes of Sewaram were put off and his dead body was thrown in the river and his clothes were taken to Karia Ki Marahi and the same were burnt by them. Thereafter, accused Rajan Yadav had taken the police party at the place where the clothes were burnt, from where the remains of burnt bed sheet and clothes of his brother Sewaram (deceased) were also recovered by the police and the police sealed the same. The dead body of the deceased was recovered on the second day of recovery of remains of burning of the clothes of the deceased.

14. This witness further stated that he along with Pintoo of the village and 2-3 other persons had gone to search the dead body of his brother and when they reached the Ghat of Yam River, then he found the dead body of his brother lying on the riverbed. There was black thread found in the neck of his brother in which there were two keys. There were six fingers in the leg of the deceased, due to which he identified the dead body to be of his brother. Thereafter, he took the dead body to his house and had given a written information through the Gram Pradhan of the village. The said information which was given to the police about the recovery of the dead body, he has signed the same and proved the same as Ext. Ka.2

15. This witness further stated that on the information given, the police had arrived and conduced the panchayatnama of the dead body of the deceased and he had also signed the inquest report.

16. In his cross-examination,this witness has stated that there was no litigation going on with him or with his brother with the accused Rajan Yadav and no marpeet had taken place prior to the incident. He knew Rajan Yadav prior to 2 years of the incident and he did not use to go to his house and he had seen Rajan Yadav at Tanda Bazar.

17. This witness has denied the suggestion that he did not know Rajan Yadav. He further denied the suggestion that he did not know Rajan Yadav and at the instance of the police he has disclosed his name. He also did not know what the accused Rajan Yadav used to do, how much he is educated and what work he does. There was no money dispute between him and Rajan Yadav. He further stated that on the day of the incident, he had come along with his brother Sewaram at about 7:00-8:00 a.m. and looked-after the work near the river and returned at about 8:30-9:00 p.m. from there and prior to it they often used to return at about 4:00-5:00 p.m.

18. This witness further stated that he along with others did not carry lantern, torch, lathi danda or anything. The accused had met them at Nagar Palika road. On the road, there were people coming and going and vehicles were also passing

through.When the accused reached to his brother, no conversation had taken place between them and because of fear he fled away from the place of occurrence. He further stated that his brother had not died in his presence. He went to his house and informed that his brother was being beaten. From the house no one had come in the night and had come on the next day. On the next day at 7:00-8:00 a.m. many persons of the village had come to the place of occurrence and he informed that it was the place where the quarrel took place. After he had fled from the place of occurrence on the said date, in the night he did not inform at the police station about the incident and on the next day while he was coming to the place of occurrence he did not remember how much time it took to search his brother. The dead boy of his brother was recovered near Ghaghra river outside the area of Nagar Palika and it was not recovered in the area of Nagar Palika. After the recovery of the dead body, he informed the police station Kotwali and lodged a report. From the place where the dead body was recovered, he took the same to his house and on the said day only the police had come. The panchayatnama of the deceased was conducted.

19. In his cross examination, he further stated that his brother was beaten by the accused by hockey and he had seen the accused beating his brother 2-4 times with hockey but because of fear he fled away from the place of occurrence. He did not see who had arrived at the place of occurrence and how the incident had taken place.

20. He denied the suggestion that he was deliberately telling lie and he was not with his brother on the day of the incident. He further denied the suggestion that he did not see any incident and at the instance of the police he lodged a false F.I.R. He also denied the suggestion that he, at the instance of police, is falsely deposing.

21. In his cross-examination made on behalf of the accused Teja alias Tej Prakash, this witness has stated that the incident had taken place 3-4 years prior. In the year of the incident it was winter and it was dark night. The deceased Sewaram, his brother, was addictive and drunkered and he had no enmity with anyone. Since how long he was doing the work of contractor he did not know. He was also unaware of the reason due to which there was quarrel of his brother with accused Teja @ Tej Prakash. He had seen the accused Teja @ Tej Prakash many times and since when he knew him, he does not know. How long the 'marpeet' took place between the accused and his brother, he was unaware of the same. He further stated that he does not know the reason due to which the dispute took place between his brother and the said accused.

22. He further stated that the medical examination of injured Lal Bahadur was not conducted at any place. The injuries which have been sustained by Lal Bahadur was not caused by fall but because of the assault made by the accused on him.

23. The dead body of the deceased was recovered after 5-6 days of the incident and the dead body was recovered by this witness and others and not by the police, which was lying in the river with face underneath and he had identified the dead body of the deceased to be of his brother because of six fingers on his leg. The case property and the weapon of assault were produced in the Court during the evidence. At the time of the post mortem of the

deceased, he was present and till what time the post mortem proceedings went on, he had no knowledge. The blood stained clothes were given to the Investigating Officer at the police station by the witness and Investigating Officer went to the place of occurrence to see the same and he was with the Investigating Officer continuously for about 1-2 days. The Investigating Officer further recorded the statements of the witnesses in his presence and after how many days of the incident the Investigating Officer had recorded their statements, he has no knowledge. He is also unaware of the fact that the accused Teja @ Tej Prakash is a respectable citizen. He denied the suggestion that because of the dark night and dense fog he had not seen the incident. He further denied the suggestion that he disclosed the name of the accused at the instance of the villagers and further denied the suggestion that he got the report written at the police station.

24. PW2-Lal Bahadur who is an injured witness, has deposed before the trial Court that he had not seen the accused Rajan Yadav and Teja @ Tej Prakash dragging the deceased Sewaram or assaulting him. On the day of the incident, some person had also assaulted him with hockey but he could not identify them. At this stage this witness was declared hostile and Public Prosecutor was given opportunity to cross-examine him.

25. On cross-examination, this witness has stated that he was assaulted near Nagar Palika when he had gone to hand over boat and Jai Raj was not with him. The Investigating Officer had not recorded his statement under Section 161 Cr.P.C. and stated that he has no knowledge that how it was written. This witness denied the suggestion that he had won over by the accused and he has been deposing falsely.

26. He was again cross-examined by the accused and stated that he was beaten towards the road coming from Nagar Palika Tehsil to Kotwali and from there Kotwali is 250 meters. He had not met Jairaj Yadav and Sewaram on the said date and in the night he used to come from Tanda to his house and on the said date he had gone at about 11:00 p.m. It was dark and foggy night, on account of which he did not identify the accused.

27. PW3-Guddu who is witness of arrest of accused Teja @ Tej Prakash and also is a witness of recovery of country-made pistol from the pointing of the accused Teja @ Tej Prakash, has deposed before the trial Court that the incident had taken place on 01.01.2005. On the said date, SHO, Tanda Kotwali along with police personnel had taken him along with witness Rampal for the arrest of the accused Teja @ Tej Prakash near Karia Ki Marahi and after the arrest of accused Teja @ Tej Prakash, who also accompanied with the police party, got recovered a countrymade pistol and four live cartridges from jute bag and stated that he had committed the murder of the deceased Sewaram with the said country-made pistol. The SHO of Police Station Kotwali Tanda had sealed the country-made pistol and live cartridges at the said place and prepared a recovery memo of the same. On which this witness along with other witness and the accused had put their thumb impression on the same. He proved the recovery memo which was read over to him. He stated that the same was written by the Investigating Officer, on which his thumb impression is affixed. The recovered country-made pistol and live cartridges

were opened before the Court which he identified to be the same which the accused Teja @ Tej Prakash had got recovered and the same was marked as material Ext.1 & 2 to 5. and empty cartridge is material Ext. 6. The accused had also got empty cartridge recovered along with country-made pistol and live cartridges. The Investigating Officer recorded his statement under Section 161 Cr.P.C..

28. This witness in his cross examination has stated that the incident had taken place 5 years ago near Karia Ki Marahi. He is an illiterate person and used to do the work of welding. He stated that he is seeing the accused Teja @ Tej Prakash for the first time in the Court. The police had taken this witness from his house. The jeep on which he was taken, there were 5-6 persons and he does not know the number of the jeep. The police personnel did not prepare any paper in his presence nor read over the same to him and when they had taken him from his house they got his thumb impression on a blank paper. He further stated that the distance of Karia Ki Marahi from his house which is in North direction is 20-25 kms. and he had gone in the afternoon to Karia Ki Marahi and it was about 11:00 a.m. and from Karia Ki Marai illegal weapon of assault of 12 bore country-made pistol was recovered and the same was in running condition. When the recovery was made, 40-50 people were arrived there. Live cartridges were also recovered which were in running condition. In preparing the recovery memo, the Investigating Officer took 4-5 hours and after the said date he did not meet the Investigating Officer.

29. He denied the suggestion that the country-made pistol and cartridges were not recovered in his presence. He further denied the suggestion that under the influence of police he is falsely deposing. He also denied the suggestion that under the influence of Jairraj Yadav he is falsely deposing. At the time of his evidence, informant Jairaj Yadav was present in the Court.

30. PW4-Rampal has deposed before the trial Court that on 01.01.2005 he and Guddu were taken by the SHO of Kotwali Tanda along with other police personnel telling them about the purpose for arresting the accused Teja @ Tej Prakesh near Karia KI Marahi, where Teja @ Tej Prakesh had got recovered a countrymade pistol, four live cartridges and one empty cartridge and recovery memo of the same was prepared by the Investigating Officer at the place from where it was recovered. The country-made pistol and other articles which were recovered, were sealed there only. The recovery memo was read over to him and he along with other witness and accused signed the same and put their thumb impression on the same. He also identified the recovery memo in the Court which is stated to have been written by the Investigating Officer at the spot and he had affixed his thumb impression. When the articles recovered were shown to him, he stated that the accused Teja @ Tej Prakesh had got recovered the same and his statement under Section 161 Cr.P.C. was recorded. He denied the suggestion that at the instance of police he has affixed his thumb impression and further denied that he has falsely deposed.

31. PW5- Dr. Vivek Gupta in his examination before the trial Court has stated that on 22.12.2004 he was posted at Community Health Centre at Tanda on the post of Medical Officer. On the said date, he had examined the injured Lal Bahadur

who was brought by Homeguard at 2:45 p.m. from Kotwali Tanda, District Ambedkarnagar and during his examination he found the following injuries on his person:-

"Injuries

1. L/W 1.0 cm. x 0.3 cm. on Lt side of scalp, 5.0 cm. above Lt. eyebrow. Injury Muscle deep.

C/o pain Rt. shoulder, Rt. knee, but no external mark of injury present."

32. In the opinion of the doctor all the injuries were found to be simple in nature and were caused by hard and blunt object. The duration of injury was one day old. He stated that the injury could be caused to the injured on 21.12.2004 at 9:00 p.m. in the night. He has proved the said medical examination report of the said injured as Ext. Ka.2 in his hand writing and signature.

33. In his cross-examination, this witness has stated that during the course of the evidence, the injured is not present in the Court. He stated that the injury no.1 which was a lacerated wound could be caused by fall while running on a pointed stone and when he was examining the injury no.1 it was not bleeding and injury no.2 was mentioned by him as was told by the injured.The duration of the injury which he had mentioned, was not at the instance of the injured. The rest of the injury etc. could be caused due to running on account of fall, is possible.

34. The working hours of PHC is from 8:00 a.m. to 2:00 p.m.. The injured was medically examined on 22.12.2004 at 2:45 p.m. and it took 10 minutes to examine his injuries.

35. PW6-Constable 181 Virendra Yadav in his deposition before the trial Court has stated that on 01.01.2005 he was posted as Constable at Police Station Kotwali Tanda and on the said date the Inspector Sri Vinod Kumar Yadav had submitted a recovery memo, on the basis of which Chick FIR No.1of 2005, arising out of Case Crime No.1 of 2005, under the Arms Act was registered at 10:30 against the accused Teja @ Tej Prakesh. Accused Teja @ Tej Prakesh was wanted in Case Crime No.350 of 2004 and Chick FIR of the said case was prepared by this witness under his hand writing which he has proved and which has been marked as Ext. Ka.3. He also proved the G.D. Entry vide G.D. No.16 at 10:30 dated 01.01.2005 for endorsing the registration of the F.I.R. under the Arms Act and carbon copy of which is on record, was prepared from the original one, was singed by him, which he proved as Ext. Ka.4.

36. In his cross-examination made on behalf of accused Teja @ Tej Prakash, this witness has stated that the original G.D. is not before him and on the carbon copy of the G.D. there is his carbon signature, he identified his signature.

37. The material exhibits of the case was not before the witness when he was deposing in the Court. While registering the F.I.R. of the crime in question, the Inspector of Police Station Kotwali was present in his office. He has not mentioned in the G.D. about the same because on his written report the F.I.R. was registered. As the original G.D. was not before him, hence, it was not possible for him to state whether any cognizable offence or non-cognizable report about the offence was earlier registered before the said case or not. He stated that it is wrong to state that

the time mentioned in the G.D. was anti-time. He further stated that it is wrong to state that he under the influence of the Inspector is giving evidence. After meeting the Investigating Officer at the concerned police station he did not meet him again.

38. PW7-Vinod Kumar Yadav in his deposition before the trial Court has stated that on 22.12.2006 he was posted as In-charge Inspector of Kotwali Tanda, Case Crime No.350 of 2004, under Sections 323, 364 I.P.C. was registered during his tenure and investigation of the same was entrusted to the Investigation Officer Sri Bandhan Ram Ghusia, S.I. who commenced the investigation. Sri Bandan Ram went on long leave, on account of which on 28.12.2004 he took the investigation of the present case. He arrested the accused Rajan Yadav on 28.12.2004 and recorded his statement and at the pointing out of the accused Rajan Yadav he recovered the remains of burnt clothes of the deceased Sewaram and prepared its recovery memo and sealed the same.The recovery memo was written by Head Constable Ramesh Chandra on his dictation. On the fard recovery memo there are signatures of Head Constable Manoj Yadav, Constable Ram Saware, accused Rajan Yadav and Zilajeet also put his thumb impression on the same. On the recovery memo this witness has also put his signature and proved the same as Ext. Ka.5 which is on record.

39. This witness further stated that on 29.12.2004, he conducted the panchayatnama on the dead body of the deceased Sewaram which was prepared by the Head Constable Ramesh Chandra and the same was copied by him in the case diary and he recorded the statements of witnesses of fard and witnesses of panch, namely, Jairaj Yadav and Zilajeet under Section 161 Cr.P.C. On 01.01.2005, he arrested the accused Teja Yadav @ Tej Pakash and recorded his statement. The accused confessed his guilt and told for getting the countrymade pistol, live cartridges recovered. On the pointing out of the accused, in the presence of Head Constable Ramesh Chand Yadav, Constable Radhey Shyam Maurya, Constable Om Prakash, Constable Ram Sabad Yadav, witness Rampal and Guddu Yadav, a countrymade pistol of 12 bore, four live cartridges of 12 bore and one empty cartridge of 312 bore were recovered near Karia Ki Marahi from a bag which was taken out by the accused Teja @ Tej Prakash and given to him. This witness has identified the recovered countrymade pistol and cartridges in the Court and stated that the same were recovered from the spot at the pointing out of the accused Teja @ Tej Prakash. He proved the recovered countrymade pistol as material Ext.1, live cartridges as material Ext. 2 to 5 and empty cartridge as material Ext.6.

40. On the basis of fard recovery memo, Case Crime No.1 of 2005, under Section 25 of the Arms Act was registered at Police Station Kotwali Tanda against the accused Teja @ Tej Prakash and recovery memo of the same was prepared by Head Constable Ramesh Chandra on his dictation and he had got the signature of the accused and other witnesses and thumb impression affixed on the same and proved the said recovery memo as Ext. Ka.6.

41. In his cross-examination,he stated that he is the informant of the said case registered under the Arms Act and investigation of the said was carried on by his subordinate Sub Inspector. The case property was not before him. On the

alleged day of the incident, he had left the police station for supervising the law and order situation but as to when he had left the police station he has no knowledge. The original G.D. of the police station was not available in the Court. After leaving the police station he had no knowledge about the distance of village Duhia and further it is at a distance of 3 Kms. and for supervising the area he had used the government vehicle and after leaving the police station for the said purpose he stopped at the kasba for an hour and for what purpose and was he was doing, he does not remember. While his stay at Kasba Duhia for an hour he had taken two witnesses of the said village and he does not remember their names and after perusing the case diary he would remember the same. After taking the two witnesses he went in search of the two accused of case crime No.350 of 2004, under Sections 323, 364, 302, 201 I.P.C. and it took about 1/2 an hour or 45 minutes for taking witness from village Duhia and to trace out the accused of Case Crime No.350 of 2004.

42. The police informer met him in Kasba Tanda. The meeting of the police informer and the place where the accused were hiding, the distance was told by the informer, which he did not remember. Karia Ki Marahi is in Majha area which is across the river and for going across the river a help of vehicle is to be taken. Pontoon bridge is constructed on which heavy vehicle were being used by plying from one ghat to another.

43. On the spot there was water in the river. The Kotwali Tanda is at a distance of 3-4 kms. away from Karia Ki Marahi and through Pontoon bridge it can be reached and on which direction, he does not remember. Prior to the arrest of the accused, the accompanying persons in the team were searched and after the arrest of the accused he did not give an opportunity to get the accused his personal search. He had given an information to the higher authorities regarding arrest of the accused and articles recovered and he had given the said information after coming to the police station. He had seen the accused Teja @ Tej Prakash for the first time and he came to know about his name on the information given by the police informer and the witnesses. At the spot it took about 1-1/2 to 2:00 hours for Head Constable to prepare the fard recovery memo which was dictated to him by this witness,thereafter the accused was arrested and taken to the police station and the accused was first arrested by the witness and his other police personnel who were with him.

44. At the pointing out out of the accused, recovery was made near Karia Ki Marahi which the accused himself had taken out and given. The recovered articles were not placed before him during the course of trial, hence, he could tell that on the material exhibits whether there is signature of the accused or not. The place where the accused was arrested it was Majha area and there only police personnel were the witness and there were no person. The place where the recovery was made, a Marahi was constructed and there was no person present or not and whether there was any person present or not he could not tell. The day on which he had arrested the accused, it was cold and not dense fog but there was fog or not he cannot tell. At the place of recovery, there were two huts and field situated. Near the place of occurrence, there were no one person available, hence, he could not made them witness and only a police team was present there and how many police personnel were there he did

not know and thereafter the accused was arrested and brought to Kotwali Tanda. The ballistic report of the recovered articles of the case and the report of Armour, the Investigating Officer can tell about it or he may tell the same after perusal of the case diary. After bringing the accused to the police station, on the basis of fard recovery memo, a case was registered and the accused was challaned and was produced before the concerned Court and the papers with respect to the arrest of the accused was submitted to the competent court. On whose pointing out, the spot inspection of the place of recovery was done by the Investigating Officer, he does not remember and stated that he would peruse the case diary and tell about the same.

45. In cross-examination made on behalf of the accused Teja @ Tej Prakash Yadav, this witness has denied the suggestion that he arrested the accused Teja @ Tej Prakash from his house and got a false recovery shown and have falsely challaned him in a case under the Arms Act. He further denied the suggestion that on 01.01.2005, no such incident had taken place at Karia Ki Marahi within the police station of Kotwali Tanda, District Ambedkarnagar. The F.I.R. of the case was registered in his presence in which accused Teja @ Tej Prakash, son of Hari Ram and Rajan son of Amrit Lal were named.

46. The site plan of the case and proceedings conducted by the earlier Investigating Officer was not before him and after he had taken over the investigation, the earlier investigation done by the earlier Investigating Officer was made part in the case diary and it was not verified and again the spot inspection was not conducted nor the site plan was prepared. The earlier Investigating Officer was a subordinate Sub Inspector.

47. In this cross-examination on behalf of the accsued Rajan Yadav, this witness has stated that accused Rajan Yadav was arrested on the way of Kalwari on the Pontoon birdge. He further denied the suggestion that accused Rajan Yadav was called from his house and challaned in the present case. Rajan Yadav confessed his guilt after he was arrested. He denied the suggestion that accused Rajan Yadav has not confessed his guilt. He moved an application before the competent court for recording the statement of accused Rajan Yadav under Section 164 Cr.P.C. but the same was not recorded. Ext. Ka.5 was prepared by him on the spot which was a recovery memo of the remains of the burnt clothes of the deceased and the same was taken by the police, but is not before him while he was deposing in the Court.

48. He further denied the suggestion that at the pointing out of the accused Rajan Yadav no articles were recovered and Ext. Ka.5 was a concocted and fabricated one just to make out a case. He also denied the suggestion that because of the contract of riverbed etc., he with the enemies of accused Rajan Yadav has falsely challaned him. During the course of investigation, he had not got recovered the hockey from the possession of accused Teja @ Tej Prakash. Near the place of occurrence,i.e., Nagar Palika premises Tanda, Ambedkarnagar, there are several shops and houses but he had not made any person residing there as a witness of the case as he did not think it to be necessary as during the course of investigation he had got the criminal antecedents of the accused Teja @ Tej Prakash. The gang chart was

prepared which was approved by the District Magistrate, Ambekdarnagar and the cases shown in the gang chart were pending till that time or not, he cannot tell. The gang chart which he has prepared and submitted, he had named both the accused.

49. The informant had told this witness about the incident taken place at 9:00 p.m. in the Nagar Palika Area Tanda and after registration of the case, subordinate Sub Inspector of this witness had gone to the police station on the same day. The panchayatnama of the dead body of the deceased was prepared by HCP Ramesh Chandra. He denied the suggestion that the accused Teja @ Tej Prakash was arrested from his house and named in the present case. It is correct to state that the accused Teja @ Tej Prakash was involved in the incident dated 21.12.2004.

50. This witness further stated that on 01.01.2005 when he was busy in maintaining law and order situation in Kasba Tanda, he received an information that the accused wanted in Case Crime No.350 of 2004 namely, Teja @ Tej Prakash is sleeping in Majha near Karia Ki Marahi and if prompt action is taken, he would be found there. On the said information, he took witnesses Rampal, Guddu Yadav and proceeded towards the said place from where the accused Teja @ Tej Prakash was arrested and he disclosed his name while was interrogated about the incident of Case Crime No.50 of 2004. He confessed his guilt and stated that the countrymade pistol by which he had shot at the deceased Sewaram and the dead body was thrown in the river, he had concealed the same and he would also recover the same. On which the accused got the same recovered and the recovery memo of the same was also prepared. He further stated that he recorded the statement of the witness, namely, Lal Bahadur, Pintoo, Brajlal and Rakesh on 17.3.2005 under Section 161 Cr.P.C. and on 18.3.2005 he prepared the gang chart and got the same approved by the S.P. Ambedkarnagar and District Magistrate, Ambedkarnagar and added offence under Section 3(1) of U.P. Gangster and Anti Social Activities (Prevention) act, 1986 in Case Crime No.350 of 2004, under Section 323, 364, 302, 201 I.P.C. and the gang chart which he had prepared under is signature and hand writing, he proved the same as Ext. Ka.7. After the offence Section 3(1) of U.P. Gangster Act was added, the accused was produced before the Special Judge, for remand. The site plan was prepared of the recovery of weapon of assault under his hand writing and signature, which has been proved and marked as Ext. Ka.8. He submitted the charge sheet against the accused Teja @ Tej Prakash and Rajan Yadav and proved the same as Ext. Ka.9 for the offences in question.

51. PW8-Dr. Atal Bihari Verma has stated before the trial Court that on 30.12.2004, he was posted as Medical Officer in Community Health Centre Tanda and on the said date he received a dead body in a sealed condition from the Inspector of Kotwali Tanda through Constable Anand Prakash and Constable Ram Chandra Verma at 11:30 a.m. being handed over for post mortem and he found the following ante mortem injuries on the person of the deceased Sewaram, which are as follows:-

"External Examination

1.	*Condition of body as regards muscularity,*	*Average built body swollen skin, peeling all*

	stoutness, emaciation, rigor mortis and decomposition.	*over body sign of decomposition present maggot present in ear. mud and sand present all over body. Hairs and nails are peeling off . Left eye and mouth closed. Rt. eye ball absent.*
2.	*Marks of Identification especially in the case of body of an unknown person*	
3.	*Eyes.*	
4.	*State of Natural Orifices, ears, nostrils, mouth, anus, urethra and vagina.*	
5.	*Injuries Nature, exact position and measurement mentioning direction specially incised wound.*	
6.	*Bones*	
7.	*External Organs of generation*	
8.	*Additional Remarks.*	

ANTE MORTEM INJURIES

1. Firearm injury present. Wound of entry present over forehead 4 cm. above Rt. eyebrow size 4 cm. x 3 cm.

Wound of exit Rt. cheek 5 cm. below Rt. eye pillets and cogweb present underneath the wound of exit.

INTERNAL EXAMINATION

1. Head & Neck

1.	*Neck*	*NAD*
2.	Scalp and Skull	*As in injury no.1*
3.	*Membrances*	*As in injury no.1*
4.	*Brain*	Lacerated & Putrifying
5.	*Brase*	*NAD*
6.	*Vertebrae*	*NAD*
7.	*Spinal Cord*	*Not opened*
8.	*Additional Remark*	*Nil*

THORAX

1.	Walls ribs, cartilages	NAD
2.	Pleura	NAD
3.	Larynx, trachea and bronchi	NAD
4.	Right lungs	NAD
5.	Left Lungs	NAD
6.	Pericardium	NAD
7.	Heart	Both Chamber Empty
8.	Vessels	
9.	Additional Remarks	

ABDOMEN

1.	*Walls*	
2.	*Peritoneum*	*NAD*
3.	*Cavity*	*NAD*
4.	*Buccal (cavity) teeth, Tongue and Pharynx*	*16/6*
5.	*Oesophagus*	*NAD*
6.	*Stomach and its contents*	*Semidigested 50 gms. food material*
7.	*Small Intestine and its contents*	*Stool gas*
8.	*Large Intestine and its contents*	*Stool gas*
9.	*Liver with weight and Gall Bladder*	*G.B. partially filled*
10.	*Pancreas*	*NAD*
11.	*Spleen with weight*	*NAD*
12.	*Kidneys with weight*	*Pale*
13.	*Urinary Bladder*	*NAD*
14.	*Generation organs*	*NAD*

Cause of Death:- The cause of death of the deceased is shock and hemorrhage due to ante-mortem firearm injury."

52. The post mortem of the deceased has been proved and marked as Ext. Ka.10.

53. On the cross-examination on behalf of the accused Teja @ Tej Prakash it was stated by him that in the abdomen of the deceased Sewaram there was semi-digested food and to get the food digested it took 2 hours and the deceased Sewaram had taken food 2 hours prior to his death.

54. On the cross-examination by the witness, it is stated that as per the report of the informant, the injuries which were caused to the deceased was by hockey whereas in the post mortem of the deceased it is stated to be caused by firearm injury. He stated that as the post mortem of the deceased was conducted after one week, hence, he cannot tell the reason whether the death of the deceased was caused by the injuries caused to him by hockey or by firearm.

55. He further stated that it it correct to say that the death of the deceased Sewaram was not caused by firearm but by some other thing as he had conducted the post mortem after one week and pellet and cogweb were found and on the body, wound of entry and wound of exit was present, which were sufficient to cause death of the deceased. He further stated that the death of the deceased could be caused by shock and hemorrhage due to marpeet and the same can also be the root cause of death of the deceased.

56. On the cross-examination made on behalf of the accused Rajan Yadav, this witness has stated that the dead body started decomposing on the third day and complete decomposition is within the period between 7-14 days. At the time of post mortem, the decomposition has started and the decomposition would start between 4-5 days from the date on which the post mortem was conducted and the body would start giving foul smell after 24 hours. At the time of post mortem, no clothes were found on the dead body of the deceased and only iron and brass metal was found in thread,

which was tied around the neck. The injuries which have been received by the deceased on his person, its duration at the time of post mortem he cannot tell. At the time of post mortem he did not found any injury of blunt object on the person of the deceased.

57. PW9-Arvind Kumar Pandey in his deposition before the trial Court has stated that on 22.12.2004 he was posted as Head Constable at Police Station Kotwali Tanda and on the said date the informant Jairaj Yadav has submitted a written report, on the basis of which, Chick FIR of Case Crime No.350 of 2004 for the offence under Section 323, 364 I.P.C. was registered against the accused Teje @ Tej Prakash and Rajan Yadav and proved the Chick FIr in his hand writing and signature as Ext. Ka.11 and further endorsement regarding the F.I.R in the G.D. has been proved by him as Ext. Ka.12 being G.D. No.31 time 13:30 dated 22.12.2004.

58. On the cross-examination made on behalf of the accused Rajan Yadav, this witness has stated that the original G.D. is not before him. In the Chick report there is no signature of the Circle Officer nor any date is mentioned. In the chick report the endorsement is 'See CJM' is seen at the bottom on 4.1.2005. At the police station along with the informant Lal Bahadurl, village Pradhan Sitaram had come.

59. This witness has denied the suggestion that under the influence of the informant he had registered the F.I.R of the present case as anti-timed.

60. On behalf of the accused Teje @ Tej Prakash, this witness was further cross-examined. The G.D. of the concerned police station with respect to the endorsement of the FIR was filed by the witness under his signature and carbon copy of the same was not on record and original was not before the Court and without seeing the original he is unable to tell that prior to the present case any other case crime number or NCR was registered or not. He denied the suggestion that G.D. of the police station was not according to the time. It is correct to state that at the time of the incident G.D. of the police station was anti time but later on it was corrected.

61. PW10- S.I. Ramesh Chandra Yadav in his deposition before the trial Court has deposed that on 28.12.2004 he was posted as Head Constable at Police Station Kotwali Tanda and on the said date he along with In-charge Inspector, namely, Sri Vinod Kumar Yadav of the said police station and other police personnel have left the same for arresting the wanted accused to village Duhia, their they came to know that the accused of Case Crime No.350 of 2004, under Sections 323, 364 I.P.C. had been seen near pontoon bridge. On believing the said information they took two witnesses from village Duhia, namely, Jairaj and Zilajeet and went from pontoon bridge to Police Station Kalwari, District Basti and they met the accused Rajan Yadav near a thatch (chappar) on the way of Kalwari towards East, who after seeing them tried to flee, but with the help of witnesses and police force, he was arrested at about 2:00 p.m. in the afternoon. On the interrogation made, he disclosed his name as Rajan Yadav and stated that on 22.12.2004 he along with accused Teja @ Tej Prakash was standing near Nagar Palika Tanda and were waiting for Sewaram and at about 9:00 p.m. in the night Sewaram, Lal Bahadur and Jairaj were going on foot in front of gate of Nagar

Palika. Thereafter, he along with Teja @ Tej Prakash apprehended Sewaram and after beating him, dragged him in the premises of Nagar Palika. Sewaram had heavily consumed liquor and when they assaulted him, he had fallen on the ground. On which the persons accompanying Sewaram, namely, Lal Bahadur and Jairaj ran to his rescue but they had also beaten Lal Bahadur, on account of which he had also fallen and when Jairaj was about to be assaulted then he fled away. Both the accused carried Sewaram on a boat and took him across the river to Karia Ki Marahi and as Sewaram had not died, hence, Teja @ Tej Prakash had shot on his head by a countrymade pistol and he died. Thereafter, both of them put off all the clothes of the deceased Sewaram and thrown his dead body in a naked condition in the mids of the river, his clothes were taken and burnt and thereafter they went to Majha. He further stated that he can show the place where the incident had taken place. The witness further stated that thereafter he along with witnesses, namely, Jai Raj and Zilajeet and other police personnel went near Karia Ki Marahi and on the pointing out of the accused, got recovered remains of burnt woolen shawl and underwear of the deceased and handed over the same to the police. The brother of the deceased, namely, Jairaj identified the same to be of his brother Sewaram. The accused further told that from there only they had thrown the dead body of the deceased in the river. The remains of the recovered bed sheet (woolen shawl) and underwear were sealed in a white clothe and he prepared the recovery memo of the same in his hand writing. The said recovery memo was signed by the In-charge Inspector and two witnesses and accused also signed the same. He proved the same as Ext. Ka.5.

62. The information regarding the dead body of the deceased being recovered on 29.12.2004 at 18:30 hrs, this witness along with other police personnel had come to the house of the deceased in Village Duhia where the body was kept. He prepared the panchayatnama on the dead body of the deceased and got the signature of the panch witnesses and their thumb impression also. On the neck of the body of the deceased there was a black thread in which two keys of iron were found. He proved the panchayatnama as Ext. Ka.13. The dead body was sealed in white cloth and he prepared the police papers, such as photo-lash, letter to C.M.O., letter to R.I. in his hand writing and signature and proved the same as Ext. Ka.14 to 17 and he also proved the sample seal of the dead body and proved the same as Ext. Ka.18. He also endorsed the information for the recovery of the dead body in G.D. No.13 at 18:00 hours on 29.12.2004.

63. The information about the recovery of the dead body was also endorsed in the G.D. by Constable Ramkesh on the application given by Jairaj, on the basis of which offence under Sections 302, 201 I.P.C. was added by him and he identified the hand writing and signature of the Constable Ramkesh whom he had seen working during service. He has also proved the carbon copy of the same as Ext. Ka.19. The woolen shawl and underwear which were recovered in burnt condition, its seal was opened before the Court and the witness after seeing the same has stated that the said woolen shawl and underwear were taken in possession by the police. He also after seeing the two keys in the black thread, which was opened before the Court, identified the same to be found on the neck of the deceased and proved the same as material Ext.7 & 12. The recovery

memo of one countrymade pistol of 12 bore and four live cartridges and arrest memo which was prepared by him, was on record, which was in his hand writing and the same was signed by the In-charge Inspector Vinod Kumar Yadav. He stated that there is signature of the said witness along with the witnesses and the accused Teja @ Tej Prakash and also thumb impression on the same and proved the same as Ext. Ka.6.

64. In his cross-examination made on behalf of the accused Teja @ Tej Prakash, this witness has stated a case under Section 3/25 of the Arms Act against the accused was registered by the In-charge Inspector Kotwali Tanda. The investigation of the case under the Arms Act was conducted by Sub Inspector Sri R.K.Kannaojia who was his subordinate and the witness was also subordinate to the said Inspector.The incident had taken place in day light and they had left the police station in the morning and he did not remember the exact time and he can tell the same after seeing it. The original G.D. was not present during the trial when his evidence was being recorded. After leaving the police station firstly they went to village Duhia. The distance of village Duhia from police station is 6 kms. It took about 1 hour in village Duhia searching the accused persons. During the said period they did not make search of any person. In village Duhia they received an information that the accused Rajan Yadav is present near pontoon bridge at Kalwari. The said information was received by the In-charge Inspector Tanda Ambedkarnagar by the informer, which was given by him in his presence.The informer after giving the said information had left the place. It was about 1:00 p.m. when they reached village Duhia along with two witnesses. On the telling of the witnesses and after enquiring the name and address, the police came to know that the accused was Rajan Yadav. The accused Rajan Yadav was arrested by all the police personnel who were on the jeep, who after alighting from the jeep suddenly apprehended the said accused. He further stated prior to the arrest of the accused, the witness along with all police personnel made search of each other,but before arresting the accused, police personnel had not given search to the accused person.

65. A suggestion was given to the witness that the deceased was a drunker which he denied. On the day of the incident the deceased was in a heavy drunken state, which this witness state that he has no knowledge about the same.

66. This witness further stated that that the accused have not committed any incident in his presence and whatever information was given to the witness, the said information was given by the accused themselves, which he came to know.The brother of the deceased Sewaram was told by Lal Bahadur that the the deceased died on account of injuries caused by hockey. He further stated that the recovery of the dead body of the deceased Sewaram was made on the 9th day of the incident, for which an information was given at the police station by his brother, namely, Jairaj Yadav and on the basis of the said information, the offences under Section 302, 201 I.P.C. were added in the case. He was not aware of the fact as to how and from where the dead body of the deceased Sewaram was recovered as the informant had given an application about the same and on his written information he came to know about the said fact. He cannot tell as to how many persons had come to the police station when the brother of the deceased had come to lodge the report. He

did not remember as to who was the scribe of the report. The recovery memo which was prepared by him, was under the instructions of In-charge Inspector, Kotwali Tanda, District Ambedkarnagar. At that time he was a subordinate staff posted under him. He prepared the recovery memo on the spot word to word on the instructions of the In-charge Inspector and it took about 2 hours for preparing the same. When the recovery memo was being prepared, besides the witness In-charge Inspector Sri Vinod Kumar Yadav, four Constables namely, Shailenda Pandey, Manoj Yadav, Ram Sawre and one more Constable whose name he did not remember and two witnesses, namely, Jairaj and Zilajeet and accused Rajan Yadav were present. Two public witnesses, namely, Zilajeet and Jairaj were also present at the time when the recovery was made. The remains of burnt clothes of the deceased was recovered at the pointing out of the accused Rajan Yadav and the same were recovered after 9 days, i.e., 28.12.2004 and the said burnt clothes were recovered near Karia Ki Marahi near bushes. The remains of burnt clothes which was recovered, was not recovered near South of Karia Ki Marahi, but towards East there is field of Raja Ram and on the West there is Thatch (chhapar) of baba. At the time of recovery of burnt clothes, there were no other public witness except the aforesaid persons, hence, there is no mention of any independent witness in the fard recovery memo. Ext. Ka.13 is the printed format of the panchayatnama.

67. He denied the suggestion that he prepared the panchayatnama and he filled up the panchayatnama on the direction of the In-charge Inspector. Jairaj is the witness of the panchayatnama, who is also the witness of the recovery memo of the burnt clothes.He has prepared the panchayatnama on 29.12.2004 and it took about 3 hours. There are in all five witnesses of the panchayatama and he along with the police constables are the police witnesses.

68. This witness denied the suggestion that the injuries found during the panchayatnama, has not been mentioned on the telling of the informant, but on his own. After completing the inquest proceeding he met the Investigating Officer at the police station who recorded his statement and the said Investigating Officer is Inspector Vinod Kumar Yadav and the second Investigating Officer was Sri R.P. Kannaojia who had recorded his statement.

69. He denied the suggestion that he did not inform the higher authorities regarding the arrest of the accused and recovery made from them. He also denied the suggestion that the accused was not informed about the reason of his arrest nor his family members were informed about the same. He did not mentioned in the fard recovery memo and arrest recovery memo about the information being given to the family members of the accused. He stated that the same is mentioned in G.D. and not in the fard recovery memo, hence, he did not mention the same in the fard recovery memo.The case property, i.e., countrymade pistol and cartridges, were not produced before the witness during his examination.The recovery memo of the countrymade pistol and cartridges which were prepared by him, were prepared on the dictation of the In-charge Inspector Kotwali Tanda, Ambedkarnagar.

70. He denied the suggestion that the accused was arrested from his house and after showing a false recovery he has been

challaned in the present case. He further denied the suggestion that he being subordinate employee of the In-charge Inspector, he is falsely deposing in the Court.

71. PW11-S.I.Rajendra Prasad has stated before the trial Court that on 01.01.2005 he was posted as Sub Inspector, Police Station Kotwali Tanda, Ambedkarnagar and on the said date he has started investigation of Case Crime No.01 of 2005. On the said date he had prepared the Chick FIR and G.D. and also recorded the statement of the accused in which he confessed his guilt and he had also given an application for recording statement under Section 164 Cr.P.C. on 02.01.2005. He recorded the statement of SHO Vinod Kumar Yadav and Head Constable Ramesh Chandra Yadav, Constable Radhey Shyam Maurya, Constable Om Prakash and Constable Ram Sabad Yadav and scribe of the F.I.R. Constable Moharrir Virendra Singh and prepared the site plan of the place of occurrence and proved the same as Ext. Ka.19. He recorded the statement of the eye witnesses, namely, Rampal and Guddu on 07.02.2005 and had drawn the proceedings of taking remand for accused Teja @ Tej Prakash. He took the orders of the District Magistrate for sanction for prosecution of the accused Teje @ Tej Prakash under the Arms Act which was given by the District Magistrate Sri Mohan Swaroop. The sanction granted in his hand writing, is on record and he has identified the signature of District Magistrate as he was acquainted with is signature while working. The prosecution for sanction he has proved as Ext. Ka.20. He submitted charge sheet against the accused Taja @ Tej Prakash being Charge Sheet No.22/05 which was in his hand writing and signature and proved the same as Ext. Ka.21.

72. This witness in his cross-examination has admitted that he was subordinate officer under the SHO Kotwali Tanda Sri Vinod Kumar Yadav. He in his case diary did not mention of starting time of investigation nor closing of the same.The date of the spot inspection of the place is mentioned but no time has been mentioned. The spot inspection of the place of occurrence was an open place which was accessible to any person. Near the place of occurrence there was a Marahi and a field and at some distance there was a way. At the place of occurrence there was frequent movement of the persons he cannot tell. He had prepared site plan at the pointing out of the informant. He has shown the distance between place "A" to "B" as one step. The place where the eye witnesses, namely, Rampal and Guddu Yadav had seen the incident and were standing, has not been shown in the site plan as they were with the police party and had seen the incident. The Ghaghra river is towards the Kacchi Sadak going through the village and at the time of the incident whether there was water in it or not he has not mentioned the same in the site plan. The sanction for prosecution is on a printed format. He is unaware of the same. On a question being put by the Court to the witness that the sanction for prosecution letter is typed one, on which the name of the District Magistrate, Ambedkarnagar Sri Mohan Swaroop is type and seal of District Magistrate, Ambedkarnagar is affixed and the signature of the District Magistrae is illegible one.

73. On his cross examination, this witness further stated that the sanction for prosecution was received under the Arms Act on 08.02.2005 at the office of police station and after receiving the sanction for prosecution he mentioned the same in the case diary. The case property was not

placed before the Court when his evidence was being recorded and the original G.D. was also not there. He had recorded the statements of eye witnesses, namely, Rampal and Guddu Yadav in village Duhia and the same was recorded on the next day and the distance of the place where the said two witnesses were residing from the place of recovery, he has not mentioned the same in the case diary. The statements of other witnesses relating to the incident was taken by him at the police station. He denied the suggestion that he being the subordinate staff of the informant, he is falsely deposing in the Court. He also denied the suggestion that under the influence of the informant he is falsely deposing against the accused. He has submitted charge sheet against the accused in the Court.

74. PW12-Constable Kailash Singh has stated in his examination before the trial Court that he was posted as Constable Moharrir at Police Station Tanda, District Ambedkarnagar on 29.12.2004 and he registered a Case Crime No.350 of 2004, under Section 323, 364 I.P.C. and he had mentioned the same in G.D. No.35 at 18:30 hours on 29.01.2004 and prepared the original G.D. in his hand writing and signature in which he added offence under Sections 302, 201 I.P.C. and recovery of the dead body and proved the G.D. as Ext. Ka.22 which is carbon copy of the original one available on record. Sub Inspector Bandhan Ram Ghuria was posted at police station Kotwali Tanda at that point of time and he had seen him writing and signging the documents, hence, he has identified his hand writing and signature and proved the site plan available on record of Case Crime No.350 of 2004 dated 22.12.2004 which was prepared and signed by S.I Bandhan Ram Ghusia.

75. In his cross-examination by the defence, this witness has stated that when and where Ext. Ka.23 was prepared he has no knowledge.The original G.D. no.22 by which sections were added, was not before him in the Court. He was not aware of the fact that the earlier Investigating Officer Bandhan Ram Ghusia was in police service or not, he is not aware of the said fact.

76. DW1-Suresh Kumar Srivastava in his deposition before the trial Court has submitted that he was a Class-IVth employee of Nagar Palika Parishad. On 01.01.2004 he was posted as Chaukidar and his duty hours was from 2:00 p.m. till 10:00 p.m. in the night. The office of Nagar Palika closes by 5:00 p.m. in the evening and after office hours of the Nagar Palika is over, the main gate etc. are closed. The boundaries of of the office of Nagar Parishad is surrounded by high walls and for entering in the premises there is only one gate and after the gate is closed, he on duty does not permit any person to enter. On 21.12.2004 his duty was in Nagar Palika Parishad as Chaukidar and his duty was up to 10 O'clock and on the said date after closing of the office and closing of the gate as per his knowledge, no one enter in the premises till 10:00 p.m. and no marpeet had taken place inside the premises of Nagar Palika Parishad at 10:00 p.m. till his duty.

77. In his cross-examination by the Prosecuting Officer on behalf of the prosecution, he has stated that the Nagar Palika Tanda closes at 5:00 p.m. in the evening and he used to remain at the gate after the office is closed. On 22.12.2004, it was winter and he used to sit under the porch and at the time when he was sitting, fire was burning and beside him there was no other person and outside the gate he

could not see anything. When he was sitting, the gate was closed. On 21.12.2004 there was fog. He knew Taja @ Tej Prakash and Rajan Yadav from before. He did not knew them by name. They used to come in Nagar Palika Tanda as per his knowledge. After the gate was closed, if he wishes to go to have tea, then he used to lock the gate and then go, when any official used to come at the door he knock the same and he used to open the gate, for attaining the nature call he used the toilet inside the premises and distance between the river Ghaghra from the Nagar Palika is about 1 Bigha and his house is situated at about 6-7 kms. away from the Nagar Palika premises and he used to come to his house by bicycle. After performing his duties he used to go by 10:15 p.m.-10:30 p.m. to his house and he used to reach to his house by 11:00-11:30 p.m.He did not go to his house before 10:00 p.m. He denied the suggestion that on 21.12.2004 he went to his house after closing the door before 10:00 p.m. in the night. He further denied the suggestion that the accused Teja @ Tej Prakash and Rajan Yadav are history sheeter and because of the fear he is not disclosing the correct fact.

78. The accused in their statements under Sections 313 Cr.P.C. have categorically denied the prosecution case and submitted that they have been falsely implicated in the present case and the present case has been registered against them in collusion between the informant and the local police on account of enmity. In their defence, documentary evidence filed by them are the true copy of the judgment and order of the trial Court dated 22.5.2004 passed in S.T. No. 933 of 1995 (State Vs. Tanuj Khanna and others) and true copy of the judgement and order dated 15.3.2008 passed by F.T.C. No.1, Ambedkarnagar in S.T. No.18 of 2003 (State Vs. Rajan Yadav), under Section 8/21 of NDPS Act, P.S. Kotwali Tanda, District Ambedkarnagar and further in their defence they have also examined DW1-Suresh Kumar Srivastava, whose evidence has been referred above.

79. The trial Court after examining the evidence led by the parties during the course of trial, found the two accused appellants to be guilty of the offences for which they have been charged and has convicted and sentenced them for the same by the impugned judgment and order.

80. Being aggrieved by the same, the accused appellants have preferred the instant appeals.

81. Heard Sri Santosh Kumar Srivastava, learned counsel for the appellants, Ms. Nand Prabha Shukla, learned A.G.A. appearing for the State and perused the lower court record.

82. The learned counsel for the appellants argued that the appellants did not have any motive to commit the murder of the deceased and the police after the recovery of the dead body of the deceased, at the instance of the informant just to show its good work, has falsely implicated the appellants in the present case though there is no cogent evidence against them that they had abducted the deceased in the presence of PW1 and PW2 and further, committed his murder.

83. It was next argued that the presence of the two eye witnesses, namely, PW1-Jairaj Yadav and PW2-Lal Bahadur at the place of occurrence is doubtful and PW2 who claims himself to be an injured witness, has turned hostile and has not

supported the prosecution case but the trial Court committed error in believing their evidence and recorded finding of conviction and sentenced the appellants without there being any cogent evidence against them.

84. It is urged by the learned counsel for the appellants that the recovery of remains of the burning clothes of the deceased at the pointing out of the accused appellant Rajan Yadav, who was arrested by the police on 28.12.2004, is also a false recovery as out of the two independent witnesses, namely, Jairaj Yadav and Zilajeet and one witness Jairaj Yadav is the informant PW1 and brother of the deceased who is highly interested and partisan witness whereas the other independent witness has not been produced by the prosecution and other persons of the recovery and arrest of the said accused who are police personnel, their evidence cannot be relied upon for the conviction and sentence of the appellants.

85. The confessional statement made by the appellant Rajan Yadav before the police is also not admissible under Section 27 of the Evidence Act. The clothes which have been recovered of the deceased, i.e., woolen bed sheet and underwear had already burnt and only ashes and remains of the said two articles were not such that they could be identified by the informant to be the clothes of this brother Sewaram. Similarly, it was argued that the arrest and recovery made from the appellant Teja @ Tej Prakash on 1.1.2005 and his confessional statement recorded by the police is not reliable one and recovery of country made pistol of 12 bore and four live cartridges, is also not reliable one and cannot be read in evidence in view of Section 27 of the Evidence Act.

86. He urged that the confessional statements of the two accused appellants which have been recorded by the police to show that they in verbatim have recorded their confessional statements in order to make out a case and prove the prosecution case as has been set up in the F.I.R. and also in the evidence of PW1 and PW2. The accused appellant Rajan Yadav was having criminal antecedents of 9 cases, whereas the accused appellant Teje @ Tej Prakash was having criminal antecedents of three cases as per the the Gang Chart and in case being S.T.No.18 of 2003 (Case Crime No.122 of 2003), under Section 8.21 of N.D.P.S. Act, P.S. Kotwali Tanda, District Ambedkarnagar appellant Rajan Yadav has been acquitted by the competent court and accused Teja @ Tej Prakash has also been acquitted in S.T. No. 933 of 1995 (Case Crime No.210 of 1995) under Sections 307/34 and S.T. No. 930 of 1994, under Section 25 Arms Act, but the trial Court has observed that the said cases were not the part of the gang chart which was filed on record.

87. Learned counsel for the appellants has lastly argued that that though initially the FIR was registered under Sections 323, 364 I.P.C. but after recovery of the dead body of the deceased was made after 9 days of the incident from an open place, the offence under Sections 302, 201 I.P.C. were added in the present case and from the post mortem report of the deceased it transpires that the deceased died on account of firearm injuries sustained by him, whereas the appellants are said to have been armed with hockey but no injury of of hard and blunt object was found on the dead body of the deceased and only on the basis of confessionals statements of the accused it has been stated by the prosecution that the appellant Teje @ Tej

Prakash fired on the head of the deceased by country-made pistol and the dead body of the deceased was thrown in the mids of the river after putting off all his clothes in a naked condition and his clothes were burnt but there appears to be no eye witness account or evidence to show that the deceased was done to death by the appellant Teje @ Tej Prakash by firearm weapon and his dead body was thrown in the river by the two accused appellants and the trial court on the basis of the circumstantial evidence with respect to the murder of the deceased, has convicted the appellants under Section 302 I.P.C. and sentenced for life imprisonment. He submitted that the appellants are in jail for the last 11 years and they have already served out the sentence awarded to them for the offence under Sections 323, 364, 201 I.P.C. & under Section 3(1) of U.P. Gangster Act and under Section 3/25 of the Arms Act. Thus, they may be released by setting aside the conviction under Section 302 I.P.C.

88. Learned A.G.A. on the other hand, has vehemently opposed the arguments advanced by the learned counsel for the appellants and submitted that from the prosecution case it is evident that the deceased was abducted by the two appellants with an intention to murder him and they also disposed of his dead body, which is evident from the evidence of PW1 Jairaj Yadav who is brother of the deceased who along with Lal Bahadur had witnessed the incident of abduction of the deceased. She further argued that the manner in which the deceased was firstly assaulted by the two appellants with hockey and thereafter was dragged in the Nagar Palika premises in the night on 21.12.2004 at 9:00 p.m. in the night and when Lal Bahadur tried to rescue him, they also assaulted him by hockey and an attempt for assault was also made by the appellants on PW1, he managed his escape good and he tried to ran away to save his life which goes to show that the deceased was abducted in the presence of the said two witnesses and further the deceased was carried away by the appellants on boat towards river and when the informant and others tried to trace the whereabouts of the deceased, he could not be traced out and his dead body was recovered after 9 days of the incident on 29.12.2004 from the riverbed, which goes to show that he was abducted by the appellants with an intention to murder him, hence the trial Court has rightly convicted and sentenced the appellants for the offences in question.

89. She further argued that at the instance of the appellant Rajan Yadav on 28.12.2004 the remains of the burnt clothes of the deceased was recovered at his pointing out and his confessional statement was recorded by the police who admitted his guilt and narrated the entire incident.

90. Similarly, the appellant Teja @ Tej Prakash who was arrested on 1.1.2005 and on his pointing out a country-made pistol of 312 bore and four live cartridges were recovered, which he had concealed and further his confessional statement too was recorded in which he admitted his guilt for the commission of the murder of the deceased along with the co-accused Rajan Yadav. She further argued that the recoveries made from the two accused appellants have been proved by the two independents witnesses and also by the police personnel who have signed the recovery memo prepared of the recovered articles from the two appellants.

91. Learned A.G.A. in support her arguments has placed reliance upon the judgment of the Apex Court reported in

(1999) 8 SCC 624, Koli Lakshmanbhai Chanabhai Vs. State of Gujarat, (2019) 8 SCC 359, Mallikarjun & Others Vs. State of Karnataka, (2014) 5 SCC 509, Dharam Deo Yadav Vs. State of U.P. & (2011) 11 SCC 111 Rameshbhai Mohanbhai Koli and Others Vs. State of Gujarat.

92. We have considered the rival submissions of learned counsel for the parties and have given thoughtful consideration for the same.

93. It is an admitted fact that the incident had taken place on 21.12.2004 at about 9:00 p.m. in the night and FIR of the same was registered on 22.12.2004 for the offence under Sections 323, 364 I.P.C. at Police Station Kotwali Tanda, District Ambedkarnagar by PW1 Jairaj Yadav, who is brother of the deceased Sewaram. On the information given by PW1 about the recovery of the dead body of the deceased at the concerned police station,Sections 302, 201 I.P.C. were added in the present case.

94. From the evidence of PW1 it is evident that he is the witness of the abduction of the deceased by the two appellants as in his presence his brother Sewaram was taken away by the appellants by dragging him after assaulting with hockey. PW2 Lal Bahadur who was also a witness of abduction has turned hostile and has stated that he did not see the two accused appellants dragging the deceased or assaulting him, though he admitted the fact that he received injuries at the hands of some persons on the day of the incident but he could not identify them. He has further denied in his cross examination that his statement under Section 161 Cr.P.C. was not recorded by the Investigating Officer and how the same has been written, he cannot tell.

95. The evidence of PW2-Lal Bahadur shows that though he was assaulted by some one at the place of occurrence on the day of incident but he failed to identify the persons who had actually assaulted him and has ruled out the involvement of the two appellants in the present case.

96. The factum of abduction of victim Sewaram has been proved by the prosecution by cogent evidence and the trial Court relying upon the evidence of PW1 has rightly convicted the appellants for the offence under Sections 323, 364 I.P.C. and further taking into account the criminal antecedents of the appellants they were also charged and prosecuted for the offence under Section 3(1) of U.P. Gangster Act which also appears to be correct one. But so far as the conviction and sentence of the appellants for the offence under Section 302 I.P.C. for life imprisonment for the murder of the deceased is concerned, the same does not seem to be a correct one as from the evidence led by the prosecution in this regard is based on the circumstantial evidence. In this regard the prosecution has relied upon the motive to the accused appellants with regard to the plying of the boat in the river and the amount charged for the same.

97. So far the motive which has been assigned to the appellants for committing the murder of the deceased by the prosecution, it is apparent from the FIR itself which was lodged by PW1 Jairaj Yadav, brother of the deceased, that two months prior to the incident there was some dispute between the appellants and the

accused for the rent being charged by the deceased who was a contractor, for getting the persons to cross the river through boat. Here it would be relevant to note that the present two appellants were not the rival contractor of the deceased which may cause them any annoyance for the charges taken by the deceased for plying the boat across the river for getting the persons cross the river and no such complaint was ever made by the deceased either to the police or any other person regarding any such dispute ever had taken place between him and the appellants. Moreover, PW1 Jairaj Yadav in his cross-examination has categorically admitted that there was no litigation or marpeet with him or with his brother Sewaram (the deceased) with the appellants. There was also no dispute of money with him or of his brother Sewaram (the deceased) with the appellants. Thus, the motive which has been suggested by the prosecution for the murder of the deceased by the appellants appears to be a weak one for the murder of the deceased Sewaram.

98. So far as the evidence of recovery which were made on the pointing out of the appellant Rajan Yadav after his arrest on 28.12.2004 and his confessional statement made before the police in which he confessed his guilt is concerned, it appears from the arrest memo which is Ext. Ka.5 that the SHO Sri Vinod Kumar Yadav (PW7) who along with other police personnel on the information received by him when he was in village Duria about the accused involved in the present case, he took PW1 Jairaj Yadav, the informant and brother of the deceased and one Zilajeet son of Thakurdeen along with other police personnel and arrested the accused Rajan Yadav who confessed his guilt and narrated the prosecution case which had taken place on 21.12.2004 and further got recovered the remains of burnt woolen bed sheet and underwear which were identified by PW1 to be of his brother. The said arrest and recovery which was made by the Investigating Officer (PW7) goes to show that he got the said confessional statement of the said accused recorded in such a manner in verbatim to make out a case in order to prove the prosecution case. It is highly improbable and beyond imagination that the accused would make such a statement without there being influenced and under the pressure of the police to confess his guilt. The independent witness of the said recovery, namely, Zilajeet has not been produced by the prosecution and no reason given by the prosecution to withhold the said witness.

99. Similarly, the arrest of the appellant Teja @ Tej Prakash on 1.1.2005 and the recovery of country-made pistol of 12 bore and four live cartridges made at his pointing out (which is Ext. Ka.6) goes to show that he was also arrested on the information given by the informer that he was sleeping at a place which is North to Marahi and on the said on the said information the Investigating Officer along with two witnesses of the village, namely, Rampal son of Sita Ram and Guddu son of Mewa Lal, arrested the accused Teja @ Tej Prakash on 1.1.2005 at 6:00 a.m. in the morning who was sleeping by wrapping a blanket and his confessional statement was also recorded in verbatim in the same manner as of the accused Rajan yadav and at his pointing out a country-made pistol of 312 bore and four live cartridges were recovered. Thus, the confessional statement of the accused and recovery which had been made from the pointing out of the said appellant also appears to be a good work of the police to work out the murder of the deceased Sewaram and the confessional

statement which has been made by the appellant Teja @ Tej Prakash also appears to be highly improbable and beyond imagination that he would confess his guilt without there being undue influence and pressure of the police for confessing the guilt.

100. It is not out of place to mention here that the statement of witness of recovery of country-made pistol, namely, Guddu Yadav (PW3) goes to show that he admitted in his cross-examination that the police had not prepared or written any papers with respect to the recovery in his presence nor had read over the same to him and when he was taken from his house, his thumb impression was also taken on a blank paper. The distance of his house from the place of recovery is about 20-25 kms., i.e., Karia Ki Marahi. So far as the other witness, namely Rampal is concerned, though in his cross-examination he has supported the recovery of countrymade pistol at the pointing out of the accused Teja @ Tej Prakash but the same does not appears to be a reliable one in the light of the evidence of PW3-Guddu Yadav as the role of the police in making false recovery from the accused Teja @ Tej Prakash in clandestine manner cannot be ruled out.

101. So far as the case which was registered under Section 3/25 of the Arms act on 1.1.2005, which was lodged by PW7 Vinod Kumar Yadav against the appellant Teja @ Tej Prakash after the recovery of countrymade pistol and four live cartridges also appears to be a foul play on the part of the In-charge Inspector of the police station Kotwali Tanda, District Ambedkarnagar to workout the murder of the deceased.

102. A suggestion was also made to the PW7 that the appellant Teja @ Tej Prakash was arrested from his house and a false recovery has been shown against him and a false FIR was also registered against him, he denied the same. He was also given a suggestion that no incident had taken place on 01.01.2005 near Karia Ki Marahi, Police Station Kotwali Tanda, District Ambedkarnagar, but he denied the same. Similarly, a suggestion was also made on behalf of the appellant Rajan Yadav that he too was arrested from his house and his confessional statement was recorded which he has also denied. But simply denial of the said suggestions could not prove the recovery made from the accused appellant free from all doubts and suspicion.

103. The confessional statements made by the two accused appellants also appears to be under the influence of the police as from perusal of the same it is evident that after abduction of the deceased, on the day of the incident, he was dragged and taken on a boat by the two appellants across the river and when they reached in the mid of the river, the deceased was shot dead by the accused Teja @ Tej Prakash by country-made pistol on his head and thereafter his clothes were put off by the appellants and his dead body was thrown in the naked condition in the mid of the river, thereafter remains of his clothes, i.e., woolen sheet and underwear were found. It appears to be highly improbable as it was a winter night and in the dark night it would not have been possible for the two appellants to carry the deceased on a boat in the river and commit such an incident. Moreover, the deceased was initially said to be mercilessly beaten by the appellants with hockey and thereafter as per the confessional statement of the appellants the deceased was shot on his head by the appellant Teja @ Tej Prakash, but neither the informant nor the

witness Lal Bahadur have stated that the appellant Teje @ Tej Prakash was ever armed with countrymade pistol or appellant Rajan was carrying any such deadly weapon with him, which further raises doubt about the incident in the manner in which it has actually taken place as being confessed by the accused appellants and coupled with the evidence of PW1.

104. The appellants no doubt are having criminal antecedents as it appears from the material available on record that they have also been tried and convicted for the offence unde Section 3(1) of the Gangster Act by the trial Court and possibility of their false implication in the present case for the murder of the deceased in the second part of the incident, cannot be ruled out as the police had an advantage of implicating them in the present case for the murder of the deceased. The conduct of the PW1 also appears to be suspicious one as he has recovered the dead body of the deceased after 9 days of the incident from the riverbed and information about the same was given to the police on 29.04.2004 which is a day after the arrest of the accused Rajan Yadav and recovery made from him on 28.4.2004 and thereafter the police just to show its good work, has manipulated the things and fabricated the evidence with respect to offence under Sections 302, 201 I.P.C. against the appellants because of their criminal antecedents as the actual assailants for the murder of the deceased could not be traced out.

105. In view of the same, the factum of the deceased being murdered by the two appellants on the basis of circumstantial evidence has not been proved beyond reasonable doubt by the prosecution.

106. As regards the evidence of last seen of PW1 Jairaj Yadav is concerned, it is relevant to point out here that the victim was abducted and taken away by the two appellants on 21.12.2004 and his dead body was found after 9 days of the incident on 29.12.2004 by the PW1 who informed the police about the same and further his belief that the victim was done to death by the appellants, the same cannot be a reliable piece of evidence as there is no proximity between the point when the accused appellants and deceased were seen together and when the deceased was found dead.

107. It would not be out of place to mention here that paragraph no.14 of the judgement of the Apex Court reported in **2020 (1) SCC 537, Shailendra Rajdev Pasvan and Ors. Vs. State of Gujarat and Ors.** on this aspect of the matter is relevant one, which is reproduced here as under:-

"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 eent involving the death at the hands of some other person. In the case of Bodh Raj Alias Bodha v. State of Jammu and Kashmir MANU/SC/0723/2002: (2002) 8 SCC 45, Rambraksh v. State of Chhattisgarh MANU/SC/0656/2017:(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."

108. In the instant case, from the evidence of PW1 Jairaj Yadav whether the deceased was with the appellants or not from 21.12.2004 till his dead body was recovered from a river-bed on 29.12.2004 has not been established by the prosecution. Moreover, it appears that when the dead body of the deceased was recovered on 29.12.2004 from river-bed and firearm injury was found on the person of the deceased, the recovery of countrymade pistol along with four live cartridges from the pointing out of the accused Teja @ Tej Prakash Yadav was made to strengthen the prosecution case along with his confessional statement. The said recovery made at the pointing out of the appellant Teja @ Tej Prakash Yadav cannot be admissible under Section 27 of the Evidence Act as it appears to be a false one and afterthought just to improve the prosecution case against the appellant Teja @ Tej Prakash Yadav.The recovery of remains of burnt clothes of the deceased Sewaram at the pointing out of the accused appellant Rajan Yadav from an open place which is accessible to all along with his confessional statement also appears to be doubtful.

109. The law regarding Section 27 of the Evidence Act, as has been pronounced by the Apex Court in its catena of decisions and in the case ***of Mukesh and Ors. Vs. State of NCT of Delhi and Ors. reported in (2017) 6 SCC1*** regarding appreciation of the statement of the statement of disclosure has to be appreciated, has been laid down in paragraph nos. 128 & 129 which is reproduced here-under:-

"128. Having reproduced the chart, now we shall refer to certain authorities on how a statement of disclosure is to be appreciated. In Pulukuri Kottaya v. Emperor, it has been observed:

"I]t is fallacious to treat the "fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

129. In Delhi Administration v. Bal Krishan and other. MANU/SC/0093/1971: (1972) 4 SCC 659, the Court, analyzing the concept, use and evidentiary value of recovered articles, expressed thus:

"7. ... Section 27 of the Evidence Act permits proof of so much of the information which is given by persons accused of an offence when in the custody of a police officer as relates distinctly to the fact thereby discovered, irrespective of whether such information amounts to a confession or not. Under Sections 25 and 26 of the Evidence Act, no confession made to a police officer whether in custody or not can be proved as against the accused. But Section 27 is by way of a proviso to these sections and a statement, even by way of confession, which distinctly relates to the fact discovered is admissible as evidence against the accused in the circumstances stated in Section 27...."

110. There is another judgment of the Apex Court reported in **(2018) 16 SCC 161, Navaneethakrishnan Vs. The State by the Inspector of Police** on this aspect, relevant paragraph nos.20 & 22 which are quoted here-under:-

"20. In this view, the information given by an accused person to a police officer leading to the discovery of a fact which may or may not prove incriminatory has been made admissible under Section 27 of the Evidence Act, 1872. Further, in Selvi (supra), this Court held as under:-

"264. In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted in accordance with Section 27 of the Evidence Act, 1872."

22. Section 27 of the Evidence Act is applicable only if the confessional statement leads to the discovery of some new fact. The relevance is limited as relates distinctly to the fact thereby discovered. In the case at hand, the Yashika Camera which was recovered at the instance of Accused No. 3 was not identified by the father as well as the mother of the deceased. In fact, the prosecution is unable to prove that the said camera actually belongs to the deceased-John Bosco. Though the mobile phone is recovered from A-1, but there is no evidence on record establishing the fact that the cell phone belongs to the deceased-John Bosco or to PW-8 as the same was not purchased in their name. Further, the prosecution failed to examine the person on whose name the cell phone was purchased to show that it originally belongs to PW-8 to prove the theory of PW-8 that he had purchased and given it to the deceased John-Bosco. Further, the material objects, viz., Nokia phone and Motor Bike do not have any bearing on the case itself. The Nokia phone was recovered from Accused No. 1 and it is not the case that it was used for the commission of crime and similarly the motor cycle so recovered was of the father of Accused No. 3 and no evidence has been adduced or produced by the prosecution as to how these objects have a bearing on the case. In fact, none of the witnesses have

identified the camera or stated the belongings of John Bosco. The said statements are inadmissible in spite of the mandate contained inSection 27 for the simple reason that it cannot be stated to have resulted in the discovery of some new fact. The material objects which the police is claimed to have recovered from the accused may well have been planted by the police. Hence, in the absence of any connecting link between the crime and the things recovered, there recovery on the behest of accused will not have any material bearing on the facts of the case."

111. The law in cases which rests on the circumstantial evidence is well settled as each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to Rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubt. The Court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes,unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions. The Court in mindful of caution by the settled principles of law and the decisions rendered by the Apex Court that in a given case like this, where the prosecution rests on the circumstantial evidence, the prosecution must place and prove all the necessary circumstances, which would constitute a complete chain without a snap and pointing to the hypothesis that except the accused, no one had committed the offence, which in the present case, the prosecution has failed to prove.

112. Thus, in view of the foregoing discussions, the conviction and sentence of the appellants under Sections 323/34, 364 I.P.C. and 3(1) of the U.P. Gangster and Antisocial Activities (Prevention) Act, 1986 by the trial Court is hereby upheld. But so far as the conviction and sentence of the appellants under Sections 302/34 and 201 I.PC. is concerned, the same is not sustainable as it is against the evidence on record. The appellants are entitled for the benefit of doubt for the murder of the deceased, hence, the conviction and sentence of the appellants under Sections 302/34 and 201 I.P.C. are hereby set aside.

113. The appellants are stated to be in jail since 2011.They shall be released forthwith, unless otherwise wanted in any other criminal case.

114. It is further directed that the accused appellants shall furnish bail bond with surety to the satisfaction of the Court concerned in terms of the provision of Section 437-A of Cr.P.C.

115. Let the lower court record be transmitted to the trial Court concerned for its information and compliance forthwith.

116. The appeal stands **partly allowed**.

(2021)03ILR A951
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.03.2021

BEFORE

THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 943 of 2013
Connected
Criminal Appeal No. 688 of 2013

Raj Kumar Savita ...Appellant
Versus
Union of India (Govt. of India)
...Opposite Party

Counsel for the Appellant:
S.R.Yadav, Ayodhya Prasad Mishra, Randhir Singh

Counsel for the Opposite Party:
I.B.Singh

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 374 - Appeals from Convictions - Section 313 Cr.P.C. - statements of appellants recorded - Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 20 (b) (ii) (C) - convicted and sentenced for ten years rigorous imprisonment with a fine - Sections 42, 50, 51,52, 53, 55 & 57 - Only on account of minor irregularities in search and seizure proceedings or sending the samples for chemical examinations, the prosecution case cannot be held doubtful, unless and until it is proved by the defence that prosecution witnesses were biased and prejudice with the appellants accused and due to which failure of justice was caused. (Para - 64)

(B) Criminal Law - The Code of criminal procedure, 1973 - Section 465 - Finding or sentence when reversible by reason of error, omission or irregularity - any error or illegality will not effect the merit of finding, sentence and order passed by the Court of competent jurisdiction unless in the opinion of the Court failure of justice was caused to the accused.(Para - 39)

(C) Criminal Law - non-production of independent witnesses - settled principle of law - statement of prosecution witnesses found reliable - only on ground of non-production of independent or other official witnesses, prosecution case story cannot be held doubtful. (Para - 61)

Appellants intercepted by D.R.I. team - Huge quantity of Hashish (Charas) transported - by two persons in Maruti 800 car white colour - search and recover the said contraband charas - contacted two public witnesses - disclosed the said information - accompany the team as witnesses in the proposed action of interception and recovery of the charas - both of them agreed - During inquiry, both the appellants admitted that charas had been kept and secreted in the said Maruti car.

HELD:- Testimony of the prosecution witnesses is wholly reliable and trust worthy. All the mandatory provisions of N.D.P.S. Act, have been complied with by the prosecution witnesses. All the evidence, proved by prosecution, leads to only conclusion that said contraband charas was being illegally transported and possessed by the appellants. The prosecution has proved its case beyond reasonable doubt. Impugned judgment and order passed by the trial Court is affirmed. (Para - 65,66)

Criminal Appeal dismissed. (E-6)

List of Cases cited:

1. St. of Punj. Vs Balbir Singh, (1994) SCC (Cri) 634,

2. Ritesh Chakarvarti Vs St. of M.P., (2007) 1 SCC (Cri) 744,

3. Karnail Singh Vs St. of Har., (2009) 8 SCC 539,

4. Rajinder Singh Vs St. of Har., (2011) 8 SCC 130,

5. Sukhdev Singh Vs St. of Har., (2013) 2 SCC 212,

6. St. of Rajasthan Vs Jagraj Singh Alias Hansa, (2016) 11 SCC 687,

7. St. of Rajasthan Vs Babu Lal, 2009 (3) JIC 612 (SC),

8. Makhan Singh vs St. of Har., (2015) 12 SCC 247,

9. Mohinder Kumar Vs St., Panji, Goa, (1998) 8 SCC 655,

10. St. of Punj. Vs Gurnam Kaur & ors., 2009 (2) JIC 267 (SC),

11. St. of Rajasthan Vs Tara Singh, 2011 (11) SCC 559,

12. Noor Aga Vs St. of Punj. & anr., 2008 (2) EFR 707,

13. Loknath Sarkar & anr. Vs St. of W.B., 2018 Crl. L. J. 1885,

14. Krishan Ch& Vs St. of H.P., 2019 (91) JIC 36 (SC),

15. U.O.I. Vs Bal Mukund & Ors., 2009 (2) EFR 218,

16. Sattan Paswan & anr. Vs St. of Bih., 2018 Crl. L. J. 3762,

17. St. of Rajasthan Vs Gurmail Singh, (2005) 3 SCC 59,

18. Central Bureau of Narcotics Vs Bahadur Singh, (2010) 15 SCC 111

19. Tofan Singh Vs St. of T.N., AIR 2020 SC 5592.

20. St. of Punj. Vs Baldev Singh (1999) 3 SCC 977,

21. Vijaysing Ch&ubha Jadeja Vs St. of Guj. (2011) 1 SCC 609,

22. St. of Punj. Vs Baljinder Singh (2019) 10 SCC 473,

23. Jeet Ram Vs Narcotics Control Bureau, Ch&igarh, AIR 2020 SC 4313

24. Mukesh Singh Vs Stae St. (Narcotics Branch of Delhi), AIR 2020 SC 4794.

25. Sajan Abraham v. St. of Kerala, (2001) 6 SCC 692,

26. Koluttumottil Razak Vs St. of Kerala, (2000) 4 SCC 465,

27. Abdul Rashid Ibrahim Mansuri Vs St. of Guj., (2000) 2 SCC 513,

28. St. of Punj. Vs Baldev Singh, (1999) 6 SCC 172

29. St. of Punj. Vs Balbir Singh, (1994) 3 SCC 299

30. Mohen Lal Vs St. of Raj., 2015 (6) 222,

31. Raveen Kumar Vs St. of H.P., AIR 2020 SC 5375,

32. Rajesh Dhiman Vs St. of H.P., (2020) 10 SCC 740,

33. Mukesh Singh Vs St. (Narcotics Branch of Delhi), AIR 2020 SC 4794

34. Gurbax Singh Vs St. of Har., (2001) 3 S.C.C. 28

35. Bahadur Singh Vs St. of Har., 2010 (4) SCC 445

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

1. Both the Criminal Appeals have been filed under Section 374, Code of Criminal Procedure, 1973 (hereinafter referred to as 'Code'), against the judgment and order dated 01.04.2013, passed by the Additional Sessions Judge, Court No.8, Lucknow, in Criminal Case No.431 of 2010 (Union of India Through Shri Brijendra Singh Sodhi, Intelligence Officer, Directorate of Revenue Intelligence, Lucknow Zone vs. Raj Kumar Savita and another), whereby the appellant-Raj Kumar

Savita of Criminal Appeal No.943 of 2013 and the appellant-Gopal Verma @ Teetu of Criminal Appeal No.688 of 2013 have been convicted and sentenced for ten years rigorous imprisonment with a fine of Rs. One Lakh, each for offence under Section 20 (b) (ii) (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as N.D.P.S. Act) with further direction that in default of payment of fine the appellants have to undergo one year each further imprisonment.

2 Since both the criminal appeals have been filed against the same judgment and order passed by the trial Court, both the appeals have been heard together and are being decided by this common judgment.

3. The prosecution case, in a nutshell, is that on 20.6.2010, at about 3.00 p.m., a secret information was received by Sunil Kumar Singh, Deputy Director, Directorate Revenue Intelligence, Zonal Unit, Lucknow (hereinafter referred to as 'D.R.I.") that huge quantity of Hashish (Charas) was being transported from Raxaul (Bihar) to Bharthana (Etawah, U.P.) by two persons in Maruti 800 car white colour, bearing registration no.U.P.80/AE 6792. The said information was conveyed to Ravindra Kumar Tewari (P.W.-2), Intelligence Officer, D.R.I. and Karunesh Srivastava (P.W.-1), Intelligence Officer, D.R.I. and a team, comprising of Ravindra Kumar Tewari (P.W.-2), Karunesh Srivastava (P.W.-1), Ashutosh Dixit, Intelligence Officer, D.R.I. and Ajeet Kumar, Sepoy D.R.I., was constituted with direction to intercept the said Maruti car, in order to search and recover the said contraband charas, transported in the said car. The team, headed by P.W.-1, also contacted two public witnesses, Sri Sajid Ali and Rinku Kumar Yadav, present near the main gate of City Montessory School near D.R.I. office and disclosed the said information to them and requested to accompany the team as witnesses in the proposed action of interception and recovery of the charas, whereupon both of them agreed. Thereafter, the team, headed by P.W.-1 along with aforesaid officers of D.R.I. and public witnesses, reached at 4.15 p.m. near Babu Banarsi Das Engineering College, at Faizabad Road, Lucknow (hereinafter referred to as B.B.D.) in a private hired taxi, stopped it near speed breaker and began to wait the said Maruti car. At about 8.30 p.m. on 20.06.2010, white colour Maruti 800 car was seen, coming from Faizabad side and when the said car as slowed down due to speed breaker, it was seen and found to be Maruti car bearing registration No.U.P.-80/AE 6792. Thereafter, the said car was intercepted and signaled to stop by P.W.-1 and other officers. As and when the car slowed down and stopped, P.W.-1 and other officers rushed towards the said car and found that two persons were sitting in it, they were informed by P.W.-1 and other officers of D.R.I., the purpose of their interception and it was also disclosed to them that since a secret information had been received that they were transporting huge quantity of charas, secreted in the said Maruti car, search of the car was to be conducted. Upon query the driver of the said Maruti car introduced himself as Raj Kumar Savita son of late Arun Kumar whereas other co-passenger introduced himself as Gopal Verma @ alias Teetu son of Jagdish Narayan Verma, both resident of Bharthana District- Etawah.

4. During inquiry, both the appellants admitted that charas had been kept and secreted in the said Maruti car. Before

conducting the search, the appellants were apprised their rights by written notice/letter (Ex.Ka.-1 and Ex.Ka.-2) as to whether they want their search before any Magistrate or Gazetted Officer, both the appellants expressed their unwillingness for their search before any Magistrate or Gazetted Officer and they consented and authorize P.W-1 and other officers of D.R.I. for their search. Upon their consent, the D.R.I. team brought the appellants along with the said car, in view of safety and security aspect as the crowd started gathering, to D.R.I. office, situated at 2/31, Vishal Khand, Gomti Nagar, Lucknow, at about 9.30 p.m. Thereafter search of the said Maruti car was conducted by D.R.I. team in presence of public witnesses and at the instance and disclosures of appellant Gopal Verma @ Teetu, 73 rectangular shaped Bars (Battis) (Material Ex.-1 to Material Ex.-73) of charas (each Bar of approximate 500 Grams in weight) were recovered, which were secreted behind the panel cover of four doors, doors of dickey, back side cover of back seat and also from secret space, created in the back portion of the hand brake of the said car, which, on weighing, was found as 36 kgs. Small quantity of charas was scratched by knife from each recovered charas Bar in uniform process, mixed thereafter and four representative samples, each of 25 grams approximately, were drawn and sealed with D.R.I seal on packets, which was signed by both the appellants, D.R.I. officers and independent witnesses. The remaining charas was also sealed in other bag with D.R.I. seal and was also signed by the appellants, D.R.I. officers and independent witnesses.

5. Upon personal search of appellant Gopal Verma Rs.500/- and from appellant Raj Kumar Savita Rs.300/- were also recovered, which were returned to them. Appellant Gopal Verma @ Teetu had also told that he was by profession a goldsmith and one Babloo, resident of Bharthana District- Etawah, had told him that there might be huge profit in smuggling of charas from Nepal. He further stated that Babloo had also advised him to go to Raxaul to smuggle charas and he would cause it sold. He further stated that he had also gone with said Babloo, four months ago to Raxaul and met there with a person named Muslim, who had provided his mobile, bearing no. 9807223995 and assured him that whenever he want for delivery of goods (charas) he may talk with him. He further stated that by arranging the money he had reached on 19.6.2020 to Raxaul, met with said Muslim at 8.00 a.m. and had given Rs.45,000/- to him. He further stated that thereafter the said Muslim took his Maruti 800 car and went towards Raxaul border, assuring him that he would handover the car with loaded mall (charas) on 20.6.2010. He further stated that the said Muslim on fixed date, time and place, handed over the car after showing the charas concealed/secreted behind the door panels and hand brake of the car. He further stated that thereafter he and appellant Raj Kumar Savita arrived Lucknow from Raxaul via Sogauli, Motihari, Gopalganj and Gorakhpur, but they were caught by the D.R.I. team.

6. From the search of the said Maruti car, insurance paper (Ex.Ka.4), registration certificate (Ex.Ka.5), driving licence (Ex.Ka.6) were also recovered. According to which owner of the car was Sri Narayan Singh Chahar and said car was insured and driving licence was issued in favour of appellant Raj Kumar Savita. Karunesh Srivastava (P.W.-1) prepared recovery memo (Ex.Ka.-3), arrest memos (Ex.Ka-7 and Ex.Ka.-8).

7. Representative samples of the said contraband charas were also sent for chemical examination to the Opium Factory, Gazipur and Central Revenue Control Laboratory (CRCL), New Delhi along with required test memos along with request letter (Ext.Ka.9 to Ex.Ka.-12), prepared by P.W.-1 at the time of recovery. In addition to above, in compliance of Section 57 of the N.D.P.S. Act and information/letter (Ex.Ka.-13) was also sent to the Senior Intelligence Officer, D.R.I., Lucknow. Inventory of ceased contraband charas (Ex.Ka.14) was also prepared and the appellants were produced before Pramod Kumar (P.W.-3), Senior Intelligence Officer, D.R.I. for their statements under Section 67 of the N.D.P.S. Act, who recorded the statements of appellant Gopal Verma @ Teetu (Ex.Ka.-16) and statement of appellant Raj Kumar Savita (Ex.Ka.17). The contraband goods along with appellants were produced before the concerned Additional Sessions Judge, Lucknow on 21.06.2010.

8. Investigation was entrusted to Brijendra Singh Sodhi (P.W.-4), who during investigation inspected the place of occurrence, recorded the statement of witnesses as well as appellants and also perused the chemical examinations reports (Ex.Ka.21 and Ex.Ka.22) and after conclusion of investigation, filed a complaint (Ex.Ka.23) against the appellants before the trial Court.

9. Charges under Section 20 (b) (ii) (C) N.D.P.S. Act were framed against the appellants to which they denied and claimed for trial.

10. The prosecution in order to prove its case examined Karunesh Srivastava, Intelligence Officer, D.R.I. (P.W.-1), Ravindra Kumar Tewari, Intelligence Officer, D.R.I. (P.W.-2), Pramod Kumar, Senior Intelligence Officer (P.W.-3), Brijendra Singh Sodhi, Superintendent Custom and Excise (P.W.-4), A.P. Singh, Inspector, Central Custom Excise Duty (P.W.-5).

11. After conclusion of prosecution evidence, statements of appellants under Section 313 Cr.P.C. were recorded wherein they denied the prosecution story and evidence and stated that they were innocent and had been falsely implicated.

12. In defence the appellants did not produce any evidence.

13. Upon conclusion of trial, the trial Court, vide impugned judgment and order, convicted and sentenced the appellants as above. Aggrieved by the said judgment and order, the appellants have preferred these appeals.

14. I have heard Sri A.P. Mishra, learned counsel for the appellants and Sri Digvijay Nath Dubey, learned counsel for the D.R.I./respondents.

15. Learned counsel for the appellants has submitted that appellants are innocent and have been falsely implicated. Learned counsel further submitted that the said recovery has been made in gross violation of Sections 42, 50, 52, 55 and 57 of the N.D.P.S. Act.

16. Learned counsel further submitted that according to prosecution story, on telephonic information, instruction was received by P.W.-2 at about 3.00 p.m. on 20.6.2010 but it was not reduced in writing whereas search was made at about 8.30 p.m. and continued afterward. Learned

counsel further submitted that before the search of said car, reasons and grounds of the search was also neither recorded by P.W.-2 nor was sent to his immediate superior officer. Learned counsel further submitted that superior officer i.e. Deputy Director of D.R.I. Department who got the information and gave direction to P.W.-2 to constitute a team and raid there, was also not examined by the prosecution. Learned counsel further submitted that mandatory provisions of Section 50 was also violated as the appellants were not apprised their legal right to be searched before any Gazetted officer or Magistrate because in the consent memo it has not been mentioned that appellants had right to be searched before Gazetted officer or Magistrate. Further, learned counsel also submitted that signatures of independent witnesses were also not taken on the consent memo. Learned counsel further submitted that independent witnesses Sajid and Rinku Kumar Yadav were professional witnesses, they were taken into the company of D.R.I. team, nearby D.R.I. office and no independent witnesses were taken nearby all the places of search and interception. Learned counsel further submitted that the independent witnesses were also not examined. Learned counsel further submitted that the provision of Section 57 of the N.D.P.S. Act was also not complied with because if any report was sent to S.I.O. (Senior Investigating Officer) prosecution has to produce him to prove that report.

17. Learned counsel further submitted that the recovered charas was deposited in Malkhana on 23.06.2010 whereas the recovery was made on 20/21.6.2010 and P.W.-2 had admitted that after recovery of charas it was handed over to office peon of the D.R.I. Learned counsel further submitted that provisions of Section 53 of the N.D.P.S. Act was also not complied with. Learned counsel further submitted that prosecution has also failed to prove as to when the recovered charas was sent to Malkhana because Malkhana register and Malkhana Incharge was not produced.

18. Learned counsel further submitted that at the time of recovery Karunesh Srivastava (P.W.-1) and Ravindra Kumar Tewari (P.W.-2), both were present but whole proceeding of recovery was conducted only by Karunesh Srivastava (P.W.-1), which shows that Ravindra Kumar Tewari (P.W.-2) was not present at the time of occurrence and did not make any efforts to co-operate in the proceedings.

19. Learned counsel further submitted that sample seal was required to be sent separately and not with the sample of contraband recovered charas, to chemical laboratory for analysis whereas in this case sample seal along with the sample of recovered charas was sent together. Learned counsel further submitted that photography of the vehicle/car was also conducted but neither car nor the said photo was produced before the trial Court.

20. Learned counsel further submitted that learned trial Court did not consider the evidence available on record in proper and legal manner and passed the impugned judgment and order in very cursory and casual manner, which is liable to be set-aside.

21. Per contra, learned counsel appearing for respondent/D.R.I. (Union of India) vehemently opposed and submitted that the prosecution has proved its case beyond reasonable doubt. Learned counsel

further submitted that alleged huge quantity of the contraband charas was recovered from the car driven and possessed by the appellants. Learned counsel further submitted that no contraband material has been recovered from personal search of the appellants whereas the alleged search was made only after apprising the right as provided under Section 50 of the N.D.P.S. Act, to the appellants. Learned counsel further submitted that in this case provision of section 50 of the N.D.P.S. Act is not applicable as no contraband charas was recovered from the personal search of the appellants whereas huge quantity of charas, secreted in the said car, was recovered.

22. Learned counsel for respondent/D.R.I. further submitted that due information, as required under Section 42 of the N.D.P.S. Act, was given to the superior officer by P.W.-1. Learned counsel further submitted that all the mandatory provisions of the N.D.P.S. Act was fully complied with by the prosecution whereas the appellants have neither produced any evidence in their defence nor stated any thing as to whether any prejudice was caused to them by irregularity, if any, committed by the prosecution witnesses.

23. Learned counsel further submitted that the prosecution witnesses are fully reliable and trustworthy and they have fully supported the prosecution story, nothing have come out in their cross examination which creates any doubt in prosecution story. Learned counsel further submitted that prosecution story cannot be disbelieved only on account of non production of independent witnesses and other official witnesses. Learned counsel further submitted that the impugned judgment and order is legal, well reasoned, well discussed and it requires no interference whereas the appeal is liable to be dismissed.

24. In support of the aforesaid submissions, Sri A.P. Mishra, learned counsel for the appellants, placed reliance on law laid down by Hon'ble Supreme Court in ***State of Punjab Vs. Balbir Singh***, (1994) SCC (Cri) 634, ***Ritesh Chakarvarti Vs. State of M.P.,*** (2007) 1 SCC (Cri) 744, ***Karnail Singh Vs. State of Haryana***, (2009) 8 SCC 539, ***Rajinder Singh Vs. State of Haryana,*** (2011) 8 SCC 130, ***Sukhdev Singh Vs. State of Haryana***, (2013) 2 SCC 212, ***State of Rajasthan Vs. Jagraj Singh Alias Hansa***, (2016) 11 SCC 687, ***State of Rajasthan vs. Babu Lal,*** 2009 (3) JIC 612 (SC), ***Makhan Singh vs State of Haryana***, (2015) 12 SCC 247, ***Mohinder Kumar vs. State, Panji, Goa,*** (1998) 8 SCC 655, ***State of Punjab vs. Gurnam Kaur and others***, 2009 (2) JIC 267 (SC), ***State of Rajasthan vs. Tara Singh***, 2011 (11) SCC 559, Noor ***Aga vs. State of Punjab and another***, 2008 (2) EFR 707, ***Loknath Sarkar and another vs. State of West Bengal***, 2018 Crl. L. J. 1885, ***Krishan Chand vs. State of H.P***., 2019 (91) JIC 36 (SC), ***U.O.I. vs. Bal Mukund & Ors***., 2009 (2) EFR 218, ***Sattan Paswan and another vs. State of Bihar,*** 2018 Crl. L. J. 3762, ***State of Rajasthan vs. Gurmail Singh,*** (2005) 3 SCC 59, *Central Bureau of Narcotics vs. Bahadur Singh*, (2010) 15 SCC 111 and ***Tofan Singh vs. State of Tamil Nadu***, AIR 2020 SC 5592.

25. Since the severe punishment has been provided for the offence under N.D.P.S. Act, some provisions, in order to check the misuse of N.D.P.S. Act by the concerned official, has also been provided.

26. Since the learned counsel for the appellant also submitted that provisions of Sections 42, 50, 52, 53, 55, 57 of the N.D.P.S. Act was not complied with, before any discussion on the merit of the case, it would be relevant to discuss the provisions contained in Sections 42, 50, 52, 53, 55 and 57 of the N.D.P.S. Act, which are as under :-

42. Power of entry, search, seizure and arrest without warrant or authorisation.

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intellegence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act: Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

50. Conditions under which search of persons shall be conducted.

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.

52. Disposal of persons arrested and articles seized-

(1) Any officer arresting a person under section 41, section 42, section 43 or section 44 shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under warrant issued under sub-section (1) of section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

(e) Every person arrested and article seized under sub-section (2) of section 41, section 42, section 43 or section 44 shall be forwarded without unnecessary delay to

(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered under section 53.

(4) the authority or officer to whom any person or article is forwarded under sub-section (2) or sub-section (3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article.

53. Power to invest officers of certain departments with powers of an officer-in-charge of a police station.

(1) The Central Government, after consultation with the State Government, may, by notification published in the Official Gazette, invest any officer of

the department of central excise, narcotics, customs, revenue intelligence 1[or any other department of the Central Government including para-military forces or armed forces] or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of the offences under this Act.

(2) The State Government may, by notification published in the Official Gazette, invest any officer of the department of drugs control, revenue or excise or any other department or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of offences under this Act.

55. Police to take charge of articles seized and delivered*- An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.*

57. Report of arrest and seizure *- Whenever any person makes any arrest or seizure, under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior."*

27. From perusal of aforesaid provisions, it transpires that basic purpose of the N.D.P.S. Act is that the search and seizure, made by any authorized officer, must be either in execution of any warrant issued by the Magistrate or prior authorization of the Gazetted officer or in the presence of Gazetted officer or Magistrate, if required by the accused in the matter of his personal search. Further, information regarding search and seizure must be within the knowledge and cognizance of superior officer within the prescribed time, as provided in the Act. Further, the ground of arrest must be communicated to accused, recovered contraband drugs be deposited in Malkhana without any delay and representative sample be sent for chemical examination immediately.

28. Law relating to compliance of Sections 42, 50 and other provisions of N.D.P.S. Act, regarding search and seizure, has now been settled by the larger bench/constitutional bench of Hon'ble Supreme Court in ***Karnail Singh case (Supra), Balbir Singh case (Supra), State of Punjab vs. Baldev Singh*** (1999) 3 SCC 977, ***Vijaysing Chandubha Jadeja vs. State of Gujrat*** (2011) 1 SCC 609, ***State of Punjab vs. Baljinder Singh*** (2019) 10 SCC 473, ***Jeet Ram vs. Narcotics Control Bureau, Chandigarh,*** AIR 2020 SC 4313 and *Mukesh Singh vs. Stae State (Narcotics Branch of Delhi),* AIR 2020 SC 4794.

29. Constitutional Bench of Hon'ble Supreme Court in Karnail Singh case (Supra) while discussing the scope of Sections 42 (1) & (2) i.e. statutory requirement of reducing to record the information and reason of belief and conveying it to superior officer, held that no straight jacket formula in this regard could be evolved and in view of invention of cellular phones and wireless services in India, the same may differ from facts and

circumstances of each case. Hon'ble Supreme Court, while considering earlier law laid down in Sajan Abraham v. State of Kerala, (2001) 6 SCC 692, ***Koluttumottil Razak Vs. State of Kerala,*** (2000) 4 SCC 465, ***Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat,*** (2000) 2 SCC 513, ***State of Punjab Vs. Baldev Singh***, (1999) 6 SCC 172 and ***State of Punjab Vs. Balbir Singh***, (1994) 3 SCC 299 on the point of Section 42 of the Act, upholding the validity of law laid down in ***Sajan Abraham case (Supra)*** where the non compliance of Section 42 was held non fatal to the prosecution, has observed as under :-

"***32***. *Under Section 42(2) as it stood prior to the amendment, such empowered officer who takes down any information in writing or records the grounds under the proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior.* ***If there is total non-compliance with this provision the same would adversely affect the prosecution case and to that extent it is mandatory. But if there is delay, whether it was undue or whether the same has been explained or not, will be a question of fact in each case, it is to be concluded that the mandatory enforcement of the provisions of Section 42 of the Act non-compliance with which may vitiate a trial has been restricted only to the provision of sending a copy of the information written down by the empowered officer to the immediate official superior and not to any other condition of the section.***

33.Abdul Rashid [(2000) 2 SCC 513 : 2000 SCC (Cri) 496] had been decided on 1-2-2000 but thereafter Section 42 has been amended with effect from 2-10-2001 and the time of sending such report of the required information has been specified to be within 72 hours of writing down the same. The relaxation by the legislature is evidently only to uphold the object of the Act. ***The question of mandatory application of the provision can be answered in the light of the said amendment. The non-compliance with the said provision may not vitiate the trial if it does not cause any prejudice to the accused.***

34. The advent of cellular phones and wireless services in India has assured certain expectation regarding the quality, reliability and usefulness of the instantaneous messages. This technology has taken part in the system of police administration and investigation while growing consensus among the policymakers about it. Now for the last two decades police investigation has gone through a sea change. Law enforcement officials can easily access any information anywhere even when they are on the move and not physically present in the police station or their respective offices. For this change of circumstances, it may not be possible all the time to record the information which is collected through mobile phone communication in the register/records kept for those purposes in the police station or the respective offices of the authorised officials in the Act if the emergency of the situation so requires. As a result, if the statutory provision under Sections 41(2) and 42(2) of the Act of writing down the information is interpreted as a mandatory provision, it will disable the haste of an emergency situation and may turn out to be in vain with regard to the criminal search and seizure. These provisions should not be misused by the wrongdoers/offenders as a major ground for acquittal. Consequently, these provisions should be taken as a

discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug peddlers.

35. In conclusion, what is to be noticed is that Abdul Rashid [(2000) 2 SCC 513 : 2000 SCC (Cri) 496] did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham [(2001) 6 SCC 692 : 2001 SCC (Cri) 1217] hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got

strengthened with the amendment to Section 42 by Act 9 of 2001."

(Emphasis supplied)

30. In ***Balbir Singh case (Supra***), three judges Bench of Hon'ble Supreme Court while considering the nature and scope of Sections 41, 42 and 50 of the Act has held as under :

"25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:

(1) .....

(2-A) .....

(2-B) .....

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is

obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case."

(Emphasis supplied)

31. In ***Rajendra Singh case (Supra) and Mohen Lal Vs. State of Rajasthan***, 2015 (6) 222, Hon'ble Supreme Court again while placing the reliance on law laid down in Karnail Singh (Supra) has held that total non compliance of provisions of Section 42 is not permissible whereas substantial or delayed compliance of the provisions of this section is acceptable.

32. In ***Baldev Singh case (Supra)***, Hon'ble Supreme Court while discussing the nature and scope of Section 52 on the point of recovery from personal search and the right of accused, provided in this provision, constitutional Bench of Hon'ble Supreme Court has held as under :-

"55. On the basis of the reasoning and discussion above, the following conclusions arise : (1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. ***However, such information may not necessarily be in writing;***

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;

(3) That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, ***where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act;***

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must

be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. ***That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.***

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut- sho rt a criminal trial;

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search;

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act

(9) That the judgment in Pooran Mal's case cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search;

(10) That the judgment in Ali Mustaffa's case correctly interprets and distinguishes the judgment in Pooran Mal's case and the broad observations made in Pirthi Chand's case and Jasbir Singh's case

are not in tune with the correct exposition of law as laid down in Pooran Mal's case."

33. In **Vijaysing Chandubha Jadeja case (Supra)** while discussing the scope of Section 50 of N.D.P.S. Act, the Constitutional Bench of Supreme Court, observing that mere informing the accused his willingness to be searched before Gazetted Officer or Magistrate is not sufficient but it is the duty of the concerned officer to apprise the accused about his/her right of Section 50 of the Act, has held as under :-

*"22. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision. As observed in Re Presidential Poll, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole." **We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out** from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra). **Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer.** It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."*

34. Three Judges Bench of Hon'ble Supreme Court in ***Baljinder Singh case (Supra)***, where the recovery of contraband goods was made from the car and not from the personal search of accused, has held as under :

"15. As regards applicability of the requirements under Section 50 of the Act are concerned, it is well settled that

the mandate of Section 50 of the Act is confined to "personal search" and not to search of a vehicle or a container or premises.

16. The conclusion (3) as recorded by the Constitution Bench in Para 57 of its judgment in Baldev Singh clearly states that the conviction may not be based "only" on the basis of possession of an illicit article recovered from personal search in violation of the requirements under Section 50 of the Act but if there be other evidence on record, such material can certainly be looked into.

In the instant case, the personal search of the accused did not result in recovery of any contraband. Even if there was any such recovery, the same could not be relied upon for want of compliance of the requirements of Section 50 of the Act. But the search of the vehicle and recovery of contraband pursuant thereto having stood proved, merely because there was non-compliance of Section 50 of the Act as far as "personal search" was concerned, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle. Any such idea would be directly in the teeth of conclusion (3) as aforesaid.

17. The decision of this Court in Dilip's case, however, has not adverted to the distinction as discussed hereinabove and proceeded to confer advantage upon the accused even in respect of recovery from the vehicle, on the ground that the requirements of Section 50 relating to personal search were not complied with. In our view, the decision of this Court in said judgment in Dilip's case is not correct and is opposed to the law laid down by this Court in Baldev Singh and other judgments.

18. Since in the present matter, seven bags of poppy husk each weighing 34 kgs. were found from the vehicle which was being driven by accused- Baljinder Singh with the other accused accompanying him, their presence and possession of the contraband material stood completely established."

35. In ***Jeet Ram case (Supra***), where 30 Kg Charas was recovered from the gunny bag placed just below the counter of Dhaba, owned by the appellant, appellant was acquitted by trial Court on the ground of non production of independent witness failure of compliance of Section 50 of the Act but in appeal, filed by the State, judgment and order of trial Court was set aside and the appellant was convicted. In appeal, preferred by the appellant-accused, three judges Bench of Hon'ble Supreme Court has held as under :

*"**10.** It is mainly contended by learned counsel for the appellant that the High Court/appellate Court was not justified in interfering with the judgment of acquittal passed by the trial court merely because another view is possible. As noted earlier, in support of his argument that merely because another view is possible, same is no ground to interfere with the judgment of acquittal by the appellate court, the learned counsel has relied on judgments of this Court in the case of Bal Mukund (2009) 12 SCC 161, Francis Stanly (2006) 13 SCC 210 and Rangaiah (2008) 16 SCC 737. To counter the said submission, the learned Additional Solicitor General Sri Aman Lekhi has submitted that it is always open to the appellate court to review the evidence on record upon which order of acquittal is founded and if it comes to conclusion that the order passed by the trial court is*

erroneous and unreasonable, it is always open for the appellate court to interfere with the order of acquittal. It is contended that the view taken by the trial court is not a possible view having regard to evidence on record. Such erroneous finding can be corrected by the appellate court. In support of his argument, the learned Additional Solicitor General has placed reliance on the judgments of this Court in the case of Sanwat Singh (1961) 3 SCR 126, Damodarprasad Chandrikaprasad (1972) 1 SCC 107 and Vinod Kumar (2015) 3 SCC 138. Though the ratio laid down in the judgments relied on by the learned counsel for the appellant is that the appellate court would not interfere with the judgment of acquittal only because another view is possible but at the same time whether the findings recorded by the trial court in support of acquittal are valid or not is a matter which is to be considered with reference to facts of each case and evidence on record. ***On close scrutiny of the depositions of the witnesses examined on behalf of the prosecution as well as on behalf of the accused, we are of the view that the findings recorded by the trial court are contrary to evidence on record and view taken by the trial court was not possible at all, as such the High Court rightly interfered with the same and recorded its own findings to convict the appellant. The trial court acquitted the appellant mainly on the ground that prosecution case was not supported by independent witnesses; conscious possession was not proved; non-compliance of Section 50 of the NDPS Act; proper procedure was not followed in sending the samples for examination and the case of the prosecution was unnatural and improbable. As rightly held by the High Court, this Court in the case of State of H.P. v. Pawan Kumar (2005) 4 SCC 350 has held that Section 50 of the NDPS Act is applicable only in the case of personal search, as such, there is no basis for the findings recorded by the trial court that there was non-compliance of provision under Section 50 of the NDPS Act. Even with regard to the finding of the trial court that the case of the prosecution was not supported by independent witnesses, it is clear from the evidence on record that the incident had happened at about 10 : 30 p.m. in a dhaba which is away from the village site and all other persons who are found in the dhaba were the servants of the accused.*** *It is also clear from the evidence on record that Suresh Kumar and Attar Singh examined on behalf of the appellant are closely related to the accused, as such, they could not be said to be independent witnesses. Pappu was the only other person who is none other than the servant of the dhaba and we cannot expect such a person to be a witness against his own master. Dealing with the issue of conscious possession, it is to be noticed that dhaba is constructed on the land which belongs to Kaushalya Devi who is none other than the wife of the accused. Further in deposition PW-4 has stated that when the accused was questioned as to who was the owner of the dhaba, he claimed to be the owner. The case of the prosecution was found to be unnatural and improbable by the trial court only on the ground that 13 Kg. of charas was lying in open in a gunny bag. The trial court found that it is not believable that any person would keep such a huge quantity of charas in open condition. It is clear from the evidence of prosecution witnesses that the officials of NCB got information that trafficking of charas was going on in the area in question. Two police parties had left for Theog - one party headed by PW-4 R.P. Singh started earlier and second party*

headed by PW-1 Rakesh Goyal left a little later from Shimla. Thus the depositions of PW-4 R.P. Singh; PW-3 O.P. Bhat; PW-1 Rakesh Goyal and PW-2 Hayat Singh are consistent and trustworthy and cannot be said to be unnatural and improbable. Further it is also to be noted that the trial court has held that seal with which samples and remaining bulk of charas was sealed was handed over to PW-1 Rakesh Goyal who himself gave the sample to PW-2 for carrying to Central Laboratory at Delhi and since the seals remained with the Director, the chances of tampering could not be ruled out. In this regard, it is to be noticed, as rightly held by the High Court, that the trial court totally lost sight of the fact that on 19.06.2001 JMIC, Theog had also appended his signatures on the samples as well as bulk parcels and, therefore, there was no chance of tampering of the samples. Further, there was no such suggestion of tampering either put to PW-1 Rakesh Goyal or to PW-2 Hayat Singh.

11. *For the aforesaid reasons, we are of the clear view that the view taken by the trial court was not at all possible, having regard to the evidence on record and findings which are erroneously recorded contrary to evidence on record were rightly set aside by the High Court."*

(Emphasis supplied)

36. Three Judges Bench of Hon'ble Supreme Court, on failure of prosecution to examine and produce the independent witnesses, in ***Raveen Kumar vs. State of Himachal Padesh,*** AIR 2020 SC 5375, has held as under :

""Para 19- It would be gainsaid that lack of independent witnesses are not fatal to the prosecution case. However, such omissions cast an added duty on Courts to adopt a greater-degree of care while scrutinising the testimonies of the police officers, which if found reliable can form the basis of a successful conviction."

37. In ***Rajesh Dhiman Vs. State of Himanchal Pradesh***, (2020) 10 SCC 740, where the prosecution was failed to produce independent witnesses ; the independent witnesses produced by the prosecution, were declared hostile ; appellant accused was acquitted by the trial Court from offence of N.D.P.S. Act, carrying illegal 2 kgs. and 800 grams charas but the High Court set-aside the acquittal of the accused appellant and convicted him, in appeal, three judges Bench of Hon'ble Supreme Court while relying on law laid down by constitutional Bench in ***Mukesh Singh Vs. State (Narcotics Branch of Delhi),*** AIR 2020 SC 4794 has held as under :

"*12. We, therefore, see no reason to draw any adverse inference against PW 8 himself investigating his complaint. The appellants' claim of bias stems from the purported delays, non-compliance of statutory mandates and non-examination of independent witness. In effect, the appellants are seeking to circuitously use the very same arguments which have individually been held by the High Court to be factually incorrect or legally irrelevant.* ***Although in some cases, certain actions (or lack thereof) by the investigating officer might indicate bias; but mere deficiencies in investigation or chinks in the prosecution case cannot be the sole basis for concluding bias. The appellants have at no stage claimed that there existed any enmity or other motive for the police to falsely implicate them and let the real culprits walk free. Further, such a huge***

quantity of charas could not have been planted against the appellants by the police on its own.

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19. As correctly appreciated by the High Court in detail, non-examination of independent witnesses would not ipso facto entitle one to seek acquittal. Though a heightened standard of care is imposed on the court in such instances but there is nothing to suggest that the High Court was not cognizant of this duty. Rather, the consequence of upholding the trial court's reasoning would amount to compulsory examination of each and every witness attached to the formation of a document. Not only is the imposition of such a standard of proof unsupported by statute but it is also unreasonably onerous in our opinion*. The High Court has rightly relied upon the testimonies of the government officials having found them to be impeccable after detailed reappreciation of the entire evidence. We see no reason to disagree with such finding(s)."*

(Emphasis supplied)

38. It is also pertinent to mention at this juncture that the provision of the Code, if not inconsistent, is applicable on the warrant, arrest, search and seizure made under the N.D.P.S. Act as provided by Section 51 of the N.D.P.S. Act, which is as under :-

"Section 51. Provisions of the Code of Criminal Procedure, 1973 to apply to warrants, arrests, searches and seizures*.- The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, in so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act."*

39. It is also pertinent to note that any error or illegality will not effect the merit of finding, sentence and order passed by the Court of competent jurisdiction unless in the opinion of the Court failure of justice was caused to the accused. Section 465 of the Code is relevant in this regard, which is as under :-

"Section 465. Finding or sentence when reversible by reason of error, omission or irregularity *- (1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the compliant, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.*

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

40. In ***Mukesh Singh case (Supra)*** Constitutional Bench of Hon'ble Supreme Court, while discussing the provisions relating to search, seizure and investigation as provided under Sections 41 to 43, 49 to 55, 57 and 57-A of N.D.P.S. Act, Section 154 to 157 and 465 of the Code and Section 114 Evidence Act, has held that only on the ground that investigation was conducted by

the informant, prosecution case will not be effected unless it is proved by the accused that a failure of justice was happened with him, as the prosecution witnesses were biased. Hon'ble Supreme Court has held as under :

"12. From the above discussion and for the reasons stated above, we conclude and answer the reference as under :

I. That the observations of this Court in the cases of Bhagwan Singh v. State of Rajasthan (1976) 1 SCC 15 : (AIR 1976 SC 985); Megha Singh v. State of Haryana (1996) 11 SCC 709 : (AIR 1995 SC 2339); and State by Inspector of Police, NIB, Tamil Nadu v. Rajangam (2010) 15 SCC 369 and the acquittal of the accused by this Court on the ground that as the informant and the investigator was the same, it has vitiated the trial and the accused is entitled to acquittal are to be treated to be confined to their own facts. ***It cannot be said that in the aforesaid decisions, this Court laid down any general proposition of law that in each and every case where the informant is the investigator there is a bias caused to the accused and the entire prosecution case is to be disbelieved and the accused is entitled to acquittal.***

II. In a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. ***Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case to case basis****. A contrary decision of this Court in the case of Mohan Lal v. State of Punjab (2018) 17 SCC 627 and any other decision taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled."*

(Emphasis supplied)

41. Thus, in view of the law laid down by Hon'ble Apex Court ***in Karnail Singh case (Supra), Baldev Singh case (Supra), Balbir Singh case (Supra), Vijay Singh case (Supra), Baljinder Singh case (Supra), Jeet Ram case (Supra), Rajesh Dhiman case (Supra), Mukesh Singh case (Supra) and Raveen Kumar case (Supra)***, it is clear that literal compliance of aforesaid mandatory provisions are not required whereas it depend upon the facts and circumstances of each case and no straight jacket formula can be propounded. It has also been laid down by Apex Court that if the substantial compliance of mandatory provisions of N.D.P.S. Act has been made by the concerned officers as required under Sections 42 and 50 including other provisions of N.D.P.S. Act and no prejudice has been caused to the accused, the prosecution case cannot be disbelieved.

42. It has also been laid down by Hon'ble Apex Court that for non-production of independent witness, the statement of official witnesses cannot be disbelieved unless the accused proved that the prosecution witnesses were biased or the failure of justice was caused to him. It has also been laid down by Hon'ble Apex Court that if a contraband narcotic drugs is not recovered from personal search of

accused, rather it was recovered from any vehicle or bag carried/possessed by him, the provisions of Section 50 of the Act will not apply. Similarly, it is also laid down by Hon'ble Apex Court that taking down the information regarding illegal narcotic drugs, possessed by any person, or recording the ground of his belief by concerned officer and sending it within time limit, as provided under Section 42 of the N.D.P.S. Act, depends upon the facts and circumstances of the case. Further, it has also been held that unless there is total non-compliance of provision Section 42, any irregularities in this regard, will not affect the prosecution case.

43. Thus, in view of law laid down by Hon'ble Supreme Court in the aforesaid case laws, it is clear that the procedure safeguard provided under Code as well as under N.D.P.S. Act, are only to ensure to prevent the failure of justice caused to accused and also to ensure the prevention and punishment of illegal use, possession and transportation of narcotic drugs so that the society may be saved from the menace or danger of illegal use of narcotic drugs.

44. In the light of above settled provisions of law, laid down by Hon'ble Supreme Court, it has to be examined as to whether the prosecution has succeeded to prove its case beyond reasonable doubt or whether there is any breach of mandatory provisions of N.D.P.S. Act, which has caused failure of justice or prejudice to the appellants.

45. Karunesh Srivastava (P.W.-1) has stated that he was posted as Intelligence Officer, D.R.I., Zone Lucknow on 20.6.2010 and was informed on his Cell phone by the Deputy Director, D.R.I., Lucknow at about 3:00 p.m. that huge quantity of charas, secreted in white colour Maruti 800 car bearing registration No.UP80/AE 6792, was being illegally transported by two persons from Raxaul to Bharthana, District- Etawah and the said information was also given by him to R.K. Tewari (P.W.-2), Intelligence Officer, D.R.I. He further stated that upon that information he rushed to D.R.I. office, constituted a team comprising of R.K. Tewari (P.W.-2), Ashutosh Dixit, Intelligence Officer, D.R.I. and Sepoy Ajeet Kumar. He further stated that two independent witnesses, present near the gate of D.R.I. office, were also requested to company the team, who were also included in the team and thereafter the members of the team proceeded in a private Scorpio Taxi and reached near B.B.D, Faizabad Road. He further stated that after waiting for hours at about 8:30 p.m., a white colour old Maruti 800 car was seen, coming from Faizabad side and as it slowed down at speed breaker, it was seen and found as Maruti car bearing registration No.UP.80/AE-6792. Stating that the said car was intercepted and signaled to stop and was found that two persons were sitting in the car, he and other officers introduced themselves to them and also the purpose of their interception, he further stated that the person sitting on driving seat, introduced himself as appellant Raj Kumar Savita whereas another person introduced himself as appellant Gopal Verma @ Teetu. He further stated that both the appellants were informed by him and other officers of the D.R.I. that, as per information, huge quantity of charas, secreted in the said car, was being illegally transported by the appellants. He further stated that during interrogation both the appellants confessed the presence of charas in the said car being carried by them. He further stated that thereafter in compliance of Section 50 of

the N.D.P.S. Act, written notices (Ext.Ka.-1 and Ext.Ka.-2), informing them that they had right to be searched either before the Magistrate or any Gazetted Officer, were served upon them but both the appellants gave their consent to be searched by the D.R.I. team.

46. He (P.W.-1) further stated that since there was darkness at that place and crowd was also gathered, the D.R.I. team with the consent of appellants, brought them along with the said car at D.R.I. office, Gomti Nagar, Lucknow at about 9.30 p.m. and on the pointing out of appellant Gopal Verma @ Teetu, panel cover of dickey, four doors of the car, back cover and back side cover of hand brake of the car were opened wherefrom 73 rectangular shaped Bars (Battis) (material Ex.-1 to material Ex.-73) of charas (each Bars of average weight of 500 Grams), rapped in cellophane tape, were recovered. He further stated that all 73 Bars were scratched with knife and four representative samples, 25 - 25 Grams each, were prepared and sealed, kept in envelope and again sealed with signature of D.R.I. team, witnesses and appellants also. Stating that the said recovered charas was kept in a bag and thereafter sealed, he further stated that registration certificate (Ext.Ka.-5) and insurance certificate (Ext.Ka.-4) of the said car and driving licence (Ext.Ka.6) of appellant Raj Kumar Savita were also taken into custody for further inquiry. He further stated that both the appellants admitted the possession of charas and also stated that one Babloo Warsi was also involved in the said illegal transportation. He further stated that the recovery memo (Ext.Ka.-3) was prepared by him and it was also signed by the members of the D.R.I. team as well as witnesses and both the appellants. Stating that copies of recovery memos were provided to both the appellants, they were informed their ground of arrest and their arrest memos (Ext.Ka.-7 and Ex.Ka.-8) were also prepared, he further stated that whole search and seizure proceedings were concluded at about 2.00 a.m. on 21.06.2010.

47. He (P.W.-1) has also stated that test memos along with covering letter (Ext.Ka.9 to Ext. Ka.12) were sent separately on 21.6.2010 to Opium Factory, Gazipur and Central Revenue Control Laboratory (CRCL), New Delhi for laboratory test of the said charas. He further stated that proceedings as required under Section 57 of the N.D.P.S. Act was also complied with and report (Ext.Ka.13) was prepared. Stating that at the time of recovery, an inventory (Ext.Ka.14) was also prepared by him, he further stated that after completion of search and seizure proceedings, appellants were produced before the Court for remand and recovered contraband charas was deposited in the godown of custom department.

48. Ravindra Kumar Tewari (P.W.-2) has also stated that at the time of occurrence he was also posted as Intelligence Officer, D.R.I., Zone Lucknow, on 20.6.2010. He further stated that on that day at about 3:00 p.m., an information was given by S.K. Singh, Deputy Director, D.R.I. that huge quantity of illegal charas was being carried in Maruti car bearing registration no.U.P.-80 AE 6792 which had to be recovered along with the accused persons. He further stated that upon that information he reached at his office and constituted a team of Karunesh Srivastava (P.W.-1), Intelligence Officer, D.R.I., Ashutosh Dixit, Intelligence Officer, D.R.I. and Ajeet Kumar, Sepoy, also took two independent witnesses and

reached B.B.D. College and started to wait for the said Maruti car. Stating further, as stated by P.W.-1 that the said Maruti car was intercepted at 8.30 p.m., after compliance of mandatory provisions as provided under Section 50 of the N.D.P.S. Act, appellants Raj Kumar Savita and Gopal Verma @ Teetu were interrogated who admitted that huge quantity of charas, approximately 36 Kgs. secreted in the said car was being carried by them, search and seizure proceedings were conducted whereupon the said charas was recovered, recovery memo (Ext.Ka.-3), and other relevant documents along with site plan (Ext.Ka.15) was prepared by Karunesh Srivasava (P.W.-1), he further stated that he had also put his signature on recovery memo (Ext.Ka.-3).

49. Pramod Kumar (P.W.-3) has stated that he was posted as an Intelligence Officer, D.R.I., Zone Lucknow on 21.6.2010 and appellants Raj Kumar Savita and Gopal Verma @ Teetu had appeared before him in proceedings under Section 67 of N.D.P.S. Act. He further stated that he had told and explained the relevant provisions of N.D.P.S. Act to both the appellants, warned them that their statements may be used as evidence in judicial proceedings. He further stated that both the appellants, admitting their guilt voluntarily, had admitted in written statement under their signatures (Ext.Ka.16 and Ext.Ka.17).

50. Brijendra Singh Sodhi (P.W.-4) has stated that on 25.6.2010 he was posted as Intelligence Officer, D.R.I. Zone Lucknow and was appointed as Investigating Officer, vide order (Ext.Ka.-18) passed by S.K. Singh, Deputy Director, D.R.I. Zone Lucknow. He further stated that during investigation he recorded the statements of witnesses and also recorded that statement of Anurag Gaur owner of the Maruti car who stated that the said Maruti car was stolen. He further stated that during investigation he had recorded the statement of appellants (Ext.Ka.19 and Ext.Ka.-20) and during investigation Forensic chemical examination report sent by CRCL, New Delhi opium factory, Gazipur (Ext.Ka.21 and Ext.Ka.22), confirming the samples as charas were also received. He further stated that during investigation it was also found that forged registration number was used on the said Maruti car at the time of recovery. He further stated that after completion of investigation, he had filed a complaint dated 16.12.2010 (Ext.Ka.-23) against the appellants and one co-accused Babloo Warsi.

51. A.P. Singh (P.W.-5) has stated that on 23.6.2010 he was posted as Incharge Godown, Central Excise and Customs Division No.1, Lucknow. He further stated that on that day 36 Kgs. charas, in sealed packet, was deposited by P.W.-1. He further stated that the said recovered contraband charas, received by him, was deposited in godown and relevant entry was made by him in Malkhana register. He also filed self attested photo copies of relevant entry (Ext.Ka.24) made by him in Malkhana register regarding deposit of said contraband charas.

52. So far as compliance of Section 50 of the N.D.P.S. Act is concerned, the submission of learned counsel in this regard is that in Ext.-Ka-1 and Ext.Ka-2, it has not been mentioned that appellants had right to be searched before any Gazetted Officer or Magistrate, hence the said recovery is against this provision. Admittedly, said contraband charas was recovered from the vehicle (car), being

used and possessed by the appellants at the time of recovery and no contraband charas was recovered from personal search of any of the appellants. From perusal of Ext.Ka.1 and Ext.Ka.-2 i.e. consent/authorisation letter given by the appellants, it transpires that before their personal search, they were apprised their right that their personal search may be conducted, if they required, before any Magistrate or Gazetted Officer but they refused for their personal search either before any Magistrate or any Gazetted Officer and gave their consent to be searched by officers of D.R.I. team. P.W.-1 and P.W.-2 have categorically stated that the appellants were apprised with their rights provided under Section 50 of the Act but they refused to appear before any Magistrate or Gazetted officer for their personal search and had given consent to be searched by D.R.I. team whereupon their personal search were made but no contraband charas was recovered from their personal search, whereas all charas were recovered from the alleged car, carried by them. Thus, in the light of law laid down by Hon'ble Apex Court in Balbir Singh (Supra), Baldev Singh (Supra), Vijay Singh Chandubha Jadeja (Supra), Baljinder Singh (Supra) and Jeet Ram (Supra), there is no violation of provisions of Section 50 of the Act in this case and submission of learned counsel for the appellants has no force.

53. So far as compliance of Section 42 of the Act is concerned, P.W.-1 and P.W.-2 have specifically stated that direction/information was given to them on 20.6.2010 at about 3:00 p.m. by the Deputy Director, D.R.I. Lucknow i.e. their superior officer. P.W.-1 further stated in cross examination that when he received the said information, he was present at his house and since it was Sunday, the office was closed. Further, in cross-examination he (P.W.-1) again specifically stated that the Deputy Director was his superior officer who by informing him on phone, had directed for taking action.

54. In the instant case, the appellants were intercepted by the D.R.I. team on 20.6.2010 at about 8:30 p.m. near B.B.D. at Faizabad Road, search, seizure and recovery proceedings were continued till 2:00 a.m. on 21.6.2010 and it was concluded in the D.R.I. office. The record further shows that on 22.6.2010 information regarding whole proceedings of search, seizure and recovery (Ext.Ka.-13) was sent to the Senior Intelligence Officer, D.R.I., Zone Lucknow by P.W.-1. Further, the statement of appellants under Section 67 of the Act were also recorded by Pramod Kumar (P.W.-3). Regarding compliance of Section 42 of the N.D.P.S. Act, P.W.-1, in cross-examination, has specifically stated that he had produced the report regarding recovery and arrest before his superior officer within 24 hours and P.W.-2 has also specifically stated that after the arrest of appellants and recovery of contraband goods, detailed information was given by P.W.-1 to the superior officer. P.W.-3 was Senior Intelligence Officer, D.R.I. whereas P.W.-1 and P.W.-2 were Intelligence Officer, D.R.I. In addition to above, statements (Ext.Ka.16 and Ex.Ka.17) of both the appellants, recorded by P.W.-3 on 21.6.2010, were also produced on same day before the Additional Sessions Judge along with other relevant documents and recovered charas at the time of remand of appellants. Nothing has come out in the cross examination of any of the prosecution witnesses whereby an inference can be drawn regarding any doubt on the veracity of their statements.

55. In addition to above, the order dated 25.6.2010 (Ext.Ka.-18) shows that on

due information, given by P.W.-1 to the Deputy Director, D.R.I., B.S. Sodhi (P.W.-4) was appointed as Investigating Officer in the case. P.W.-4 has also stated that he was appointed as Investigating Officer vide order dated 25.6.2010, passed by the Deputy Director, D.R.I., Zone Lucknow. This witness was also not cross examined by the defence counsel on the genuineness of Ext.Ka.-18. In cross-examination he has also specifically stated that Karunesh Srivastava (P.W.-1) had given written information to the superior officer within 72 hours from the arrest of the appellants and recovery of the contraband goods.

56. Further P.W.-3 has specifically stated that the appellants were produced before him for their statements under Section 67 of the Act. P.W.-3, Senior Intelligence Officer, D.R.I., who was posted in the same office where office of Deputy Director Intelligence and other superior officer was situated. He had recorded the statement (Ext.Ka-16 and Ext.Ka-17) of the appellants on 21.06.2010. In addition to above, from perusal of documents (Ext.Ka.1 to Ext. Ka.-17) i.e. recovery memo, compliance of Section 50 and other relevant documents including the information given by P.W.-1 to P.W.-3 narrating whole facts i.e. source of information, search and seizure memo of contraband charas and arrest memos of the appellants, prepared by P.W.-1 at the time of recovery, it transpires that the said documents were perused by the In-charge Additional Sessions Judge, Court No.12, Lucknow on 21.6.2010, which shows that appellants were produced before the concerned Court within 24 hours. Furthermore according to P.W.-5, it is also clear that the said recovered contraband goods were deposited in godown on 23.6.2010. The record shows that aforesaid whole proceedings was concluded by P.W.-1 and P.W.-2 in presence of D.R.I. team and witnesses in D.R.I. office in compliance of directions of their superior officers and due information was given to immediate superior officer within the prescribed time as provided under Section 42 (2) of the Act.

57. In addition to above, it is also pertinent to note at this juncture that admittedly, the information of the alleged illegal transportation of charas was given by the Deputy Director, D.R.I. to P.W.-1 on Sunday i.e. 20.6.2010. P.W.-1, in cross-examination, has specifically stated that no G.D. Register (documents/register pertaining to maintenance of entry regarding minutes to minutes events) was being maintained in his office and no entry was being made in any document regarding any event or visitor of his office. P.W.-1 and P.W.-2 have categorically stated that at the time of information, given by his superior officer on phone, they were at home and in compliance of said information and direction they had reached at the office, constituted the team and had proceeded to the place of occurrence. In cross examination of the prosecution witnesses nothing has come out whereby it can be presumed that there was total non compliance of provisions of Section 42 of the N.D.P.S. Act whereby any prejudice or failure of justice was caused to appellants. Thus, in view of the facts and circumstances of this case as well as in the light of law laid down by Constitutional Bench of Hon'ble Supreme Court in ***Karnail Singh case (Supra),*** there is no violation of Section 42 of the Act and submission of learned counsel for the appellants in this regard has no force.

58. So far as the submissions of learned counsel for the appellants that recovered charas was not immediately

deposited in godown, rather it was handed over to office peon and Malkhana register was not produced, is concerned, P.W.-1 has specifically stated that search and seizure proceedings were concluded at 2:00 a.m. on 21.6.2010 in his office. P.W.-2, in cross-examination, has stated that recovered and sealed charas along with sample seal was kept in the office in the supervision of sepoy and chowkidar of the office, which was later on deposited in the godown of custom department. P.W.-1 has also stated that said recovered charas was deposited in the godown of custom department. P.W.-5 while corroborating the prosecution story has also stated that on 23.6.2010 he was posted as In-charge godown of Central Custom and Excise Division-I, Lucknow and 36 Kgs. charas, in sealed packets got deposited by P.W.-1. This witness had appeared before the trial Court with Malkhana register, proved and filed the self attested photocopy of relevant entry (Ext.Ka.-24), made by him regarding the deposition of said contraband charas in Malkhana register. In addition to above, recovered charas (Material Ext.Ka.-1 to Material Ext.Ka.-73) had also been produced before the trial Court in sealed condition during examination of P.W.-1 and proved by him. In my view, in the facts and circumstances of the case, keeping the recovered charas after its recovery, in office, in safe custody and supervision of chaukidar and sepoy of the office and thereafter depositing the same in Malkhana after legal formalities, is just and proper. Nothing has come out either in the cross-examination of P.W.-1, P.W.-2 or P.W.-5 which creates any doubt in their testimonies. Thus, it is clear that alleged recovered charas was properly sealed and deposited in the godown in the sealed condition within the proper time and the submissions of learned counsel for the appellants, in this regard, has no substance.

59. So far as the submission of learned counsel for the appellants that alleged charas was neither sealed properly nor sample seal was prepared, kept and sent in proper manner to the laboratory for examination with representative sample of charas, is concerned, P.W.-1 in examination-in-chief has specifically stated that at the time of recovery, four representative samples were drawn, whose test memo (Ext.Ka.-9) and (Ext.Ka.10) along with covering letters (Ext.Ka.11 and Ext.Ka.12) were prepared on 21.6.2010. From perusal of these documents (Ext.Ka.-9 to Ext.Ka.12), it transpires that while relevant information of recovered charas as well as of representative samples were mentioned in these documents, sample of seals were also put on it. It further transpires that Ext.Ka.-9 and Ext.Ka.-10, prepared by P.W.-1 was also signed by the independent witnesses and the appellants. These documents were also seen by the concerned Additional Sessions Judge on 21.06.2010 at the time of the remand of appellants.

60. Furthermore, the representative samples were sent for chemical examination to chemical examiner of Government Opium and Alkaloid Works, Gazipur, U.P. and Central Revenue Control Laboratory, New Delhi. In report dated 20.7.2010 (Ext.Ka.-22), prepared by Joint Director, Government Opium and Alkaloid Works, Gazipur, U.P. and in report dated 26.07.2010 (Ext. Ka-21) prepared by chemical examiner C.R.C.L., New Delhi, it has been specifically mentioned in the said reports that the said representative samples

packets were received in their office in sealed and intact condition and tallied with facsimile seal as given in the test memo. According to both the reports, after chemical examination, the said samples were found as charas. Nothing has come out either in examination of P.W.-1 and P.W.-2, which may create any suspicion, either in the preparation of sample or sending it to concerned laboratory for chemical examination. Thus, in view of above, submissions of learned counsel for the appellants in this regard has no substance.

61. So far as the submissions of learned counsel for the appellants for non-production of independent witnesses is concerned, it is settled principle of law, prosecution case based on official prosecution witnesses, whose testimony is reliable and trust worthy, cannot be thrown out only on account of non examination of independent or other official witnesses. In this case, as discussed above, statement of prosecution witnesses has been found reliable, hence in the light of law laid down by Hon'ble Supreme Court in Raveen Kumar case (Supra) and Rajesh Dhiman case (Supra), only on the ground of non-production of independent or other official witnesses, prosecution case story cannot be held doubtful and the submissions of learned counsel for the appellants has no force.

62. So far as the submissions of learned counsel for the appellants for non-compliance of provisions of Sections 52, 53, 55 and 57, is concerned, it is settled principle of law, as laid down by Hon'ble Supreme Court in ***Balbir Singh case (Supra), Gurbax Singh Vs. State of Haryana***, (2001) 3 S.C.C. 28 and ***Bahadur Singh Vs. State of Haryana,*** 2010 (4) SCC 445 wherein it has been held that compliance of aforesaid provisions is not mandatory. However, in the instant case, record shows that the appellants were informed the ground of their arrest by information (Ext.Ka.-7 and Ex.Ka.-8), the representative samples were properly sealed and sent for chemical examination to the Opium Factory, Gazipur as well as C.R.C.L., New Delhi without any delay, due information was also given without any delay to immediate superior officers and recovered charas was also deposited in Malkhana in sealed condition within time. Thus, in view of the above, submissions of learned counsel has no substance.

63. In addition to above, it is also pertinent to note at this juncture that appellants are the resident of district Etawah, Uttar Pradesh. Their arrest, made by D.R.I. team in Lucknow on 20.6.2010 when they were travelling with Maruti car bearing registration No.U.P.-80 AE 6792, has not been disputed by the appellants. They were produced before the concerned Judge by P.W.-1. on 21.6.2010 and they were also sent to jail. The prosecution has also succeeded to prove its case that from their possession huge quantity of contraband charas was recovered by the D.R.I. team. During examination, no suggestion was put to any prosecution witnesses by the counsel of the appellants, regarding any enmity with the appellants or that the appellants were arrested from any other known time or place and their false arrest or recovery from their possession, was shown in Lucknow by the prosecution witnesses. In addition to above, in examination under Section 313 of the Code appellants had also not specifically stated that prosecution witnesses had any enmity with them or they were arrested illegally from any other time or place and false

recovery of charas was shown. Further no evidence has been led by them in their defence to create any doubt in the prosecution story.

64. Drug trafficking has become one of the most serious problem of the world at present. Many white collar criminals are involved in this business who, for their illegal profit, are not only exploiting the life of young generation but also permitting the heinous offences like murder, kidnapping, sexual exploitation of girls and other crimes. Only on account of minor irregularities in search and seizure proceedings or sending the samples for chemical examinations, the prosecution case cannot be held doubtful, unless and until it is proved by the defence that prosecution witnesses were biased and prejudice with the appellants accused and due to which failure of justice was caused.

65. Thus, in the light of aforesaid whole discussions, I am of the view that testimony of the prosecution witnesses is wholly reliable and trust worthy. They were put to lengthy cross examination by learned defence counsel before the trial Court, but nothing could be extracted by way of cross examination so as to create any doubt in their testimony. All the mandatory provisions of N.D.P.S. Act, required in this case, have been complied with by the prosecution witnesses. All the evidence, proved by prosecution, leads to only conclusion that said contraband charas was being illegally transported and possessed by the appellants. The prosecution has proved its case beyond reasonable doubt. The impugned judgment and order, passed by the learned trial Court, is well discussed, well reasoned and within the paramount of the settled provisions of law. The appeals, filed by both the appellants, lack merit and are liable to be dismissed.

66. Both the Criminal Appeals No.943 of 2013 (Raj Kumar Savita Vs. Union of India (Govt. of India) New Delhi) and 688 of 2013 (Gopal Verma @ Teetu Vs. Union of India Thru. Directorate of Revenue Intelligence) are ***dismissed*** and impugned judgment and order passed by the trial Court is affirmed.

67. Both the appellants are on bail. Their bail bonds are cancelled and sureties are discharged. They are directed to surrender forthwith before the Court below to serve out their sentence.

68. Office is directed to send a copy of this judgment and order forthwith to the trial Court along with lower Court record for necessary compliance

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(2021)03ILR A979
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.03.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE RAJEEV SINGH, J.

Criminal Appeal No. 1044 of 2000

Angad ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:

Counsel for the Opposite Party:

(A) Criminal Law - Appeals from Convictions - Indian Penal Code, 1860 - sections 302/34 - Murder - The Code of

criminal procedure, 1973 - Section 107/116,145 - *evidence of exhortation* - a weak piece of evidence - Unless the evidence in this respect is clear, cogent and reliable, no conviction can be recorded against the person alleged to have exhorted the actual assailant.(Para - 52,)

(B) Criminal Law - Evidence Act - If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies - instant case - cross examination which have been of the two eye witnesses, i.e., P.W. 1 and P.W. 2 have been put to by the accused about eight months and more one year respectively would show that such minor discrepancies were quite natural but from their evidence it does not go to the root of the matter which belies the present case - their evidence is trustworthy and has been rightly relied upon by the trial court while convicting and sentencing the appellant.(Para - 46)

(C) Criminal Law - Indian Penal Code, 1860 - Section 34 - acts done by special persons in furtherance of common intention - Even an illegal omission on the part of accused can indicate the sharing of common intention - accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34, IPC - To ascertain common intention, totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the such intention to commit an offence of which he could be convicted.(Para - 53)

P.W.1 (Informant) son of deceased lodged FIR against appellant and other co accused - allegation in FIR - opposite to his house a house of appellant , was being constructed - dispute with respect to a public pathway in between their houses - compromise meeting held between his father and appellant - dispute settled - appellant came along with his 4-5 associates - armed with fire arm - entered into the house of the informant along with accused appellant - made an ***exhortation*** to the other co-accused uttering that ***"Maro Sale ko Bachne na Paye"*** - opened fire on deceased - sustained fire arm injuries and fell down - incident was witnessed by the informant, his wife, Rajdeep Yadav and Chaukidar - present in the house at the time of incident - deceased was taken to Medical College in injured condition where the doctor on duty declared him dead.(Para - 3)

HELD:- Court after scrutinizing the evidence lead by the prosecution and the defence of the accused, who had only pleaded for his false implication in the present case and has not denied his presence at the place of occurrence, and his previous conduct goes to show that the appellant has played an active role in the instant case by instigating the co-accused persons for killing the deceased and uttered ***"Maro sale ko aaj bachne na paye"*** on which co-accused persons have committed the murder of the deceased with their respective rifles in broad day light which had been witnessed by P.W. 1 and 2, namely, Vijay Kumar Yadav (informant) and Smt. Kumkum Yadav, who are son and daughter-in-law of the deceased and the ocular testimony is corroborated by the medical evidence and considering the law laid down by the Apex Court in cases regarding ***exhortation***, we are of the opinion that the trial Court has rightly convicted and sentenced the appellant for the offence under section 302/34 I.P.C., hence does not require any interference by this Court. The impugned judgment and order passed by the trial Court is hereby upheld. (Para - 54)

Criminal Appeal dismissed. (E-6)

List of Cases cited:

1. Brahm Swaroop & ors. Vs St. of U.P., 2011 (6) SCC 288

2. Yogesh Singh Vs Mahabir Singh & Ors., 2017 (11) SCC 195

3. Jainul Haque Vs St. of Bih., AIR 1974 SC 1651

4. Ramesh Singh @ Photti Vs St. of A.P. , AIR 2004 (SC) 4545

5. Surendra Chauhan Vs St. of M.P., 2000 4 SCC 110

6. Pandurang VS St. Of Hyderabad, 1955 1 SCR 1083

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

1. This criminal Appeal has been preferred against the judgment and order dated 18.11.2000 passed by VIII Additional Sessions Judge, Lucknow in S.T. No. 579 of 1996 convicting and sentencing the appellant under sections 302/34 I.P.C. for life imprisonment with a fine of Rs. 20,000/- and in default of payment of fine further to go simple imprisonment for 3 years

2. Out of six accused persons, namely, Angad Yadav, Surajpal Yadav, Chandrapal Yadav, Ramesh Kaliya, Ramji Prasad, Shiv Bahwan, accused Surajpal Yadav and Chandrapal were killed in police encounter whereas accused Ramesh Kaliya died during the pendency of the appeal and his appeal, i.e., Crl. Appeal No. 1047 of 2000 has been abated by Co-ordinate Bench of this Court vide order dated 21.11.2017. So far as accused Ramji Prasad and Shiv Bhawan have been acquitted by the trial Court, hence the Court proceed to adjudicate the appeal on behalf of the surviving appellant Angad Yadav only.

3. The prosecution story as has been set out by the informant Vijay Kumar Yadav in the F.I.R. is that opposite to his house a house of Angad Yadav, who was a State Minister in the regime of B.S.P. Government, was being constructed. There was a dispute going on with respect to a public pathway in between their houses. On 28.10.1995, with respect to the dispute of public pathway, a compromise meeting was held between his father Laxmi Shanker Yadav and Angad Yadav and the dispute was settled but on 29.10.1995, at about 9:30 p.m., Angad Yadav came along with his 4-5 associates at the place where his house was being constructed and was standing. Few minutes thereafter a white Gypsy with a banner of Samajwadi Party came there from which 3-4 persons including Ramesh Kaliya and Surajpal Yadav came out. They were armed with fire arm. The said persons entered into the house of the informant along with accused Angad Yadav. The deceased Laxmi Shanker Yadav was in his bed room in the house. Accused Angad Yadav made an exhortation to the other co-accused uttering that "Maro Sale ko Bachne na Paye". On his exhortation, the associates of accused Angad Yadav opened fire on Laxmi Shanker Yadav, who sustained fire arm injuries and fell down. The incident was witnessed by the informant Vijay Kumar Yadav, his wife Smt. Kumkum Yadav, Rajdeep Yadav and Chaukidar Ram Charan Yadav, who were present in the house at the time of incident. The deceased Laxmi Shanker Yadav was taken to Medical College in injured condition where the doctor on duty declared him dead.

4. The informant Vijay Kumar Yadav prepared a written report (Ex. Ka-1) and submitted the same at police station Hazratganj, Lucknow on the basis of which chik report was prepared and the case was registered as case crime no. 835 of 1995 under sections 147, 148, 149, 302 I.P.C. at 10:45 a.m. which was endorsed in G.D. rapat no. 21 dated 29.10.1995 at 10:45 a.m. The distance of police station from the place of occurrence was about 2 kms. The inquest report (Ex. Ka-10) was prepared and further necessary documents such as police form no. 13 (Ex. Ka-11), challan

nash (Ex. Ka-12) etc. were also prepared. Thereafter, the dead body of the deceased was sent to mortuary for post mortem. The post mortem of the deceased was conducted on 29.10.1995 at 12:30 p.m. by P.W. 4 Dr. R.K. Mishra, who opined that the cause of death of the deceased is due to shock and hemorrhage as a result of ante mortem injuries. The Investigating Officer took over the investigation of the case and after recording the statement of the witnesses prepared the site plan of the place of occurrence etc. and after investigation submitted charge-sheet against accused Angad Yadv, Surajpal Yadav, Chandrapal Yadav, Head Constable A.P. 14 Ramji Prasad, Constable A.P. 204 Shiv Bhawan- the security guards of appellant Angad Yadav and Ramesh Kaliya under sections 147, 148, 149, 302, 109, 120-B I.P.C. On submission of charge-sheet before the Magistrate, the case was committed to the Court of Sessions. The trial Court framed charges on 25.2.1997 against accused persons, who denied the same and claimed their trial.

5. The prosecution in support of its case has examined seven prosecution witnesses, i.e., P.W. 1 Vijay Kumar Yadav, who is the informant of the case and son of the deceased, P.W. 2 Smt. Kumkum Yadav wife of the P.W. 1 and daughter-in-law of the deceased, P.W. 3 Head Constable Chandra Bhan, P.W. 4 Dr. R.K. Mishra, P.W. 5 S.I. Ram Chandra Maurya- the 1st Investigating Officer, P.W. 6 S.I. Chakki Lal Verma, who conducted the inquest proceedings and P.W. 7 S.I. Vedpal Singh- the second Investigating Officer, who concluded the investigation and submitted charge-sheet.

6. Appellant Angad Yadav in his statement under section 313 Cr.P.C. has stated that under the influence of the police, the witnesses have falsely deposed against him and further at the instance of police false prosecution has been launched against him. He has been falsely implicated in the present case.

7. The appellant has not led any witness in his defence nor filed any documentary evidence.

8. P.W. 1 Vijay Kumar Yadav, who is the informant of the case and son of the deceased, in his deposition before the trial Court has reiterated the prosecution case as has been set out by him in the F.I.R., for brevity the same is not repeated.

9. In addition to it, he identified accused Ramji Prasad and Shiv Bhawan, who were present in the Court as gunners/shadow of accused Angad Yadav. He stated that a white Gypsy having banner of Samajwadi Party reached near his house and from the said vehicle Chandrapal Yadav, Surajpal Yadav and Ramesh Kaliya came out and two persons were sitting inside it. All the three persons were armed with rifles out of three Ramesh Kaliya fired in the air and Surajpal Yadav and Chandrapal Yadav abused his father and came to his house. Surajpal Yadav had shot a fire at the door which after hitting the door went inside and hit the wall and the window. He identified Surajpal Yadav and Chandrapal Yadav, who were also present in the Court. He stated that he was at the roof of his house at the time of incident and he saw the said incident from there. When the accused persons entered into his house they were abusing and uttering that "Aaj na bachne paye". Thereafter he got down from his roof and came inside his house till that time the accused had entered in his house and his wife had tried to stop them and

when he had reached in the hall of the house, he saw that Chandrapal Yadav had dragged his father from his bed room into the big hall. By that time Surajpal Yadav and Ramesh Kaliya had also come in the hall. Appellant Angad Yadav was present in the gallary. On the exhortation made by accused Angad Yadav uttering "Maro sale ko aaj na bachne paye" Chandrapal Yadav had firstly assaulted his father with the butt of the country made pistol on his neck thereafter Chandrapal Yadav, Surajpal Yadav and Ramesh Kaliya had fired at his father. On receiving the gun shot injuries his father had fallen down. At that time both the guards of Angad Yadav, namely, Ramji Prasad and Shiv Bhawan were standing at the door of the house and while going back the accused have broken the telephone which was kept on the table. The witness further stated that till he could come out all the accused had gone away on their vehicle. The witness further stated that at the time of incident, his wife Smt. Kumkum Yadav, Chaukidar Ram Charan and one of his relative, namely, Rajdeep were present at the place of occurrence. Thereafter, the witness made a call to Civil hospital for Ambulance on which he took his father to the hospital. An information was also send to police station Hazratganj by sending some persons. The witness had taken his father to the Medical College where the doctor after seeing his father had declared him dead. Thereafter he took a paper at the medical college and got a report written and lodged the F.I.R. at police station Hazratganj. He has dictated the report about the incident and the person to whom he dictated the report, he did not remember but he has signed the report. He has proved the written report as A5/2 which is marked as Ex. Ka-1. The witness stated that Angad Yadav was in Bahujan Samaj Party. The name of Surajpal Yadav had come for contesting the election. The witness stated that he did not has any information about the relationship of the accused persons and Angad Yadav.

10. In the cross examination made on behalf of the appellant Angad Yadav, the witness stated that he started practice in Lucknow in the year 1980 and did practice for one and half years. He had heard the name of Angad Yadav before laying down the foundation of the house of Angad Yadav but neither he has seen him and nor he has been formerly introduced by any one to him. He has also neither formerly met his gunner nor anyone had introduced him. He also did not formerly meet Surajpal Yadav, Chandrapal Yadav and Ravi Yadav. On the day of incident, he did not know the name of the gunner of Angad Yadav and he identified them by their faces. At the time of incident, there was name plate of the gunners and he came to know about their name from it. He did not mention the name of the gunners in the F.I.R. but he told the Investigating Officer about their names in his statement and if the Investigating Officer had not mentioned the same then he cannot tell any reason for the same. He denied the suggestion that at the tutoring of someone he has identified the gunners as he did not mention in the F.I.R. that at the time of incident there was any guard or shadow along with Angad Yadav. He stated that at the time of the incident no person was in police uniform. He saw the uniform and name plate of the gunners prior to the incident. He did know that whether on the date of incident or prior to it any police squad was deputed for the security of Angad Yadav or not. He further deposed that neither he had seen any sale deed nor any map of the house of Angad Yadav. He further did not know about the area of the plot of Angad Yadav. He saw Angad

Yadav coming to his plot for getting the work done. He further did not know whether the plot on which Angad Yadav was getting his house constructed, was part of sale deed or not. He further deposed that he did not mention in the F.I.R. that in spite of his father opposing, Angad Yadav had not stopped the work of digging of the land and abused him. He further did not mention in the F.I.R. that from the conduct of Angad Yadav, it was apparent that he was not happy with the compromise. He stated that he had told the Investigating Officer about the said fact and if he has not mentioned the same then he cannot tell the reason. He further stated in the F.I.R. that he did not mention that Angad Yadav had made an exhortation to his associates but he has told the same in his statement to the Investigating Officer that Angad Yadav made an exhortation and if he has not mentioned the same in his statement then he cannot tell any reason. He further did not mention in the F.I.R. that at the time of incident both the guards of Angad Yadav were standing at the gate. He denied the suggestion that the aforesaid facts were not mentioned by him in the F.I.R. and on the tutoring he has stated the same in his statement. He further stated that he did not mention in the F.I.R. that Angad Yadav was getting the digging done excess 12ft. wide on public pathway and he has stated the said fact to the Investigating Officer that Angad Yadav was making constructions on excess 12 ft. wide on public pathway. The total width of the public pathway was 12 ft. and he cannot tell that as to how much in width Angad Yadav was getting the digging done. The question was being put to the witness that whether Angad Yadav was getting the construction done on more 12 ft. width? on which the witness replied that after leaving 2-3 ft. public pathway, the digging was being done by him. The digging was being done by Angad Yadav after leaving 10 ft. from the gate of the house of the witness. On the day of the incident, no shadow was provided to his father. Surajpal Yadav had absconded after the incident. Angad Yadav was in B.S.P. and he did not know in which party Surajpal was. On the Gypsy the banner of Samajwadi Party was put. He stated that he had shown the place where the accused were standing at the time of the incident and he has also stated that Angad Yadav was standing in the gallery. The Investigating Officer had prepared the site plan at his instance on the day of the incident. He has denied the suggestion that on the day of the incident Angad Yadav and his shadow, namely, Shiv Bhawan and Ramji Prasad were not present. He further denied the suggestion that Angad Yadav had not exhorted the accused to kill the deceased. He has also denied the suggestion that he was not present at the place of occurrence. He also denied the suggestion that the report which has been stated to be written, has not been written at that time. He denied the suggestion that because of the political rivalry the name of Angad Yadav has been falsely implicated in the present case.

11. P.W. 2 Smt. Kumkum Yadav, who is the wife of P.W. 1 and daughter-in-law of the deceased in her deposition before the trial Court has reiterated the prosecution case as has been stated by P.W. 1 in its entirety, hence for the sake of brevity the same is not being repeated.

12. In her cross examination, she has stated that when the house of Angad Yadav was being constructed, he was not the Minister and he was Minister prior to it. The witness stated that towards the East of her house there was house of Angad Yadav

and in between there was a public pathway. Towards West of the house of the witness there was house of Ravi Yadav. There was some hot talks of her father-in-law with Ravi Yadav 3-4 months prior to the incident as he wanted to grab their land. She stated that quarrel took place in the year 1994. She is not aware of the month in which the quarrel had taken place. She did not accompany her father-in-law when there was quarrel between them. She used to live in her house and outside work and other matter were taken care of by her husband and father-in-law. She used to live in the house and take care of children and during the talks in the house she came to know about the dispute with Ravi Yadav. During the course of talks she further came to know that Ravi Yadav, Surajpal Yadav, Chandrapal Yadav and Ramesh wanted to grab their land. She did not meet them but she had seen them earlier when they used to come. She has stated that at the time of incident Angad Yadav was getting the digging done at his plot. At the time of incident, there was President rule in the State. She denied the suggestion that because of the influence of Congress party, her father-in-law had grab the land of nearby areas. She did not know that her father-in-law had a sale deed of two biswas of land. She has stated that security was provided to her father-in-law by the administration with gunner, who used to accompany her father-in-law but in June, 1995, the government has withdrawn the same and her father-in-law had not tried to get the shadow as there was no threat to his life. She did not know that to whom Angad Yadav had got the arm license provided. She stated that no identification of the shadow and gunners of Angad Yadav was got done from her. She has stated about the names of guards in her statement to the Investigating Officer and if the same has not been mentioned by him then she cannot tell any reason. She did not have any conversation with Angad Yadav prior to the incident nor anyone got her introduced with him. Angad Yadav used to come at his plot prior to a month and used to sit there. On the date of incident, no work was being done on the plot of Angad Yadav though the work on the plot used to start at about 9 a.m. She denied the suggestion that the said incident had not taken place on the exhortation of Angad Yadav. She further denied the suggestion that he did not enter in the boundary of house. She also denied the suggestion that he has not participated in the incident. She denied the suggestion that on the tutoring, she named the shadow and gunners of Angad Yadav in the Court. She also denied the suggestion that there was no dispute of Angad Yadav for digging the base on the disputed land. She also denied the suggestion that because of political rivalry the name of Angad Yadav has been falsely implicated. She denied the suggestion that the name of guards have been taken by her after due deliberation and consultation.

13. P.W. 3 Head Constable Chandrabhan Singh Gautam had stated before the trial Court that on 29.10.1995, he was posted at Kotwali Hazratganj and on his instructions, on the basis of written report (Ex, Ka-1) submitted by the informant Vijay Kumar Yadav, chik F.I.R. no. 833 was written and case was registered as case crime no. 835 of 1995 under sections 147, 148, 149, 302 I.P.C. by Constable No. 355 Girish Kumar Sharma. Chik F.I.R. No. 833 is in the hand writing and signature of Constable Girish Kumar Sharma. He is conversant with the hand writing and signature of Constable Girish Kumar Sharma as he was posted with him. He has proved Ex. Ka.3 (G.D. No. 21)

dated 29.10.1995 which was prepared by him in his hand writing and signature. He has further stated that no endorsement regarding receiving of any information on telephone on 29.10.1995 has been made in the G.D. On 23.10.1995 also, no endorsement regarding the information given by Laxmi Shanker Yadav against Angad Yadav, has been made in the G.D. of the police station. He next stated that it might be possible that Laxmi Shanker Yadav or his son have given any application to Chauki In-charge of Bandariya Bagh as proceeding under section 107/116 Cr.P.C. was initiated. On 28.10.1995, a notice for proceeding under section 145 Cr.P.C. was received in the police station from the Court in the matter of Angad Yadav and Laxmi Shanker Yadav which was endorsed in G.D. rapat no. 36 at 7:30 hours. On 29.10.1995 at 16:05 hours special report was sent to the authorities as the case was of murder, hence special report was sent.

14. P.W. 4 Dr. R.K. Mishra has submitted that on 29.10.1995, he was posted at medical college and was on post mortem duty. On 29.10.1995 at 12:30 hours, he had conducted the post mortem of the deceased Laxmi Shankar Yadav which was sent in an unsealed condition and he found following ante mortem injuries on his person:-

"1. Fire arm wound of entry 1/2 cm. x 1 cm. x abdominal cavity deep put at Ant. auxiliary line 12 cm. Above ASIS right side, 16 cm. lateral to umbilicus at 9:30 O'clock. Margins inverted.

2. Fire arm wound of entry 1/2 cm. x 1 cm. x bone deep 12 cm. above, right elbow in an outer aspect of right arm.

3. Wound of exit 12 cm. x 7 cm. x bone deep 6 cm. below axilla inner side of right arm wound communicating to injury no. 2 . All tissues in below. Two injuries are lacerated bone right humerous is fractured.

4. Fire arm wound of entry 1/2 cm. x 1 cm. x chest cavity deep put on left side of chest at post axillary line 9-1/2 cm. below left axilla 17 cm. lateral to nipple (left).

5. Wound of exit 7 cm. x 4 cm. x chest cavity deep margin inverted 7 cm. lateral to right nipple 9-1/2 cm. below axilla, on probing this wound is communicating to injury no. 4. On opening each injury on observation put under ... each injury bright red coloured blood fluid + clotted put in chest cavity 1/2 litre and in abdominal cavity 1 litre. 8th and 9th ribes right side fractured under injury no. 4 and 7th to 10th ribes left fractured under injury no. 5. Both lungs lacerated along with pleurae. Liver lacerated chest muscles lacerated under injury no. 4, 5 abdominal muscle lacerated Psoas muscle lacerated. 10th + 11th vertebra lacerated. Metallic piece of bullet found in vertebrae. Three in number sealed in double envelope and sent to S.S.P. Lucknow through police constable concerned."

15. He has proved the post mortem report of the deceased as Ex. Ka-5. The doctor opined that all the injuries on the person of the deceased, were caused by fire arm before his death. At the time of post mortem, the duration of death was 1/2 day old. The injuries in the ordinary course of nature, were sufficient to cause death. All the injuries were caused by Rifle on 29.10.1995 at about 9:30 a.m. The cause of

death was found to be shock and hemorrhage as a result of fire arm injuries.

16. P.W. 5 S.I. Ram Charan Maurya in his deposition before the trial Court has stated that the F.I.R. of the present case was lodged at the police station at 10:45 a.m. on 29.10.1995 in his presence. He took over the investigation and proceeded to the spot with copy of the report of the chik etc. He examined Head Constable, who had prepared the chik F.I.R. and registered the case. On the spot, he recorded the statements of the informant-Vijay Kumar Yadav, Smt. Kumkum Yadav and Ram Charan and prepared the site plan of the place of occurrence at the instance of the informant and proved the same as Ex. Ka-6. On the spot, he recovered three cartridges of 315 bore and one bullet of rifle and broken telephone and taken the same in police custody. Blood stain and plain earth taken and sealed the same in three memo were prepared on which he put his signature and also taken the signature of the witnesses. He proved the same as Ex. Ka-7 to Ex. Ka-9. After the arrest of Ramji Prasad and Shiv Bhawan, their uniform, batch, belt and cap were taken in police custody. Rest of the accused had surrendered before the Court. As the said witness could not conclude the investigation, the remaining investigation was handed over to another Investigating Officer. The remaining investigation was conducted by S.I. Ved Pal Singh P.W. 7, who submitted charge-sheet against the accused persons and proved it as Ex. Ka-13.

17. P.W. 6 S.I. Chakki Lal Verma has stated before the trial Court that on 29.10.1995 he was posted as S.I. at police station Chowk, Lucknow and on the death memo being received he was entrusted with the task to conduct the inquest on the dead body of the deceased Laxmi Shanker Yadav. He prepared the inquest report and handed over the body to Constable Saroj Mishra for being taken to mortuary for post mortem examination. He prepared the relevant document such as Ex. Ka-10 challan nash, Ex. Ka.11, photo nash Ex. Ka. 12, police paper Ex. Ka-13 and Ex. Ka-11.

18 . P.W. 7 S.I. Vedpal Singh has deposed before the trial Court that he took over the investigation of the case from Investigating Officer S.I. Ram Chandra Maurya, who was earlier investigating the matter. The witness stated that after concluding the investigation, he submitted charge-sheet against the accused persons which he has proved as Ex. Ka-13.

19. The trial Court after examining the evidence led by the prosecution and considering the defence has convicted and sentenced the appellant for the offence in question and being aggrieved by the same, the appellant has preferred the instant appeal.

20. Heard Sri Nagendra Mohan, learned counsel for the appellant, Sri Umesh Chandra Verma, learned A.G.A. for the State and perused the impugned judgment and order as well as lower Court record.

21. Learned counsel for the appellant argued that the appellant Angad Yadav was named in the F.I.R. along with other accused persons, namely, Surajpal Yadav and Ramesh Kaliya. During the course of investigation the involvement of one Chandrapal Yadav came into light along with accused Ramji Prasad and Shiv Bhawan. All of them were put to trial but

two co-accused, namely, Ramji Prasad and Shiv Bhawan were acquitted by the trial Court and the appellant along with accused Surajpal Yadav, Chandrapal Yadav and Ramesh Kaliya was convicted. He argued that the appellant had no motive to commit the murder of the deceased as there was no animosity between the appellant and the deceased. He submitted that so far as co-accused Ramesh Kaliya, Chandrapal Yadav and Surajpal Yadav are concern, the appellant has no concern with the said co-accused persons, who had motive to commit the murder of the deceased. As per the prosecution case, appellant Angad Yadav has been assigned the only role of exhortation whereas other co-accused persons, namely, Ramesh Kaliya, Surajpal and Chandrapal opened fire with their rifles on the deceased Laxmi Shankar Yadav, who sustained fire arm injuries and fell down. The incident was witnessed by P.W. 1 Vijay Kumar Yadav, who is the informant and son of the deceased along with his wife P.W. 2 Kumkum Yadav, who is the daughter-in-law of the deceased but their testimony is unworthy to be believed as they are highly interested and partisan witnesses on close scrutiny of their evidence shows that they have made contradictory statements before the trial Court regarding the manner in which the incident had taken place.

22. He submitted that the F.I.R. of the incident was lodged after the inquest proceeding done and it is evident from the evidence of P.W. 1 that he did not disclose the identity or the involvement of the appellant Angad Yadav to the police, who had arrived soon after the incident. He had only stated that it was accused Surajpal and his associates, who have committed the murder of the deceased and the F.I.R. of the incident is an ante time document as in the panchayatnama of the deceased, no case crime number, police station etc. were mentioned.

23. It was further vehemently argued that the motive which has been suggested by the prosecution that there was animosity between the appellant and the deceased with respect to a public pathway and on 28.10.1995, a compromise also took place between the parties but on 29.10.1995, the appellant along with his 4-5 associates came to the place where his house was being constructed and was standing and within few minutes thereafter a white Gypsy with flag of Samajwadi Party had come from which 3-4 persons got down, who were armed with fire arm weapons. In the said Gypsy co-accused Ramesh Kaliya and Surajpal Yadav were present. He submitted that there was a compromise taken place between the appellant and the deceased, hence there was no occasion for the appellant to participate in the murder of the deceased with co-accused Surajpal Yadav, Chandrapal Yadav and Ramesh Kaliya with whom the appellant was not having good relation.

24. He argued that the appellant because of political rivalry in collusion with the police has been falsely implicated in the present case and has been given ornamental role of exhortation. He further pointed out that as per the evidence of P.W. 1, it has been stated that appellant Angad Yadav was getting the public pathway dig which was objected by the deceased Laxmi Shanker Yadav but the Investigating Officer-P.W. 4 did not find any such incident of digging at the place of occurrence nor he has shown any said place in the site plan. Further in the site plan Ex. Ka-5 which was prepared by the Investigating Officer, the place from where

the appellant Angad Yadav had made exhortation to the co-accused to kill the deceased, has not been shown.

25. He submitted that during the course of cross examination PW-1 has admitted that in the F.I.R. he had not written that there was any guard or shadow of Angad Yadav with him nor there was any person in police uniform at the time of incident with Angad Yadav. He had seen the guard in police uniform and shadow of Angad Yadav and their name plate a day prior to the incident. He further in his cross examination has stated that he has neither seen any map of the house of Angad Yadav nor any sale deed. He also did not know the size of the plot of Angad Yadav. He further did not know the land on which Angad Yadav was digging foundation of the house. The said land was part of sale deed or not he did not mention in the F.I.R. The fact that in spite of his father had opposed the digging of the land/pathway, Angad Yadav abused him and continued digging, has not been mentioned by him in the F.I.R. He has further not mentioned in the F.I.R. that Angad Yadav was not happy with the compromise entered into between the parties. He stated that he had given the said statement to the Investigating Officer but if he has not mentioned the same, he cannot tell any reason.

26. He further argued that from the evidence of P.W. 1, it is apparent that he did not ever had any conversation with Angad Yadav or his associates and prior to the incident they have not insulted or used any filthy language to him. Angad Yadav once had met the witness and on the said occasion his conduct was good. The pathway with a width of 12 ft. on which digging was being done, did not belong to the witness as it was public pathway.

27. With regard to the evidence of P.W. 2 Smt. Kumkum Yadav wife of P.W. 1 and daughter-in-law of the deceased, it has been argued by learned counsel for the appellant that she has stated in her examination in chief the manner of incident stating that Angad Yadav along with Surajpal Yadav, Chandrapal Yadav and Ramesh Kaliya entered into the house and Chandrapal Yadav, Surajpal Yadav and Ramesh Kaliya were armed with rifle and her father-in-law, who was in his bed room and Angad Yadav exhorted to kill him on which Chandrapal Yadav entered into the bed room and dragged him into the hall and when she tried to interfere, she was pushed and thereafter Chandrapal Yadav, Surajpal Yadav and Ramesh Kaliya all the three fired one shot each from rifle. Thereafter, the deceased fell on the carpet which was on the floor and Surajpal, Chandrapal and Ramesh Kaliya also broke the phone which was kept on a table and went outside whereas P.W. 1 has narrated the incident stating that he saw Chandrapal Yadav dragged his father in a hall and at that time Surajpal and Ramesh Kaliya had also came in the hall and Surajpal Yadav was present in the gallery and Chandrapal had firstly assaulted by butt of country made pistol on the neck of his father and thereafter all the three accused fired at his father and Angad Yadav had exhorted his associates to kill the deceased so that he may not remain alive and at that time the two guards of Angad Yadav, namely, Ramji Prasad and Shiv Bhawan were standing at the door of the house which goes to show that the evidence of P.W. 1 and 2 are highly contradictory in nature.

28. It was also argued that P.W. 1 has stated that his wife and Chaukidar Ram Charan and one person Raj Deep, who is resident of Jaunpur and came to meet him,

were present but the said persons, who were independent witnesses, were not produced by the prosecution.

29. He further argued that the two security guards of the appellant, namely, Ramji Prasad and Shiv Bhawan, who were also stated to be present with the appellant Angad Yadav as has been deposed by P.W. 1 and 2, have been acquitted by the trial Court as their involvement was found to be false, thus, the counsel for the appellant assailed the presence of the two eye witnesses, i.e., P.W. 1 and 2 at the place of occurrence and submitted that their evidence is not reliable one. Lastly it was argued that the reasoning given by the trial Court for convicting and sentencing the appellant for the offence in question is against the evidence on record, hence the appellant is entitled to be acquitted by this Court and the judgment and order of the trial Court be set aside.

30. Per contra, learned A.G.A. on the other hand vehemently opposed the arguments of learned counsel for the appellant and submitted that the incident had taken place at 9:30 a.m. in the morning on 29.10.1995 and the F.I.R. of the incident was lodged by P.W. 1 on the same day at 10:45 a.m. at the concerned police station which was at a distance of two kms. from the place of occurrence. He argued that though the appellant has assigned the role of exhortation as per the prosecution case and the deceased was shot dead by the associates of the appellant, namely, Surajpal Yadav, Chandrapal Yadav and Ramesh Kaliya by their respective fire arm weapon and the deceased has received three gun shot wound of entry and two wound of exit on his person and has died on account of ante mortem fire arm injuries and the main assailants have been killed in police encounter and have died, cannot be a ground to take sympathetic view regarding the appellant's role in the incident.

31. He submitted that the previous conduct of the appellant Angad Yadav in committing the murder of the deceased cannot be ignored by this Court. He submitted that a day prior to the incident, i.e., 28.10.1995 there was some talks about the settlement of the dispute with respect to public pathway between the deceased and the appellant but that was not taken seriously by the appellant. He also pointed out from the evidence of P.W. 5 that there were proceedings initiated under sections 107/116 against both the parties and on the disputed land also proceedings under section 145 Cr.P.C. was initiated.

32. He argued that there was strong motive for the appellant Angad Yadav to commit the murder of the deceased also as he was trying to grab the 12 feet land of public pathway which was being opposed by the deceased Laxmi Shankaer Yadav. On the day of incident, the appellant was getting the public pathway dig which was opposed by the deceased and the few minutes thereafter co-accused arrived at the place of occurrence with rifles and on the exhortation of the appellant, the deceased was done to death by the co-accused persons, namely, Surajpal Yadav, Chandrapal Yadav and Ramesh Kaliya as is apparent from the evidence of P.W. 1 and 2, who are son and daughter-in-law of the deceased and also the eye witnesses of the occurrence.

33. He submitted that the argument of learned counsel for the appellant that appellant Angad Yadav had no concern with the co-accused Surajpal Yadav, Chandrapal Yadav and Ramesh Kaliya is

hardly of any significance as all the accused are men of criminal antecedents and the co-accused, who were also having enmity with the deceased had joined together to commit the brutal murder of the deceased. P.W. 1 and 2 have narrated the prosecution case in toto which is fully corroborated by the post mortem report of the deceased. Moreover, if any compromise had actually taken place between the appellant and the deceased then the appellant shall have tried to save the deceased from the co-accused persons, who had come on Gypsy and shot him dead with their respective rifles as he was also present at the place of occurrence. But the appellant's conduct was otherwise and instead of saving the deceased from co-accused persons he made an exhortation to the co-accused to kill the deceased which shows his common intention to murder the deceased.

34. The incident had taken place in broad day light and there is no possibility of falsely implicating the appellant and other co-accused persons by P.W. 1 for the murder of his father Laxmi Shankar Yadav, who is an eye witness of the incident. He pointed out that the appellant is also having a long criminal antecedent. He was earlier involved in five murder cases including the present one out of which in three cases though the appellant has been acquitted by the trial Court and one is pending trial hence, it cannot be said that he is innocent. He also submitted that minor discrepancies in the evidence of P.W. 1 and 2 cannot be a ground to disbelieve the prosecution case unless and until it shakes the prosecution case in toto. He argued that the trial Court has rightly convicted and sentenced the appellant for the murder of the deceased. The appeal is devoid of merit and it may be dismissed.

35. We have given a thoughtful consideration to the submissions advanced by learned counsel for the parties and have perused the impugned judgment and order of the trial Court along with its lower Court record.

36. Admittedly, the appellant Angad Yadav is named in the F.I.R. along with co-accused Ramesh Kaliya, Surajpal Yadav and as per allegation levelled in the F.I.R. and the statement of P.W.1-informant Vijay Kumar Yadav, who is the son of the deceased and P.W. 2 Smt. Kumkum Yadav-wife of P.W. 1 and daughter-in-law of the deceased, it is evident that the appellant has been assigned the role of exhortation and on his exhortation, accused Ramesh Kaliya and Surajpal Yadav shot dead the deceased with their respective rifles. During the course of investigation, the participation of co-accused Chandrapal Yadav has also come into light and he too is said to have fired at the deceased along with Ramesh Kaliya and Surajpal Yadav. The two gunners of the appellant, namely, Ramji Prasad and Shiv Bhawan were found to be standing along with appellant at the place of occurrence where the house of the appellant Angad Yadav was being constructed but during the course of trial, it was found that the two security guards of appellant Angad Yadav were not attached with the appellant on the day of the incident, hence the trial Court acquitted them of the charges.

37. In order to ascertain the involvement of the appellant in the present case whether he was present at the place of occurrence or not, this Court has to examine the previous conducted of the appellant along with the evidence of P.W. 1 Vijay Kumar Yadav and P.W. 2 Smt. Kumkum Yadav. Further in order to

determine whether the conviction of the appellant by the trial Court can be sustained by this Court or not, in this regard it is to be noted that admittedly the appellant's house was being constructed at a place which was opposite to the house of the informant and in between there was a public pathway. The appellant Angad Yadav was trying to encroach and grab the 12 ft. land of the said public pathway by moving forward from the original place from where his house was being constructed and the deceased was raising objection to the said act of the appellant.

38. On 28.10.1995, in order to settle the dispute a meeting was convened and a compromise was entered into between them regarding the said dispute. It has come in the evidence of P.W. 1 that from the conduct of the appellant, it was apparent that the appellant was not happy or satisfied with the said compromise which had taken place between his father and the appellant.

39. On 29.10.1995, i.e., the date of incident, the appellant had come at his plot where his house was being constructed and was standing, along with 4-5 persons and few minutes thereafter a white Gypsy came there having banner of Samajwadi Party and 3-4 persons came out. Accused Ramesh Kaliya and Surajpal Yadav also came out from the said Gypsy and went inside the house of the informant along with appellant Angad Yadav and on the exhortation of Angad Yadv, who uttered "Maro sale ko aaj bachne na paye" his associates started firing on his father, who after being seriously injured, fell down and P.W. 2 Smt. Kumkum Yadav wife of P.W. 1 tried to resist the said accused persons but could not succeed. She witnessed the said incident along with Chaukidar Ram Charan and one Rajdev, who were present there. The deceased was taken to the Medical College in the injured condition where the doctor declared him dead.

40. It has been consistent case of the prosecution which is evident from the evidence of P.W. 1 Vijay Kumar Yadav and P.W. 2 Smt. Kumkum Yadav daughter-in-law of the deceased that on the exhortation of the appellant the co-accused persons fired at the deceased with their respective rifles and the deceased received as many as five gun shot wound out of which three wound of entry and two of exit. The incident had taken place in the broad day light at 9:30 a.m. and it was witnessed by P.W. 1 the informant Vijay Kumar Yadav and P.W. 2 Smt. Kumkum Yadav daughter-in-law of the deceased and there can be no mistake by them to identify the appellant and co-accused persons involved in the present case, who committed the brutal murder of the deceased in the heart of the city of Lucknow.

41. It has come in the evidence of the witnesses that the appellant was Ex. Minister of the State and he because of his political influence raising constructions on the public pathway also which was between the two houses and the deceased, who was also a strong man having status in the society opposed the appellant because of his highhandedness. The proceedings under section 107/116 Cr.P.C. has also been initiated between them as it has come in the evidence of P.W. 3 and also a notice under section 145 Cr.P.C. was received at the concerned police station regarding the dispute between the appellant and the deceased Laxmi Shanker Yadav which was endorsed in G.D. rapat no. 36 at 7:30 hours on 28.10.1995. P.W. 3 Ram Charan Maurya, who is the Investigating Officer of the present case has denied the suggestion

that on 23.10.1995 and 28.10.1995 no incident had taken place nor any information about the incident was sent to the police outpost Bandariya Bagh of police station Hazratganj nor any police personnel were sent at the place of occurrence. He has stated that the proceedings under section 107/116 Cr.P.C. was initiated and S.I. T.B. Singh of police outpost Bandariyabagh had visited the place of occurrence as there was information about the apprehension of breach of peace, hence against both the parties proceedings under section 107/116 Cr.P.C. were initiated and further on the disputed land proceedings under section 145 Cr.P.C. was also initiated. Though he has stated that the endorsement of the said proceedings were not made in the case dairy. Thus, it is established that there was animosity between the deceased and the appellant and the appellant had strong motive to commit the murder of the deceased along with his associates and he in furtherance of common intention planned murder of the deceased and actively participated in the murder of the deceased along with co-accused, who shot him dead. The appellant was present at the place where his house was being constructed which is near the place of occurrence and the deceased was shot dead by the co-accused persons with their respective rifles.

42. The contention of learned counsel for the appellant that the appellant had no occasion to participate in the incident with the co-accused Surajpal Yadav, Ramesh Kaliya and Chandrapal Yadav as he had no concern with them and he was not having good terms with them as the co-accused were inimical to the appellant, is hardly of any significance as from the conduct of the appellant it is crystal clear that the appellant had planned the murder of the deceased as it has been established from the prosecution evidence that he was present at his plot along with his associates and was standing and few minutes thereafter co-accused Surajpal Yadav and Ramesh Kaliya along with 3-4 unknown persons arrived and the appellant went inside the house of the deceased along with co-accused persons and made an exhortation to the co-accused to kill the deceased, who shot him dead with their respective rifles, who succumbed to his injuries. The incident was witnessed by P.W. 1 Vijay Kumar Yadav, the informant, who is the son of the deceased and P.W. 2 Smt. Kumkum Yadav wife of P.W. 1 and daughter-in-law, who has categorically stated about the participation of the appellant along with co-accused persons in the incident which is fully corroborated by the medical evidence.

43. The next argument which has been raised by the learned counsel for the appellant that the F.I.R. of the incident was lodged after inquest proceedings have been conducted on the dead body of the deceased by the police as no details of case crime number, police station etc. were mention in the inquest report of the deceased, hence the F.I.R. is an ante time document, the said argument of learned counsel for the appellant is not acceptable at all as in view of the statement made by the informant Vijay Kumar Yadav before the trial court in which he had deposed that he had shown copy of the F.I.R. received by him in the police station to the Inquest Officer at the time of preparation of panchayatnama. The G.D. entry regarding the registration of the case Ext. Ka-3 reveals that on the written report of the informant Vijay Kumar Yadav, case was registered in the G.D. on

29.10.1995 at 10:45 a.m. as case crime no. 835 of 1995 under sections 147, 148, 149, and 302 I.P.C. vide rapat No. 21. The head Constable P.W. 3 Chandra Bhawan has entered in the witness box and has proved the entry and the factum of receiving of the written report in the police station at 10:45 a.m. on 29.10.1995. P.W. 6 S.I. Chakki Lal Verma, who conducted the inquest on the dead body of the deceased had deposed that on the basis of the death memo he was deputed to prepare inquest report and conducted the same and send the dead body for the post mortem through Constable Saroj Kumar Mishra. P.W. 1 has stated that as soon as the doctor declared his father dead in the hospital he got a report prepared and rushed to police station Hazaratganj, Lucknow where he lodged the F.I.R. and received the copy thereof and went to participate in the inquest proceedings. Thus, simply because case crime number and sections etc. have not been mentioned in the inquest report, it cannot falsify the prosecution case. In this regard the judgment of ***the Apex Court 2011 (6) SCC 288 (Brahm Swaroop and others vs. State of U.P.)*** is relevant to be considered in which the Apex Court has held that omissions in the inquest report are not sufficient to put the prosecution out of Court. The basic purpose of holding an inquest is to report regarding the apparent cause of death, namely, whether it is suicidal, homicidal, accidental or by some machinery etc. It is, therefore, not necessary to enter all the details of the overt acts in the inquest report. Thus, considering the proposition of law regarding the inquest, it cannot be said the same is fatal to the prosecution case and such omission could not necessarily lead to inference.

44. The next argument of learned counsel for the appellant is that security guards of the appellant, namely, Ramji Prasad and Shiv Bhawan, who were also stated to be present at the place of occurrence along with the appellant as has been deposed by P.W. 1 and 2, their participation have been found to be false and have been acquitted by the trial Court, hence the evidence of P.W. 1 and 2 for convicting the appellant cannot be relied upon. In this regard it is to be noted that the trial Court found from the evidence that said two accused whose participation have come into light during the course of investigation were found to be not deputed on the date and time of the incident and the act of the Investigating Officer for roping them in the present case cannot be a ground to exonerate the appellant, who was named in the F.I.R. and seen by P.W. 1 and 2 at the place of occurrence and active participation of the appellant in the incident has been stated by the said two eye witnesses and there is no reason to doubt their statement as their ocular testimony is corroborated by the medical evidence. Nevertheless, this Court cannot loose sight that the incident had taken place in broad day light at 9:30 a.m. in the morning in the heart of city of Lucknow where the deceased, who was also a man of strong personality having a reputation in the society, was done to death by the co-accused persons on the exhortation of the appellant. The appellant also have a criminal antecedent of 18 cases out of which five cases including the present one was registered against him under sections 302 I.P.C. though he has been acquitted in three cases under section 302 I.P.C. as has been stated by learned counsel for the appellant and the other co-accused persons were also men of criminal antecedents and two of them, namely, Surajpal Yadav and

Chandrapal Yadav have been shot dead in police encounter and it cannot be said that the appellant could not join hand with the co-accused persons to murder the deceased as accused Surajpal Yadav was known to one Ravi Yadav with whom also the deceased had some dispute of land as has come in the evidence of P.W. 1.

45. The next submission of learned counsel for the appellant that P.W. 1 and 2 being the son and daughter-in-law of the deceased, are highly interested and partisan witnesses, hence their testimony is not worthy to credence, has no substance. It is true that P.W. 1 and 2 are son and daughter-in-law of the deceased but on the said count alone their testimony cannot be discarded as it is a settled legal proposition that evidence of closely related witnesses is to be required carefully scrutinized and appreciated before resting of conclusion, to convict an accused in a given case. In case, the evidence has a ring of truth, is cogent, credible and trustworthy it can be relied upon. P.W. 1 and 2 have categorically supported the prosecution case in the F.I.R. and have also given evidence before the trial Court against the appellant. The ocular testimony of P.W. 1 and P.W. 2 is corroborated by the post mortem report of the deceased which established their presence at the place of occurrence and the trial Court has rightly relied upon their evidence in convicting and sentencing the appellant in the present case.

46. Learned counsel for the appellant has further pointed out some contradiction and inconsistency in the evidence of P.W. 1 and 2 on the basis of which he submitted that they were not present at the place of occurrence but after scrutinizing the evidence of P.W. 1 and 2, who were put to endless cross examination by the accused persons including the appellant. From the evidence of P.W. 1 Vijay Kumar Yadav, it is evident that his examination-in-chief recorded on 12.3.1997 and thereafter cross examination was conducted till 6.11.1997. Similarly examination-in-chief of P.W. 2 Smt. Kumkum Yadav was recorded on 27.11.1997 and thereafter her cross examination was conducted till 8.12.1998 which goes to show that accused have made all efforts to dislodge the said witnesses but they remained intact as appears from the evidence given by them in the examination-in-chief supporting the prosecution case and minor discrepancies in evidence are not such which may create doubt about their testimony because of recording of their evidence went on for about eight months and more than one year respectively and such discrepancies, if any, were quite natural but not such which may discard their evidence. In this regard the judgment of the Apex Court in the case of ***Yogesh Singh vs. Mahabir Singh & Ors.; 2017 (11) SCC 195*** is relevant to be taken note of on this point wherein the Apex Court has held 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 or omission. In the instant case as has been stated that the cross examination which have been of the two eye witnesses, i.e., P.W. 1 and P.W. 2 have been put to by the accused about eight months and more one year respectively would show that such minor discrepancies were quite natural but from their evidence it does not go to the root of the matter which belies the present case, hence their evidence is trustworthy and has been rightly relied upon by the trial court while convicting and sentencing the appellant.

47. The law regarding the act of exhortation of an accused has been laid down by the Apex Court in catena of decisions some of which are relevant to be mention for the consideration of present case are quoted hereinbelow;

48. In ***Jainul Haque vs. State of Bihar : AIR 1974 SC 1651*** Hon'ble Supreme Court in para 8 of its judgment has held as under:

"The evidence of exhortation is, in the very nature of things, a weak piece of evidence. There is quite often a tendency to implicate some person, in addition to the actual assailant by attributing to that person an exhortation to the assailant to assault the victim. Unless the evidence in this respect be clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant."

49. ***In Ramesh Singh @ Photti vs. State of Andhra Pradesh : AIR 2004 (SC) 4545*** Hon'ble Supreme Court in para 12 of its judgment has held as under:

"12. To appreciate the arguments advanced on behalf of the appellants it is necessary to understand the object of incorporating Section 34 in the Indian Penal Code. As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held to guilty. By introducing Section 34 in the penal code the Legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principles of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered by the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made, from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of

common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted."

50. In ***Surendra Chauhan vs. State of Madhya Pradesh : 2000 4 SCC 110***, Hon'ble Supreme Court in ***para 11*** of its judgment has held as under:

"11. Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. Ramaswami Ayhangar & Ors. v. State of Tamil Nadu2. The existence of common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. Rajesh Govind Jagesha v. State of Maharashtra3. To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established : (i) common intention and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case."

51. In ***Pandurang VS State Of Hyderabad, 1955 1 SCR 1083,*** Hon'ble Supreme Court in para ***34 and 35*** of its judgment has held as under:

"34. In the present case, there is no evidence of any prior meeting. We know nothing of what they said or did before the attack-not even immediately before. Pandurang is not even of the same caste as the others. Bhilia. Tukia and Nilia are Lambadas, Pandurang is a Hatkar and Tukaram a Maratha. It is true prior concert and arrangement can, and indeed often must be determined from subsequent conduct as; for example, by a systematic plan of campaign unfolding itself during the course of the action which could only be referable to prior concert and pre-arrangement, or a running away together in a body or a meeting together subsequently. But, to quote the Privy Council again,

"the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case".

But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in

every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time-honoured way, "the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis". (Sarkar s Evidence, 8th edition, page 30).

35. The learned counsel for the state relied on - Mamand v. Emperor , AIR 1946 PC 45 (C), because in that case the accused all ran away and their Lordships took that into consideration to establish a common intention. But there was much more than that. There was evidence of enmity on the part of the accused who only joined in the attack but had no hand in the killing; and none on the part of the two who did the actual murder. There was evidence that all three lived together and that one was a younger brother and the other a tenant of the appellant in question. There was evidence that they all ran away together: not simply that they ran away at the same moment of time when discovered, but that they ran away together.

As we have said, each case must rest on its own facts and the mere similarity of the facts in one case cannot be used to determine a conclusion of fact in another. In the present case, we are of opinion that the facts disclosed do not warrant an inference of common intention in Pandurang s case. Therefore, even if that had been charged, no conviction could have followed on that basis. Pandurang is accordingly only liable for what he actually did."

52. From the law laid down in the above referred cases it can be deduced that evidence of exhortation is a weak piece of evidence. There is quite often a tendency to implicate some person, in addition to the actual assailant by ascribing to that person role of an exhortation to the assailant to assault the victim. Unless the evidence in this respect is clear, cogent and reliable, no conviction can be recorded against the person alleged to have exhorted the actual assailant.

53. The essence of joint liability in doing a criminal act is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. If the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove it. Hence, in most cases it has to be inferred from the conduct of the accused or other relevant circumstances of the case. The inference can be gathered by the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made, from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. Even an illegal omission on the part of such accused can indicate the sharing of common intention. The act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. Presence of the accused, who in one way or other facilitate the execution of

common design is tantamount to actual participation in the criminal act. The act need not necessarily be overt, even a covert act is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. To invoke Section 34 IPC two factors must be established : (i) common intention and (ii) participation of the accused in the commission of an offence. To fasten the liability u/s 34 IPC an act, whether overt or covert, is indispensable to be done by a co-accused. If no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34, IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34, IPC. To ascertain common intention, totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the such intention to commit an offence of which he could be convicted.

54. Thus, this Court after scrutinizing the evidence lead by the prosecution and the defence of the accused, who had only pleaded for his false implication in the present case and has not denied his presence at the place of occurrence, and his previous conduct goes to show that the appellant has played an active role in the instant case by instigating the co-accused persons for killing the deceased and uttered "Maro sale ko aaj bachne na paye" on which co-accused persons have committed the murder of the deceased with their respective rifles in broad day light which had been witnessed by P.W. 1 and 2, namely, Vijay Kumar Yadav (informant) and Smt. Kumkum Yadav, who are son and daughter-in-law of the deceased and the ocular testimony is corroborated by the medical evidence and considering the law laid down by the Apex Court in cases referred above regarding exhortation, we are of the opinion that the trial Court has rightly convicted and sentenced the appellant for the offence under section 302/34 I.P.C., hence does not require any interference by this Court. The impugned judgment and order passed by the trial Court is hereby upheld.

55. The appeal lacks merit and is accordingly, **dismissed.**

56. The appellant is stated to be in jail. He shall remain in jail to serve out the sentence as has been awarded by the trial Court.

(2021)03ILR A999
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.03.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SANJAY KUMAR PACHORI, J.

Criminal Appeal No. 1876 of 2009
With
Criminal Appeal No. 1541 of 2009

Mukesh Tiwari ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Lav Srivsastava, Sri Adhya Shankar Chaturvedi, Sri I.K. Chaturvedi, Sri Pradeep Kumar Mishra, Sri Ranjan Kumar, Sri Sanjay Kumar, Sri V.P. Srivastava, Sri S.K. Chaubey

Counsel for the Opposite Party:

A.G.A.

(A) Criminal Law - Appeals from Conviction - Indian Penal Code, 1860 - Section 452, 302 read with section 34 - The Code of criminal procedure, 1973 - Section 313 - delay in lodging the FIR does not make prosecution case improbable when such delay is properly explained, but a deliberate delay in lodging the FIR may prove fatal - cases where there is a delay in lodging the FIR, the court has to look for a plausible explanation for such delay - even though the existence of motive loses significance when there is reliable ocular account but where the ocular testimony appears to be suspect the existence or absence of motive acquires some significance regarding the probability of the prosecution case. (Para - 39,48)

(B) Criminal Law - The Code of criminal procedure, 1973 - defect in the investigating by itself cannot be ground for acquittal - Prosecution case cannot be doubted merely on the ground of non-recovery of 'empties' fired from the Katta at the deceased, or non-recovery of the lantern from the place of the incident, or non-recovery of the hockey stick and the knife - any omission on the part of the Investigating Officer cannot go against the prosecution case if it is otherwise supported by reliable and credible evidence - investigation is not the solitary area for judicial scrutiny in a criminal trial. (Para - 84,85)

F.I.R. lodged by PW-1 (wife of deceased) - PW-1 & her husband (deceased) & brothers were sleeping in a room of their house on the intervening night - At around 2:00 a.m., she woke up hearing rattle upon entry of persons in her room - door of the room was open and a lantern was lit - saw the appellants with a hockey stick, knife and a Katta in their hand - attacked husband with a hockey stick - shot at point-blank range on his neck, her husband fell down after receiving firearm injury - PW-2 & other woke up on hearing cries - tried to catch the appellants, but they fled away - injured taken to hospital - died - Due to enmity between the appellants & her husband, on account of civil & criminal litigation as well as a family partition, her husband was killed.(Para - 2)

HELD:- This is a case of blind murder, no one actually witnessed the incident and the FIR was lodged on the basis of guess-work and suspicion and the appellants have been implicated on account of suspicion because of the previous enmity. Even the possibility of the FIR being ante-timed cannot be ruled out as at the time of conducting inquest the G.D. Entry of the Chick FIR was not available and the dispatch time of the Special Report has not been proved by the prosecution - prosecution has failed to prove the charge of offences punishable under Section 302 read with Section 34 and Section 452 IPC against the appellants beyond reasonable doubt. As the evidence on record does not bring home the guilt of the appellants beyond the pale of doubt, the appellants are entitled to the benefit of doubt. Consequently, the appellants are entitled to be acquitted of all the charges for which they were tried - judgment and order of conviction as well as sentence recorded by the trial court is set aside. (Para - 88,90,91)

Criminal appeals allowed. (E-6)

List of Cases cited:

1. Meharaj Singh & Ors. v. St. of U. P. & Ors, (1994) 5 SCC 188

2. Thulia Kali v. The St. of Tamil Nadu, (1972) 3 SCC 393

3. Satpal Singh v. St. of Haryana, (2010) 8 SCC 714

4. Darbara Singh v. St. of Punj. (2012) 10 SCC 476

5. The St. of U. P. v. Hari Prasad & Ors., (1974) 3 SCC 673

6. Badam Singh v. St. of M. P., (2003) 12 SCC 792

7. Yogesh Singh v. Mahabeer Singh & Ors., (2017) 11 SCC 195

8. Rammi @ Rameshwar v. St. of M. P.,(1993) 8 SCC 649

9. Leela Ram (dead) through Duli Ch& v. St. of Haryana & Anr., (1999) 9 SCC 525

10. Bihari Nath Goswami v. Shiv Kumar Singh & Ors., (2004) 9 SCC 186

11. Vijay @ Chinee v. St. of M.P., (2010) 8 SCC 191

12. Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124

13. Shyamal Ghosh v. St. of Bengal,(2012) 7 SCC 646

14. Mritunjoy Biswas v. Pranab @ Kuti Biswas & Anr.,(2013) 12 SCC 796

15. Balaka Singh & Ors. v. St. of Punj., AIR 1975 SC 1962

16. Zwinglee Arivel v. St. of M.P., AIR 1954 SC 15

17. Vadivelu Thevar v. The St. of Madras, AIR 1957 SC 614

18. Kusti Mallaiah vs St. of A.P., (2013) 12 SCC 680

19. Lallu Manjhi & Anr. v. St. of Jharkh&, (2003) 2 SCC 401

20. Jhapsa Kabari & Ors. v. St. of Bihar, (2001)10 SCC 94

21. Yogesh Singh v. Mahabeer Singh & Ors., (2017) 11 SCC 195

22. Ramashish Rai v. Jagdish Singh, (2005) 10 SCC 498 C.

23. Muniappan & Ors. v. St. of Tamil Nadu, AIR 2010 SC 3718

(Delivered by Hon'ble Sanjay Kumar Pachori, J.)

1. The present appeals are filed against the judgment and order passed by Special Judge/Additional Sessions Judge, Ballia, on 28.2.2009 in Sessions Trial No. 51 of 2008 by which the appellants Indrajit Mishra, Sanjit Mishra and Mukesh Tiwari have been convicted for the offences punishable under Section 452, 302 read with section 34 Indian Penal Code (in short "I.P.C."). 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 under section 302 read with section 34 I.P.C., and five year's rigorous imprisonment with fine of Rs. 5000/- each and default sentence of six months additional imprisonment under Section 452 I.P.C. The sentences were directed to run concurrently. Since the abovementioned appeals arise from a common judgment of the trial court, it will be proper for us to deal with these appeals in a common judgment.

PROSECUTION CASE

2. The Prosecution case in brief, as could be elicited from the First Information Report (in short FIR) lodged by Smt. Manorama Devi (PW-1) is that Smt. Manorama Devi and her husband Pratap Shankar Mishra (deceased) were sleeping in a room of their house on the intervening night of 29/30.7.2007. Her brothers Ajit Narayan Pathak (PW-2) and Lalit Narayan Pathak (not examined) were also sleeping in the courtyard at that time. At around 2:00 a.m., she woke up hearing a rattle upon entry of persons in her room. At that time door of the room was open and a lantern was lit. She saw the appellants Indrajit Mishra with a hockey stick, Sanjit Mishra with a knife and Mukesh Tiwari with a Katta in their hand. Indrajit Mishra attacked her husband with a hockey stick. Her husband got up from the cot and tried to run towards the courtyard but Indrajit

Mishra and Sanjit Mishra caught him at the door of the room and Mukesh Tiwari shot at point-blank range on his neck, her husband fell down after receiving firearm injury. Ajit Narayan Pathak (PW-2) and Lalit Narayan woke up on hearing her cries. They tried to catch the appellants, but they fled away by jumping over the boundary wall. The injured was taken to the hospital, where he died. Due to enmity between the appellants and her husband, on account of civil and criminal litigation as well as a family partition, her husband was killed.

3. After the incident, CP-337 Kanhaiya Yadav (PW- 4) along with Sub-Inspector1 Surendra Yadav (not examined) while on patrol duty, reached the place of occurrence on hearing the gunshot and noise. The injured Pratap Shankar Mishra was brought from the spot to District Hospital Ballia by Tata 407 vehicle with *Mazarubi Chitthi* (not proved). In the District Hospital, at about 3:50 a.m., he succumbed to the injuries. Ajit Narayan Pathak (PW-2) informed Smt. Manorama Devi, at 4:30 a.m., about her husband's death.

4. The First Information Report dated 30.7.2005 (Ex.Ka-2) was registered as case crime No. 117 of 2007 under section 302 I.P.C. against the appellants at Police Station-Reoti, District Ballia, at 5:20 a.m. by CP-598 Deo Nath Singh (PW-3), on the basis of a written complaint (Ex.Ka-1) of Smt. Manorama Devi (PW-1) which was scribed by Ajit Narayan Pathak (PW-2). The distance between the place of occurrence and the Police Station is 1/2 Km.

5. On 30.7.2007, S.I. Hasmat Khan (PW-7) started the investigation of the case and after inspecting the place of the incident, as pointed out by the informant (PW-1), he prepared a site map (Ex.Ka-8) of the place of the incident. He also recovered blood-stained and plain earth from the place of the incident and prepared a seizure memo (Ex.Ka-9). The proceedings of the inquest were completed at about 1:30 p.m. by S.I. Hari Prasad Vishwakarma (PW-8) at the mortuary of District Hospital Ballia and inquest report (Ex.Ka-7) was prepared on the basis of death information Memo (Ex.Ka.-5) received from the Hospital. He also prepared other police papers (Ex.Ka- 13 to Ex.Ka-17) for getting a post-mortem of the body of the deceased.

6. PW-5 Dr. B. Narayan conducted the post-mortem examination of the body of the deceased on 30.7.2005 at 4:45 p.m. The post-mortem report (Ex.Ka.-6) disclosed the presence of 4 ante-mortem injuries on the corpse of Pratap Shankar Mishra (aged about 35 years). These are as under:

1. Wound of entry of firearm size 0.6 cm x 0.6 cm x cavity deep present on the middle of neck 3 cm above from Supra external notch, margins inverted, burning & blackening present around the wound, sign of tattooing present on the front of chest, both upper arms and face 10 inches all around the wound, abrasion collar present.

2. Wound of exit of firearm size 2 cm x 1.5 cm present on right side of back of chest just below the scapula bone edge of the wound were everted, 15 cm below the right shoulder, injury no. 1 & 2 are interconnected to each other.

3. Abrasion 2.5 cm x 2.0 cm present just below the beard.

4. Abrasion 2.5 cm x 2.0 cm present over chin anterior aspect, 3 cm behind the injury no. 3.

The doctor opined that the death was caused due to shock and haemorrhage as a result of ante-mortem injuries about one day before the post-mortem. Internal examination disclosed semi-digested food in the stomach, and 6th rib of the right side, 3rd and 4th bone of trachea fractured. The doctor further noticed that the deceased was brought dead by CP-337 Kanhaiya Yadav at 3:50 a.m. on 30.7.2007.

7. During the course of the investigation, on 4.8.2007 at 5:00 a.m., PW-7 S.I. Hasmat Khan arrested the appellant Mukesh Tiwari and recovered an unlicensed pistol (Katta) .315 bore with a cartridge, on the disclosure statement and pointing out of the appellant Mukesh Tiwari, from near northern wall of Bajrangbali temple at Chaubey Chhapra Dhala Road, and prepared a seizure memo (Ex.Ka-10). After completion of the investigation, PW-7 S.I. Hasmat Khan submitted a charge sheet (Ex.Ka-21) against the appellants under Sections 452, 302 I.P.C. and under Sections 25/27 Arms Act. The court took cognizance. On committal, the trial court framed charges against the appellants under Sections 452 and 302 read with Section 34 I.P.C. The appellants denied the charges and claimed trial.

8. In order to substantiate the charges against the appellants, the prosecution examined as many as 8 witnesses. PW-1 Smt. Manorama Devi, PW- 2 Ajit Narayan Pathak were examined as eye-witnesses; PW-4 CP Kanhaiya Yadav who was on patrol duty and had reached the place of the incident on hearing the gunshot and noise was examined to provide link evidence. He had taken the injured Pratap Shankar Mishra to the hospital along with the informant's brothers Ajit Narayan Pathak and Lalit Narayan Pathak. He had also informed the police station Kotwali Ballia vide Memo (Ex.Ka.-5) at 4:30 a.m. on 30.7.2007.

9. The prosecution also examined an array of formal witnesses, namely, PW-3 CP Deo Nath Singh (scribe of the F.I.R.), PW- 5 Dr. B. Narayan, PW- 6 CP 640 Virendra Rai (who took the dead body of the deceased to the Police Line, Ballia), PW- 7 S.I. Hasmat Khan investigating officer2, PW- 8 S.I. Hari Prasad Vishwakarma (who prepared the inquest report), to prove the exhibited documents and material objects produced. A Forensic Scientific Laboratory report (Paper No. 33Ka/1 and 33Ka/2) has also been submitted by the prosecution. The prosecution proved certain material exhibits, namely, unlicensed pistol (Katta) .315 bore as material Ex.No.-1 and used cartridge as material Ex.No.-2.

10. The accused persons were examined under section 313 of the Code of Criminal Procedure (in short 'Cr.P.C.') wherein they denied the incriminating evidence put to them and stated that they have been falsely implicated on account of enmity. The appellants Indrajit Mishra and Sanjit Mishra stated that they had been residing at Village Suremanpur with their families in the house of Sanjay Maurya (DW-1) for the last 7-8 years and were running a clinic there. On the night of the incident, wife of Sanjay Maurya was admitted to their clinic and they were treating Sanjay Maurya's wife. The police arrested them from their clinic at 4:00 a.m. on 30.7.2007.

11. The appellant Mukesh Tiwari stated in his statement under Section 313 Cr.P.C that at the time of the incident Smt.

Manorama Devi was doing service as Shiksha Mitra and in connection therewith had been residing in her maternal home at Village Shivpur. After the death of her husband, the Police called her from Village Shivpur to lodge the report. She had got a registered Power of Attorney of the property from the mother of the deceased which was later cancelled. The appellants filed few certified copies as documentary evidence and examined DW-1 Sanjay Maurya and DW-2 Rajendra Prasad (Sub-Registrar) in support of their defence.

12. Before the trial court the appellants came with a specific case that when the police took the injured Pratap Shankar Mishra to the District Hospital Ballia from the place of the incident, at that time, and at the time of the incident, PW-1, Smt. Manorama Devi was present in her maternal home at Village Shivpur because she lived there in connection with her service as Shiksha Mitra, which is at a distance of 12-14 Km from the place of the incident. It was also the appellants' case that PW-1 and PW-2 Ajit Narayan Pathak were informed and called by the Police after the death of Pratap Shankar Mishra; and that the testimony of eyewitnesses PW-1 and PW-2 is full of contradictions and omissions. The appellants Indrajit Mishra and Sanjit Mishra further pleaded that they had been arrested at 4:00 a.m. on the day of the incident from their clinic at Village Surmanpur, wherein they were treating the wife of DW-1 Sanjay Maurya. They also took the plea that the motive assigned to Mukesh Tiwari has not been proved.

FINDINGS OF THE TRIAL COURT

13. The trial court discarded the documentary evidence filed by the defence i.e. residence certificate of the year 2001, income certificate of PW-1 Smt. Manorama Devi, and held that on the basis of such evidence it can not be held that at the time of incident PW-1 Smt. Manorama Devi was not present at the place of occurrence.

14. The trial court found that after the incident, the injured Pratap Shankar Mishra was brought to the District Hospital Ballia by PW-2 Ajit Narayan Pathak and Lalit Narayan Pathak along with PW-4 CP Kanhaiya Yadav. The distance between the District Hospital Ballia and the place of incident is about 30 Km, where Pratap Shankar Mishra was declared dead at 3:50 a.m. and the FIR was lodged at 5:20 a.m. It found that there was ample reason for Ajit Narayan Pathak not to lodge the FIR on the way to the hospital because he had not seen the incident. Therefore, there is no such delay in lodging in the FIR, in as much as, PW-1 Smt. Manorama Devi, who had been the eye witness, lodged the FIR against the accused-appellants with full disclosure of the facts, shortly after the death of her husband.

15. The trial court further found that on the night of the incident there was a full moon and a lantern was also lit near the place of occurrence, the accused-appellants were well known to the witnesses, therefore, there was sufficient opportunity to identify the accused-appellants. It held that on account of failure of the investigating officer to recover the lantern from the place of the occurrence, it can not be presumed that there was no sufficient light. It held that even if PW- 2 Ajit Narayan Pathak had not seen the accused-appellants, PW-1 Smt. Manorama Devi, wife of the deceased, was sleeping in the room and, therefore, her testimony as eye-witness is natural.

16. The trial court observed that though the investigating officer mentioned the name of Udit Narayan in case diary in place of Lalit Narayan but since Smt. Manorama Devi (PW-1) had clearly stated that Lalit Narayan and Ajit Narayan were sleeping at her house on the night of the incident, the accused persons cannot get the benefit of the error made by the investigating officer. Thus, by placing reliance on the testimony of PW-1, the trial court concluded that the prosecution successfully proved the charges against the appellants under Section 452, 302 read with Section 34 I.P.C., beyond all reasonable doubt and thereby convicted and sentenced the appellants as above.

17. Being aggrieved by the trial court's order, the appellants have preferred these appeals.

SUBMISSIONS BEFORE THIS COURT

18. We have heard Sri V. P. Srivastava, learned Senior counsel assisted by Sri A. S. Chaturvedi for the appellant Mukesh Tiwari; Sri Amit Mishra, learned counsel for the appellants Indrajit Mishra and Sanjit Mishra; Sri Patanjali Mishra, learned A.G.A., for the State; and Sri S. K. Chaubey, learned counsel for the informant and have perused the record.

19. Learned counsel for the appellants vehemently urged that PW-1 Smt. Manorama Devi and PW-2 Ajit Narayan Pathak had not seen the incident. The presence of alleged eyewitnesses PW-1 and PW-2 at the time of the incident is highly doubtful and unbelievable because at the time of the incident PW-1 and PW-2 were present in Village Shivpur, both of them were informed and called by the Police after the death of injured Pratap Shankar Mishra, and it is for this reason that the FIR has been lodged after 3.20 hours. This delay is fatal to the prosecution, particularly, because the distance between the place of the incident and the police station is only 1/2 Km. The minute description in the first information report also suggests that it has been lodged after legal consultation and deliberation.

20. Learned counsel for the appellants further submitted that there are material contradictions/omissions in the oral testimony of PW- 1 Smt. Manorama Devi and PW- 2 Ajit Narayan Pathak with regard to their presence at the time of the incident. There is a contradiction in the testimony of PW-4 CP Kanhaiya Yadav and PW-7 S.I. Hasmat Khan in respect of the presence of eye-witnesses. Though appellants-accused persons were alleged to have been recognized in the light of the lantern, but the lantern was not recovered by the investigating officer. The gunshot injury could not be caused in the manner and from the place where the appellants were alleged to be present at the time of firing the gunshot. There is a material contradiction between the testimony of PW-1 Smt. Manorama Devi and PW-5 Dr. B. Narayan in respect to injury no. 1. The role of catching hold of the deceased has been attributed to the appellants Indrajit Mishra and Sanjit Mishra even though the shot has allegedly been fired from a point-blank range and the bullet entered the body from the middle of the neck just above Supra external notch and exited the body from the back of right side of the chest just below scapula bone, which renders the ocular account highly unbelievable.

21. Learned counsel for the appellants further contended that the trial court

ignored the evidence of DW-1 Sanjay Maurya wherein he stated that the appellants Indrajit Mishra and Sanjit Mishra had been arrested from their clinic situated at Village Suremanpur at around 4:00 a.m., i.e. before lodging the F.I.R. In spite of that, the investigating officer did not make any effort to recover hockey stick and knife from the aforesaid appellants. The motive attributed to all the appellants in the FIR is enmity due to pending criminal and civil cases regarding family partition between the appellants and the deceased (Pratap Shankar Mishra). Whereas, the appellant Mukesh Tiwari has no concern with the family of the deceased. PW-1 admitted this fact in her cross-examination by stating that there was no case pending against Mukesh Tiwari in respect to family partition. Thus, the prosecution has failed to prove any motive against Mukesh Tiwari. It was urged that the trial court has not properly appreciated the deposition of PW- 1 Smt. Manorama Devi which is full of contradictions and omissions and, therefore, the prosecution has failed to prove the case against the appellants beyond all reasonable doubts. Hence, the impugned judgment is liable to be set aside.

22. Per Contra; Learned A.G.A. submitted that PW-1 Smt. Manorama Devi and her cousin PW-2 Ajit Narayan Pathak had recognized the appellants in the light of the lantern as well as in full moonlight and the accused persons were known to PW-1 and PW-2 even before the incident. Although there is some discrepancy between the statement of PW-1 and PW-2 with regard to the presence of PW-2 but does not damage the core of the prosecution case. In the present case, though, the conviction of the appellants is based upon the deposition of sole eye-witness PW-1 Smt. Manorama Devi but there is no rule that there cannot be a conviction by relying on the testimony of a sole eye-witness. It is submitted that her presence on the spot is natural as the incident had taken place in her house and near the place where she was sleeping. It is further submitted that PW-1 is a reliable and trustworthy witness. Moreover, the presence of lantern burning at the place of the incident at the time of occurrence has been proved by eye-witnesses PW-1 and PW-2. The F.I.R. was registered against the appellants promptly (within 50 minutes of the death) at 5:20 a.m.; learned Additional Sessions Judge has rightly held the appellants guilty; the findings recorded by the trial court are on an appreciation of the evidence, which is neither perverse nor contrary to the evidence on record; that the charges levelled against the appellants had been proved beyond reasonable doubts. Thus, their conviction and sentence do not warrant any interference, the judgment of the trial court is liable to be affirmed. A prayer was, therefore, made to dismiss the appeals.

23. Learned counsel for the informant Sri S. K. Chaubey adopted the submissions made by learned A.G.A.

ANALYSIS OF THE PROSECUTION EVIDENCE:

24. Before we proceed to weigh the respective submissions it would be apposite to notice the arguments on behalf of the appellants in detail. The appellants' arguments are: Firstly; that at the time of the incident, PW- 1 Smt. Manorama Devi and PW-2 Ajit Narayan Pathak were present at Village Shivpur which is around 12-14 Km away from the place of the incident; that due to strained relations

between PW-1 Smt. Manorama Devi and the deceased, PW-1, working as a Shiksha Mitra, used to stay in her maternal home at Village Shivpur. After the death of Pratap Shankar Mishra, the police called her and her relatives and thereafter the FIR of the present case has been lodged after consultation and deliberation which is clearly borne out from the fact that the FIR was lodged, as alleged, after 3 hours 20 minutes of the incident, even though the distance between the place of occurrence and the Police Station is just 500 meters. The delay in lodging the FIR assumes significance and casts a complete shadow of doubt on the prosecution case for the reasons below:

(a) The delay in lodging the FIR assumes importance because admittedly the police had arrived at the scene of occurrence and they took the injured, Chitthi Majrubi was prepared at the police station but FIR was not lodged, which suggests that guess-work was going on to lodge a named FIR.

(b) The delay suggests that it was a blind murder. Through conjectures, all persons against whom the deceased had enmity were implicated. Two of them were assigned ornamental roles, which finds no corroboration from medical evidence as neither there is any injury of hockey stick nor of the knife, and the third is not related to the other two and shared no common motive with them therefore, why would he join them.

(c) Gunshot was allegedly fired from a point-blank range whilst two accused persons held the deceased from either side, which appears improbable because no one would take the risk of himself getting injured and, secondly, from the spread of blackening and tattooing around the wound to an extent of 10 inches, firing from a point-blank range is ruled out. Thus, no one actually witnessed the incident and everything is based on conjectures.

(d) There are two groups of accused, who are totally unrelated to each other. The appellant Mukesh Tiwari does not appear to have any concern or connection with the deceased or other appellants. In spite of that, the prosecution attributed the motive against him that he committed the murder due to enmity of family partition. The motive against Mukesh Tiwari has been changed by the prosecution.

(e) G.D.Report of the Chick FIR was not available at the time of the inquest proceedings.

(f) Conduct of PW-1, Smt. Manorama Devi, also creates doubt, inasmuch as the investigating officer stated that Manorama Devi told him that the deceased had a land dispute with Mahesh Tiwari and expressed doubt that Mahesh Tiwari might be involved in the incident.

(g) There is no evidence on record whether the injured Pratap Shankar Mishra was alive enroute to the hospital at the time of preparation of *Mazrubi Chitthi* (Paper no. 8Ka/1). The prosecution case is totally silent on this account. But according to PW-5 Dr. B. Narayan as well as Memo (Ex.Ka.-5), Pratap Shankar Mishra was brought dead at District Hospital at 3:50 a.m.

(h) PW-7 S.I. Hasmat Khan in his cross-examination admitted his signature *on Mazrubi Chitth*i but he stated that he does not remember when and where the

Mazrubi Chitthi was prepared. He also could not remember whether it was prepared after or before the lodging of the FIR. This *Mazrubi Chitthi* has not been proved.

(i) The prosecution failed to prove the dispatch time of the Special Report however, PW-3 CP Deo Nath in his cross-examination stated that the special report has been sent at 7:10 a.m. on 30.7.2007.

Secondly; the prosecution case wholly depends on the testimony of solitary witness, PW-1 Smt. Manorama Devi. The incident occurred in the night and nobody witnessed the incident, which is borne out from the contradictions/omissions present in the testimony of PW-1 and PW-2. The ocular version of PW-1 does not appear reliable and does not inspire confidence in the prosecution case. In support thereof, it has been pointed out that:

(a) PW-2 Ajit Narayan has not supported the prosecution case. In spite of that, the prosecution has not examined Lalit Narayan (real brother of PW-1), who was sleeping along with PW-2 in the courtyard.

(b) There are contradictions with regard to; the place where PW-2 Ajit Narayan and Lalit Narayan slept in the house of the deceased on the night of the incident; the presence of PW-2 Ajit Narayan and Lalit Narayan in the intervening night at the place of the incident; the arrival of PW-4 CP Kanhaiya Yadav and PW-7 S.I. Hasmat Khan at the place of the occurrence, after the incident, before lodging the FIR.

(c) There are contradictions in the testimony of PW-1, PW-2, PW-4 with regard to the place of the incident.

(d) There are omissions with regard to the role of appellants Indrajit Mishra and Sanjit Mishra.

(e) There is material inconsistency between the ocular and medical evidence. More so, the prosecution has failed to prove injury no. 3 and 4 received by the deceased.

(f) Behaviour (conduct) of PW-1 Smt. Manorama Devi and PW-2 Ajit Narayan Pathak after the incident cast a shadow on their alleged presence at the time of the incident.

Thirdly; false implication of the appellants, Indrajit Mishra and Sanjit Mishra, due to enmity on account of property dispute is writ large as there appears no injury of a hockey stick or of a knife on the body of the deceased. The motive against the appellant Mukesh Tiwari as narrated in the FIR has not been proved. The Prosecution has failed to prove the motive against the appellant Mukesh Tiwari.

Fourthly; the appellants Indrajit Mishra and Sanjit Mishra were arrested by the police at around 4:00 a.m. after the incident from their clinic situated at Village Suremanpur and were implicated due to enmity.

25. At this stage, it would be useful for us to notice the topography of the house where the incident took place (as depicted in the site-plan Ex.Ka-8). It appears from the site plan that the house of the deceased is north facing. In front of the main door of his house is a '*Sahan*' (front courtyard/open place in front of house) thereafter, a constructed road. There is a Shiv Temple in the '*Sahan*'. A gallery connects the '*Sahan*' and the courtyard (*Angan/back* courtyard), which is an open place in the back portion

of the house. Adjacent to the gallery there are two rooms. The doors of these rooms open in the courtyard as well as in the gallery. The incident took place in one of the rooms, located on the western side of the gallery. Two other rooms are situated on the western side of the courtyard. The southern boundary wall of the house is made of bricks. This wall is five feet high. On the eastern side of the house, there is an open land of the deceased and on the western side, there is the house of appellants Indrajit Mishra and Sanjit Mishra. On the southern side of the house, there is a field belonging to the deceased.

26. Before we proceed to dwell upon the merit of the contentions raised before us, it will be apposite to have a close scrutiny of the entire ocular evidence, which is as follows:-

27. **PW-1** Smt. Manorama Devi (wife of the deceased) in her testimony has deposed that the incident took place on the intervening night of 29/30.7.2007. On the night of the incident, she was sleeping next to her husband in a room located on the northern side of her house, of which the exit door opens towards the south in the courtyard *(Angan*), the door of the room was half open; her brothers (PW-2 Ajit Narayan and Lalit Narayan) who had come to her house, were sleeping near the hand pump in the courtyard (*Angan*) and her mother-in-law, who is deaf and of unsound mind, was sleeping towards the north in an open terrace room. It was a full moon night, at around 2:00 a.m. she heard some sounds and woke up to see the appellants with weapons in the light of the lantern, which was lit at the door of the room. As soon as Indrajit hit her husband with a hockey stick, he woke up, stood up from the cot and tried to escape towards the courtyard (Angan), then Indrajit and Sanjit caught hold of her husband and Mukesh Tiwari shot at him from point-blank range on his neck due to which her husband fell on the ground. On hearing her cries and gunshot, her brothers woke up and saw the incident; they tried to catch them, but they ran away by jumping over the south-eastern corner of the boundary wall of the courtyard. She had given the report to the scribe at the police station, the case was registered and he gave her its copy.

PW-1 Smt. Manorama Devi in her cross-examination stated that Indrajit Mishra and Sanjit Mishra were holding her husband's waist from both sides, one was holding from the back and the other was holding from the side. At that time her brothers were not awaking. Therefore, they could not come to his rescue. She further stated that Indrajit Mishra and Sanjit Mishra caught her husband at the door of the room and at the same time, Mukesh Tiwari shot him from a point-blank range on the right side of his neck. At that time her brothers were still sleeping. They woke up after hearing the gunshot and tried to catch the appellants but by that time, they fled away. She further stated regarding the registration of the case that she did not remember how long after the incident the report was written.

It is noteworthy that PW-1, even while witnessing her husband being caught and shot by the appellants, neither screamed nor cried for help. Her brothers (PW-2 Ajit Narayan and Lalit Narayan) woke up only after hearing the gunshot.

At this stage, it would be appropriate to highlight that even Pratap Shankar Mishra (deceased) did not make any noise nor did he call his two brothers-

in-law for help, who were sleeping at a distance of just 9-10 feet from the door of the room in the courtyard (Angan). He also did not call his mother (who was sleeping in the adjacent open terrace room) and wife for help. Pratap Shankar Mishra woke up after receiving an injury from the hockey stick, stood up from the cot and ran towards the door of the room. He had enough time and opportunity to call his wife, mother and brothers-in-law for help.

Moreover, the most surprising aspect is that there has been no scuffle between the assailants and the deceased before firing, and till the very last, the deceased, his wife, and the assailants, did not let out a single noise. This entire situation seems to be extremely improbable and impractical.

Even the post-mortem report reveals no wound on the body of the deceased by the hockey stick. Further, the injury no. 1, wound of entry of firearm, was present on the middle of neck 3 cm above from Supra external notch whereas injury no. 2, wound of exit, was present on right side of the back of chest just below the scapula bone, which suggests that shot travelled from upper part of the body to the lower part. Moreover, blackening, burning and tattooing was found around injury no. 1 up to an area of 10 inches, which is possible only if one fires from a short distance and not from point-blank range. The direction of the bullet travelling from upper part to lower part rules out possibility of two persons catching hold the victim.

After analysing all of the above circumstances, it rounds off to the following probabilities: firstly, PW-1 was not present in the room at the time of the incident and did not see its occurrence. Secondly, the incident has not occurred in the manner as alleged by the prosecution. Thirdly, the incident has been a split second affair i.e. it occurred in an extremely short period of time. Fourthly, PW-2 Ajit Narayan and Lalit Narayan were not sleeping in the courtyard at that time. Fifthly, statement of PW-1 Smt. Manorama Devi that she does not remember how long after the incident the report was written casts a serious dent to the credibility of the prosecution case.

28. P W-2 Ajit Narayan (brother-in-law of the deceased) in his statement in chief stated that he went along with his cousin Lalit Narayan, to meet their sister at her house. They ate food at around eleven o'clock and slept on a wooden plank in the courtyard *(Angan*). His sister and brother-in-law were sleeping in the room located in the northern side of the house, the door of which opens towards the south in the courtyard. At around 2:00 a.m., on hearing the cries and gunshot, they woke up. They saw the appellants with weapons and, his brother-in-law lying near the door of the room. They tried to catch them but they ran away by jumping over the south-eastern boundary wall of the courtyard.

Though, in his cross-examination, he stated that he did not see the shot being fired and did not see the accused-appellants jumping over the boundary wall.

After analysing the testimony of PW-2, there are two possible situations arising- firstly, PW-2 Ajit Narayan and Lalit Narayan were not sleeping in the courtyard that night and that is why they did not see anything. Secondly, they were planted as an eye-witness by the prosecution after due deliberation.

29. **PW-3** CP 598 Deo Nath Singh (scribe of FIR): According to him, he had registered the FIR on the basis of a written

complaint of Manorama Devi at 5:20 a.m. on 30.7.2007 as Crime No. 117 of 2007 under Section 302 IPC and endorsed in the G. D. Report No. 4 at 5:20 a.m. He has proved G.D. Report No. 15 timing 9:40 a.m. by which, S.I. Surendra Yadav and CP 337 Kanhayia Yadav, departed from the police station for maintaining law and order.

He stated in his cross-examination that the Special Report of the present case has been sent at 7:10 a.m. on 30.7.2007. After considering the testimony of this witness, it clearly shows that the despatch time of the Special Report has not been proved by the prosecution.

30. **PW-4** CP Kanhaiya Yadav (who reached at the spot after hearing gunshot and noise, along with S.I. Surendra Yadav) has deposed that he and S.I. Surendra Yadav were on patrol duty. They heard the sound of gunshot and noise at around 2:00 a.m. on the night of 29/30.7.2007. They ran towards Pratap Shankar Mishra's house from where the sound came and saw his two relatives and some villagers present there, his mother and wife were crying. He immediately informed the Station House Officer from his mobile and asked for a vehicle from the police station. They took the injured Pratap Shankar Mishra with the help of his relatives and villagers, firstly, to the police station Reoti by TATA 407 vehicle and got a Mazrubi Chitthi, then reached Sadar Hospital Ballia and got him admitted.

PW-4 stated in his cross-examination that the mother and wife of the deceased were shouting and telling the names of assailants.

After considering the testimony of PW-4, the following inferences can be drawn: (a) that mother and wife knew about the assailants at the time of his arrival, (b) mother of the deceased was not deaf and dumb or of unsound mind, (c) he took the injured with the help of his relatives first to the police station and then to the hospital.

31. **PW-5** Dr. B. Narayan (who conducted the post-mortem) has deposed that injury no. 1, wound of entry of firearm was present on the middle of neck 3 cm above from Supra external notch and injury no. 2, wound of exit present on right side of the back of chest just below the scapula bone. At the time of post-mortem, semi-digested food was present in the stomach. He also found one abrasion just below the beard and another abrasion over the chin, anterior aspect, as injury nos. 3 & 4 respectively.

PW-5 stated in his cross-examination that injury no. 1 can possibly be caused from a distance of 10- 12 feet by a standard gun. The time and date of death of the deceased were not mentioned in Form No.-13. On the basis of ante-mortem injuries, the death might have also been possible on 29.7.2007 between 8 - 9 p.m.

32. **PW-7** S.I. Hasmat Khan (Station House Officer/I.O.): According to him, the FIR was registered in his presence. He inspected the place of occurrence at the instance of Smt. Manorama Devi and prepared a site plan. He took blood-stained and plain earth from the place of incident in presence of Pramod Kumar Upadhyay and Sanjeev Kumar Upadhyay and prepared a memo. He arrested the appellants, Indrajit Mishra and Sanjit Mishra. Further, he arrested Mukesh Tiwari on 4.8.2007 and recovered a Katta at his instance. After completing the investigation, he submitted the charge sheet against the appellants.

PW-7 in his cross-examination stated that he arrested Indrajit Mishra and Sanjit Mishra near the Suremanpur Railway Station around 6 o'clock in the evening. Manorama Devi told him in her statement that her brothers, Udit Narayan and Ajit Narayan were present at the place of the incident in the night and saw the occurrence. She, though, did not tell him that Lalit Narayan was present at the time of the incident. He reached the spot within 30 minutes after the incident. On questioning Manorama Devi, he got the names of the assailants from her while she was crying and he also orally enquired about the incident from the people present there. After that, he returned back to the Police Station. During the course of the investigation, no such fact came to his knowledge that Mukesh Tiwari had any land dispute with the deceased. He further stated that Manorama Devi told him that the deceased had a land dispute with Mahesh Tiwari and expressed doubt that Mahesh Tiwari might be involved in the incident.

After considering the evidence of PW-7, it is observed that; (a) he reached the place of occurrence within 30 minutes of the incident, (b) Manorama Devi told him that her brothers, Udit Narayan and Ajit Narayan were present at the time and place of the incident and saw the occurrence, (c) she knew the names of the assailants, though she suspected the involvement of Mahesh Tiwari in the murder of Pratap Shankar Mishra, (d) the motive against Mukesh Tiwari could not be established.

33. **PW-8** S.I. Hari Prasad Vishwakarma (who prepared the inquest report): According to him, he was posted at Police Chowki Satni Sarai, PS. Kotwali Ballia on 30.7.2007 as Chowki Incharge. On the same day at 11:30 a.m., he commenced the inquest proceedings at the Mortuary of District Hospital Ballia on the basis of G. D. Report No. 4 timing 4:30 a.m. (PS- Kotwali). This G. D. Report has been prepared on the basis of a Memo which has been filed in PS - Kotwali Ballia by CP 337 Kanhayia Yadav.

In his cross-examination, he stated that he did not get any G.D. Report of Chick FIR at the time of preparing the inquest report and that he had mentioned the cause of death in the inquest report on the basis of FIR.

Through the above consideration, it can be observed that till the time of conducting the inquest (i.e. 11:30 a.m. on 30.7.2007), G.D. Report of Chick FIR had not been endorsed in the General Diary of the Police Station Raoti.

34. Having noticed the contentions of learned counsel for the parties and having taken a glimpse of the evidence on record, now we shall weigh the argument of learned counsel for the appellants that the FIR of the present case was lodged after an unexplained delay of 3 hours 20 minutes of the incident because of consultation, guess-work and deliberation.

35. Noticeably, as per the prosecution case, the Police were present at the door-step, immediately after the incident, the police arranged a vehicle, a Mazrubi Chitthi was prepared at the Police Station yet, PW-1 Smt. Manorama Devi and PW-2 Ajit Narayan who claim themselves as eye-witnesses of the incident chose not to immediately lodge the report. The wife and mother of the deceased were naming the assailants before PW-4 CP Kanhaiya Yadav and PW-7 S.I. Hasmat Khan on the

spot but they did not disclose their names to the police and the FIR has not been lodged promptly, because either PW-1 and PW-2 were not present at the time of the incident or they did not witness it and were, therefore, deliberating to name the accused merely on conjecture.

36. It would be useful to notice the law with regard to the importance of prompt lodging of FIR. In **Meharaj Singh & Ors. v. State of U. P. & Ors, (1994) 5 SCC 188** the Supreme Court has observed: (SCC p. 195-96, para 12)

"12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eye witnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR, was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 Cr. P.C. is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante timed to give it the colour of a promptly lodged FIR..."

37. In **Thulia Kali v. The State of Tamil Nadu, (1972) 3 SCC 393,** the Supreme Court, emphasising the necessity of explaining the delay in lodging FIR, has held as follows: (SCC p. 397, para 12)

"12... 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 eye witnesses present at the scene of occurrence. Delay in lodging the First Information Report quite often results in embellishment which

is a creature of afterthought. On account of delay the report not only gets bereft of the advantage of spontaneity 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 satisfacorily explained...."

38. In **Satpal Singh v. State of Haryana, (2010) 8 SCC 714** the Supreme Court has observed: (SCC p. 720, para 15)

"15. This Court has consistently highlighted the reasons, objects and means of *prompt lodging of FIR. Delay in lodging FIR more often than not, results in embellishment and exaggeration, which is a creature of an afterthought. A delayed report not only gets bereft of the advantage of spontaneity, the danger of the introduction of a coloured version, an exaggerated account of the incident or a concocted story as a result of deliberations and consultation, also creeps in, casting a serious doubt on its veracity. Thus, FIR is to be filed more promptly and if there is any delay, the prosecution must furnish a satisfactory explanation for the same of the reason that in case the substratum of the evidence given by the complainant/informant is found to be unreliable, the prosecution case has to be rejected in its entirety. [Vide: State of Andhra Pradesh v. M. Madhusudhan Rao (2008) 15 SCC 582]*

39. It is well-settled position of law that delay in lodging the FIR does not make prosecution case improbable when such delay is properly explained, but a deliberate delay in lodging the FIR may prove fatal. In cases where there is a delay in lodging the FIR, the court has to look for a plausible explanation for such delay.

40. According to the prosecution case, PW-4 CP Kanhaiya Yadav and S.I. Surendra Yadav upon hearing the gunshot and noise immediately arrived at the spot where PW-1, PW-2, Lalit Narayan and the mother of the deceased were present. According to PW-4, he immediately informed the SHO (PW-7) from his mobile and asked for a vehicle from the Police Station. Thereafter, PW-4, two relatives of the deceased and some villagers took the injured, first, to the police station Reoti by TATA 407 vehicle and got a Mazrubi Chitthi, then reached Sadar Hospital Ballia and got him admitted. PW-4 stated in his cross-examination that the mother and wife of the deceased were shouting and telling names of the assailants. According to PW-7 S.I. Hasmat Khan, as stated in his cross-examination, he reached the spot within 30 minutes of the incident. Upon enquiring Manorama Devi, she disclosed to him the names of the assailants while crying.

41. From the prosecution case itself as noticed above, it can be logically inferred that, firstly, PW-1 (wife of the deceased), PW-2 Ajit Narayan and Lalit Narayan (brothers-in-law) including the mother of the deceased knew the name of the assailants and PW-4 CP- Kanhaiya Yadav, S.I. Surendra Kumar Yadav and PW-7 S.I. Hasmat Khan (I.O.) also came to know the name of the assailants through the mother and wife of the deceased. Secondly, the police arrived at the place of occurrence immediately after the incident and arranged a vehicle for taking the injured to the hospital for medical assistance. Thirdly, the injured kept lying on the spot until the

vehicle was arranged, which must have taken some time. Fourthly, the said eye-witnesses (PW-2 and Lalit Narayan) were present at the police station before they reached the hospital. Fifthly, the mother of the deceased does not seem to be of unsound mind since as soon as she witnessed the incident, she shouted and took names of the assailants, this conduct of her is the sign of a person whose cognitive responses are intact.

42. But despite all that the FIR was not lodged till return of information from the hospital. In fact, the FIR was lodged after about lapse of 50 minutes from the return of PW-2 Ajit Narayan from the hospital via police station at 4:30 a.m. Thus, the FIR was lodged with a delay of 3 hours 20 minutes. The prosecution explained the delay by stating that PW-2 Ajit Narayan did not know the whole incident, therefore his sister (PW-1) lodged the FIR. Whereas, PW-2 Ajit Narayan claimed in his examination-in-chief that he witnessed the incident and identified the assailants. PW-1 Smt. Manorama Devi also supported his version and stated the same in her examination-in-chief. We are of the opinion that the explanation put forth by the prosecution is not satisfactory because PW-1 and PW-2 had sufficient time and opportunity to lodge the FIR promptly.

43. In addition to the above, there are other circumstances also which generate a doubt regarding the time of lodging of FIR, these are; firstly, PW-1 does not remember how long after the incident the report was lodged, secondly, the inquest report was prepared on 30.7.2007 at 11:30 a.m. without receiving the copy of the G.D. Report of the Chick FIR, as PW-8 S.I. Hari Prasad Vishwakarma conducted the inquest on the basis of Memo (Ex.Ka.-5); he stated that he had not received the copy of Chick FIR, thirdly, the prosecution did not prove the dispatch time of the Special Report, fourthly, the prosecution also did not prove the Mazrubi Chitthi (Paper no. 8Ka/1).

44. A conspectus of the evidence noticed above indicates that the FIR in the present case was lodged with an 'unreasonable delay' and after deliberation. Normally, a delay of few hours, particularly in night incidents, might not be considered significant but here the police were at the doorstep of the informant and the injured (Pratap Shankar Mishra) was carried to the hospital by the police, with Mazrubi Chitthi, and a so-called witness, who was there at the place of incident and happens to be the brother of the eye-witness, yet prompt reporting of the incident was withheld, which suggests that either the incident was not witnessed or if witnessed, the identity of the assailant was not certain, therefore, the guess-work delayed the FIR.

45 . Now we shall deal with the motive behind the incident. It was argued that the prosecution failed to establish presence of motive for the crime against Mukesh Tiwari.

46. It would be useful to notice the law with regard to the role of motive in assessing the credibility of the prosecution case. In **Darbara Singh v. State of Punjab (2012) 10 SCC 476**, the Supreme Court has observed as under: (SCC, p. 482, para 16)

"16. Motive in criminal cases based solely on the positive, clear, cogent and reliable ocular testimony of witnesses is not at all relevant. In such a fact situation, the mere absence of a strong motive to commit the crime, cannot be of

any assistance to the accused. The motive behind a crime is a relevant fact regarding which evidence may be led. The absence of motive is also a circumstnce which may be relevant for assessing evidence." (Vide: Gurcharan Singh v. State of Punjab, AIR 1956 SC 460, Rajinder Kumar & Anr. v. State of Punjab, AIR 1966 SC 1322, Datar Singh v. State of Punjab, AIR 1974 SC 1193 and Rajesh Govind Jagesha v. State of Maharashtra, (1999) 8 SCC 428)

47. In **The State of U. P. v. Hari Prasad & Ors., (1974) 3 SCC 673**, the Supreme Court observed as under: (SCC, p. 674, para, 2)

"2. ..This is not to say that even if the witnesses are truthful, the prosecution must fail for the reason that the motive of the crime is difficult to find. For the matter of that, it is never incumbent on the prosecution to prove the motive for the crime. And often times, a motive is indicated to heighten the probability that the offence was committed by the person who was impelled by that motive. But, if the crime is alleged to have been committed for a particular motive, it is relevant to inquire whether the pattern of the crime fits in with the alleged motive..."

48. It is trite law that even though the existence of motive loses significance when there is reliable ocular account but where the ocular testimony appears to be suspect the existence or absence of motive acquires some significance regarding the probability of the prosecution case. [vide **Badam Singh v. State of M. P., (2003) 12 SCC 792]**

49. In the present case, PW-1 Smt. Manorama Devi stated in her cross examination that her husband's land was situated on the Kachchi road leading to Sahatwar. Ram Pravesh Tiwari and his son Mukesh Tiwari wanted to buy this land. Her husband had sold this land to Arjun Pal. For this reason, Mukesh Tiwari was annoyed. Her husband had told her that Mukesh Tiwari has threatened him. The prosecution, however, has not proved as to when the deceased executed sale-deed in favour of Arjun Pal and no evidence has been offered as to when the deceased was threatened.

50. It is an admitted fact that Dina Nath (father of the deceased) had instituted a suit under section 229-B of U. P. Z. A. & L. R. Act, against Suresh Dutt, Ramesh Dutt, Govind Dutt, Indrajit and Sanjit, which he had won. Against this judgment, Suresh Dutt and 4 others had filed a case before the Commissioner, Azamgarh. In connection with that dispute, a Police Challani case under section 151/107 Cr.P.C. was also there and the deceased was assaulted and threatened by Indrajit, Suresh, and Sanjit but the report was not registered and a complaint case was filed before the Magistrate.

51. Another important aspect of the case is that there are two sets of accused who are completely unrelated to each other and, therefore, why would they join hands to finish off the deceased. Appellants Indrajit Mishra and Sanjit Mishra are real brothers and are cousins of the deceased whereas, appellant Mukesh Tiwari is not related to the family of the deceased as well as other appellants Indrajit Mishra and Sanjit Mishra. The Appellant Mukesh Tiwari does not appear to have any concern or connection with the deceased or the members of their family. In spite of that, it is alleged that the appellants Indrajit Mishra, Sanjit Mishra, and Mukesh Tiwari

have committed the murder of Pratap Shankar Mishra due to enmity arising out of family partition. All this leaves us to believe that it being a split second night incident, no one got opportunity to witness the incident and, therefore, all persons with whom the deceased had enmity or were suspected to have had a hand in the incident were implicated.

52. Now we shall proceed to examine contradictions and omissions in the testimony of the witnesses which have been highlighted during the course of arguments.

53. 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 **Yogesh Singh v. Mahabeer Singh and Others, (2017) 11 SCC 195**, the Apex Court has 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 constradictions, 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 or omission." (See: Rammi @ Rameshwar v. State of M. P.3; Leela Ram (dead) through Duli Chand v. State of Haryana & Anr.4; Bihari Nath Goswami v. Shiv Kumar Singh & Ors.5; Vijay @ Chinee v. State of Madhya Pradesh6; Sampath Kumar v. Inspector of Police, Krishnagiri7; Shyamal Ghosh v. State of Bengal8 and Mritunjoy Biswas v. Pranab @ Kuti Biswas and Anr.9)

54. In **Balaka Singh and Others v. State of Punjab, AIR 1975 SC 1962,** the Apex Court observed:

"8...It is true that, as laid down by this Court in Zwinglee Arivel v. State of Madhya Pradesh10, and other cases which have followed that case, the Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply..."

55. In **Vadivelu Thevar v. The State of Madras, AIR 1957 SC 614**, the Apex Court held that if the testimony of a sole witness is found by the court to be entirely reliable, there is no legal impediment in recording the conviction of the accused on

such proof. It has been further laid down that the law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness. A similar view has been expressed in Kusti Mallaiah vs State of A.P.11, Lallu Manjhi and Anr. v. State of Jharkhand12, Jhapsa Kabari and Ors. v. State of Bihar13.

56. PW-1 Smt. Manorama Devi in her statement-in-chief stated that her brothers Ajit Narayan and Lalit Narayan were sleeping in the courtyard (Angan) near the handpump; whereas in her cross-examination she stated that they were sleeping in the Sahan (front courtyard of the house) just east of the handpump in the midst of which there is a Shiv temple. She stated: "सहन मे मंदिर है जिस पर पुजारी नहीं है। हैंड पंप सहन मे बीच मे है। दच्छिनी पूर्वी किनारे पर नहीं है। हैंड पंप से पूर्व मे एक दो हाथ की दूरी पर भाई सोये थे। "

57. There appears contradiction in the testimony of PW-1 Smt. Manorama Devi with regard to the presence of Lalit Narayan. She stated in her examination-in-chief that PW-2 Ajit Narayan and Lalit Narayan were sleeping in the courtyard (Angan); whereas she stated in her cross-examination that she had not told the I.O. that Udit Narayan was at home. PW-7 S.I. Hasmat Khan (I.O.) stated that Smt. Manorama Devi told him that Udit Narayan and Ajit Narayan were present in her house. She did not state that her brother Lalit Narayan was present at the time of the incident.

58. PW-2 Ajit Narayan Pathak in his examination-in-chief stated that at around 2 o'clock at night he and his brother Lalit Narayan Pathak woke up on hearing cries and gunshot whereupon they saw Indrajit Mishra, Sanjit Mishra and Mukesh Tiwari. He stated that Indrajit Mishra had a hockey stick; Sanjit Mishra had a knife, and Mukesh Tiwari had a Katta and they jumped over the boundary wall to escape. Whereas, in his cross -examination he stated that he did not see the shot being fired, and he did not see the accused persons jumping over the boundary wall. After careful consideration of his testimony, we are of the firm opinion that PW-2 Ajit Narayan Pathak had neither witnessed the incident nor did he see the accused-appellants escaping by jumping over the boundary wall.

59. There appears contradiction in the testimony of PW-2 Ajit Narayan with regard to the presence of his cousin brother Lalit Narayan on the night at the place of the incident. PW-2 Ajit Narayan Pathak in his cross-examination stated that Udit Narayan is his brother. Udit Narayan had not gone to Reoti with him on the evening preceding the incident and he had not slept beside him that night. He had not told the I.O. that on the night of the incident Udit Narayan had slept beside him. He told that he had gone with Lalit Narayan and slept beside him. On the above fact, PW-7 S.I. Hasmat Khan (I.O.) stated that Ajit

Narayan had told him that he had gone with Udit Narayan to her sister's house and witnessed the incident there and Lalit Narayan was not with him.

60. There appears contradiction in the testimony of PW-1 Smt. Manorama Devi regarding the place of the presence of her brothers Ajit Narayan and Lalit Narayan, as already noticed above, at the time of the incident. This suggests that either they were not present at the place of the incident or that the culprits escaped from the southern side of the courtyard, while they were sleeping on the northern side of the house. A close and comparative scrutiny of the testimony of PW-1 Smt. Manorama Devi and PW-2 Ajit Narayan as well as the site plan would suggest that PW-2 was not sleeping on the wooden cot in the back courtyard from where the assailants allegedly escaped by jumping over the wall. This shakes our confidence in the prosecution case.

61. There is another important aspect which we have noticed in the testimony of PW-2. PW-2 Ajit Narayan claimed that he reached the place of the incident immediately, at that time Pratap Shankar Mishra was lying in an injured state near the door of the room; he brought the injured (along with PW-4 CP Kanhiya Yadav and his brother Lalit Narayan) to District Hospital Ballia; on the way a Mazrubi Chitthi was prepared at Police Station Reoti; and at 3:50 a.m. on 30.7.2007 at District Hospital Ballia Pratap Shankar Mishra was declared dead; whereas, in his cross-examination, PW-2 stated that he does not remember at what time he left for Ballia hospital from the house. He also could not remember the time when he reached there. This is quite surprising because PW-2 Ajit Narayan admitted himself to be a graduate and his statement has been recorded within 10 months of the incident, therefore, it cannot be said that due to a long time gap his memory faded.

62. There appears contradiction between the testimony of PW-2 Ajit Narayan, on one hand, and PW-5 Dr. B. Narayan and the Memo (Ex.Ka-5) on the other, with regard to the presence of PW-2 at the District Hospital Ballia. PW-2 Ajit Narayan deposed that Pratap Shankar was alive in the hospital, however, the doctor did not give any medicine; whereas PW-5 Dr. B. Narayan stated that on 30.7.2007 at 3:50 a.m. CP 337 Kanhaiya Yadav brought the injured in a dead state. Memo (Ex.Ka-5) prepared by Dr. V. K. Gupta, which has been proved by PW-5, also corroborates the stand of PW-5. PW-4 CP 337 Kanhaiya Yadav also proved his signature on the Memo (Ex.Ka.- 5).

63. In addition to that, there appears another discrepancy in the evidence which is that according to PW-4 CP 337 Kanhaiya Yadav, he along with S.I. Surendra Yadav was on patrol duty in Reoti town and, after hearing gunshot and noise they ran to the house of the deceased; whereas PW-7 S.I. Hasmat Khan stated that no policeman reached upon hearing the gunshot rather they reached on sensing commotion. This discrepancy holds importance with respect to the time of arrival of the police and the incident.

64. With regard to the arrival of police at the place of occurrence, there is discrepancy between the testimony of PW-1 Smt. Manorama Devi, PW-2 Ajit Narayan and PW-7 S.I. Hasmat Khan. PW-1 Smt. Manorama Devi stated that the Inspector (PW-7) came at between 5:00

a.m. and 5:30 a.m., PW-2 Ajit Narayan stated that the Inspector (PW-7) came on the spot at 6.00 a.m.; whereas PW-7 S.I. Hasmat Khan stated in his cross-examination that he had reached the place of the incident within half an hour of its occurrence, which if taken literally would mean at 2:30 a.m.

65. It is noteworthy that PW-2 Ajit Narayan stated in his cross-examination that he did not remember at what time he left for Ballia hospital from the house; and that he did not remember at what time he reached there. According to PW-4 CP Kanhaiya Yadav, he took the injured Pratap Shankar Mishra with the help of his relatives and villagers, first, to the police station Reoti by TATA 407 vehicle, got the Mazrubi Chitthi, and then he reached Sadar Hospital Ballia, where the doctor declared him dead. Whereas, PW-7 S.I. Hasmat Khan stated in his cross-examination that he does not remember when the Mazrubi Chitthi was prepared. He also could not remember whether it was prepared after or before lodging of the FIR; and when and where the Mazrubi Chitthi was prepared, is not mentioned in the case diary. However, he admitted his signature on Mazrubi Chitthi. This fact is quite important because PW-7 claimed that he reached the spot after half an hour of the incident. The Mazrubi Chitthi (Paper No. 8Ka/1) has not been proved by the prosecution. PW-3 CP Deo Nath in his cross-examination stated that Special Report has been sent at 7:10 a.m. on 30.7.2007, but the prosecution failed to prove the dispatch time of the Special Report.

66. Further, PW-1 Smt. Manorama Devi with regard to the role of the appellants Indrajit Mishra and Sanjit Mishra, that is of catching hold the deceased before he was shot at, in her cross-examination, stated that she had given a statement to the investigating officer that her husband was caught hold by Indrajit and Sanjit when he was shot by Mukesh Tiwari but if the investigating officer did not write this fact in her statement then she cannot disclose the reason. PW-5 S.I. Hasmat Khan stated that it is not in her statement that Indrajit Mishra and Sanjit Mishra caught hold the deceased Pratap Shankar Mishra when he was shot by Mukesh Tiwari; if told, it would have been written.

67. With regard to the persons initially named by the witnesses on the spot, PW-4 CP Kanhaiya Yadav stated in his cross-examination that the mother and wife of the deceased were shouting and telling the names of the assailants, he had told this fact to the investigating officer, if he has not written in his statement then he cannot disclose the reason. PW-7 S.I. Hasmat Khan however stated that CP Kanhaiya Yadav did not tell him the names of the relatives who were present there. He also did not tell him that the mother and wife of the deceased were screaming and telling names of the assailants

68. Now we shall deal with the next contention of the learned counsel for the appellants that the gunshot injury found on the body of the deceased could not have been caused in the manner alleged and the same renders the testimony of the eye-witness PW-1 Smt. Manorama Devi unreliable. It has been urged that if the medical evidence is taken to be correct, the mode and manner in which the occurrence took place, accordiing to the prosecution, cannot be said to have been proved.

69. It is noteworthy that PW-1 Manorama Devi stated in her examination-in-chief that Indrajit Mishra attacked her husband with a hockey stick, her husband

got up from the cot and tried to run towards the courtyard but Indrajit Mishra and Sanjit Mishra caught him at the door and Mukesh Tiwari shot at him from a point-blank range on his neck. Whereas PW-5 Dr. B. Narayan stated in his examination-in-chief that blackening, burning and tattooing was found around injury no. 1 up to an area of 10 inches. He stated in his cross-examination that looking at injury nos. 1 and 2, it seems that the shot travelled at an angle from high to low; and that injury no. 1 could possibly be caused from a distance of 10 to 12 feet.

70. Dr. B. Narayan (PW-5) found injury no. 1, wound of entry of firearm present on the middle of neck 3 cm. above from Supra external notch and injury no. 2, wound of exit present on right side of the back of chest just below the scapula bone. We have noticed that the direction of injury no. 1 of Pratap Shankar Mishra was from upwards to downwards, blackening, burning and tattooing was found around injury no. 1 up to an area of 10 inches, therefore, injury no 1 is possible if somebody is lying or in a squatting position and one fires from some distance at a position higher in height to the target.

71. In this regard, it would be useful to extract a passage from Modi's Medical Jurisprudence and Toxicology (24th Edn. at page 540-541):

"If a firearm is discharged very close to the body or in actual contact, subcutaneous tissues over an area of two or three inches around the wound of entrance are lacerated and the surrounding skin is usually scorched and blackened by smoke and tattooed with unburnt grains of gunpowder or smokeless propellant powder. The adjacent hairs are singed, and the clothes covering the part are brunt by the flame. If the powder is smokeless, there may be a greyish or white deposit on the skin around the wound. If the area is photographed by infrared light, a smoke halo round the wound may be clearly noticed. Blackening is found, if a firearm like a shotgun is dicharged from a distance of not more than three feet and a revolver or pistol discharged within about two feet. In the absence of powder residue, no distinction can be made between one distant shot and another, as far as distance is concerned. Scorching in the case of the latter firearms is obverved within a few inches, while some evidence of scorching in the case of shotgun may be found even at one to three ft...At a distance of one to three feet, small shots make a single aperture with irregular and lacerated edges corresponding in size to the bore of the muzzle of the gun, as the shot enter as one mass, but are scattered after entering the wound and cause great damage to the internal tissues. The skin surrounding the wounds is blackened, scorched and tattooed, with unbrunt grans of powder."

72. 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 Gujarat14, Mani Ram v. State of Rajasthan15, State of U.P. v. Krshna Gopal16, State of Haryana v.

Bhagirath17, Dhirajbhai Gorakhbhai Nayak v. State of Gujarat18, Thaman Kumar v. State (UT of Chandigarh)19, Krishnan v. State20, Khambam Raja Reddy v. Public Prosecutor21, State of U. P. v. Dinesh22, State of U.P. v. Hari Chand23, Abdul Sayeed v. State of M.P.24 and Bhajan Singh v. State of Haryana25)

73. From the extract of Modi's Medical Jurisprudence, it appears, blackening around the wound can be found only when the shot is fired from a short distance i.e. within 3 to 4 feet. Although the presence of tattooing on the front of the chest, both upper arms and face in an area of about 10 inches may suggest that the shot may not be made with gun barrel touching the skin but in the light of the law noticed above, such variance in the medical report may not be considered totally in conflict with ocular evidence.

74. However, PW-1 Smt. Manorama Devi alleges that she saw appellant Indrajit Mishra with a hockey stick and appellant Sanjit Mishra with a knife; and that Indrajit Mishra assaulted the deceased with the hockey. Whereas, the deceased did not sustain any injury by either hockey stick or knife.

75. Now we shall deal with the next contention made on behalf of the appellants that the role assigned to appellants Indrajit Mishra and Sanjit Mishra of catching hold of the deceased at the time of firing a gunshot at deceased's neck is highly improbable and renders the ocular account unworthy of credence, especially because the bullet has travelled across the body and has made an exit wound as well.

76. The appellants Indrajit Mishra and Sanjit Mishra, from the very beginning, had denied the prosecution story and had contended that they had been falsely implicated on account of enmity due to civil and criminal cases pending between the appellants (Indrajit Mishra and Sanjit Mishra) and the deceased. We also noticed that PW-1 Smt. Manorama Devi in her statement under Section 161 Cr.PC. had omitted to attribute the role of catching hold to the appellants Indrajit Mishra and Sanjit Mishra at the time of firing the gunshot. Further, why would anyone risk injury to himself by catching hold of a person who is being shot at, particularly, when the post-mortem report suggests that the bullet exited the body. Thus, the role attributed to the appellants Indrajit Mishra and Sanjit Mishra of catching hold the deceased at the time he was shot at does not at all inspire confidence.

77. In **Ramashish Rai v. Jagdish Singh, (2005) 10 SCC 498**, the Apex Court observed: (SCC, p. 501, para 7)

"7....The requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double-edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence..."

78. There is no dispute regarding the enmity between the deceased and appellants Indrajit Mishra and Sanjit Mishra on account of a property dispute. It thus appears to us that the appellants Indrajit Mishra and Sanjit Mishra were

roped in as accused due to an inimical relationship between the parties.

79. Learned counsel for the appellants further submitted that PW-1 Smt. Manorama Devi claimed herself to be the eye-witness of the incident but the circumstances suggest that at the time of the incident she was not present. PW-1 Smt. Manorama Devi (wife of the deceased), claimed that she was sleeping in the room and she saw the entire sequence of events unfolding in front of her but there is no evidence to show that she as a wife of the deceased made any attempt to take her husband out of the clutches of the accused-appellants and in the process sustained injury. No doubt each person reacts differently in a given situation but if she had intervened, her conduct may have lend credence to her story.

80. Here, PW-1 Smt. Manorama Devi claimed that PW-2 Ajit Narayan and Lalit Narayan were sleeping in the courtyard (Angan) at a distance of 9-10 feet from the place of the incident but both her brothers were not awake, therefore, they did not come to rescue the deceased. But that does not inspire confidence because if PW-1 Smt. Manorama Devi and the deceased could wake up on wielding of a hockey stick why would the other menfolk sleeping close by not swing into action.

81. PW-2 Ajit Narayan Pathak (brother-in-law of the deceased) claimed that he on hearing cries and gunshot immediately reached the spot to find Pratap Shankar Mishra in an injured state, but neither he nor PW-1 Smt. Manorama Devi touched the body of the injured immediately after the incident. The above conduct of PW-1 and PW-2 appears unnatural and is not in sync with the probable conduct of a wife who has witnessed the murder of her husband in front of her eyes.

82. Learned counsel for the appellants submitted that the prosecution failed to prove that injury no. 1 on the body of the deceased was caused by the firearm alleged to have been recovered at the instance of the appellant, Mukesh Tiwari.

83. The appellant Mukesh Tiwari had been arrested on 4.8.2007 from town Reoti and at his instance, an unlicensed pistol (Katta) .315 bore was allegedly recovered with a used cartridge from open land, which had been sent to the FSL. As no bullet or 'empty' was recovered from the body of the deceased or the place of occurrence, the weapon recovered could not be connected with the crime.

84. There are also several lapses in the investigation of the case like non-recovery of 'bullet/empties' fired from the Katta; non-recovery of the lantern from the place of the incident; and non-recovery of hockey stick used by one of the appellants. However, it is well-settled that any omission on the part of the Investigating Officer cannot go against the prosecution case if it is otherwise supported by reliable and credible evidence. In **C. Muniappan and Ors. v. State of Tamil Nadu, AIR 2010 SC 3718,** the Apex Court observed as under;

"The defect in the investigating by itself cannot be ground for acquittal. If primacy is given to such designed or negligent investigation or to the omissions or lapses be perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence

on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the Court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation."

85. Thus, the prosecution case cannot be doubted merely on the ground of non-recovery of 'empties' fired from the Katta at the deceased, or non-recovery of the lantern from the place of the incident, or non-recovery of the hockey stick and the knife. But in the present case, PW-4 CP 337 Kanhaiya Yadav, S.I. Surendra Singh Yadav had allegedly reached the spot immediately and PW-7 S.I. Hasmat Khan (I.O.) allegedly reached the place of occurrence within half an hour. On the day of the incident, as per the prosecution, the appellants Indrajit Mishra and Sanjit Mishra had been arrested, there was thus ample opportunity to recover the articles noticed above.

SUMMARY OF OUR ANALYSIS AND THE CONCLUSIONS DERIVED THEREFROM

86. On a totality of the consideration of entire evidence and keeping in mind the settled position of law, we are unhesitatingly of the opinion that the testimony of eye-witnesses PW-1 Smt. Manorama Devi and PW-2 Ajit Narayan is unreliable. The prosecution evidence is not convincing. The prosecution case appears to be based on guess-work and possibilities. In support of this conclusion regard be had to the following circumstances:

(1) The FIR was not lodged soon after the incident despite the fact that the police were present at the door-step and had arranged a vehicle to take the injured to the hospital. Wife (PW-1), brother-in-law (PW-2) and mother of the deceased were allegedly naming the assailants at that time i.e (around 2:00 a.m.) yet, they chose to wait to lodge the FIR.

(2) PW-2 (cousin of PW-1/eye witness) was present at the Police Station at the time of preparation of Mazrubi Chitthi but he did not lodge the FIR. He returned from the hospital via Police station but he still did not lodge the FIR. This gives rise to a serious doubt whether PW-1 and PW-2 at all witnessed the incident and generates a probability that they reached the place of occurrence later.

(3) The prosecution could not prove the preparation of Mazrubi Chitthi (Paper no. 8Ka/1). Even though, according to the prosecution case, PW-4 took the injured Pratap Shankar Mishra with the help of injured's relatives (PW-2 and Lalit Narayan), firstly to the police station Reoti by TATA 407 vehicle where he got a Mazrubi Chitthi, then to Sadar Hospital Ballia. Surprisingly, PW-2 stated that he does not remember at what time he left for Ballia hospital from the house and he also could not remember the time when he returned back to the spot. In addition to that, PW-7 stated that he does not remember when and where the Mazrubi Chitthi was prepared. He also could not remember whether it was prepared after or before the lodging of FIR, though, he admitted his signature on it. The

prosecution has thus failed to prove the actual time of preparation of Mazrubi Chitthi.

(4) There is no convincing evidence on record whether injured (as claimed) Pratap Shankar Mishra was alive when he was taken to the police station for preparation of Mazrubi Chitthi. According to Dr. B. Narayan (PW-5) as well as the Memo (Ex.Ka.-5), Pratap Shankar Mishra was brought dead at District Hospital Ballia at 3:50 a.m. Time taken in arranging for vehicle (TATA 407) to carry the injured cannot be ruled out, but keeping in mind the nature of injury no. 1 and 2 sustained the deceased there is a possibility that the injured had succumbed to his injuries at the spot.

(5) PW-8 (Incharge of Police Chowki Satni, PS. Kotwali Ballia) completed the inquest report on the basis of Memo (Ex.Ka.-5) by that time (1:30 p.m. on 30.7.2007) he had not received the G.D. Report of Chick FIR. Importantly, the prosecution has not proved the dispatch time of the Special Report of the present case.

(6) The prosecution claimed that the mother of the deceased was deaf and of unsound mind. She was not enquired by the investigating officer about the incident. But from the testimony of PW-4 (CP Kanhaiya Yadav) she was named the assailants while crying on the spot. Thus, she was not deaf and dumb or of unsound mind. Under the circumstances, one of the best piece of evidences of this case was withheld.

(7) PW-1 and PW-2 were not throughout consistent whether it was Lalit Narayan or Udit Narayan who was sleeping with PW-2 in the courtyard. Interestingly, PW-1 was not consistent whether PW-2 Ajit Narayan and Lalit Narayan were sleeping in the courtyard (Angan/back courtyard) or in the Sahan (front courtyard).

(8) Importantly, PW-2 (cousin of PW-1/eye witness) in his cross-examination stated that he could not witness the firing or see the assailants. The prosecution did not examine Lalit Narayan (real brother of PW-1/eye witness) who was allegedly sleeping with PW-2 in the courtyard.

(9) Neither PW-1 nor Pratap Shankar Mishra called for help. PW-1 made no attempt to save her husband from the clutches of the assailants.

(10) PW-1 and PW-2 had no blood-stained closthes to offer during investigation and from their testimony it appears that they did not touch the body of Pratap Shankar Mishra after the incident. This conduct of PW-1 and PW-2 appears unnatural and casts a doubt on their presence at the time and place of occurrence.

(11) As per the post-mortem report, there was no injury on the body of the deceased caused by a hockey stick or a knife. The prosecution has not explained deceased's injury no. 3 and 4 which were in the form of abrasion on the chin region.

(12) Injury no. 1, gunshot wound of entry on the neck with blackening and tattooing present in an area of 10 inches around the wound and the exit wound (injury no. 2) diagonal on the back with downward direction, renders the ocular account of catching hold the deceased by two accused from either side of the body

and the shot being fired at point-blank range doubtful and improbable.

(13) The possibility of the FIR being lodged on the basis of guess-work gets credence from the circumstance that two sets of accused who had no link with each other were made accused in this case. One set of accused, namely Indrajit Mishra and Sanjit Mishra, were implicated by assigning an ornamental role which finds no corroboration from the medical evidence and the other set, namely, Mukesh Tiwari, was implicated by attributing the main role. But the manner in which the prosecution alleges the incident to have unfolded does not inspire confidence in as much as why would two persons catch hold of the victim from two sides when he is being shot in such a way that the shot travels downwards from the neck to make a wound of exit at the back below the shoulder.

(14) PW-7 (I.O.) stated that PW-1 (wife of the deceased) told him that the deceased had a land dispute with Mahesh Tiwari and expressed doubt that Mahesh Tiwari might be involved in the incident. Whereas according to the FIR, the prosecution attributed motive against the appellant Mukesh Tiwari that he committed the offence due to enmity of family partition. But Mukesh Tiwari does not appear to have any concern or connection with the deceased or other appellants Indrajit Mishra and Sanjit Mishra. The motive against him has been changed by the prosecution by alleging that as the deceased sold his four Kathha land to Arjun Pal, which Mukesh Tiwari and his father wanted to buy, animosity developed resulting in the crime. However, this fact had not been investigated during the course of the investigation.

(15) The motive against Indrajit Mishra and Sanjit Mishra is that father of the deceased had instituted a suit under Section 229-B of U.P.Z.A. & L. R. Act against Indrajit, Sanjit and 3 other brothers, which he had won. Against this judgment, Suresh Dutt and 4 others had filed a case before the Commissioner, Azamgarh. Suresh Dutt and 4 others wanted a compromise but the deceased was not ready. In connection with that dispute, a Challani case and a complaint case were filed. Though, this can be motive for the crime but whether the appellants Indrajit Mishra and Sanjit Mishra would commit the offence by joining Mukesh Tiwari, who has no connection with the other appellants (Indrajit Mishra and Sanjit Mishra), and that too without covering their faces in moonlight. All of this shows that the prosecution case is shrouded in suspicion.

87. Following aspects emerge from the discussion of the prosecution evidence:

(i) PW-2 Ajit Narayan neither witnessed the actual firing of gunshot at the deceased nor he saw the accused-appellants escaping by jumping over the boundary wall of the back courtyard. This gives rise to two possibilities. One, that PW-2 was not sleeping in that wooden cot lying in the back courtyard of the house, which was noticed by PW-7 S.I. Hasmat Khan while preparing the site plan. Two, the incident was a split-second affair, like a hit and run, therefore, by the time people got up the assailant had escaped.

(ii) Another possibility emerges from the combined reading of the evidence of PW-1 and PW-2, which is that PW-2 was sleeping in the front courtyard near the temple where the hand pump is located, which appears to be so from the testimony of PW-1. If this possibility is taken into account then, who was sleeping on the

wooden cot found in the back courtyard? This question may have two answers. One, that the wooden cot was just lying there or might have been used to sleep outside in summer months. Two, the possibility of deceased himself using that cot cannot be ruled out and therefore when he was allegedly attacked he might have rushed towards the door of his room where blood was found and he fell there resulting in injury no. 3 and 4.

(iii) The aforesaid possibilities derive strength from the delay in lodging the FIR despite the presence of police at the door-step of the informant (PW-1). It is noteworthy that PW-2 (cousin of PW-1), as per the prosecution case, had been with the deceased to the police station for Mazrubi Chitthi and had also been to the hospital. Moreover, after the injured was declared dead, he (PW-2) had returned home via the police station but still did not report the crime, which clearly suggests that by that time the witnesses were just guessing as to who could have been the culprits because they (PW-1, PW-2) had not witnessed the incident.

(iv) The theory that the FIR was lodged by guess-work gets fruther credence from the circumstance that two separate sets of accused who had no link with each other were made accused, probably, because the informant desired not to leave any possible suspect. Notably, one set was implicated by assigning ornamental role to them, which finds no corroboration from the medical evidence, and the other set was implicated by attributing the main role. But the manner in which, according to the prosecution, the incident unfolded does not inspire confidence in as much as to why would two persons catch hold the victim from two sides when he is being shot at an angle so much so that the shot travels from the neck downwards and make a wound of exit below the back of shoulder. All this shrouds the prosecution case in suspicion.

88. On the basis of the facts and circumstances discussed above, an inference can easily be drawn that this is a case of blind murder, no one actually witnessed the incident and the FIR was lodged on the basis of guess-work and suspicion and the appellants have been implicated on account of suspicion because of the previous enmity. Even the possibility of the FIR being ante-timed cannot be ruled out as at the time of conducting inquest the G.D. Entry of the Chick FIR was not available and the dispatch time of the Special Report has not been proved by the prosecution.

89. The contrary view taken by the trial court is against the weight of the evidence. A substantial portion of the judgment of the trial court goes in narration of the prosecution story, arguments of the parties and the statement of the prosecution witnesses. We hardly find objective evaluation, analysis, or scrutiny of evidence in a proper perspective. The serious infirmities pointed out by the defence raising doubt with regard to the prosecution case have been brushed aside by the learned trial judge by simply stating that he did not agree with such contentions. The trial court, in our view, was not right and justified in lightly brushing aside the contradictions and omissions borne out from the prosecution evidence, that too, when the entire prosecution rested on a sole eye-witness, PW-1 Smt. Manorama Devi.

90. For all the reasons recorded and discussed above, we are of the considered view that the prosecution has failed to

prove the charge of offences punishable under Section 302 read with Section 34 and Section 452 IPC against the appellants Indrajit Mishra, Sanjit Mishra and Mukesh Tiwari beyond reasonable doubt. As the evidence on record does not bring home the guilt of the appellants Indrajit Mishra, Sanjit Mishra and Mukesh Tiwari, beyond the pale of doubt, the appellants are entitled to the benefit of doubt. Consequently, the appellants are entitled to be acquitted of all the charges for which they were tried.

91 . As a result, both of the criminal appeals are **allowed**. The judgment and order of conviction as well as sentence recorded by the trial court is set aside. The appellants are acquitted of all the charges for which they have been tried. The appellants Indrajit Mishra, Sanjit Mishra are on bail, therefore, their personal bonds and sureties are hereby discharged. The appellant Mukesh Tiwari is in jail. He shall be set at liberty forthwith if not required in connection with any other case. The appellants Indrajit Mishra, Sanjit Mishra and Mukesh Tiwari will fullfill the requirement of section 437-A Cr.P.C. to the satisfaction of the trial Court at the earliest.

92. The trial court record be returned forthwith together with a certified copy of this judgment for compliance. The office is further directed to enter the judgment in compliance register maintained for the purpose of the Court.

(2021)03ILR A1028
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.02.2021

BEFORE

THE HON'BLE AJIT KUMAR, J.

Criminal Appeal No. 2704 of 2012

Connected with
Criminal Appeal No. 2803 of 2012

Vijai Kumar @ Pyare Lal
...Appellant(In Jail)
Versus
State of U.P. & Anr. ...Opposite Party

Counsel for the Appellant:
Sri U.B.Singh, Sri D.S. Mishra

Counsel for the Opposite Party:
A.G.A., Sri Ashish Pandey, Sri Sanjay Kumar Singh

A. Criminal Law - Code of Criminal Procedure,1973-Section 374(2) & Narcotics Drugs and Psychotropic Substance Act,1985-Sections Sections 8/20/27A/29-challenge to-conviction-no recovery from the appellant-bare verification of certain calls from PCO of his brother will by itself not amount to a proof of his guilt-no compliance of the section 52-A of the Act-the contraband seized from the spot was never produced in Court-sample that was sent to the lab for examination on opening, the envelope found less than half in quantity, this creates doubt about the sample being the same one-blind reliance upon confessional statement under Section 67 of the Act could not have been taken recourse to, to bring home the charge-confession before the Intelligence Officer cannot be used against the accused persons-the statement recorded cannot be taken as voluntary statement to robe it with credibility-recovery is not a consequence of the information given by the accused at all to attract the applicability of section 27 of the Evidence Act,1872-the accused is set at liberty.(Para 2 to 80)

B. That the officers who are invested with powers u/s 53 of the NDPS Act are "Police Officers" within the meaning of section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act, and cannot

be taken into account in order to convict an accused under NDPS Act.

The Appeal is allowed. (E-5)

List of Cases cited:-

1. Kanahiyia Lal Vs U.O.I., (2008) 4 SCC 668

2. Toofan Singh Vs St. of T.N. (2020), CRLA No. 152 of 2013

3. Noor Aga Vs St. of Punj., (2008) 16 SCC 417

4. Rajesh Jagdamba Avasthi Vs St. of Goa, (2005) AIR SC 1389

5. Jitendra & anr. Vs St. of M.P., (2003) AIR SC 4236

6. Vijay Pandey Vs St. of U.P., (2019) Supreme (SC) 799

7. Mohinder Vs St. of Har., (2013) Cri.L.J. 3662

8. Gian Chand & ors. Vs St. of Har., (2018) LawSuit (SC) 655

9. Jarnail Singh Vs St. of Punj., (2011) 1 SCC (Cri.) 1191

10. Dehal Singh & ors. Vs St. of H.P. (2010) LawSuit (SC) 592

11. St. of Raj. Vs Sahi Ram, (2019) AIR SC 4723

12. Madan Lal & anr. Vs St. of Har., (2003) 47 ACC 763

13. Dhananjay Reddy Vs St. of Karn., (2001) 4 SCC 9

14. St. of Ker. & Ors. Vs Kurian Abraham (P) Ltd. & anr.(2008) 3 SCC 582

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

1. Heard Sri D.S.Mishra, learned Advocate assisted by Sri U.B.Singh and Sri Chandrakesh Mishra, learned counsel for the respective appellants, Sri Ashish Pandey, learned counsel for the Narcotics Control Board and Sri B.A.Khan, learned Additional Government Advocate for the State.

2. These two above noted criminal appeals have been listed together under the order of this Court dated 20th August, 2019 as they arise out of common judgment dated 3rd July, 2012 passed in Sessions Trial No. 188 of 2003 (State v. Pyare Lal) under Section 8/20/27A/29 of the Narcotics Drugs and Psychotropic Substance Act, 1985 passed by Additional District and Sessions Judge, Court No. 24/Special Judge, Allahabad. Accordingly both the appeals have been heard together and are being decided by this common judgment.

3. The prosecution case in the complaint is that on receiving information from some reliable confidential sources, Sri Kaushal Kant Mishra, an intelligence officer of the Narcotics Control Bureau Control, Varanasi landed at Allahabad on 2nd June, 2003 alongwith a team of officers at around 5:00 pm directly at the gate of M/s Gati Transport Private Ltd. a private transport service for carriage of goods and articles (for short transport company). At the very gate of Transport Company, he and his team happened to meet two persons namely, Mrinmay Das Gupta and Sandip Kumar Sharma, who claimed themselves to be employees of the Transport Company. The team of officers led by Mr. Mishra apprised these employees about the purpose of their arrival at Allahabad and persuaded them to be their witnesses, to which they readily agreed. Thus, having obtained their consent, the team alongwith those two witnesses reached at the spot where 20 plywood boxes were lying and they approached the person as well who was

standing by side these boxes. Upon an enquiry, he told the team that his name is Vijay Kumar S/o Sukru Ram, a resident of police Station Nizamabad, district Azamgarh and upon further enquiry from him, he informed them that these 20 boxes were full of Ganja *(fruiting top of Cannabis plant)*, a psychotropic substance. He admitted that these boxes belonged to one Vinod Singh S/o Shiv Nath Singh a resident of village Ronwa, Post Fariha P.S. Nizamabad, District Azamgarh, who had asked him to get these boxes released and for that purpose he had been paid Rs. 14,969/- and was also having the papers to get these boxes released, and further that he was directed by said Vinod Singh to get these boxes delivered at his shop situate in Ronwa village. He also informed the team that he was waiting there for a proper carriage to get these boxes loaded for the desired destination. As usual, the officers asked Vijay Kumar that should he wanted these boxes and himself also to be searched in front of a Gazetted Officer or Magistrate, he would be permitted to do so but he refused in writing for the same and authorized the officers of the team to carry out the search. The search was carried out on the spot and said Vijay Kumar also refused to get the independent witnesses to be searched prior to search being carried out. As agreed by Vijay Kumar, the search of 20 plywood boxes was undertaken and these boxes were found fully filled with brown colour leaves etc. and when they were tested on a testing tool kit, the team had carried with it, it was found to be ganja a psychotropic substance. On enquiry, Vijay Kumar admitted to have prior knowledge of psychotropic substance being there inside those boxes and admitted to have knowledge that he was carrying the contraband quite unauthorizedly and that it was a punishable offence under the Act, 1985, however, he claimed that he was doing so for a monthly payment of Rs. 2000/-. The boxes thus were emptied as the material was taken out of the boxes and was all weighed and it all turned out to be 630 Kg in weight. The entire material was kept in 22 jute bags and two sets of samples were collected of 25 grams each from each jute bag. The samples were separately sealed in envelopes marking with separate numbers as S1 and S 2 and were got duly signed by the officers of the bureau who were part of the team, independent witnesses and said Vijay Kumar, one of the appellants before this Court. All the 22 jute bags were properly sealed and numberd from 1 to 22 and papers pasted upon all those were duly signed by the officers, witnesses and the appellant Vijay Kumar. The recovery memo was prepared and was duly signed by the members of the team, two independent witnesses, who claimed to be employees of the Transport Company and also by Vijay Kumar, one of the appellants. Immediately after the task of search and seizure of the boxes and material was accomplished, a recovery memo was prepared on the spot and the information was sent to Varanasi about the other accused namely Vinod Kumar. A team in the leadership of Sri Ram Akbal Dubey of Narcotics Control Bureau Varanasi was constituted and with the help of local police force the team carried out search of person and the house of the said Vinod Kumar in presence of two independent witnesses, namely Shiv Murat Tiwari and Khaderu Ram, both resident of village Dilauri, P.S. Rani Ki Sarai. However, during search carried out of the person and the house of Vinod Kumar no incriminating material was found relating to any contraband including the one in respect of which one of the appellants Vijay Kumar was taken into custody as said

contraband was seized at Allahabad on 2nd June, 2003.

4. It transpires from the record that while recovery memo was prepared on 2nd June, 2003, the contraband and the jute bags were taken to Varanasi and were submitted for safe custody in Malkhana only on 5.6.2003. The sample that was sent for chemical examination and report to the Central Laboratory at Delhi, on 05.06.2003 and the reports prepared on 16.07.2003 were received in September 2003, in which the alleged sample was found to be a psychotropic substance namely Ganja.

5. The prosecution led its witnesses Ram Akbal Dubey as PW-1, the officer who had conducted search and raid at the residence of Vinod Kumar one of the appellants, K.K.Mishra prosecution witness no. 2 who had conducted search and seizure of the boxes from the alleged possession of appellant Vijay Kumar and prepared recovery memo and other officers of the team, Krishna Kant Srivastava and Pradip Kumar Gunwant, the statements recorded under Section 67 of the appellants Vijay Kumar and Vinod Kumar, the recovery memo, statements of independent witnesses Mrinmay Das Gupta, Sandip Kumar Sharma, Shiv Murat Tiwari, Yashwant Singh and Smt. Basmati recorded under Section 67 of the Act were also produced. The documents qua statements of Vinod Kumar and Vijay Kumar about their having been duly apprised of their rights to be searched before the Gazetted Officer or Magistrate were also produced and were duly marked as exhibits. The laboratory reports were also produced and duly marked as exhibits A-10 to A-31. The physical verification report of contraband kept in the Malkhana by a judicial Magistrate, claimed as the one prepared in compliance of Section 52-A of the Act, 1985 was already there on record of the trial court.

6. The trial court examined these above named witnesses except Mrinmay Das Gupta and Sandip Kumar Sharma, who were not produced by the prosecution to prove the recovery memo of 20 plywood boxes and so also independent witness Shiv Murat was not produced. Khaderu Ram appeared as defence witness. Statements of accused appellants under Section 313 of Cr.P.C. were also recorded.

7. The trial court found statement recorded by the officers of the department under Section 67 of the Act to be fully proved by the officers of the department through their respective testimonies given before the trial court. Though arguments were advanced before the trial court that two independent witnesses of the search and seizure / recovery memo of the 20 plywood boxes, recovery of contraband, collection of samples and proper sealing of samples and jute bags, were not produced before the Court and, therefore, the recovery was doubtful and that independent witness Khaderu Ram having completely denied the search carried out of the person and house of Vinod Kumar and that confessional statements of the accused persons recorded by the officers of the Bureau could not have been taken to be conclusive evidence and were surely hit by Section 25 of the Indian Evidence Act 1872, but the said argument was rejected by the trial court holding that in the light of the authority of the Apex Court in the case of **Kanahiyia Lal v Union of India (2008) 4 SCC 668**, the statements recorded under Section 67 of the Act, are not the statements to be taken as one recorded by the police under the Indian Evidence Act,

1872 and, therefore, on the basis of statement recorded under Section 67 of the NDPS Act, the accused can be convicted.

8. The trial court proceeded to hold that statements that have been recorded of Vijay Kumar under Section 67 of the NDPS Act, 1985 marked as Exhibit A-35 and that of Vinod Kumar marked as Exhibit A-1 and the recovery memo marked and Exhibited as Exhibit- A-34, it was apparent that they were all involved in the smuggling of contraband that was recovered on 2nd June, 2003 at the gate of godown of Transport Company from the possession of said Pyare Lal @ Vijay Kumar who took the name of the other accused Vinod Kumar and thus both of them were liable to be held guilty, and accordingly awarded them with sentence as prescribed under the law.

9. Learned Senior Advocate who appeared in both the appeals as instructed by the counsel appearing in the respective appeals raised basically three arguments:

a. (first) *The statements of the accused persons recorded under Section 67 of the NDPS Act, 1985, by the officers of the Narcotics Control Bureau, Varanasi, was no better than the one recorded by the police under Section 161 of the Cr.P.C. and, therefore, does not have evidenciary value and is hit by Section 25 of the Indian Evidence Act, 1872;*

b. (second) *In the absence of compliance of procedure as prescribed for under Section52-A of the Act, 1955 and non production of the original material kept safe in sealed jute bags in Malkhana, during trial in court to prove that sample collected was the same as stored in the sealed jute bags, clearly establishes that the entire theory of contraband tested positive psychotropic substance, remained uncorroborated and unproved. Adding further, it is argued that the link between the recovery of contraband and submission of it in Malkhana suffers from vice of questionable time lag of more than two days and so also sending of the sample to the Laboratory.*

c. (third) *In the absence of call details of the outgoing calls from WLL and phone numbers of Assam for want of STD facility and further absence of call details pertaining to the crucial period and so also in the absence of credentials of those in whose names telephone numbers were allotted qua their involvement in the illicit trade of contraband, mere call details to and fro between a PCO number and such numbers, would not by itself amount to conclusive proof of illicit inter-state trade of contraband by the accused persons so as to hold them guilty of the offence under the NDPS Act, 1985.*

10. In support of above arguments raised by learned Senior Advocate, he has relied upon recent judgment of the Apex Court in the case of ***Toofan Singh v State of Tamil Nadu delivered on 29th October, 2020 in Criminal Appeal no. 152 of 2013 and other connected appeals, Noor Aga vs. State of Panjab 2008 (16) SCC 417, Rajesh Jagdamba Avasthi v State of Goa, AIR 2005 SC 1389, Jitendra and Another v State of Madhya Pradesh AIR 2003 SC 4236, Vijay Pandey v State of U.P. 2019 0 Supreme (SC) 799, Mohinder v. State of Haryana 2013 CRI.L.J. 3662.***

11. Learned Senior Advocate thus argued that order of conviction and sentence impugned herein these two criminal appeals was clearly unsustainable and deserved to be set aside.

12. Per contra, learned counsel appearing for the department Sri Ashish Kumar Pandey vehemently opposed the appeals and raised arguments justifying the conviction and sentence of the accused appellants. He argued that confessional statement recorded under Section 67 of the 1985 Act, was not the only conclusive evidence in the present case. There were evidence like recovery memo etc. and the documents recovered from the possession of the said Vijay Kumar which related to release of plywood boxes and the fact that both the accused belonged to Azamgarh, there was no occasion for the accused Vijay Kumar to be here at Allahabad. In support of his argument Sri Pandey has claimed Gian Chand, and Others v. State of Haryana 2018 LawSuit (SC) 655, Jarnail Singh v. Stae of Panjab (2011)1 SCC (Cri.) 1191, Mohinder v. State of Haryana 2013 (Cri. L.J.) 3662, State of Rajasthan v. Sahi Ram AIR 2019 (SC) 4723. Dehal Singh and Others. v. State of Himachal Pradesh 2010 Law Suit (SC) 592.

13. Sri Basharat Ali Khan, learned AGA has adopted the arguments of Sri Pandey.

14 . Besides above, it was also submitted on behalf of the respondents that there was no reason to disbelieve or caste doubt over the testimonies of the officers of the department who had given conclusive proof qua recovery memo prepared on the spot, sample collected and sent to the laboratory. It was argued that there could not be any motive attached to the officers for false implication of the accused appellants. It was also argued that even there was compliance of Section 52-A of the Act, 1985 as judicial Magistrate had visited the malkhana and physically examined the contraband and prepared the report on 22.12.2005 in compliance of the order of the Court dated 03.12.2005 and submitted the same which was on record before the trial court and needed no further proof and was to be taken as primary piece of evidence.

15. Having gone through the records and the arguments raised across the bar by the learned counsel appearing for the respective parties and having thoroughly perused the records, I proceed to deal with arguments raised by the learned Senior Advocate appearing for the appellants with due consideration of the arguments raised by the learned Advocate Sri Pandey appearing for the department.

16. Coming to the **first argument**, the question is as to whether the confessional statement of the accused appellants by the officers of the department under Section 67 of the Act, 1985 would be no better than the statement recorded under Section 161 and, therefore, hit by Section 25 of the Indian Evidence Act, 1872, the legal position as has emerged in the recent judgment of Toofan Singh (supra) by the Supreme Court needs to be referred to. The reference as noticed by the Supreme Court in its judgment is reproduced hereunder:

"1. Whether an officer empowered under Section 42 of the NDPS Act and/or the officer empowered under Section 53 of the NDPS Act are Police Officers and therefore statements recorded by such officers would be hit by Section 25 of the Evidence Act; and

2. What is the extent, nature, purpose and scope of the power conferred under Section 67 of the NDPS Act available to and exercisable by an officer under section 42 thereof, and whether power

under Section 67 is a power to record confession capable of being used as substantive evidence to convict an accused?"

17. Having referred to the arguments of the respective counsel in detail and having discussed the various authorities cited before it, vide paragraph 147 to 152, the Court has observed thus:

"147. What remains to be considered is Kanhaiyalal (supra). In this judgment, the question revolved around a conviction on the basis of a confessional statement made under section 67 of the NDPS Act. This Court, after setting out section 67, then drew a parallel between the provisions of section 67 of the NDPS Act and sections 107 and 108 of the Customs Act, 1962, section 32 of the Prevention of Terrorism Act, 2002 (POTA) and section 15 of the TADA - see paragraph 41. These provisions are as follows:

Customs Act, 1962 107. Power to examine persons.--Any officer of customs empowered in this behalf by general or special order of the Principal Commissioner of Customs or Commissioner of Customs may, during the course of any enquiry in connection with the smuggling of any goods,

(a) require any person to produce or deliver any document or thing relevant to the enquiry;

(b) examine any person acquainted with the facts and circumstances of the case.

108. Power to summon persons to give evidence and produce documents.(1) Any Gazetted Officer of customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under this Act. (2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an authorised agent; as such officer may direct and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required: Provided that the exemption under section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section. (4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860 (45 of 1860).

POTA

32. Certain confessions made to police officers to be taken into consideration.- (1) Notwithstanding anything in the Code or in the Indian Evidence Act 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical or electronic device like

cassettes, tapes or sound tracks from out of which sound or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or the rules made thereunder.

(2) A police officer shall, before recording any confession made by a person under sub-section (1), explain to such person in writing that he is not bound to make a confession and that if he does so, it may be used against him: Provided that where such person prefers to remain silent, the police officer shall not compel or induce him to make any confession.

(3) The confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes it.

***(4)** The person from whom a confession has been recorded under sub-section (1), shall be produced before the Court of a Chief Metropolitan Magistrate or the Court of a Chief Judicial Magistrate along with the original statement of confession, written or recorded on mechanical or electronic device within forty-eight hours.*

(5) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate, shall, record the statement, if any, made by the person so produced and get his signature or thumb impression and if there is any complaint of torture, such person shall be directed to be produced for medical examination before a Medical Officer not lower in rank than an Assistant Civil Surgeon and thereafter, he shall be sent to judicial custody.

TADA

***"15. Certain confessions made to police officers to be taken into consideration**: (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or Rules made thereunder:*

Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

(2) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily."

***148**. Even a cursory look at the provisions of these statutes would show that there is no parallel whatsoever between section 67 of the NDPS Act and these provisions. In fact, section 108 of the Customs Act, 1962 expressly states that the statements made therein are evidence, as opposed to section 67 which is only a section which enables an officer notified under section 42 to gather information in an enquiry in which persons are "examined".*

***149.** Equally, Section 42 of POTA and section 15 of TADA are*

exceptions to section 25 of the Evidence Act in terms, unlike the provisions of the NDPS Act. Both these Acts, vide section 32 and section 15 respectively, have non-obstante clauses by which the Evidence Act has to give way to the provisions of these Acts. Pertinently, confessional statements made before police officers under the provisions of the POTA and TADA are made admissible in the trial of such person see section 32(1), POTA, and section 15(1) TADA. This is distinct from the evidentiary value of statements made under the NDPS Act, where section 53A states that, in the circumstances mentioned therein, statements made by a person before any officer empowered under section 53 shall merely be "relevant" for the purpose of proving the truth of any facts contained in the said statement. Therefore, statements made before the officer under section53, even when relevant under section 53A, cannot, without corroborating evidence, be the basis for the conviction of an accused.

150. *Also, when confessional statements are used under the TADA and POTA, they are used with several safeguards which are contained in these sections themselves. So far as TADA is concerned, for example, in Kartar Singh (supra) the following additional safeguards/guidelines were issued by the Court to ensure that the confession obtained in the course of investigation by a police officer "is not tainted with any vice but is in strict conformity with the well-recognised and accepted aesthetic principles and fundamental fairness":*

"263(1) The confession should be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him;

(2) *The person from whom a confession has been recorded under Section 15(1) of t he Act, should be produced before the Chief Metropolitan Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sent under Rule 15(5) along with the original statement of confession, written or recorded on mechanical device without unreasonable delay;*

(3) *The Chief Metropolitan Magistrate or the Chief Judicial Magistrate should scrupulously record the statement, if any, made by the accused so produced and get his signature and in case of any complaint of torture, the person should be directed to be produced for medical examination before a Medical Officer not lower in rank than of an Assistant Civil Surgeon;*

(4) *Notwithstanding anything contained in the code of Criminal Procedure, 1973, no police officer below the rank of an Assistant Commissioner of Police in the Metropolitan cities and elsewhere of a Deputy Superintendent of Police or a police* officer of equivalent rank, should investigate any offence punishable under this Act of 1987.

This is necessary in view of the drastic provisions of this Act. More so when the Prevention of Corruption Act, 1988 under Section 17 and the Immoral Traffic Prevention Act, 1956 under section 13, authorise only a police officer of a specified rank to investigate the offences under those specified Acts.

(5) The police officer if he is seeking the custody of any person for pre-indictment or pre-trial interrogation from the judicial custody, must file an affidavit

sworn by him explaining the reason not only for such custody but also for the delay, if any, in seeking the police custody;

(6) In case, the person, taken for interrogation, on receipt of the statutory warning that he is not bound to make a confession and that if he does so, the said statement may be used against him as evidence, asserts his right to silence, the police officer must respect his right of assertion without making any compulsion to give a statement of disclosure;

The Central Government may take note of these guidelines and incorporate them by appropriate amendments in the Act and the Rules."

151. Insofar as POTA is concerned, procedural safeguards while recording confessions have been discussed by this Court in State (NCT of Delhi) v. Navjot Sandhu (2005) 11 SCC 600 as follows:

"Procedural safeguards in POTA and their impact on confessions

156. As already noticed, POTA has absorbed into it the guidelines spelt out in Kartar Singh and D.K. Basu in order to impart an element of fairness and reasonableness into the stringent provisions of POTA in tune with the philosophy of Article 21 and allied constitutional provisions. These salutary safeguards are contained in Sections 32 and 52 of POTA. The peremptory prescriptions embodied in section 32 of POTA are:

(a) The police officer shall warn the accused that he is not bound to make the confession and if he does so, it may be used against him [vide sub-section (2)].

(b) The confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes it [vide sub-section (3)].

(c) The person from whom a confession has been recorded under sub-section (1) shall be produced before the Chief Metropolitan Magistrate or Chief Judicial Magistrate along with the original statement of confession, within forty-eight hours [vide sub-section (4)].

(d) The CMM/CJM shall record the statement, if any, made by the person so produced and get his signature and if there is any complaint of torture, such person shall be directed to be produced for medical examination. After recording the statement and after medical examination, if necessary, he shall be sent to judicial custody [vide sub-section (5)].

The mandate of sub-sections (2) and (3) is not something new. Almost similar prescriptions were there under TADA also. In fact, the fulfilment of such mandate is inherent in the process of recording a confession by a statutory authority. What is necessarily implicit is, perhaps, made explicit. But the notable safeguards which were lacking in TADA are to be found in sub-sections (4) and (5).

157. The lofty purpose behind the mandate that the maker of the confession shall be sent to judicial custody by the CJM before whom he is produced is to provide an atmosphere in which he would feel free to make a complaint against the police, if he so wishes. The feeling that he will be free from the shackles of police custody after production in court will minimise, if not remove, the fear psychosis by which he

may be gripped. The various safeguards enshrined in Section 32 are meant to be strictly observed as they relate to personal liberty of an individual. However, we add a caveat here. The strict enforcement of the provision as to judicial remand and the invalidation of the confession merely on the ground of its non-compliance may present some practical difficulties at times. Situations may arise that even after the confession is made by a person in custody, police custody may still be required for the purpose of further investigation. Sending a person to judicial custody at that stage may retard the investigation. Sometimes, the further steps to be taken by the investigator with the help of the accused may brook no delay. An attempt shall however be made to harmonise this provision in Section 32(5) with the powers of investigation available to the police. At the same time, it needs to be emphasised that the obligation to send the confession maker to judicial custody cannot be lightly disregarded. Police custody cannot be given on the mere asking by the police. It shall be remembered that sending a person who has made the confession to judicial custody after he is produced before the CJM is the normal rule and this procedural safeguard should be given its due primacy. The CJM should be satisfied that it is absolutely necessary that the confession maker shall be restored to police custody for any special reason. Such a course of sending him back to police custody could only be done in exceptional cases after due application of mind. Most often, sending such person to judicial custody in compliance with Section32(5) soon after the proceedings are recorded by the CJM subject to the consideration of the application by the police after a few days may not make material difference to the further investigation. The CJM has a duty to consider whether the application is only a ruse to get back the person concerned to police custody in case he disputes the confession or it is an application made bona fide in view of the need and urgency involved. We are therefore of the view that the non-compliance with the judicial custody requirement does not per se vitiate the confession, though its non-compliance should be one of the important factors that must be borne in mind in testing the confession.

158. These provisions of Section 32, which are conceived in the interest of the accused, will go a long way to screen and exclude confessions, which appear to be involuntary. The requirements and safeguards laid down in sub sections (2) to (5) are an integral part of the scheme providing for admissibility of confession made to the police officer. The breach of any one of these requirements would have a vital bearing on the admissibility and evidentiary value of the confession recorded under section 32(1) and may even inflict a fatal blow on such confession. We have another set of procedural safeguards laid down in Section 52 of POTA which are modelled on the guidelines envisaged by D.K.Basu [(1997) 1 SCC 416]. Section 52 runs as under:

"52. (1) Where a police officer arrests a person, he shall prepare a custody memo of the person arrested.

(2) The person arrested shall be informed of his right to consult a legal practitioner as soon as he is brought to the police station.

***(3)** Whenever any person is arrested, information of his arrest shall be immediately communicated by the police*

officer to a family member or in his absence to a relative of such person by telegram, telephone or by any other means and this fact shall be recorded by the police officer under the signature of the person arrested.

(4) The person arrested shall be permitted to meet the legal practitioner representing him during the course of interrogation of the accused person:

Provided that nothing in this sub-section shall entitle the legal practitioner to remain present throughout the period of interrogation."

Sub-sections (2) and (4) as well as sub-section (3) stem from the guarantees enshrined in Articles 21 and 22(1) of the Constitution. Article 22(1) enjoins that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. They are also meant to effectuate the commandment of Article 20(3) that no person accused of any offence shall be compelled to be a witness against himself.

152. Thus, to arrive at the conclusion that a confessional statement made before an officer designated under section 42 or section 53 can be the basis to convict a person under the NDPS Act, without any non obstante clause doing away with section 25 of the Evidence Act, and without any safeguards, would be a direct infringement of the constitutional guarantees contained in Articles 14, 20(3) and 21 of the Constitution of India. "

18. And finally, vide paragraphs 153, 154 and 155, the majority view has emerged thus:

"153. The judgment in Kanhaiyalal (supra) then goes on to follow Raj Kumar Karwal (supra) in paragraphs 44 and 45. For the reasons stated by us hereinabove, both these judgments do not state the law correctly, and are thus overruled by us. Other judgments that expressly refer to and rely upon these judgments, or upon the principles laid down by these judgments, also stand overruled for the reasons given by us.

154*.On the other hand, for the reasons given by us in this judgment, the judgments of Noor Aga (supra) and Niramal Singh PehlwanSingh v. Inspector Customs (2011) 12 SCC 298 are correct in law.*

155*. We answer the reference by stating:*

(i) That the officers who are invested with powers under section 53 of the NDPS Act are "police officers" within the meaning of section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

(ii) That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."

(Emphasis added)

19. Coming back to the case in hand the trial court in its findings part has observed thus:-

ष्20. बचाव पक्ष की ओर से अभियुक्त के विद्वान अधिवक्ता द्वारा इस तर्क पर बहुत जोर दिया गया है कि अभियुक्त से बरामदगी का कोई स्वतंत्र गवाह नहीं है। इस सम्बन्ध में अभियोजन साक्षी संख्या 2 व 4 के बयान से स्पष्ट है कि अभिकथित अभियुक्त विजय कुमार जिसका सही नाम प्यारेलाल है, के पास से की गयी बरामदगी क समय वहां दो स्वतंत्र साक्षी भी मौजूद थे, जिनका नाम क्रमशः एम. एम.दास गुप्ता और संदीप कुमार शर्मा है। **यद्यपि इन दोनो साक्षियों को अभियोजन पक्ष द्वारा परीक्षित नहीं कराया गया है, किन्तु इसका कोई प्रतिकूल प्रभाव अभियोजन कथानक पर नही पडेगा क्योंकि अभियुक्त विजय कुमार उर्फ प्यारे लाल ने धारा 67 एन.डी.पी.एस. अधिनियम के अन्तर्गत दिये गये बयान में स्पष्ट रूप से यह स्वीकार किया है कि उसके पास से जो गांजा बरामद हुआ था, वह विनोद सिंह के निर्देशानुसार प्राप्त करने के लिए इलाहाबाद आया था और इसके सम्बन्ध में उसे 2000 रूपया प्रतिमाह विनोद सिंह से प्राप्त होता है। इस प्रकार का बयान विनोद सिंह ने धारा 67 एन. डी.पी.एस.अधिनियम क अन्तर्गत दिया है। इस प्रकार अभियुक्त विनोद सिंह व विजय कुमार उर्फ प्यारे लाल द्वारा धारा 67 एन.डी.पी.एस.अधिनियम के अन्तर्गत दिये गये बयान उनके विरूद्ध**

21– अभियोजन साक्ष्यों से यह स्पष्ट है कि अभियुक्त विजय कुमार उर्फ प्यारे लाल की अभिरक्षा से दिनांक 3.6.03 को 630 किलोग्राम गांजा की बरामदगी हुई थी, जिसकी पुष्टि अभियोजन साक्षी संख्या 2 व 4 ने भी की है। अभियोजन साक्षी सख्या 1 व 3 ने भी इस तथ्य का समर्थन किया है। इससे यह स्पष्ट है कि अभियुक्त विनोद कुमार उर्फ प्यारे लाल धारा 8/20 एन.डी.पी.एस.एक्ट के अन्तर्गत दोषी है। अभियोजन साक्षी संख्या 2 व 4 ने अपने बयान से यह स्पष्ट रूप से बताया है कि अभियुक्त विजय कुमार उर्फ प्यारे लाल ने धारा 67 एन.डी.पी.एस.एक्ट के अन्तर्गत यह स्वीकार किया है कि वह अभियुक्त विनोद सिंह के यहां गांजा पहुंचाने का काम करता है और उसे विनोद सिंह उसके लिए 2000 रूपया प्रतिमाह देता है। अभियुक्त विनोद सिह द्वारा धारा 67 एन.डी.पी.एस.एक्ट क अन्तर्गत दिये गये बयान में इस तथ्य को स्वीकार किया है कि जो गांजा में0 गति लिमिटेड टान्सपोर्ट नगर इलाहाबाद के गोदाम सह कार्यालय के पास से दिनांक 2.6.03 को ब्यूरो की टीम द्वारा बरामद किया गया है, वह उसका तथा प्यारे लाल का था। अभियुक्त विनोद सिंह के भाई यशवन्त सिंह ने अपने बयान में यह बताया है कि अभियुक्त प्यारे लाल उसके पी.सी.ओ. की दुकान पर एक अन्य व्यक्ति के साथ आकर आसाम के किसी व्यापारी से वार्ता करता था। इस सम्बन्ध में विवेचक द्वारा यशवन्त सिंह के पी.सी.ओ. की गयी वार्तालाप का काल डिटेल का विवरण प्रस्तुत किया गया है, इससे यह स्पष्ट है कि अभियुक्त प्यारे लाल उर्फ विजय कुमार व विनोद सिंह योजनाबद्ध तरीके से गांजे का व्यापार में लिप्त थे, जिसके सम्बन्ध में विनोद सिंह , प्यारे लाल की आर्थिक मदद करता था। इस प्रकार विनोद सिंह का यह कृत्य धारा 2 की उप धारा 8 (3) एन.डी.पी.एस. अधिनियम के अन्तर्गत किया गया कार्य है, जिसके लिए अभियुक्त विनोद सिंह धारा 27 ए एन.डी.पी.एस. एक्ट के अन्तर्गत दोषी हैं ष

"20. Learned counsel appearing for the defense strenuously argued that no independent witnesses to the recovery has been produced. In this regard, it is quite explicit from the statement of PW2 and PW 4 that at the time of recovery from the alleged accused Vijay Kumar whose correct name is Pyare Lal, two independent witnesses M.M.Das Gupta and Sandip Kumar Sharma were present. ***Even though the independent witnesses were not produced and examined but it will not adversely affect the prosecution case because it has been clearly admitted by the accused Vijay Kumar @ Pyare Lal in his statement under Section 67 of the NDPS Act that ganja was recovered from his possession and the recovered ganja had arrived at Allahabad on the instruction of Vinod Singh and that he used to receive Rs. 2000/- per month for such job. Similar statement has also been given by Vinod Singh under Section 67 of NDPS Act.***

Thus statements recorded under Section 67 of NDPS Act of accused Vinod Singh and Vijai Kumar @ Pyare Lal are liable to be read against them. In this regard, Supreme Court in the case of Kanhaiya Lal v. Union of India (2008) 4 SCC 668, has held that statements recorded by NCB are not the statements recorded by the police. Thus on the basis of statement recorded under Section 67 of the NDPS Act accused can be held guilty under NDPS Act. Further as has come to be stated that correct name of Vijai Kumar is Pyare Lal, his statement recorded under Section 67 of the NDPS is available on record and marked as Exhibit A-35. From the statements of accused Vinod Kumar and Vijai Kumar it is clear that both the accused were involved in interstate smuggling of ganja and the ganja that was recovered from the possession of accused Pyare Laal at the office of godown of M/s Gati Ltd that was being illegally traded by Vinod Singh in the containers of tea company preparing forged papers of the said company and for the same both accused Vinod Singh and Pyare Lal are guilty.

21. From the evidence provided by prosecution it is explicit that 630 kg of ganja was recovered from the possession of Vijai Kumar @ Pyare Lal on 02.06.2003 and this has been confirmed by the PW 2 and PW 4 also. PW 1 and PW 3 have also supported the said fact. Thus it is clear that accused Vinod Kumar @ Pyare Lal is guilty under Section 8/20 of NDPS Act. PW 2 and 4 have clearly stated in their respective statements that accused Vijai Kumar @ Pyare Lal had admitted in his statement under Section 67 of NDPS Act that he does work of transporting ganja to Vinod Singh's place and Vinod Singh used to pay him for the same of Rs. 2000 per months. Accused Vinod Singh has clearly admitted in his statement recorded under Section 67 of the NDPS Act that the ganja that was recovered by Bureau Team on 02.06.2003 from a place near joint office of M/s Gati Limited Transport belonged to him and Pyare Lal. Yashwant Singh, brothere of the accused Vinod Singh has also stated in his statement that accused used to talk from him PCO to some trader of Assam and the call details of talks have been placed before the Court. Thus it is clear that both the accused Pyare Lal and Vijai Kumar were involved in trade of ganja in a quite planned way and in which Vinod Singh used to help Pyare Lal financially. Thus this act of Vinod Singh is an offence under Sub-section 8(3) of Section 2 of NDPS Act for which he is guilty under Section 27A of the NDPS Act."

(English translation by the Court)

(Emphasis added)

20. Now the above findings returned by the trial court in convicting the accused persons have to be tested on touchstone of the legal proposition as laid down in the supreme Court Judgement of Toofan Singh. It is a fact that two independent witnesses to the recovery memo of the search and seizure of the contraband prepared at Allahabad, namely, Mrinmay Das Gupta and Sandip Kumar Sharma were not produced before the Court as prosecution witness. To what extent their absence as an independent witness would question the credibility of the recovery memo and consequent upon that criminal case instituted under the NDPS Act, is an another issue relating to cumulative effect of various discrepancies casting doubt upon prosecution theory. What required here is that in the absence of those witnesses whether the statement recorded under Section 67 of the Act, 1985 besides the testimonies of the departmental witnesses,

do come to conclude that material and the documents have stood proved to bring home the charge and whether the trial court could have assumed the appellant to be guilty taking recourse to the presumption under Section 35 read with Section 54 of the Act, 1985.

21. Two crucial witnesses besides the independent witnesses to the recovery memo were the intelligence officer Kaushal Kant Mishra who had led the team to carry out search and seizure, Pradip Kumar Gunwant another intelligence officer who was part of the said team. Since independent witnesses were not produced and in the statement recorded under Section 313 Cr.P.C, the entire recovery and preparation of the recovery memo was denied by the accused persons, especially the appellant Vijay Kumar @ Pyare Lal, the burden lay heavily upon P.Ws 2 and 3 to prove the recovery memo and the factum of recovery to raise statutory presumption. No doubt, the documents alleged to have been recovered from the possession of Vijay Kumar @ Pyare Lal were related to release of those plywood boxes from the Transport Company but that would not alone be sufficient to draw the conclusion that plywood boxes were found from his possession and that too it did contain the contraband.

22. P.W. 2 Kaushal Kant Mishra who had prepared recovery memo had stated in his examination in chief that independent witnesses who claimed to be employees of Gati Pvt. Ltd. had been seen at the very gate of the private transport company and at the very gate of Transport Company those 20 plywood boxes were lying and it was there the suspect was standing. Naturally a large number of containers were lying at the gate, so common sense would prevail to take help of the local police to confiscate and seize such huge quantity of contraband more specially when there was prior knowledge of psychotropic substance being there in plywood boxes but there is noting in the recovery memo and so admittedly the prosecution witnesses had stated in Court that they had not taken help of the local police. Every exercise of search and seizure was carried out on the spot, but nothing was stated how such a huge quantity of the contraband was weighed. The entire exercise of search and seizure was carried out till 11:30 pm in the night, the jute bags were purchased, the entire material was transferred from plywood boxes into jute bags and then sealed and that sealing process was witnessed by the two independent witnesses, namely employees of the Transport Company besides officials of the team and the accused. Interestingly during cross-examination, the two departmental witnesses have admitted that local police was not informed about the search and seizure activity which was to be carried out by the team coming from Varanasi, whereas there was sufficient information to the intelligence officer that contraband was being sent to Allahabad was in huge quantity and the boxes were seized on the road itself. PW 2 stated that team did not enter the premises of the Transport Company as nothing was seized from there and that contraband was weighed on road itself. He further denied to have stated ever that contraband was weighed after taking out from the plywood boxes and filling the same in the jute bags. He further stated during cross-examination that employees of transport company were roaming on road and they were asked to come forward and help the team and it is after querry being made that they informed him that they were employees of the Transport Company. He

further did state that the entire material was carried to Varanasi by a truck but he did not know about the truck number and its payment. It is admitted that entire contraband to the tune of 630 kg was submitted to malkhana at Varanasi only on 05th June, 2003.

23. P.W. 4 Pradip Kumar Gunwant another member of the raiding team headed by P.W. 2 though supported the recovery and preparation of the recovery memo but quite interestingly he stated that entire material was weighed on a weighing machine of the transport company M/S Gati Pvt. Ltd. Naturally, weighing machine was inside the transport company and has stated very clearly that it is after recording of confessional statement of the accused under Section 67 of the Act, 1985 that he came to conclude that said Vijay Kumar was involved in the smuggling of contraband. During cross-examination, he further stated to have reached Allahabad with team in the night to carry out such search and seizure, but before 12:00 am. During cross-examination, he further stated that not only the team had the testing kit but also sealed papers weighing scales and weights of 10 grams, 25 grams and 50 grams. He stated very clearly during his cross-examination that entire contraband was weighed inside the transport company M/s Gati Pvt. Ltd. upon weighing scales provided by it and that it was weighed in the jute bags, but it is not so stated in the recovery memo. So, this statement is in contrast to the statement of the PW 2 witness Kaushal Kant Misrha, who had prepared recovery memo and had led team that carried out search and seizure. This witness also stated that in the entire exercise it took 6 to 7 hours and so if he reached in the night hours before 12:00 am, then exercise must have been carried out until early next morning. It is a fact that the team had stayed at Allahabad from 2nd June to 4th June, and the material confiscated was in huge quantity, then in such circumstances its security and storage must have been an issue as it was in custody of NCB men who were four in numbers and yet there is nothing on record as to whether they stayed with such a huge quantity at Allahabad and if yes where, as they did not take help of the local police under Section 55 of the Act, 1985 and quite interestingly for prety two full days they did not inform local police station at all. Admittedly, they did not keep the contraband with transport company but what happened to contraband which was in such a huge quantity for two days is not known, at least there is nothing on record to come to conclude as to where such a huge quantity of contraband was kept, in a hotel or in any guest house and under which kind of security.

24. Similarly, again the team led by P.W.-1 with help of P.W.-3 and local police of Azamgarh carried out search and seizure of person and residential premises of another co-accused, namely, Vinod Kumar. There again four persons namely Shiv Murat Tiwari, Khaderu Ram, Yashwant Singh and Smt. Basmati were taken to be independent witnesses to the search carried out of the person and residential premises of Vinod Kumar. Shiv Murat Tiwari, Yashwant Singh and Smt. Basmati were were never produced in Court whereas Khaderu Ram appeared as Defence Witness and denied entire alleged search and preparation of zero recovery memo. It is admitted to the prosecution that no incriminating material was found during search to connect the appellant Vinod Kumar with commission of the crime. The Public Call Office (PCO Booth) which was

owned by his brother Yashwant Singh was later on when put to search for details of phone calls, it was found that phone numbers used for repeated calls from the PCO were the phone numbers of Assam. Since, the confiscated material was coming from Assam, and there were confessional statements of accused persons under Section 67 of the Act, 1985, an inference has been drawn by the prosecution while implicating said Vinod Kumar that he was master mind behind the entire activity and he could not give satisfactory reply about calls made to Assam.

25. It is in the above background of the testimonies of the prosecution witnesses it becomes necessary to test as to how far statements of accused persons under Section 67 of the Act can be relied upon to raise statutory presumption under Section 35 read with Section 54 of the Act, 1985 and whether the trial court has succeeded in arriving at a finding that there was culpable mental state of the accused. The question, therefore, is that whether findings recorded by the trial court is supported by cogent and convincing evidence that may lead to conclude that guilt is proved beyond reasonable doubt. The trial Court has held that Vinod Kumar in his statement under Section 67 of the NDPS Act, 1985 had admitted that the person who was arrested with 630 Kg of Ganja at Allahabad was Pyare Lal, a resident of Azamgarh and that he had admitted that he had been paid Rs. 14969/- to get the ganja released and that the other accused also admitted to have given that money and that he had earlier also been accused in respect of recovery of 1 Kg and 12 Kg of psychotropic substance and that his brother Yashwant Singh was also investigated alongwith two other independent witnesses under Section 67 of the Cr.P.C . The call details of PCO telephone no. 231468 to the telephone no. 32246 were also detected. Similarly, again the trial court had held that the prosecution witness no. 2 Kaushal Kant Mishra has proved the statement of Vinod Singh under Section 67 of the NDPS Act.

26. On argument being raised that independent witnesses to the recovery memo were never produced and statements of official witness to the recovery memo are at variance during cross-examination and that the departmental witnesses would be interested witnesses coupled with the fact that the independent witnesses were not produced and the discrepancies were to the extent that cumulative effect of these discrepancies would be fatal to prosecution case, the trial court held that since accused Vijay @ Pyare Lal in his statement recorded under Section 67 of the Act, 1985 made a confessional statement that contraband belonged to Vinod Kumar and that he was being paid 2,000/- per month in lieu thereof would be read against the accused persons and in holding so, the trial court has relied upon the judgment of the trial court in the case of ***Kanhaya Lal v. Union of India (supra***).

27. It is relevant to quote paragraphs 21,22,23 and 43,44,45 of the above judgment (supra) here that run as under:

"21. Mr. S.K. Gambhir, learned Senior Advocate, contended on behalf of the appellant, Kanhaiyalal, that the High Court had incorrectly stated the law regarding statements made under Section 67 of the NDPS Act before officers empowered under Section 42 thereunder. It was his specific case that once the appellant had been summoned in an inquiry under Section 67 of the aforesaid Act and was placed under arrest, any

statement made by him thereafter would be hit by the provisions of Sections 24 to 27of the Indian Evidence Act, 1872

22. Apart from the above, Mr. Gambhir also submitted that after making the statement in terms of Section 67 of the NDPS Act the appellant had retracted such statement and in the absence of corroborative evidence, the said retracted statement/confession could not be relied upon in order to convict the appellant. Furthermore, there was no independent evidence to corroborate the retracted confession, which fact had weighed with the trial court in acquitting the appellant.

23. Mr. Gambhir submitted that although from the arrest Memo it would be clear that Kanhaiyalal was arrested on 8.6.1997 at 5.30 p.m., he was produced before the Magistrate on 9th June, 1997, and on the same day he made an application in writing to the Court that his signature had been forcibly obtained on blank papers under threat that if he did not sign he would be involved in other serious cases and the same were subsequently used for preparing statements under Section 67 of the aforesaid Act as if the same had been voluntarily made by him. Mr. Gambhir submitted that the appellant had already been arrested and detained in custody when the statement under Section 67 of the NDPS Act was recorded and, accordingly the same came within the mischief of Sections 24 to 27 of the Evidence Act

43 The law involved in deciding this appeal has been considered by this Court from as far back as in 1963 in Pyare Lal Bhargavas case (supra). The consistent view which has been taken with regard to confessions made under provisions of Section 67 of the NDPS Act and other criminal enactments, such as the Customs Act, 1962, has been that such statements may be treated as confessions for the purpose of Section 27 of the Evidence Act, but with the caution that the Court should satisfy itself that such statements had been made voluntarily and at a time when the person making such statement had not been made an accused in connection with the alleged offence.

44. In addition to the above, in the case of Raj Kumar Karwal v. Union of India and others (1990) 2 SCC 409, this Court held that officers of the Department of Revenue Intelligence who have been vested with powers of an Officer-in-Charge of a police station under Section 53 of the NDPS Act, 1985, are not police officers within the meaning of Section 25 of the Evidence Act. Therefore, a confessional statement recorded by such officer in the course of investigation of a person accused of an offence under the Act is admissible in evidence against him. It was also held that power conferred on officers under the NDPS Act in relation to arrest, search and seizure were similar to powers vested on officers under the Customs Act. Nothing new has been submitted which can persuade us to take a different view.

45. ***Considering the provisions of Section 67 of the N.D.P.S. Act and the views expressed by this Court in Raj Kumar Karwals case (supra), with which we agree, that an officer vested with the powers of an Officer-in-Charge of a Police Station under Section 53 of the above Act is not a Police Officer within the meaning of Section 25 of the Evidence Act, it is clear that a statement made under Section 67 of the N.D.P.S. Act is not the same as a statement made***

under Section 161 of the Code, unless made under threat or coercion. It is this vital difference, which allows a statement made under Section 67 of the N.D.P.S. Act to be used as a confession against the person making it and excludes it from the operation of Sections 24 to 27 of the Evidence Act" *(emphasis added)*

28. The above view has been expressly overruled by the Supreme Court in its judgment in Toofan Singh's case (supra). The legal position now that stands is that the statement under Section 67 of the Act stands hit of Section 25 of the Indian Evidence Act, 1872 in view of paragraph 155 of the **Toofan Singh's judgment** *(supra).*

29. Applying the legal pronouncement in Toofan Singh (supra) wherein judgment of Kanhaiya Lal (supra) has been overruled, the finding returned by the trial court placing reliance upon said judgment of Kanhaiya Lal holding that confessional statement of the accused persons to be having evidenciary value to treat the same as conclusive proof of the guilt, is clearly rendered unsustainable and, therefore, conviction and sentence of the accused appellants deserves to be set aside on this ground alone.

30. However, here I find it necessary to deal with argument of learned Advocate Sri Pandey appearing for the department. Sri Pandey strenuously argued that even if statement under Section 67 of the Act is not a conclusive proof but it cannot be brushed aside altogether in the face of other material evidence. He argues that police submits a chargehseet on the basis of evidence it has obtained already during investigation including the statement of the witnesses under Section 161 and the trial court is hide bound in law to appreciate the evidence, test it and then proceed to record finding of conviction or acquittal. He has taken the plea of Section 30 of the Evidence Act as well.

31. Placing reliance upon the judgment of the Supreme Court in **Gian Chand and Others v. State of Haryana,2013 AIR (SC)** 3395, Sri Pandey has argued that one who takes plea of false implication only, it would not amount to rebuttal of the statutory presumption. He argues that since accused arrested at Allahabad failed to give any plausible explanation as to why plywood boxes should not have been taken to be in his possession as he was standing near by the boxes at a certain steps distance and that he failed to offer any explanation for being at Allahabad. There is valid presumption in law that contraband or article was recovered from his possession. In other words it is a conscious possession to raise the plea of culpable mental state. Learned counsel has relied upon paragraph 11,12,13 and 14 of the **Gian Chand and Others (supra)** that are reproduced hereunder:

"11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors., AIR 2013 SC 1204 observing as under:

"31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been

objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses." (Emphasis supplied) (See also: Ravinder Kumar Sharma v. State of Assam & Ors. , AIR 1999 SC 3571; Ghasita Sahu v. State of Madhya Pradesh, AIR 2008 SC 1425; and Rohtash Kumar v. State of Haryana, JT 2013 (8) SC 181)

12. The defence did not put any question to the Investigating Officer in his cross-examination in respect of missing chits from the bags containing the case property/contraband articles. Thus, no grievance could be raised by the appellants in this regard.

13. The appellants were found travelling in a jeep at odd hours in the night and the contraband material was found. Therefore, the question arises whether they can be held to have conscious possession of the contraband substances.

This Court dealt with this issue in Madan Lal & Anr. v. State of Himachal Pradesh AIR 2003 SC 3642, observing that Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences and penalties for possession of such articles. Undoubtedly, in order to bring home the charge of illicit possession, there must be conscious possession. The expression "possession' has been held to be a polymorphous term having different meanings in contextually different backgrounds. Therefore, its definition cannot be put in a straitjacket formula. The word "conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended. Possession in a given case need not be actual physical possession and may be constructive i.e. having power and control over the article in case in question, while the person to whom physical possession is given holds it subject to that power or control. The Court further held as under:

"Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. It has not been shown by the accused-appellants that the possession was not conscious in the

logical background of Sections 35 and 54 of the Act."

14. From the conjoint reading of thep rovision of Section 35 and 54 of the Act, it becomes clear that if the accused is found to be in p ossession of the contraband article, he is presumed to hve committed the offence under the relevant provisions of the Act until the contrary is proved. According to Section 35 of the Act, the court shall presume the existence of mental state for the commission of an offence and it is for the accused to prove otherwise. (Emphasis added)

32. Still further, citing the judgment of Jarnail Singh v. State of Punjab (2011)1 SCC (Cri) 1191 Sri Pandey has heavily placed reliance upon paragraph nos. 11 and 12 of the judgment that run as under:

"11. The first submission of Mr. Ujjal Singh, learned counsel, is that the appellant has been falsely implicated. We are unable to accept this submission. Merely because the prosecution has not examined any independent witness,would not necessarily lead to the conclusion that the appellant has been falsely implicated. It was clearly a case where the police personnel had noticed the odd behaviour of the appellant when he was working towards them on a path which led to Village Mirzapur. It was the display of hesitation by the appellant on sighting the police party that Satpal Singh (PW5) became suspicious. On seeing the police personnel, the appellant tried to run away from the scene. It was not a case where the prosecution has claimed that the appellant was apprehended on the basis of any earlier information having been given by any secret informer. It was also not a case of trap. In such circumstances, it would not be possible to hold that the appellant has been falsely implicated.

12. The prosecution has offered a plausible explanation with regard to non joining of the independent witnesses. It was clearly stated by PW5 that the path on which the appellant was apprehended was not frequently used by the public. I fact, efforts were made to bring a member of panchayat or Sarpanch of the village. However, the Head Constable Baldev Singh who had been sent, reported that none of the villagers were prepared to join as independent witnesses. This reluctance on the part of the villagers is neither strange nor unbelievable. Generally, people belonging to the same village would not unnecessarily want to create bad relations/enmity with any other villager. Especially when such a person would be feeling insecure, having been accused of committing a crime."

33. The above legal positions do stand to reason but question is, whether this proposition is attracted in the setting of facts of the present case where one officer says that he landed at 5:00 pm at Allahabad in the month of June during sunlight and the other officer of the same team says he arrived in the night and quite interestingly both came to Allahabad as a team. The officer preparing the recovery memo says that 20 boxes were recovered from the gate of the transport company and every exercise was carried out there itself whereas other officer of the team says that the contraband was filled in jute bags and was taken inside the transport company on the weighing scale of the company. None of the officers could disclose as to where they stayed with huge quantity of ganja for two days in Allahabad and except transportation by truck, nothing more can

be deciphered from their statements as to how they managed the entire contraband first be stored and kept safely at Allahabad for almost 72 hours and then transportation thereof to Varanasi. All those above facts have come during cross examination of crucial prosecution witnesses.

34. The credibility of the recovery is not impeached by simple denial of the accused persons in the statement recorded under Section 313 Cr.P.C but variance in statements and cross-examinations of the prosecution witnesses in the present case have hit the the prosecution theory of search and seizure of goods at Allahabad and thus quite seriously questioned the entire credibility of the recovery and, therefore, in such circumstances a blind reliance upon confessional statement under Section 67 of the Act could not have been taken recourse to, to bring home the charge. The statutory presumption as sought to be argued by learned counsel for the department to have stood raised in the present case does not stand to reason either. The word possession has been taken to be a polymorphous and so it may vary in its form to robe it in the cloth of statutory presumption, provided of course the persons/ officers who are in the helm of affairs are not quite substantially at variance in their respective testimonies in the court of law.

35. Similarly, again the principle laid down in the case of Jarnail Singh v. State of Punjab (supra) can also not come to rescue of the prosecution in the present case because the trial court in the present case has basically proceeded to convict the appellants on the basis of their respective confessional statements recorded under Section 67 of the Act and it is in the light of that impugned finding alone, this court does not find that the documents recovered from possession of the Vijay Kumar would alone lead to the recovery of contraband, as such. Factually also case of search of independent witnesses to witness the recovery and even after persuasion no one agreeing to the same, is not the case here. In the considered opinion of the Court recovery of contraband from the possession of the appellants becomes doubtful. 20 bags are lying on road at 5:00 pm in the evening in the month of June, a person standing nearby so casually, searching for a conveyance, almost like giving open offer to NCB or police to arrive especially in the circumstances when he knew that those boxes were full of ganja, does not appeal to reason at all and at least it can not appeal to reason even of man of ordinary prudence.

36. The judgment in the case of **Madan Lal and Another v. State of Himachal Pradesh, 2003 (47) ACC 763** is also not attracted in the setting of facts of the present case.

37. In so far as the argument regarding applicability of Section 30 of the Indian Evidence Act, 1872 (Evidence Act) is concerned, suffice it to say that the parameters as given under the Section are not met in the facts of the present case. A conjoint reading of the provisions as contained under Section 24 to Section 30 of the Evidence Act shows that most relevant of the sections are Sections 25, 26 and 27 to be read and applied before advantage of Section 30 is given to the prosecution. While Section 25 specifically provides that the confession made to the police officer shall not be proved against the person accused of an offence, Section 26 says confession of the accused in custody, shall not be proved except when made before a Magistrate, against such person and a bare

reading of Section 27 indicates of treating the statement of accused in components qua admissible and inadmissible portion of such statement given to the police, and the component that relates to immediate cause of discovery of arms or articles would only be legal evidence and admissible in law in case if recovery is proved of such arms or articles.

38. In the setting of facts of the present case qua knowledge and recovery of contraband, nothing has come either in the recovery memo or in the statement of the intelligence officer that it was at the pointing out of the accused Vijay Kumar @ Pyare Lal that the boxes belonging to Vinod Kumar were traced. It is not the case at all that it is at accused's pointing the Intelligence Officer arrived at the sight of recovery and had thus recovered the same so as to track out and split that part of accused's statement which may be made admissible from the rest of it.

39. In the present case the situation is rather otherwise; the information was received from the third source and the accused Vijay Kumar @ Pyare Lal had been interrogated while he was standing at a place quite nearby those boxes.

40. It is interesting to notice here a crucial fact that Intelligence Officer had apprised the employees of transport company who were later taken as independent witnesses of the recovery memo and signed the same, much before the recovery of plywood boxes carrying the contraband.

41. Statement of accused Vijay Kumar is recorded after the boxes were seized and thereafter upon being interrogated he confessed that he knew that those boxes were full of ganja. So there is nothing from where the statement of the accused Vijay Kumar @ Pyare Lal can be split up into two components as admissible and inadmissible part of it. However, it is very much clear that in view of Section 25 and 26 of the Act, 1872 confession before the Intelligence Officer now in view of judgment of Toofan Singh (supra) cannot at all be proved and used against accused persons.

42. Thus, the recovery of the contraband in the present case is not a consequence of the information given by the accused at all to attract the applicability of Section 27 of Evidence Act, inasmuch as, the contraband being already seized and, thereafter, the statement recorded of the accused in the presence of the intelligence officer, cannot be taken as voluntary statement to robe it with credibility. In such circumstances, therefore, the presumption if any, cannot be raised upon any portion of the statement of the accused within the meaning of Section 27 of the Evidence Act, which is an exception to the general provisions of Section 25 and 26 of the Evidence Act.

43. In such above facts and circumstances, Section 30 of Evidence Act cannot be taken aid of to bring home the charge as is sought to be argued and so the argument qua applicability of Section 30 of the Evidence Act in the present case, is also rejected.

44. Coming to the second ground of challenge qua non- compliance of Section 52-A, it has been vehemently urged by learned Senior Advocate appearing for the appellants that report of the laboratory fully demonstrate vide exhibits A-1 to A-31 that in all the envelops in which sample was

sent to the tune of 25 grams vide each envelope was found less than half in quantity in the laboratory when opened for testing and that creates doubt about the sample being same one as was claimed to be collected from the jute bags and sent for laboratory examination.

45. Learned counsel has argued that in order to remove all these doubts compliance of Section 52-A of the Act, 1985 becomes all the more necessary and mandatory because if the application is moved before the Magistrate, he passes an order for collection of representative samples and an inventory is prepared in presence of the Magistrate, photographs of such drugs or substance are duly certified by the Magistrate and the representative samples are drawn so that in case if any doubt is cast qua the reports and the samples sent for said purpose, it could be matched with representative sample to bring home the guilt and even otherwise it is argued, if representative sample is there, then there will be no further need to produce the entire original material.

46. Learned Senior counsel appearing for the appellants has argued that it is prosecution's case that since material was in huge quantity and stored in as many as 20 bags and so the same could not be produced in Court and under such circumstances in the absence of any representative material it cannot be said that sample collected was the same as was stored in sealed gunny bags. It is also argued that though a report had been prepared on 23.12.2005 after more than two years of the incident but that report was not even proved. Even though physical verification report not proved in Court, it clearly states that gunny bags were in a sealed condition in the malkhana but at several places they were laciniated and the material was coming out of the same and so no verification of weight and exact material could be done except the record maintained in the form of register in the malkhana.

47. Thus learned counsel for the appellant has further argued that there has been no physical verification of the material as contemplated under section 52-A of the Act, 1985. He has placed reliance upon judgment of the **Mohinder Singh (supra),** in which vide paragraph 10 to 13, Court has held thus:

"10. So far as the contention regarding production of the contraband seized from the accused, in his evidence, Harbhajan Singh (PW-3) stated that on 01.05.1998, he produced the sample parcels and the case property parcels with the seal and the sample seals before the Judicial Magistrate, Ludhiana and the Magistrate has recorded the seals tallied with the specimen impression. Harbhajan Singh (PW-3) further stated that after return of the samples and the parcels from the court, the same were lodged by him to the Malkhana on 01.05.1998 itself. Baldev Singh (PW-5) has not produced Register No. 19 maintained in the Malkhana to show the relevant entry in Register No. 19 as to deposit of the case property in the Malkhana. Oral evidence of Harbhajan Singh (PW-3) and Baldev Singh (PW-5) as to the deposit of the contraband seized from the accused with Malkhana is not corroborated by the documentary evidence namely the entry in Register No. 19.

11. After referring to the oral evidence of Joginder Singh (PW-2) and Harbhajan Singh (PW-3), the trial court in para (14) of its judgment has recorded the finding that no order of the Magistrate to

prove the production of the contraband before the Magistrate was available on the file. After recording such observation, the trial court held that the oral evidence regarding production of the case property before the Magistrate was not trustworthy and not acceptable. In the absence of the order of the Magistrate showing that the contraband seized from the accused was produced before the Magistrate, the oral evidence adduced that the contraband was produced before the Magistrate cannot form the basis to record the conviction.

12. For providing the offence under the NDPS Act, it is necessary for the prosecution to establish that the quantity of the contraband goods allegedly seized from the possession of the accused and the best evidence would be the court records as to the production of the contraband before the Magistrate and deposit of the same before the Malkhana or the document showing destruction of the contraband.

13. In Vijay Jain v. State of Madhya Pradesh (2013) 14 SCC 527, this Court reiterated the necessity of production of contraband substances seized from the accused before the trial court to establish that the contraband substances seized from the accused tallied with the samples sent to the FSL. It was held that mere oral evidence to establish seizure of contraband substances from the accused is not sufficient. It was held as under:-

"10. On the other hand, on a reading of this Court's judgment in Jitender v.State of M.P. (2004) 10 SCC 562, we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in Ashok v. State of M.P. (2011) 5 SCC 123, this Court found that the alleged narcotic powder seized from the possession of the accused was not pdoduced before the trial court as material exhibit and there was not explanation for its non production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant. "

48. Learned counsel for the appellant has cited above authority looking to two obvious facts of this case:

a. a sample that was sent as S-1 to the laboratory for examination on opening , reported to have been found less than half; and

b. the contraband that was seized from the spot on 3rd June, 2002 and was submitted for safe custody in the malkhana on 5th June, 2003, was never produced in Court.

49. Learned counsel for the appellant has argued that in the absence of the proof of the original contraband in Court it would always lead to question the credibility of the sample, moreso in the face of the fact

that quantity of the sample opened in the laboratory was found less than half of what was sent in all the samples packed in a paper envelop. Thus he argues that link evidence is quite missing between the search seizure of the contraband and the same material stored in jute bags and the material sent for laboratory examination.

50. Learned counsel for the appellant has argued that safeguards that have been provided under the Act, which incorporate very stringent measures in terms of punishment and sentence, require certain mandatory procedures to be followed in order to rule out even remotest possibility of doubt. Besides above he has also argued that where a thing is required to be done under the Act in a particular manner then that thing is required to be done in that manner alone. No administrative or even quasi judicial discretion can be permitted to be exercised to bye pass the procedure otherwise there would be no rule of law and the procedure would become keptive of administrative and judicial conveniences and at times even of whims.

51. In support of his above argument, learned Advocate has also relied upon the judgment of the Apex Court in the case of Noor Aga (supra), on the issue of non production of original material in court proceedings. Learned counsel for the appellant has also relied upon the judgment of Supreme Court in the case of Jitendra and Another v. State of M.P. Air,2003 SC 4236.

52. To counter the above arguments of learned counsel for the appellant and further the above authority relied upon by the learned counsel, Sri Pandey appearing for the State has placed reliance upon judgment of Supreme Court in the case of Dehal Singh v. State of Himachal Pradesh 2010 Law Suit (SC) 529, in which vide paragraph nos. 11,21 and 22 it has been held as under:

"11. We do not find any substance in the submission of Mr. Rai and the decisions relied on are clearly distinguishable. The vehicle was intercepted and searched on a highway and it has come in the evidence of PW.16, Brijesh Sood that he had sent PW.3, Churamani to bring weighing scale and weight from the grocery shop of PW.5, Ram Lal. From the evidence of PW.3, Churamani and PW.5, Ram Lal, the grocery shop owner it is evident that the weighing scale and the weight came from the grocery shop. It is common knowledge that weighing scale and weight kept in the grocery-shop are not of such standard which can weigh articles with great accuracy and therefore difference of 15 gms. in weight, in the facts and circumstances of this case, is not of much significance. Sample was taken by a common weighing scale and weight found in a grocery shop, whereas the weight in the laboratory recorded with precision scale. This would be evident from the fact that the weight of the sample recorded in the laboratory was 65.5606 gms. In this background, small difference in weight loses its significance, when one finds no infirmity in other part of the prosecution story.

21. We do not find any substance in this submission of Mr. Mishra. Statement under Section 313 of the Code of Criminal Procedure is taken into consideration to appreciate the truthfullness or otherwise of the case of prosecution and it is not an evidence. Statement of an accused under Section 313 of the Code of Criminal

Procedure is recorded without administering oath and, therefore, said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act. Appellants have not chosen to examine any other witness to support this plea and in case none was available they were free to examine themselves in terms of Section 315 of the Code of Criminal Procedure which, inter alia, provides that a person accused of an offence is a competent witness of the defence and may give evidence on oath in disproof of the charges. There is reason not to treat the statement under Section 313 of the Code of Criminal Procedure as evidence as the accused cannot be cross-examined, with reference to those statements. However, when an accused appears as witness in defence to disproof the charge, his version can be tested by his cross-examination. Therefore, in our opinion the plea of the appellant Dinesh Kumar that he had taken lift in the car is not fit to be accepted only on the basis of the statements of the appellants under Section 313 of the Code of Criminal Procedure.

22. Both the appellants have been found travelling in the car from which Charas was recovered and, therefore, they were in possession thereof. They were knowing each other. They were not travelling in a public transport vehicle. Distinction has to be made between accused travelling by public transport vehicle and private vehicle. It needs no emphasis that to bring the offence within the mischief of Section 20 of the Act possession has to be conscious possession. Section 35 of the Act recognizes that once possession is established the Court can presume that the accused had a culpable mental state, meaning thereby conscious possession. Further the person who claims that he was not in conscious possession has to establish it. Presumption of conscious possession is further available under Section 54 of the Act, which provides that accused may be presumed to have committed the offence unless he accounts for satisfactorily the possession of contraband. The view which we have taken finds support from a judgment of this Court in the case of Madan Lal and another vs. State of H.P., 2003 (7) SCC 465, wherein it has been held as follows:

"26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

27. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act."

53. In order to appreciate rival submissions, it is necessary to test their respective arguments on facts of the case in hand. Now coming back to the facts relating to the sample tested by the laboratory and report sent and placed before the Court in the present case that have been exhibited as A-10 to A-31, the sample in A10 was weighed as 10.8. grams, A11- 5.8 grams, A12- 10.7 grams, A13- 10.7 grams, A14- 11.3 grams, A15- 11.8

grams, A16 - 6.1 grams, A17- 9.8 grams, A18- 14.3 grams, A19- 8.8 grams, A20 -8.1 grams, A21- 10.2 grams, A22- 14.9 grams A23 -8.6 grams, A24 - 8.1 grams, A25 5.3 grams, A26- 13.1 grams, A27 - 5.5 grams, A28 - 14.1 grams, A29 - 9.2. grams, A30 - 7.3 grams, and A31 - 13.3 grams. The sample was admittedly dispatched on 5th June, 2003 and was received in the laboratory on 10th June, 2003, the sample was opened on 2nd July, 2003 for conducting the test and weighed accordingly and report was prepared on 16th July, 2003. The description of substance was ganja weighed as 25 grams in each sample. The question, therefore, is that whether the sample which was to the tune of 25 grams could have gone less than half, if opened within 25 days. Interestingly in some of the reports, the sample received has been found less than 1/3rd of the exact weight given in the recovery memo as well as penned on the sealed envelop. It seems as if contraband sample got evaporated substantially in less than 25 days and for which no explanation has been offered except a very lame excuse that it might have further dried up.

54. It is in this above background that preparation of the report under Section 52-A becomes quite significantly important. In the present case the report is a part of the record of the trial court, which is in the form of report dated 22.12.2005 of the Judicial Magistrate, Court No. 2 Varanasi, which recites that in compliance of the order of Special Judge NDPS Act/Additional Sessions Judge Allahabad in Sessions Trial no. 188 of 2003 dated 3rd December, 2005, he visited the godown of the department by the vehicle provided by NCB (National Control Board) at Varanasi and carried out inspection. As per the report he looked into page no.10 of the Seized Goods Register, in which there was an entry regarding seized contraband of 630 kg weight, 20 plywood boxes and the contraband in 22 gunny bags and that samples were taken to the tune of 25 grams from each bag as sample to be sent for the laboratory and additionally also. He also reported to have perused yellow colour envelop and all those were in a sealed condition claimed to be second sample of contraband material marked as S-2 and he then got opened the locked door of the godown and inside there he found 22 plywood boxes with mark Low cost Tea Leaf and Dhansri to Dehradun via Allahabad. 22 gunny bags were also found and seal upon those bags intact. However, gunny bags were got lacianated at several places and that ganja was coming out of them and was found scattered on floor. Regarding verification of the weight of contraband, the report said it was not possible to do that and, therefore, nothing was reported about exact weight of the contraband claimed to 630 kg. Report is stated to have been prepared confidentially of which neither intelligence officer was aware nor, the accused persons qua verification done and preparation of report.

55. It is argued on behalf of the department that since this report was confidential report, it did not require to be marked as exhibit nor, could it be led as an exhibit. It is further argued that this report was in compliance of an order passed by the court on an application moved by the department under Section 52-A of the Act, 1985 and therefore, there has been compliance of the mandatory provision and no advantage can be given in this matter to the accused persons because a question was put to the accused regarding this very report as well under Section 313 Cr.P.C. to which they simply denied.

56. In order to test the argument of learned Advocate appearing for the department that there was compliance and that of argument of appellant that there was no compliance of the mandatory provisions, it is necessary to have re-look of the provisions as contained Section 52-A of the NDPS Act. Section 52- is reproduced hereunder:

"[52A. Disposal of seized narcotic drugs and psychotropic substances.

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence]."

(emphasis added)

57. From bare reading of the aforesaid provisions, it is quite apparent that detailed procedure is prescribed for preparation of report under Section 52A, the correctness of the entry was to be certified; the photographs of the drugs or substances to be taken and needed certification thereof as well; representative samples have to be

drawn of such drugs or substances in the presence of such magistrate certifying correctness of any list of sample that was drawn.

58. In the present case an application was moved by the intelligence officer before the trial court on 15.10.2004 with following prayer.

ष्अत; श्रीमान जी से प्रार्थना है कि उपरोक्त मुकदमा माल स्वापक एवं मन प्रभावी पदार्थ की धारा 52–ए धारा 52 ए (2) एन डी पी एस एक्ट 1985 के अनतर्गत संलगन विवरण तालिका को प्रमाणित करते हुए माल मुकदमा को नियमानुसार कार्यवाही करते हुए निष्पादित एवं व्ययन करने की आज्ञा प्रदान करें ताकि न्याय हो ।ष

"Accordingly, it is prayed that the court may be pleased to certify the details of Articles prepared under Section 52A (2) of NDPS Act, 1985, and order for disposal of the seized articles.

(English translation by this Court)

59. It is upon this above application an order was passed on 3.12.2005 by the trial court but while report was prepared in compliance of the said order on 22.12.2005 none of the procedures as prescribed for undere sub section 2 (a) (b) and (c) of NDPS Act, 1985 were followed as no representative sample was collected so as to do away with procedure of production of material before the Court to test the veracity of the lab report on the ground that it was this very material from which samples were taken. In fact, there is no certification of the material as required under Section 52-A of the Act. What is further interesting to notice is that during pendency of this appeal itself, an application was moved for disposal of the material under Section 52-A of the Act and upon which a detail order was passed by this Court which is reproduced hereunder:

"Learned counsel for the applicant as well as learned counsel for the Union of India, Sri Sanjay Kumar Singh present.

Union of India through Narcotics Control Bureau, Lucknow has moved a Criminal Misc. Application No. 209337 of 2015 in the present appeal under Section 374(2) of Cr.P.C., whereby it is prayed that a suitable order or direction may be issued and permission be granted for destruction/disposal of 630 Kg. of Ganja (case property of this case), to the Drug Disposal Committee/authorities of Narcotics Control Bureau, Lucknow.

It is submitted by the learned counsel for the applicant that Investigating Officer was present before the trial court and he has specifically stated that case property has already been disposed off and this has been observed by the trial court in its judgment also, and it is further submitted that once the property has been disposed off under Section 52-A, no question arises for its disposal again.

Dispelling the arguments submitted by the learned counsel for the applicant, it is submitted by the learned counsel for the Union of India that the case property is still intact and is liable to be disposed off as per directions given by the Apex Court. It is further submitted that as per direction of the trial court to the CJM concerned, a proceeding under Section 52-A was drawn and in that CJM concerned only checked the recovered article and the said article was not disposed off under Section 52-A of the Act.

It is submitted by the learned counsel for Union of India that it is clearly stated by the Investigating Officer before

the trial court that it is not possible to produce the case property before the court as it contains several packets and in large quantity.

From the record, it is ample clear that no clear cut order is there to dispose off the contraband as provided under Section 52-A of the Act, although Section 52-A of the Act has been used by the trial court in its judgment, but the same has not been complied with, rather only CJM was directed to check the availability of the contraband and same was checked and compliance report was sent to the trial court.

In the circumstances, I do not find any ground for dismissing application of learned counsel for Union of India and same is liable to be allowed and learned counsel for appellant has failed to give any reason as to what prejudice will be caused to him by the disposal off the case property. The trial has already been concluded before the trial court and case property is not further required for any purpose and any disposal of such contraband as provided under Section 52-A of the Act is essential.

Hon'ble Apex Court in the case of Union of India Vs. Mohanlal and another, reported in 2016(93) ACC 546, also issued direction regarding disposal of such type of drugs, which are being re-circulated in the market.

This application is moved just to follow the procedure given in Section 52-A of the N.D.P.S. Act, and in the circumstances the application can very well be allowed.

In view of the above, Criminal Misc. Application No. 209337 of 2015 is allowed with following directions:-

(a) liberty is being given to the respondent - Union of India to move a proper application along with certified copy of the order before concerned Magistrate/Committee/Special Judge, under Section 52 A of the N.D.P.S. Act, which application shall be considered and disposed off by the concerned Magistrate/Committee/Special Judge within a period of three weeks from the date of filing of such application in accordance with law;

(b) liberty is also given to the concerned Magistrate/Committee/Special Judge, to consider the request of Union of India for destroying of confiscated drugs in accordance with law after following the procedure as established under the Act and relevant circulars, which may be produced before concerned Magistrate/Committee/Special Judge.

With the aforesaid direction, the application is disposed off finally.

List the matter for final hearing of appeal in due course. "

60. Thus, it is quite apparent that till conclusion of the trial, no compliance of Section 52-A of the Act had taken place and a very lame excuse was taken that original material kept in malkhana could not be produced because of its huge quantity and excuse was tried to be taken of the report of the Judicial Magistrate to prove the credibility of the laboratory report.

61. Sri Pandey, learned counsel appearing for the department defending the prosecution case on the above issue has submitted that non production of the contraband which was seized and kept in a sealed cover would not be so fatal to the prosecution case in the light of Supreme Court judgment in the case of **State of Rajasthan v. Sahi Ram, AIR 2019 (SC) 4723** in which vide paragraph 16 and 17, the Court has held thus:

"16. Turning to the facts in the present matter, the evidence of PW15 Surender Singh shows that from and out of 7 bags of poppy husk, samples weighing about 500 grams were taken out of each bag. Out of these 3500 grams thus taken out, two samples of 500 grams were independently sealed while rest 2500 grams were also sealed in a separate pouch. These samples were marked A, B and C respectively. The bags were also independently sealed and taken in custody and Exbt-5 seizure memo which recorded all these facts was also signed by the accused. We have gone through the Criminal Appeal No .1497 of 2019 arising out of SLP(Crl) No.8428 of 2016 ***State of Rajasthan vs. Sahi Ram cross-examination of the witness. At no stage even a suggestion was put to the witness that either the signatures of the accused were taken by fraud, coercion or mis-representation or that the signatures were not of the accused or that they did not understand the purport of the seizure memo. It would therefore be difficult to even suggest that the seizure of contraband weighing 223 kgs was not proved by the prosecution. In our view this fact stood conclusively proven.***

17. If the seizure of the material is otherwise proved on record and is not even doubted or disputed the entire contraband material need not be placed before this Court. If the seizure is otherwise not in doubt, there is no requirement that the entire material ought to be produced before the Court. *At times the material could be so bulky, for instance as in the present material when those 7 bags weighed 223 kgs that it may not be possible and feasible to produce the entire bulk before the Court. If the seizure is otherwise proved, what is required to be proved is the fact that the samples taken from and out of the contraband material were kept intact, that when the samples were submitted for forensic examination the seals were intact, that the report of the forensic experts shows the potency, nature and quality of the contraband material and that based on such material, the essential ingredients constituting an offence are made out.* " (Emphasis added)

62. In the considered opinion of the Court in the first instance when the procedure is laid down for a particular purpose that procedure needed to be followed in the manner prescribed for. In the absence of compliance of procedure alleged report prescribed under Section 52-A of the Act cannot be approved of.

63. There is a legal maxim "***Expressio unius est exclusio alterius***" means mention of one is the exclusion of another meaning thereby, if statute provides for a particular procedure/ manner to carry out an exercise to achieve the end result as per the Act, then it should be done in that manner alone. No deviation to the prescribed course of procedure, therefore, is permissible in law. Supreme Court has clearly held in the case of **Dhanajaya Reddy v. State of Karnataka, (2001) 4 SCC 9** that if the procedure as prescribed for and the thing as

required to be done in a manner that should be done in that manner alone. Vide 25 and 26, the Court has held thus:

"25. We examined the matter with a different angle as well by considering to see the admissibility of said confessional statement not as a judicial confession but as extra judicial confession made to PW50. We found it difficult to treat Exhibit P-77 as extra-judicial confession of A4 made to PW50. Confessions in criminal law have been categorised to be either judicial or extra-judicial. The prosecution is obliged to refer and rely on the alleged confession of the accused in any one of the aforesaid categories. As extra-judicial confession cannot be treated as judicial confession, similarly an alleged judicial confession proved to have not been legally recorded cannot be used as extra-judicial confession. Otherwise also such an approach would result in dragging the judicial officers into uncalled for and unnecessary controversies. In Nazir Ahmad v. Emperor [AIR 1936 PC 253] it was observed, which we approve, that:

"....it would be particularly unfortunate if Magistrates were asked at all generally to act rather as police officers than as judicial persons; to be by reason of their position freed from the disability that attaches to police officers under S.162 of the code; and to be at the same time freed, notwithstanding their position as Magistrates, from any obligation to make records under S.164. In the result they would indeed be relegated to the position of ordinary citizens as witnesses and then would be required to depose to matters transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever."

26. Relying upon Nazir Ahmad's case and applying the principles laid down in Taylor v. Taylor [(1876) 1 Ch.D 426] this Court in Singhara Singh's case (supra) held:

"The rule adopted in Taylor v. Taylor [(1876) 1 Ch.D 426] is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in S.164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of S.164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory. The section, therefore, by conferring on magistrates the power to record statements or confessions, by necessary implication, prohibited a magistrate from giving oral evidence of the statements or confession made to him."

Emphasis added

64. Secondly when the weight of sample received in the laboratory for the test vary substantially from what is mentioned on the recovery memo prepared after the sample is collected and sealed and mentioned as sample as well, non-compliance of the prescribed procedure would raise adverse cumulative effect adding upto the discrepancies making it fatal to the prosecution case.

65. In the case of **Noor Aga (supra)** following contentions were raised by the counsel appearing for the accused appellant in the said case.

"CONTENTIONS Ms. Tanu Bedi, learned counsel appearing on behalf of the appellant, in support of this appeal, submits:

(i) The provisions of Sections 35 and 54 of the Act being draconian in nature impo sing reverse burden on an accused and, thus, being contrary to Article 14 (2) of the International Covenant on Civil and Political Rights providing for `an accused to be innocent until proved guilty' must be held to be ultra vires Articles 14 and 21 of the Constitution of India.

(ii) Burden of proof under the Act being on the accused, a heightened standard of proof in any event is required to be discharged by the prosecution to establish the foundational facts and the same having not been done in the instant case, the impugned judgment is liable to be set aside.

(iii) The prosecution having not produced the physical evidence before the court particularly the sample of the purported contraband materials, no conviction could have been based thereupon.

(iv) Independent witnesses having not been examined, the prosecution must held to have failed to establish actual recovery of the contraband from the appellant.

(v) There being huge discrepancies in the statements of official witnesses in regard to search and seizure, the High Court judgment is fit to be set aside.

(vi) The purported confessions of the appellant before the customs authorities are wholly inadmissible in evidence being hit by section 25 of the Indian Evidence Act, as Section 108 of the Customs Act should be read in terms thereof coupled with sections 53 and 53A of the Act. "

66. Then arguments advanced on behalf of State were also referred to which run as under:

"Mr. Kuldip Singh, learned counsel appearing on behalf of the State, on the other hand, would contend:

(i) The learned Trial Judge as also the High Court upon having examined the materials brought on records by the prosecution to hold that the guilt of the accused sufficiently has been established in the case, this Court should not interfere with the impugned judgment.

(ii) Appellant having exercised his option of being searched by a Gazetted Officer; and the legal requirements of Sections 42 and 50 of the Act must be held to have been fully complied with. In any event, search and seizure of the carton did not attract the provisions of Section 50 of the Act.

(iii) Despite some discrepancies in the statements of the witnesses as regards recovery, the same cannot be said to be a vital flaw in the case of the prosecution so as to make the impugned judgment unsustainable. The learned Trial Judge as also the High Court had considered the practices prevailing in the Customs Department for the purpose of

appreciating the evidence brought on record, and having recorded their satisfaction with regard thereto, the impugned judgments do not warrant any interference.

(iv) Any confession made before the customs authorities in terms of Section 108 of the Customs Act is not hit by Section 25 of the Indian Evidence Act and the same, thus, being admissible in evidence could have been relied upon for the purpose of recording a judgment of conviction. "

67. Thus after referring to the above quoted judgments of both sides and having over view of the statutory provisions of the NDPS Act, 1985, the Court referring its earlier judgment in the **State of Kerala and Others v. Kurian Abraham (P) Ltd. And Another (2008) 3 SCC 582**, observed:

"The last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin were also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52A of the Act.

The fate of these samples is not disputed. Two of them although were kept in the malkahana along with the bulk but were not produced. No explanation has been offered in this regard. So far as the third sample which allegedly was sent to the Central Forensic Science Laboratory, New Delhi is concerned, it stands admitted that the discrepancies in the documentary evidence available have appeared before the court, namely:

i) While original weight of the sample was 5 gms, as evidenced by Ex. PB, PC and the letter accompanying Ex.PH, the weight of the sample in the laboratory was recorded as 8.7 gms.

ii) Initially, the colour of the sample as recorded was brown, but as per the chemical examination report, the colour of powder was recorded as white.

We are not oblivious of the fact that a slight difference in the weight of the sample may not be held to be so crucial as to disregard the entire prosecution case as ordinarily an officer in a public place would not be carrying a good scale with him. Here, however, the scenario is different. The place of seizure was an airport. The officers carrying out the search and seizure were from the Customs Department. They must be having good scales with them as a marginal increase or decrease of quantity of imported articles whether contraband or otherwise may make a huge difference under the Customs Act.

We cannot but also take notice other discrepancies in respect of the physical evidence which are:

i) The bulk was kept in cotton bags as per the Panchnama, Ex PC, while at the time of receiving them in the malkhana, they were packed in tin as per the deposition of PW 5.

ii) The seal, which ensures sanctity of the physical evidence, was not received along with the materials neither at the malkhana nor at the CFSL, and was not produced in Court.

Physical evidence of a case of this nature being the property of the court should have been treated to be sacrosanct. Non-production thereof would warrant drawing of a negative inference within the meaning of Section 114(g) of the Evidence Act. While there are such a large number of discrepancies, if a cumulative effect thereto is taken into consideration on the basis whereof the permissive inference would be that serious doubts are created with respect of the prosecution's endeavour to prove the fact of possession of contraband from the appellant.

This aspect of the matter has been considered by this Court in Jitendra v. State of U.P. [(2004) 10 SCC 562], in the following terms :

"In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchanama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS, Act."

Several other lacunae in the prosecution case had been brought to our notice. The samples had been kept at the airport for a period of three days. They were not deposited at the malkhana. It was obligatory on the part of the Customs Department to keep the same in the safe custody. Why such precautions were not taken is beyond anybody's comprehension. "

68. And finally the Supreme court held thus:

"CONCLUSION Our aforementioned findings may be summarized as follows:

1. The provisions of Sections 35 and 54 are not ultra vires the Constitution of India.

2. However, procedural requirements laid down therein are required to be strictly complied with.

3. There are a large number of discrepancies in the treatment and disposal of the physical evidence. There are contradictions in the statements of official witnesses. Non-examination of independent witnesses and the nature of confession and the circumstances of the recording of such confession do not lead to the conclusion of the appellant's guilt.

4. Finding on the discrepancies although if individually examined may not be fatal to the case of the prosecution but if cumulative view of the scenario is taken, the prosecution's case must be held to be lacking in credibility.

5. The fact of recovery has not been proved beyond all reasonable doubt which is required to be established before the doctrine of reverse burden is applied. Recoveries have not been made as per the procedure established by law.

6. The investigation of the case was not fair.

We, therefore, are of the opinion that the impugned judgment cannot be sustained which is set aside accordingly. "
(Emphasis added)

69. Again in the case of **Vijai Pandey v. State of U.P. (supra)** vide paragraph 8 the Supreme Court has held thus:

"The failure of the prosecution in the present case to relate the seized sample with that seized from the appellant makes the case no different from failure to produce the seized sample itself. In the circumstances the mere production of a laboratory report that the sample tested was narcotics cannot be conclusive proof by itself. The sample seized and that tested have to be correlated. The observations in Vijay Jain v.State of Madhya Pradesh, (2013) 14 SCC 527, as follows are considered relevant:"

70. In the present case, I have no reason to doubt that manner in which prosecution has led its evidence and tried to bank upon the same in bringing home the charge and the way the trial court proceeded to presume the correctness of the report dated 23.12.2005 of Judicial Magistrate as compliance of Section 52-A of the Act and then taking extra-judicial confession, Section- 67 of the Act as against the accused persons as a conclusive proof, the conclusions arrived at by it and findings recorded for the same cannot be sustained in law and if are not arrested to hold that conviction as bad, there will be serious miscarriage of justice.

71. Thus second argument advanced by learned counsel for the appellant also deserves to be upheld and conviction deserves to be set aside.

72. Coming to the **third argument** that there has been no recovery from Vinod Kumar and bare verification of certain calls from PCO of his brother will by itself not amount to a proof of his guilt.

73. It is necessary here to refer to the recovery memo prepared by R.A. Dubey, in which it has clearly come that nothing much less an incriminating one was recovered from his possession and his house. Statements under Section 67 of the Act have come to be recorded to the effect that his confession was that he was involved in the illicit trade/ smuggling of psychotropic substance and contraband confiscated from Allahabad belonged to him and that he also confessed the true name of Vijay Kumar as Pyare Lal.

74 Now what is crucial here are the call details obtained by the prosecution and placed before the Court and exhibited. What is interesting to notice is that it was a PCO that belonged to the brother of the accused and it was meant for the public to make calls. Now calls can be said to have been made from this PCO to Assam, however outgoing calls of those phone numbers on which calls were made from this PCO, could not be obtained because no STD facility was available on those phone numbers. The prosecution has not been able to trace out the relevant talk details so as to test whether these calls were made by the accused himself otherwise further scientific test would have been conducted as to whether the voice recorded was of the accused or not. Anybody could have dialed from that phone number of Assam and anybody could have been kingpin as itwas all between a PCO and phone numbers at Assam. It is not the case of prosecution that PCO was no used by any public man during that period nor, PCO register was

there to offer an explanation that no one else except accused Vinod Kumaer used the PCO except the statement of Yashwant Singh recorded under Section 67 of NDPS Act but he was never produced in Court. Thus prosecution it appears, has not tried to ensure that it is Vinod Kumar, the appellant who used to call and that large number of calls were made and received by him to and from Assam and only since confiscated material / contraband was coming from Assam that presumption has been raised that Vinod Kumar had made all those calls and confessional statement was accordingly held needed not further to be proved.

75. In order to test the findings of the trial court vis a vis argument of learned Senior Advocate on this point, it is necessary to refer to the call details that were obtained by the department and certification thereof by the competent authority. Exhibit A-9 is certification from the office of Deputy Commissioner of Customs, Guwahati, which reads as under:

"To The Deputy Commissioner of Customs

Dated: 17.07.2003

Subject : Follow up action in seizure case of 630 Kgs Ganja at Allahabad on 02.06.2003.

Sir,

As per your directives enquiries has been carried out at Barpeta Road Bongaigaon telephone exchange and the result of the inquiry is furnished below;

1. Telephone Number 03666 256445: This is a WLL number although installed at Barpeta Road, the connection is given from the Bongaigaon telephone Exchange.On enquiry with Bongaingaon Telephone Exchange it was learned that the Number was allotted to one Osman Ali Bhuyan of Village- Borbala, Village No. 140830, Block- Barpeta, P.O.- Barpeta.

However, this WLL no has been disconnected since 15.07.2002 and this particular number had no STD facility, as such dial out details are not maintained by the Exchange.
On verification of the antecedent of Oman Ali Bhuyan, it was found that he is a teacher of repute and originally from a rich back ground.

2. Telephone No. 03666 263266: This telephone number is allotted to a P.C.O. At Barpeta Road owned by one Shri Dhiren Das, Gaugacha, Barpeta Road.

The dial out details for the period 01.03.03 to 31.05.03 has been obtained and are enclo sed herewith. The records for the month of June 03 could not be furnished by Telecom authority due to technical failure of the computer system during that period.

3. Telephone No. 03664 225429: This telephone number is allotted in the name of one Shri Subrata Choudhury, Krishna Electrical, Paglastan, Bongaigaon.

As the above telephone number does not have STD facility dial out details are not available with the Bongaigaon Telephone Exchange authority.

Yours Faithfully
(M.Purakayastha)
Inspector (A/S)"

76. From a bare reading of the certification report, it is clear that no inference can be drawn to raise presumption

that these calls were made by Vinod Kumar. A PCO can be utilized by any public person. Certain calls from a particular phone number to a PCO phone number at certain point of time do not and must not connect the accused Vinod Kumar with the crime in absence of any connection of the person of Assam with the crime. It, therefore, can be safely concluded that these call details are by itself not enough to hold Vinod Kumar guilty of the offence under the Act 1985, beyond reasonable doubt.

77 I, therefore, find merit in the third argument of learned counsel for the appellants as well and find no reason to justify the findings returned by the trial court in convicting the appellants.

78. Thus, besides the authority of Supreme Court in the case of Tofan Singh *(supra)* which applies absolutely to the present case and accordingly the conviction and sentence in question is liable to be held bad, the facts and circumstances of this case do clearly show that evidence for the offences tried are not grounded well and seem to have evaporated clouding the prosecution theory so much so that entire prosecution case has got washed away bit by bit. Resultantly, the divide between the evidence and implication of the appellants in the case is so sharp and deep that long bottom connectivity , if any, is too blurred to be reckoned with. It is rightly said that a thousand culprits may escape but an innocent should not be punished, otherwise, the very sanctity of criminal justice system would be lost and trust and confidence of the people in rule of law would get shakened

79. In view of above, the appeals are allowed. Conviction and sentence of the appellant accused Vijay Kumar @ Pyare Lal in Sessions Trial No. 188 of 2003 (State v. Pyare Lal) under Section 8/20 of the Narcotics Drugs and Psychotropic Substance Act, 1985 passed by Additional District and Sessions Judge, Court No. 24/Special Judge, Allahabad is hereby set aside. Accordingly, the appellant, Vijay Kumar @ Pyare Lal who is already on bail under of the orders of this Court in Criminal Appeal No. 2704 of 2012, his bail bonds are cancelled and sureties are discharged and the appellant is set at liberty. Similarly, conviction and sentence of the appellant accused Vinod Kumar in Sessions Trial No. 188 of 2003 under Section 8/20/27-A of Narcotics Drugs and Psychotropic Substance Act, 1985 passed by Additional District and Sessions Judge, Court No. 24/Special Judge, Allahabad is also set aside and, accordingly, he is set at liberty.

80. Before parting, I may record my appreciation for the assistance of learned counsel for the parties especially to Sri Ashish Pandey, learned counsel appearing for the NCB for his meticulous arguments and that too by way of a fabulous presentation that helped the Court a lot in appreciating legal position in the setting of facts of the present case. Sri Khan also rendered his valuable assistance to the Court.

(2021)03ILR A1066
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.03.2021

BEFORE

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

Criminal Appeal No. 3813 of 2016
With
Criminal Appeal No. 4374 of 2016

Smt. Meena ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Tapan Kumar Mishra, Sri Heera Lal Yadav, Sri Rajesh Kumar Mishra, Sri Sukhvir Singh

Counsel for the Respondent:
A.G.A.

(A) Criminal Law - Appeals from Conviction - Indian Penal Code, 1860 - Section 302 read with section 34 - The Code of criminal procedure, 1973 - Section 161,313 - murder - illicit relationship - motive - in case based upon circumstantial evidence the prosecution has to prove the motive - occular evidence - circumstantial evidence - judicial adjudication suspicion - however strong cannot be allowed to take the place of proof - courts shall take utmost precaution in finding an accused guilty only on the basis of circumstantial evidence - if there is clinching and reliable circumstantial evidence, then that would be the best evidence to be safely relied upon which is lacking in this case - appreciation of evidence - hypothetical conclusion based on surmises & conjunctures cannot be made the basis of conviction.(Para - 41,43,51,71)
(B) Indian Evidence Act, 1872 - Section 106 - Burden of proving fact especially within knowledge - 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 - 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. (Para -58)

Real brother of deceased is informant - Deceased was living with his sister in her house - real brother of deceased got information that his brother (deceased) had been murdered - arrived at where dead body of his brother was lying in the field - blood stains from Aagan to field where dead body was lying - after committing murder of his brother with sharp-edged weapon, his dead body had been thrown in the field . (Para - 2)

HELD:- There is no eye witness on record proving the complicity of the appellants in the commission of murder of deceased. It is a case of circumstantial evidence. The prosecution failed at all to prove that the appellants were in occupation of their house with the deceased at the time incident took place or even in the evening on that unfateful night just prior to the commission of crime - Additional Sessions Judge has relied on the statement of P.W.2 in which he had denied the suggestion put by defence that deceased was errant/wanderer and was in bad company on account of which someone had murdered him. This is only hypocrisy of the mind of learned Additional Sessions Judge - a grave and heinous crime had been committed but when there is no satisfactory proof of the guilt, we have no other option but to give the benefit of doubt to the accused appellants - conviction and sentence of the appellants is set-aside. (Para - 29,68,70,72,73)

Criminal appeals allowed. (E-6)

List of Cases cited:

1. Hanumant Vs St. of M.P., 1952, SCR1090

2. Sharad Birdhi Chand Sarda Vs St. of Mah., 1984 (4) SCC 116

3. Attygalle Vs Emperior , (1936) 38 Bombay LR 700

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

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

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

7. West Bengal Vs Mir Mohammad Umar , 2000 SCC(Cr) 1516

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

9. Trimukh Maroti Kirkan Vs St. of Mah. , (2007) 10 SCC 445

10. P. Mani Vs St. of T.N. 2006 (3) SCC 161

11. Vikramjit Singh Vs St. of Punjab 2006 (12) SCC 306

12. St. of Raj. v. Thakur Singh , (2014) 12 SCC 211

13. Pawan Kumar Vs St. of U.P. and , 2016 SCC OnLine All 949

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

1. Both criminal appeals emanate from the common judgment and order dated 09.06.2016 passed by learned Additional District & Sessions Judge, Court No. 2, Farrukhabad in Sessions Trial No.122 of 2014 (State Vs. Gyan Singh Shakya) and Session Trial No. 90 of 2015 (State Vs. Smt. Meena) arising out of Crime No. 1116 of 2009 under Section 302/34 IPC, Police Station & District Farrukhabad by which appellants have been convicted and sentenced under Section 302 read with Section 34 IPC with rigorous imprisonment for life and fine of Rs. 10,000/- for each, in default of payment of fine to undergo additional imprisonment for a period of ten months, therefore these appeals are heard and being decided together.

2. The prosecution case in brief is that Girish Chandra Dubey, r/o village Khera Guleriya, Police Station Jahanganj, District Farrukhabad, real brother of deceased Umesh Dubey is informant. Deceased was living with his sister Munni Devi in her house at Chatta Dalpat Rai, Farrukhabad. On 22/23.06.2009 at about 4 a.m. Girish Chandra Dubey got information that his brother (deceased) had been murdered. On this information, he along with his brothers Dinesh Chandra, Mahesh Chandra, Ram Vilash, Anand Mohan and Ram Datt arrived at Muhalla Adiyana where dead body of his brother Umesh Dubey was lying in the field and there was blood on a cot in the courtyard (Aagan) of one Gyan Singh Shakya near to that place. There were blood stains from Aagan to field where dead body was lying. On query he came to know that after committing murder of his brother with sharp-edged weapon, his dead body had been thrown in the field. On this, he believed that Gyan Singh Shakya, his wife and his companion have committed murder and threw the dead body in the field. In this regard, tahreer was got scribed by Anand Mohan Dubey at Kotwali, Farrukhabad on 23.06.2009 at 7.30 a.m. on the basis of which F.I.R. was lodged as crime no. 1116 of 2009 under Section 302 IPC against accused Gyan Singh Shakya and Smt. Meena (hereinafter referred to as appellants).

3. Investigation of the case was handed over to S.S.I. Nasir Husain who proceeded to place of occurrence.

4. He started preparing inquest of deceased Umesh Dubey on 23.6.2009 at 9 a.m. in presence of witnesses. Dead body was got sealed. Other essential papers for the purpose of conducting post-mortem of the deceased were prepared. Sealed dead body was handed over to constable Sukhram and constable Govind with papers who brought it to mortuary, Fatehgarh, Farrukhabad.

5. Blood stained and plain soil were collected from the courtyard of appellant-Gyan Singh Shakya and took into possession the ropes used in the cot and bed sheet which were also blood stained. These articles were sealed and recovery memo Ext. Ka-11 and Ka-12 were prepared. Thereafter, these articles were sent to F.S.L. for Chemical Examination.

6. Post-mortem of deceased Umesh Dubey was conducted on the same day at about 4.50 p.m. by Dr. Singh Vikram Katiyar and post-mortem report Ext. Ka-5 was prepared, details of which are as below:-

External Examination: Time after death was about half day. He was aged about 40 years. Average built body. Eyes closed, mouth partially opened, dry clotted blood at place of body. Rigormortis was present in upper extremities.

Ante-mortem injuries:(1) Incised wound 12 in number. Both side face and cheecks measuring 7 cm x 1 cm to 3 cm x 0.5 cm muscle to bone deep.

(2) Incised wound 18 cm x 4 cm x muscle deep in front of neck middle part, on dissection all neck structure cut, body of C5 and C6 partially cut.

(3) Incised wound 9 x 3 cm x bone deep on top of left shoulder.

(4) Multiple incised wounds 18 in number in front of abdomen both side measuring 11 c.m. X 4 c.m. To 4 cm x 1.5 cm. Abdominal cavity deep, abdominal cavity exposed, loop of intestines coming out.

Internal examination: Head-NAD, neck-noted, Scalp-NAD, skull-NAD, membranes-NAD, brain-NAD, base-NAD, vertebrae-NAD, spinal cord-not opened. Thorax: walls-NAD, ribs & cartilages NAD. Larynx & trachea-noted, right & left lungs-NAD, pericardium-NAD. Heart-empty. Blood vessels-NAD. Abdomen: Walls, peritonium, cavity-noted. Buccal cavity & teeth 16/16. Pharynx, oesophagus-noted. Stomach and contents-blood mixed pasty material about 150 gm. Small and large intestine cut. Gall Bladder-half filled. Pancreas, spleen, kidneyes-NAD. Urinary bladder-20 ml. Generation organs-NAD.

Cause of death is shock and haemorrhage as a result of ante-mortem injuries.

7. Investigating Officer having recorded the statements of informant-Girish Chandra, inspected the spot and prepared site plan. He further recorded the statements of constable-Kunwar Pal, Ram Vilash Dixit, Mahesh Chandra Dubey, Anand Mohan Dubey, Smt. Prabha Devi, Dr. S.V. Katiyar and concluded the investigation and submitted the charge sheet against appellants-Gyan Singh Shakya and Smt. Meena under Section 302 IPC.

8. The court concerned took cognizance of the offence and summoned the appellants for trial.

9. After providing copies of prosecution papers in compliance of Section 207 Cr.P.C. the court concerned committed the case for trial to the court of Session.

10. The case was opened by the prosecution and on the basis of material on record charge under Section 302 read with Section 34 IPC was framed against the appellants-Gyan Singh Shakya and Smt. Meena. It was explained to them. They did not plead guilty but denied and claimed for trial.

11. The prosecution examined P.W.1 Girish Chandra Dubey, P.W.2 Dinesh Chandra, P.W.3 Prabha Devi as witnesses of fact. P.W.4 Head constable Kunwar Pal

Singh Yadav chick/G.D. writer. P.W.5 Dr. Singh Vikram Katiyar, P.W.6 S.I. Nasir Husain who conducted investigation of the case. P.W.7 Awadesh Kumar who proved the writing of S.H.O. T.P. Singh and P.W.8 Kalu Ram Dohare, C.O., the then inspector Kotwali, Farrukhabad who proved test report from F.S.L. as Ext. Ka-13.

12. After conclusion of prosecution evidence statements of appellants were recorded under Section 313 Cr.P.C. in which appellant-Gyan Singh Shakya alleged that his involvement was false and further stated that he was not present on the place of occurrence. Appellant-Smt. Meena also alleged that her involvement is false, she further stated that she had no concern with the case, she did know nothing about the murder of deceased. She had been falsely implicated. No any other evidence has been adduced on the part of appellants in their defence.

13. After hearing the argument for prosecution as well as appellants, the trial court has convicted the appellants under Section 302/34 IPC and sentenced to each of them with rigorous imprisonment for life and with fine of Rs. 10,000/- in default of payment of fine to undergo ten months' additional imprisonment. Against this conviction and sentence, this appeal has been preferred.

14. We heard Sri Sukhvir Singh, learned counsel for the appellants as well as Sri Ratan Singh, learned A.G.A. for the State and perused the record.

15. Learned counsel for the appellants submits that in this case, there is no any witness who had seen the occurrence. Informant had lodged the F.I.R. only on the basis of suspicion against the appellants. Even during their examination, they (prosecution witnesses) stated that they had not seen the occurrence themselves. P.W.2 is brother of informant who had also not seen the occurrence. P.W.3 Smt. Prabha Devi was said to be witness of occurrence but she turned hostile during examination and she faced gruel cross-examination on the part of prosecution but nothing came out likely to support the prosecution version. In this way, there is no evidence at all to support the prosecution version against the appellants. The dead body of deceased was found lying in open field which was seen by stranger and information was given to the informant. It has also been alleged that blood stained cot and bed-sheet was found in the courtyard of appellants and also blood stains were present from the courtyard to place where dead body was lying. On the basis of this fact conviction has been made while presuming that appellants had committed the murder of deceased and threw the dead body in open field. Appellants were not present at that very night in their house and none had seen them present there. Only on the basis of blood stained cot and bed sheet found in the courtyard of appellants, it cannot be concluded that appellants had committed the murder. P.W.3 Smt. Prabha who is neighbour has also stated in her examination-in-chief that she was not present at her house in the night, the incident took place. No any kind of recovery relating to weapon or other articles used in the commission of the crime had been recovered from inside the house or from the possession of the appellants. There was no any motive present in the minds of appellants to commit murder of deceased. In fact, this case is of no evidence and conviction and sentence held against the appellants is based only on assumption. The link of

circumstances is not so complete to indicate that the appellants had committed the murder of deceased. The burden of proof lies on the prosecution to prove beyond reasonable doubt that appellants had committed the murder of deceased but this burden had not been discharged by the prosecution. Only on the basis of assumption, conviction cannot be made. In this way the conviction and order passed by the trial court is not based on sound principles of law but on assumption. It is further submitted that in this case trial court had taken aid of Section 106 of Evidence Act but in this case the position is different. Section 106 of Evidence Act could only be invoked where it is proved beyond reasonable doubt that the appellants were in exclusive possession of the place where incident took place or it was inside the room where no other person except the appellants could be present, which is lacking in this case. On mere probability, appellants cannot be convicted and sentenced, therefore the impugned judgment and order passed by the learned trial court dated 09.06.2016 is not good in eye of law and is likely to be set aside.

16. Learned A.G.A. vehemently opposed the submissions made by learned counsel for the appellants and urged that in this case, blood stained cot and bed sheet were found in the courtyard of the appellants from where blood stains were found continuously up-to the field where dead body was found. Forensic Science Laboratory Report has also proved that human blood was there on the cot and bed sheet. Deceased was lying on the cot there in the courtyard of the appellants. His dead body was found in the morning. The possibility of presence of other persons in the courtyard of appellants was nil but facts relating to the commission of crime were specifically in the knowledge of appellants as the house being in their possession. Only they could disclose as to how deceased was murdered while lying in the courtyard in the night and as to how his dead body was brought from there to the open field. The appellants had not given satisfactory explanation in their statements recorded under Section 313 Cr.P.C. Prosecution could not be expected to bring such evidence which is beyond its control. In such circumstances, only appellants are to explain the true fact. If they fail or give explanation which is wrong, they cannot absolve themselves from the liability. In this way, learned trial judge has passed the judgment dated 09.06.2016 on the sound principles of law and had convicted and sentenced the appellants properly as per law. The evidence on record is sufficient on the basis of which learned trial judge has concluded the conviction of appellants which is right in the eye of law. There is no illegality or impropriety. The appeals are force less and liable to be dismissed.

17. Before we deal with the contentions raised by learned counsel for the appellants, it will be convenient to take note of the evidence as adduced by the prosecution.

18. P.W.1 Girish Chandra is the informant and brother of deceased who deposed that Umesh Dubey (deceased) was his real brother. On the day of occurrence, he was living in Datta Dalpatrai, Farrukhabad with his sister Munni Devi. On 23.6.2009 in the morning at about 3-4 o'clock his relative Suresh informed him on telephone that Umesh Dubey has been murdered. On this information, he along with his brother Dinesh Chandra, Mahesh Chandra, Ram Vilash, Anand Mohan and Ramdatt went to Mohalla Adiyana from the

village where in a field the dead body of his brother was lying. There was house of Gyan Singh Shakya near to it. In the house of Gyan Singh Shakya, there was blood on a cot and bed sheet. On query, he came to know that last night Gyan Singh Shakya and his wife Smt. Meena have thrown the dead body in the field after committing the murder with sharp-edged weapon. There were blood stains visible from the house of Gyan Singh Shakya to the place of dead body. Seeing this, he was assured that Gyan Singh Shakya and his wife Smt. Meena has thrown the dead body of Umesh Dubey in the field after committing murder. He got tahreer written by his uncle Anand Mohan Dubey and after making his signature on it tendered to the police station. Paper no. 5-A tahreer was exhibited to the witness which he asserted. He further stated that police went to the place and prepared inquest in his presence. He also made signature on the inquest report, paper no. 10-A/2, 10-A/3. The witness was cross-examined by defence in which he stated that he met to deceased prior to one and half months at the house in the village. Deceased was married and had three children. Children with his wife lived in the village. His village was 20 Km. distant from the place of occurrence. He along with his brothers went to the place of occurrence straightly without going to the house of his sister. At the place of occurrence, 20-25 people were present whose names, he did not know. At that time, dead body of his brother was in the field. He did not see the dead body in the house. It was 20 meters distant in right direction. Nothing was recovered from the place where dead body was lying. He and his companion had entered the house and saw the cot in which ropes were cut with a bed sheet near about 5 x 4 feet long. Except this, there were 2-3 blood stained cloths on the cot. Door in the house was towards the east direction, width of door was 3-4 feet and it was not in fit condition but having *fatkiya*. The house of Gyan Singh Shakya was in the west direction. He further stated that he named accused persons on the basis of suspicion. He did not see his brother Umesh while going to the house of Gyan Singh Shakya. He came to know that deceased Umesh Dubey used to go to the house of Gyan Singh Shakya. He was told about this by some people those were gathered at the place of occurrence. He did not know as to whether deceased had illicit relation with the wife of Gyan Singh Shakya, Smt. Meena. He also did not know as to whether Smt. Meena was an unchaste lady. He further reiterated that he had not seen any person committing the murder. It was told by the people when he reached there. He went into the house of Gyan Singh Shakya where blood stained cot was found outside with a bed sheet. There was no other thing. No any weapon was there. During cross-examination on behalf of appellant Gyan Singh Shakya, he again reiterated that he had not seen with his eyes the murder of his brother Umesh Dubey but narrated about it as told by the people.

19. P.W.2 Dinesh Chandra is also brother of deceased Umesh Dubey who deposed that his brother Umesh Dubey was living with his sister Munni Devi at Datta Dalpatrai in Farrukhabad. On 23.6.2009 in the morning, he received information on telephone that in the night Umesh Dubey had been murdered and his dead body was lying in the field. On this information, he along with his brothers Girish Chandra Dubey and Mahesh Chandra went to Muhalla Adiyana where dead body of his brother Umesh Dubey was lying. The house of Gyan Singh Shakya was near about 10 steps distant from where dead

body was lying. From the place of dead body to courtyard of Gyan Singh Shakya, there were blood stains. This witness was also cross-examined on behalf of appellants in which he stated that he saw his brother prior to two years. He had not seen anyone while committing murder. On the basis of suspicion, he named, Gyan Singh Shakya and Smt. Meena.

20. P.W.3 Prabha Devi has deposed that the house of Gyan Singh Shakya was adjacent to her house. Deceased Umesh Dubey used to come and go to Gyan Singh Shakya. This fact was known to entire *muhalla* in addition to her. The name of wife of Gyan Singh Shakya was Smt. Meena and both of them were living in their house. In the night Umesh Dubey was murdered, she was not present at her house. On the next day, she came to her house. She did not know whether there were illicit relations between Meena and Umesh Dubey.

This witness was declared hostile and cross-examined by learned A.D.G.C. In cross-examination, she had denied the statement made by her before Investigating Officer about illicit relations between Meena and Umesh Dubey. She did not see anyone while coming and going to the house of Gyan Singh Shakya. On the day, Umesh Dubey was murdered she was not at home. Afterwords she came back then she was told by the residents of Muhalla about the murder. She did not see the dead body of Umesh Dubey, even Investigating Officer did not record her statement. She expressed inability in explaning as to how the Investigating Officer had recorded her statement.

21. P.W.4 Head-constable Kunwar Pal Singh Yadav has proved the first information report in his hand-writing which is exhibited as Ext. Ka-2 and also carbon Copy of G.D. As Ext. Ka-3.

22. P.W.5 Dr. Singh Vikram Katiyar had conducted the post-mortem of deceased Umesh Dubey on 23.6.2009 and prepared post-mortem report which he proved as Ext. Ka-5 in his hand-writing and signature.

23. P.W.6 S.I. Nasir Husain who investigated the case has proved the papers prepared by him during investigation of case that is the inquest of deceased as Ext. Ka-7 and site-plan as Ext. Ka-6

24. P.W.7 Constable Awadhesh Kumar has proved charge sheet as Ext. Ka-14 in hand-writing of S.H.O. Tribhuwan Pratap Singh who had been posted with him.

25. P.W.8 Kaluram Dohare, C.O. And then inspector has proved report received from Forensic Science Laboratory as Ext. Ka-13.

26. From the perusal of statements as deposed by P.W.1 & P.W.2, it is evident that both of them had not seen the occurrence. They came there after getting information from some relative, namely, Suresh. They had also not seen appellants in company of deceased before the occurrence. They had named them in F.I.R. only on the basis of suspicion.Therefore, P.W.1 & P.W.2 are not eye witnesses of the occurrence.

27. P.W.3 was not present at her house which is adjacent to the house of appellants, on the day, the incident took place. She knew about it after she returned on the next day. She is also not the witness

of last seen, therefore, P.W.3 is also not the eye witness of the incident.

28. P.W.6 Investigating Officer has also stated on page 11 that he did not mention from Parcha no. 1 to 5 that someone had seen the commission of murder.

29. Thus, there is no eye witness account regarding commission of murder of deceased by the appellants in their courtyard (Aagan) and then throwing the dead body in the field, about 20 meters, away from their house.

30. Now, we are to consider the circumstances in which incident of murder of deceased took place on that unfateful night of 22/23.6.2009 in the courtyard of appellants' house and then dead body was thrown in the field, about 20 meters for from the place of occurrence.

31. The blood stained cot and bed sheet was found in the courtyard of appellants' house. Blood stained and plain soil were taken from the place by Investigating Officer along with some ropes and a piece of bed-sheet from the cot and sent to Forensic Science Laboratory for Chemical Examination. The test report Ext. Ka-13 shows that there was human blood present on these articles. Site plan Ext. Ka-6 also shows the place of occurrence in the house (courtyard) of the appellants. P.W.1 & P.W.2 also deposed that they saw blood stained cot and bed-sheet lying in the courtyard of appellants. Drops of blood were also lying on the ground from the courtyard to the place where dead body was lying in the field.

32. This account of testimony of P.W.1 & P.W.2 regarding place of occurrence in the courtyard of appellants gets support with the F.S.L. test report Ext. Ka-13 and site plan Ext. Ka-6. So place of occurrence, where murder of deceased was committed, stands proved to be in the courtyard of appellants.

33. The courtyard has been shown to be a part of appellants' house in the site plan Ext. Ka-6. The house is consisted of one room and the courtyard. The courtyard is open as stated by Investigating Officer P.W.6 S.I. Nasir Husain on page 7 in his statement. P.W. 1 has also stated in Page 6 that the door in the house was not in good condition but fatakia were fitted. This situation clears that the courtyard (Angan) where incident took place was not covered with ceiling or roof but open place having room in one side.

34. Admittedly, in the present case there is no occular evidence on record proving the complicity of the appellants in the commission of murder of deceased. It is a case of circumstantial evidence.

35. The principles how the circumstance be considered weighed are well-settled and summed up by the Hon'ble Apex Court in the case of **Hanumant Vs. State of Madhya Pradesh, 1952, SCR1090.** Para no. 12 is quoted as under:

12. It is well to remember that in cases where the evidence in 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 pendency 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. In case of Sharad **Birdhi Chand Sarda Vs. State of Maharashtra, 1984 (4) SCC 116**, which was observed as under:

"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 and another Vs. State of Maharashtra 1973 2 SCC 793 where the observations were made :

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

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

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

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

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

51. In Sujit Biswas Vs. State of Assam (2013) 12 SCC 406 the Apex Court ruled that in judging the culpability of an accused the circumstance adduced when collectively considered must lead to the only irresistible conclusion that the accused alone is the perpetrator of a crime in question and the circumstances established must be of a conclusive nature consistent only with the hypothesis of the guilt of the accused and observed as here under :

59. A reference in the passing however to the of quoted decision in Sharad Birdhichand Sarda (supra) construed to be locus classicus on the relevance and decisiveness of circumstantial evidence as a proof of the charge of a criminal offence would not be out of place. The relevant excerpts from paragraph 153 of the decision is extracted herein below.

"153.(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused...they

should not be explainable on any other hypothesis except that the accused is guilty.

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

** * * (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

52. In Dhan Raj @ Dhand Vs. State of Haryana (2014) 6 SCC 745, (Hon. Ghose,J.) while dwelling on the imperatives of circumstantial evidence ruled that the same has to be of highest order to satisfy the test of proof in a criminal prosecution. It was underlined that such circumstantial evidence should establish a complete unbroken chain of events so that only one inference of guilt of the accused would ensue by excluding all possible hypothesis of his innocence. It was held further that in case of circumstantial evidence, each circumstance must be proved beyond reasonable doubt by independent evidence excluding any chance of surmise or conjecture."

37. The legal proposition which emerges out from the reading of the aforesaid authorities is where a case is based upon circumstantial evidence the same has to be of highest order to satisfy the test of proof in a criminal prosecution and as such circumstantial evidence should establish a complete unbroken chain of events so that only one inference of guilt of the accused would ensue by excluding all possible hypothesis of his innocence, each circumstance must be proved beyond reasonable doubt by independent evidence excluding any chance of surmise or conjecture.

38. We now proceed to scrutinize whether the circumstances which weighed with the trial court are conclusive in nature and have tendency which could be considered against the appellants in the background of the evidence adduced by the prosecution and the defence and to see if those circumstances bring home the case of the prosecution.

39. In these two appeals preferred by the appellants challenging the correctness of judgment and order of conviction, we have gone through the entire record and considering the rival submissions and the question which arises in this matter for our consideration is that whether the circumstances on record satisfy the principle laid down by the Hon'ble Apex Court in its various judgments as regards appreciation of cases based on circumstantial evidence.

40. The circumstances which have weighed with the learned trial court are that the dead body of deceased was found in a field, about 20 meters from the house of appellants and blood stains were found continuously between the house and place where dead body was found lying in the field. Thirdly, the cot and bed sheet was also found blood stained in the courtyard of the appellants.

41. In this case appellants had been named in the F.I.R. on the basis of suspicion. During, their examination before the court P.W.1 & P.W. 2 had categorically stated that they had named the appellants on the basis of suspicion and knowledge as gathered from the people at the place of occurrence but they had not seen anyone

causing murder of deceased or taking the dead body to the field from the courtyard (aagan) at all. No doubt, the offence is shocking one but the gravity of the offence cannot by itself over-weigh as far as legal proof is concerned. In the judicial adjudication suspicion, however strong cannot be allowed to take the place of proof. It is well settled that suspicion, however great it may be, cannot be substituted for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of circumstantial evidence.

42. With that caution in mind we shall now proceed to examine the facts and circumstances as put forward and various arguments advanced.

43. The present case is a case of circumstantial evidence, hence motive assumes considerable significance and it is well settled that in case based upon circumstantial evidence the prosecution has to prove the motive.

44. The motive suggested by the prosecution in the present case for committing the murder of deceased by the appellants is illicit relationship between the deceased and appellant Smt. Meena wife of appellant Gyan Singh Shakya. It has been argued by the learned counsel for the appellants that prosecution has failed to prove by leading any evidence about the motive in this case. None of the witness has asserted this fact.

45. In the first information report, there is none mention of motive to murder the deceased by the appellants. P.W.1 & P.W.2 both are real brothers of the deceased. They had also not stated even a single word about the illicit relationship between the deceased and Smt. Meena. P.W.3 is neighbour of appellants, she had also stated categorically that she did not know whether there was illicit relation between deceased Umesh Dubey and appellant Smt. Meena or not. Even during her cross-examination, she had not acceded the statement as recorded by the Investigating Officer under Section 161 Cr.P.C. No question in this regard had been put before the Investigating Officer by the prosecution during his examination. Thus, in view of the evidence on record, we have no hesitation in holding that prosecution has failed to prove by any reliable or cogent evidence the motive suggested by the prosecution for the appellants to commit the murder of deceased on account of illicit relationship with the appellant Smt. Meena.

46. The perusal of record shows that in this case prosecution witnesses are not the eye-witnesses of the occurrence. There is nothing on record to show that deceased was seen in company of appellants prior to unfateful night, the incident took place and that the appellants were present at their house. Even the presence of appellants in their house had also not been tried to be proved by prosecution. No any other last seen witness had been produced. P.W.3 Smt. Prabha Devi who was neighbour of the appellants had been examined but she had not supported the prosecution case and she said nothing about the presence of appellants in their house on that day. She had also declined the version of prosecution about illegal relationship of deceased with the appellant Smt. Meena Devi. Except this, there is no other reason shown to be present as motive for causing murder of the deceased by the appellants. Though, P.W.3 had stated that deceased used to come and go to the house of appellants but on the day of incident, she was

not present at her house. So, she could not be in a position to tell about the presence of appellants in their house with the deceased. There is no evidence that appellants absconded from their house after committing the crime. In the statement under Section 313 Cr.P.C. appellants had denied their presence in their house. They were also not seen by any person at their house even throughout the night or day prior to or after the incident. They had also not been seen by anyone while taking the dead body from their courtyard (aagan) to the field where it was found lying in the morning. Nothing was recovered from the possession of the appellants or on the instance of their pointing out. Nothing incriminating was recovered from inside their dwelling house (room). Courtyard (aagan) where blood stained cot and bed-sheet was found, was open and uncovered. The door was not in fit condition but only *fatkiya* was fitted. It has also not been brought on record by the prosecution that entry of some other person could not be possible into the courtyard (aagan) by opening *fatkiya* or otherwise. This possibility of entry by someone else except the appellants had not been ruled out by the prosecution. P.W. 6 Investigating Officer, had also not provided any detail in this regard either in the site plan Ext. Ka-6 or in his statement made before the court during examination but he had categorically stated that it was open courtyard (aagan) where cot was lying blood stained. All injuries found on the body of deceased were incised wounds but no any weapon had been recovered either from the possession of the appellants or on their pointing out or from their living room. How and when did the deceased go there to the courtyard (aagan) of the appellants is unknown to everyone.

47. In the background of facts as narrated above, it is apparent that the prosecution has not been able to prove the link of circumstances which connect the appellants with the commission of murder of deceased.

48. The said three circumstances that blood stained cot and bed sheet was found in the courtyard (aagan) of the appellants, absence of appellants as well as continued blood stains upto the place where dead body was found lying in the field, in our opinion cannot be said to be inconsistent with innocence of the appellants and on the basis of these three circumstances alone, it cannot be held that the appellants had caused the murder of deceased.

49. There is no other circumstance to rope appellants with the commission of murder of deceased.

50. It is well settled that if there is clinching and reliable circumstantial evidence, then that would be the best evidence to be safely relied upon which is lacking in this case.

51. Learned trial court has also taken aid of Section 106 of Evidence Act and held on the basis of blood stained cot and bed sheet to have been found in his courtyard that the fact of commission of crime was specially in the knowledge of appellants, therefore, burden of disclosing that special fact was on them, which they failed as a consequence conviction was made in the evidence of aforesaid circumstance.

52. At this juncture, it is expedient to consider the legal position regarding invocation of Section 106 of Evidence Act in such a case by the trial judge.

53. 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."

54. 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."

55. 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."

56. 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."

57. 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."

58. 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.

59. 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."

60. **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.

61. 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.

62. 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.

63. 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."

64. 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.

65. 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.

66. 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.

67. 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.

68. The prosecution failed at all to prove that the appellants were in occupation of their house with the deceased at the time incident took place or even in the evening on that unfateful night just prior to the commission of crime. In such a situation, it cannot be said that the fact as to how death of deceased was caused in the

open courtyard (aagan) of appellants was in their special knowledge. The legal burden on the prosecution to prove the presence of appellants in the house had not been discharged, therefore, the burden of proof cannot be shifted upon the shoulder of the appellants to explain as to how incident took place.

69. 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 appellants were in occupation of house at the time incident took place or last seen with the deceased.

70. Perusal of impugned judgment shows that learned Additional Sessions Judge has relied on the statement of P.W.2 in which he had denied the suggestion put by defence that deceased was errant/wanderer and was in bad company on account of which someone had murdered him. On this denial statement of P.W.2 learned court had concluded that deceased was errant and living in bad company. Learned Court had also drawn such inference from the fact of living in his sister's house at Chhatta Dalpal Rai. This is only hypocrisy of the mind of learned Additional Sessions Judge.

71. Further statement of P.W.3 was recorded by Investigating Officer under Section 161 Cr.P.C. that deceased had illicit relation with the appellant Smt. Meena and in this regard there was quarrel between Gyan Singh Shakya and Smt. Meena several times but when she was examined before the court, she denied this statement and said that she had not made such statement before the Investigating Officer. This denial statement of P.W.3 has not been considered by the learned Additional Sessions Judge but statement under Section 161 Cr.P.C. has been relied and conclusion has been drawn that deceased was errant, living in bad company and having illicit relation with Smt. Meena that was the reason appellants caused murder of deceased and threw his dead body in the field. This conclusion cannot be said to be based on sound principles of law relating to the appreciation of evidence but it is hypothetical based on surmises & conjunctures which cannot be made the basis of conviction.

72. We are conscious that a grave and heinous crime had been committed but when there is no satisfactory proof of the guilt, we have no other option but to give the benefit of doubt to the accused appellants and we are constrained to do so in this case.

73. Accordingly, these appeals are ***allowed***. The conviction and sentence of the appellants is set-aside and they shall be set at liberty forthwith if not required in any other case.

74. It is directed that the appellants shall furnish bail bonds with sureties to the satisfaction of the court concerned in terms of the provision of Section 437-A Cr.P.C.

75. 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)03ILR A1085
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 26435 of 2020

M/s Newtech Promoters and Developers Pvt. Ltd. Delhi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pratik Chandra, Sri Azhar Ikram, Sri Manish Singh

Counsel for the Respondents:
C.S.C.

A. Real Estate (Regulation and Development) Act (16 of 2016), S. 21, S. 29, S. 30, S. 81 - Recovery Certificate challenged on ground that single member of RERA alone could not pass order - as S. 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members - *Held* - Even single member competent to pass order - Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson - S. 30 shows that in case of vacancy, or any defect in the constitution of the Authority the proceeding of the Authority would not be invalidated - S. 81 provides for delegation of power/function, an order was issued to delegate the power to a Member for hearing of the complaint - More so petitioner did not raise objection before the single Member about his competence to adjudicate the complaint - petitioner challenged the order in reference to the composition only when he lost in the complaint (Para 7,9, 11, 12)

B. Real Estate (Regulation and Development) Act (16 of 2016), S. 40 (1), S. 40 (2) - Recovery - If a promoter or an allottee or a real estate agent, fails to pay *principal amount deposited with him*, *interest or penalty or compensation* imposed on him, it shall be recoverable as an arrears of land revenue u/s 40 (1) - recovery of the amount is provided under Section 40(1) alone - whereas S. 40(2) is to enforce any direction of the nature of restrain, injunction or to act in a particular manner or to refrain a party in doing any act, which cannot be enforced as an arrears of land revenue & it is not meant for recovery of the amount. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. (Para 18)

Complaint filed alleging that despite payment possession of a unit not given - prayer was made for refund of the amount with interest - an order was passed by RERA for refund of the principal amount of Rs 21,42,887/- alongwith interest - RERA issued citation for return of the principal amount of Rs 21,42,887/- deposited with the Promoter alongwith interest Rs 14,77,569/ - recovery of the amount was to be made as arrears of land revenue - Order challenged on the ground that refund of the principal amount is not recoverable as an arrears of land revenue u/s 40 (1) but can be as per Section 40(2) of the Act of 2016 - *Held* - If recovery of amount is sought by dividing it in two parts and by different method i.e. for recovery of principal amount consumer is to be send to civil court while recovery of amount of interest is made as arrears of land revenue then it would be against the object of the Act of 2016 of speedy redressal (Para 20)

Dismissed (E-4)

List of Cases cited:

1. M/s K.D.P. Build Well Pvt. Ltd. Vs State of U.P. & Ors Writ -C No.2248 of 2020 dt 04.02.2020

2. Rudra Buildwell Constructions Pvt. Ltd. Vs Poonam Sood & Anr Writ- C No.3289 of 2020 dt 06.02.2020

3. Janta Land Promoters Private Limited Vs U.O.I. CWP No.8548 of 2020 dt 16.10.2020 (P&H)

(Delivered by Hon'ble Munishwar Nath Bhandari, J. & Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Manish Singh with Sri Pratik Chandra and Sri Azhar Ikram, learned counsel for the petitioner. Sri Wasim Masood has put in appearance on behalf of respondents.

2. The writ petition has been filed with the following prayers:

"(i) Issue an appropriate writ, order or direction declaring the section 24(a) of the U.P. Real Estate Regulatory Authority (General) Regulation, 2019 as ultra vires and contrary to the section 21 and 85 of the RERA Act.

(ii) Issue a writ, order or direction in the nature of Certiorari quashing order dated 30.4.2019 passed Regulatory Authority / Bench No. I, U.P. RERA Regional Office, Gautam Budh Nagar, in Complaint No. 6201813029 (Lovesh Khera Vs. M/s Newtech Promoters and Developers Pvt. Ltd.).

(iii) Issue a writ, order or direction in the nature certiorari quashing the impugned Recovery Certificate dated 14.12.2019 issued by opposite party no. 4.

(iv) Issue a writ, order or direction in the nature of mandamus not to give effect the impugned recovery certificate dated 14.12.2019 issued by opposite party no. 4.

(v) Issue a writ, order or direction in the nature of mandamus directing the state respondents not to initiate coercive measures pursuant to the impugned recovery certificate dated 14.12.2019 issued by opposite party no. 4."

3. The petitioner has challenged the order passed by Real Estate Regulatory Authority (in short "RERA") dated 30.4.2019 though an appeal against the said order lies under Section 43(5) of Real Estate (Regulation and Development) Act, 2016 (in short "Act of 2016").

4. It is a case where a complaint was filed by the non-petitioner alleging that despite payment towards unit No. B-01 in the scheme introduced by the petitioner, the possession of a unit has not been given. The unit (flat) was booked on 26.7.2017 and was to be delivered in the year 2019. The prayer was made for refund of the amount of Rs.8,44,000/- with interest. The Authority found that as per the agreement entered between the parties, possession of the flat in question should have been delivered by 2019. The petitioner-Company failed to show delivery of possession of the flat in question. Thus, taking into consideration the default of the Promoter (petitioner herein) and referring to the judgment of Apex Court, an order was passed by RERA on 30.4.2019 for refund of the principal amount alongwith interest. In pursuance thereof, order dated 30.4.2019 was issued for its execution. The amount of Rs.8,44,000/- was shown towards the principal amount while component of interest was Rs.2,12,791.96/-. The petitioner has filed this writ petition to challenge not only the order dated 30.4.2019 passed by RERA but the recovery certificate dated 14.12.2019 on the execution application.

5. Learned counsel for the petitioner submits that an appeal against the order

passed by RERA is maintainable but this case has exceptional circumstances thus even a writ petition would be maintainable. One member of RERA has passed the order going against the Act of 2016. Section 21 provides for formation of Authority consist of Chairperson alongwith two whole time Members. The impugned order is by one Member alone going against the mandate of Section 21 of the Act of 2016. In view of the above, there is no need to prefer an appeal as the order dated 30.4.2019 is without jurisdiction.

6. It is also stated that the order to award interest by the Authority is again going contrary to the provisions. Rules for award of interest was introduced in the year 2018. The amount deposited with the Promotor has been ordered to be returned with interest. The interest has been allowed even for the period prior to introduction of U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 (in short "Rules of 2018"). It is even ignoring the rate of interest agreed by the parties. Challenge to the order has been made on that ground also.

7. We are first taking challenge to the order dated 30.4.2019, passed by the Authority to find out as to whether one member was competent to pass the order.

8. The issue has been raised in reference to Section 21 but it is not open for debate having been decided by this Court in ***Writ -C No.2248 of 2020 (M/s K.D.P. Build Well Pvt. Ltd. vs. State of U.P. and 4 Others) vide judgment dated 04.02.2020 and in Writ- C No.3289 of 2020 (Rudra Buildwell Constructions Pvt. Ltd. vs. Poonam Sood and Another) vide judgment dated 06.02.2020*** holding order by one member to be legal. The issue regarding composition of RERA was considered in reference to Sections 21 and 81 of the Act of 2016. Section 81 provides for delegation of power/function and taking the aforesaid provision into consideration, the argument was not accepted.

9. At this stage, learned counsel for the petitioner has made a reference to the judgment of Punjab and Haryana High Court on the same issue in ***Civil Writ Petition No.8548 of 2020 (Janta Land Promoters Private Limited vs. Union of India and others) vide judgment dated 16.10.2020.*** It is stated that judgment of this Court has been referred by Punjab and Haryana High Court and has taken a different view.

10. What we find is binding effect of the judgment rendered by this Court than to follow the judgment of other High Court. Accordingly, we are unable to accept the first argument in reference to Section 21 of the Act of 2016. It is more so when the petitioner did not raise objection before the single Member about his competence to adjudicate the complaint. In absence of objection, the Authority proceeded with the matter. If the objection would have been taken and was sustainable, the complaint could have been decided by the Authority consisting of three Members. The petitioner has challenged the order in reference to the composition only when he lost in the complaint.

11. It is further necessary to refer Sections 21, 29 and 30 of the Act of 2016 to discuss the issue independent to the earlier judgments. The provisions aforesaid are quoted hereunder :

"21. Composition of Authority.- *The Authority shall consist of a Chairperson*

and not less than two whole time Members to be appointed by the appropriate Government."

29. Meeting of Authority.- (1) *The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.*

(2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.

(4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application.

Provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

30. Vacancies, etc., not to invalidate proceeding of Authority*.- No act or proceeding of the Authority shall be invalid merely by reason of--*

(a) any vacancy in, or any defect in the constitution of, the Authority; or

(b) any defect in the appointment of a person acting as a Member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case."

12. Section 21 of Act of 2016 speaks about composition of the Authority, which shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government. Section 29, however, talks about the meeting of Authority and perusal of sub-section (2) thereof shows that in absence of Chairperson for any reason, the other Member chosen by the Members present amongst themselves at the meeting, shall preside thereby. Sub-section (2) to Section 29 permits adjudication of complaint even in absence of Chairperson so appointed by the appropriate Government. Thus, it is not necessary that the adjudication of the complaint has to be made by the composition of Authority, as given under Section 21 of the Act of 2016 though as per Section 29 also, it should be by two Members in absence of the Chairperson.

13. Section 30 of Act of 2016 is, however, relevant and address the issue raised in this petition. The vacancies, etc. not to invalidate proceeding of the Authority. It shows that in case of vacancy, or any defect in the constitution of the Authority or any defect in the appointment of a person acting as a Member of the Authority, the proceeding of the Authority would not be invalidated. Section 30 of the Act of 2016 give complete answer to the objection raised by the petitioner regarding composition of the Authority. It is not that whatever composition given under Section 21 of the Act alone can decide the complaint rather reference of Section 29 has been given to indicate that complaint can be heard even in absence of the Chairperson and, in any case, due to the

vacancy or any defect in the constitution of Authority, the proceeding would not be invalidated. This aspect was not brought to the notice of Punjab and Haryana High Court in the case of ***Janta Land Promoters Private Limited (supra).***

14. It is otherwise a fact that the petitioner kept silence on the hearing of the complaint by one Member and thereby he cannot now be allowed and to seek invalidation of the proceeding going contrary to Section 30 of the Act of 2016 and his conduct. The first argument cannot be addressed simply by referring to Section 21 of the Act of 2016 but has to be reference of other provisions, more specifically, Section 30 of the Act of 2016, which was inserted by the legislature to save the proceeding if the vacancy exist in the Authority or other reason. It is otherwise a fact that an order was issued to delegate the power to a Member for hearing of the complaint, which was considered by this Court in earlier judgment. Thus the first ground raised by the petitioner cannot be accepted. The resolution of the Authority has also been challenged but in the light of Section 30 of the Act of 2016, we find no ground to set aside the resolution as otherwise Section 81 saves it.

15. So far the second issue regarding rate of interest is concerned, it is nothing but a challenge on the merit of the order. We hold writ petition for it to be not maintainable as petitioner has remedy of appeal. Thus, we are not causing interference in the order on merit but allowing the petitioner to take remedy of appeal, if so desires. It is after taking note of the fact that the order of RERA is not otherwise onerous so as to maintain a writ petition.

16. The other challenge in the writ petition is to execution of the order made in reference to Section 40(1) of the Act of 2016. The recovery of the amount is to be made as arrears of land revenue. It is stated that recovery of interest, penalty or compensation alone can be made as arrears of land revenue. In the instance case, RERA has issued citation for return of the amount so deposited with the Promoter with interest. The refund of the principal amount cannot be through the process of execution given under Section 40(1) of the Act of 2016 but can be as per Section 40(2) of the Act of 2016.

17. To deal with the argument aforesaid, we are quoting Section 40 of the Act of 2016, hereunder :

"40 Recovery of interest or penalty or compensation and enforcement of order, etc.- *(1) If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.*

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed."

18. Before addressing the issue further it would be necessary to go through

the object of the enactment i.e. as to why the Parliament brought the Act of 2016. The object of Act of 2016 is to protect the interest of consumer in real estate sector apart from others. The Bill was introduced with the following object :

*"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be**, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal** and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."*

19. A perusal of the object reveals that the Act of 2016 has been enacted to save interest of consumers apart from others and thereby to regulate real estate in a proper manner. It is even to give speedy dispute redressal mechanism. Section 40(1) of Act of 2016 no doubt provides for mechanism for recovery of interest, penalty or compensation. It cannot however be ignored that recovery of the amount is provided under Section 40(1) alone. Section 40(2) is for execution of any other order or direction to any person to do any act, or refrain from doing any act, which is not empowered to do under the Act of 2016 and in case of failure to comply, execution can be enforced in the manner prescribed. Sub-section (2) of Section 40 was to enforce any direction of the nature of restrain or injunction which cannot be enforced as an arrears of land revenue. After coming into the force of the rules framed by the State of Uttar Pradesh, the matter of execution can be taken by the Adjudicating Authority. Sub-Section (2) of Section 40 is not meant for recovery of the amount but for any other direction either to act in a particular manner or to refrain a party in doing any act. Such order can be enforced firstly by the Adjudicating Authority and in case of failure, through the civil court. Rules 23 and 24 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (in short "Rules of 2016") were brought for that purpose and provides the machanism for execution of the order.

20. In the light of the aforesaid, we are required to give proper interpretation to Section 40 so that the object sought to be achieved by enactment of Act of 2016 is carried out.

21. In the instant case, the consumer had deposited a sum of Rs.8 lacs and odd, in instalments but despite an agreement for giving possession of the flat in the year 2019, it was not handed over to the consumer. The direction for return of the amount with interest has been given in those circumstances. If a consumer is to seek execution of the part of the order through the civil court then the very purpose of the enactment of Act of 2016 to provide speedy dispute redressal mechanism would frustrate. If the argument of the petitioner is accepted then for recovery of a sum of Rs. 8 lacs and odd, the non-petitioner consumer is to be send to civil court while recovery of amount of interest of Rs.2 lacs and odd can be made as arrears of land revenue, as admitted by the counsel for the petitioner himself. If recovery of amount is to be sought by dividing it in two parts and by different

method, it would be against the object of the Act of 2016. The object of speedy redressal would frustrate if recovery of the amount is also sought through the civil court. We thus hold that the purpose and object of Section 40(1) is to allow recovery of the amount as arrears of land revenue so as to expeditiously give the relief to the consumer having suffered in the hands of the Promoter. Section 40(1) has to be given interpretation by reading down the provision to make it purposeful and akin to the object of the Act of 2016. Section 40(2) is for any other direction either to act in a particular manner or to restrain a party to do certain act and execution of it can be made by the Adjudicating Authority and in case of failure, by the civil court. Section 40(2) covers basically the case of an order of injunction or mandatory injunction.

22. Accordingly, we are unable to accept even the last argument raised by the counsel for the petitioner. It would otherwise frustrate the very object of the Act of 2016 and would give rise to the anarchy, existing earlier, in the hands of Promoters.

23. So far as challenge to Rule 24 (a) of U.P. Real Estate Regulatory Authority (General) Regulation, 2019 is concerned, the issue is kept open. It has not been debated for the reason that an order of the nature provided under Regulation 24 (a) has not been passed in the case in hand. Thus, there is no occasion for the petitioner to challenge the vires of the said Regulation in these proceedings However, as and when the Authority invokes Regulation 24 (a) of Regulation, 2019, the liberty is given to challenge the validity. Thus, issue is kept open for the aforesaid.

24. Thus, for all the reasons, we are unable to accept any of the arguments raised by the counsel for the petitioner. The writ petition is accordingly **dismissed**, however, with the liberty to avail the remedy of appeal if other than the issue decided by us remains, which may include the issue towards interest.

(2021)03ILR A1091
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.02.2020

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Second Appeal No. 68 of 2012

Bachai & Ors. ...Appellants
Versus
Ram Nayan & Ors. ...Respondents

Counsel for the Appellants:
Sri A.P. Singh, Sri Ashutosh Srivastava, Sri H.C. Singh

Counsel for the Respondents:
Sri Y.S. Saxena

Second Appeal though entertained after condoning delay-no substantial relief can be granted-Second Appeal entertained after 28 years of passing of decree-decree executed-limitation could be looked at the time of hearing also-no ground for condoning delay-Appeal dismissed. (E-7)

List of Cases cited:

1. T. Arivandandam Vs T.Vs Satyapal & anr.,(1977) 4 SCC 467

2. Krishnasami Panikondar Vs Ramasami Chettiar & ors.,AIR 1917 PC. 179

(Delivered by Hon'ble Siddhartha Varma, J.)

1. A suit for specific performance of an agreement was filed by the respondent-Ram Nayan. It was stated that Samujh, the

predecessor in interest of the defendant had agreed to sell his share of the property in favour of the plaintiff on 25.1.1969 for a consideration of Rs.8,000/-. Through the agreement it was agreed that that defendant would execute the sale deed in favour of the plaintiff and get the entire consideration at the time when the sale would be registered before the Sub-Registrar. It was further agreed that sale would be possible only after Samujh got a bhumidhari certificate of his share. To get the property converted from Sirdari to Bhumidhari, an application was also moved before the Tehsildar by Samujh on 2.5.1969. Even though there was no right to transfer the land, Samujh executed a registered sale deed in favour of the plaintiff Ram Nayan and had also received Rs.8,000/-. Samujh, the brother of the defendant-Bachai, died on 2.10.1969 and, therefore, when the defendant did not execute the sale deed in favour of the plaintiff, the suit was filed. At the trial stage, the suit was decreed in favour of the plaintiff only to the extent that he could recover Rs.8,000/- from the defendant. However, the remaining claim was rejected. This gave rise to two First Appeals, one being First Appeal No.32 of 1980 by which the defendant prayed that the portion of the decree by which the Trial Court had directed for return of Rs.8,000/- be set-aside and another being First Appeal No.349 of 1980 by which the plaintiff desired the decreeing of the suit in toto.

2. First Appeal No.32 of 1980 filed by the defendant was dismissed while the First Appeal No.349 of 1980 filed by the plaintiff and others was allowed and the suit was decreed in toto. The defendant-Bachai filed a Second Appeal being Second Appeal No.3123 of 1981 but this Second Appeal was confined to the decree which was passed in First Appeal No.32 of 1980. The Second Appeal did not challenge the decree as was passed in First Appeal No.349 of 1980. Second Appeal No.3123 of 1981 was admitted on 16.12.1981 but was dismissed for want of prosecution on 15.9.2006. A Restoration Application for recalling the order dated 15.9.2006 was filed which was again dismissed on 8.11.2006 with the following order :

"This second appeal was dismissed for want of prosecution on 24.3.2003. It was, however, restored on 22.8.2003 on the condition that the appeal shall be argued immediately after 15 days and was directed to be listed. The appeal was on the list for final hearing, thereafter. On 28.10.2005 it was directed to be listed in the next cause list. On 28.11.2005 a prayer was made by Shri Mahesh Narain Singh that the matter be passed over. It was again passed over on the request of appellant on 30.3.2006, 5.5.2006 and then on 19.5.2006 it was directed to be listed peremptorily on 18.7.2006.

On 18.7.2006 once again a request was made to adjourn the case on which learned Judge hearing the matter released the appeal. It was then nominated to this Court. On 01.9.2006 on the request of learned counsel for the appellant it was directed to be listed in the next cause list. On 15.9.2006 no one appeared and the second appeal was dismissed. The order sheets now clearly establish that the appellants do not want the second appeal of 1981 to be heard by the Court.

Today once again when the Court asked whether the learned counsel for the parties are ready to argue, the appellants have again requested for adjournment. Shri Y.S. Saxena pointed out that the appeal has been filed against the civil judge's decision on a Civil Appeal No.32 of 1980, which was infact dismissed in favour of the

appellant. The appellant should have been aggrieved by the decision of civil judge on appeal No.349 of 1980, which was partly allowed. The memo of appeal shows that the appellants have not preferred the appeal against the judgment in first appeal No.349 of 1980. In this manner the appeal is also defective.

The second restoration application is accordingly rejected for want of prosecution with costs."

3. There was one more Restoration Application filed for recalling the order dated 8.11.2006 which was again rejected on 1.10.2007. Another application for correcting the order dated 1.10.2007 along with a Modification Application was filed which was rejected on 23.10.2009. Thereafter, the instant Second Appeal being Second Appeal Defective No.381 of 2010 was filed. Initially notices were issued to the respondents. However, on 11.11.2011, this Court condoned the delay of almost 28 years and allowed the Delay Condonation Application. The Second Appeal was thereafter numbered as 68 of 2012. Subsequently, the appeal was admitted on 30.4.2012 and the following substantial question of law was formulated :

"Whether lower appellate court was legally justified in treating the sale deed dated 02.05.1969 executed by late Sri Ram Samujh in favour of original plaintiffs respondents Ram Nayan and others as an agreement for sale on the ground that on the date of execution of the sale deed, Ram Samujh was only sirdar of the agricultural land in dispute and application for grant of bhoomidhari sanad filed on the same date was afterwards rejected on the ground of death of Ram Samujh who died on 02.09.1969? "

4. Since there were other respondents also, notices were issued on 30.4.2012 itself. The Court on the Stay Application while issuing notices made note of the fact that the decree for specific performance had already been executed in favour the plaintiff-respondents. It also directed that the appellants would not interfere in the possession of the plaintiff-respondents. The plaintiff-respondents were also restrained from alienating the property in dispute. The order dated 30.4.2012 which was passed on the Stay Application is being reproduced here as under :

"Issue notice. Steps to serve unrepresented respondents shall be taken both ways i.e. through ordinary process as well as registered post.

Sale deed pursuant to the impugned decree for specific performance has been executed by the executing court in August, 2010 in favour of the plaintiffs respondents. Accordingly, it is directed that until further order appellants shall not interfere in the possession of the plaintiffs respondents. Simultaneously, plaintiffs respondents are also restrained from alienating the property in dispute."

5. Learned counsel for the defendant/appellant submitted that Samujh, the brother of the defendant-Bachai had never agreed to sell the land and the sale deed which was executed despite the fact that there was no bhumidhari sanad in favour of the defendant was absolutely a waste paper.

6. Learned counsel for the defendant-appellant further submitted that the application filed by Samujh for the grant of

bhumidhari sanad was rejected by the Assistant, First Class on 5.8.1970. The plaintiff had assailed the order dated 5.8.1970 but the Revisional Court i.e. the Court of Additional Commissioner, Gorakhpur Division, Gorakhpur had dismissed the Revision and the Board of Revenue also did not grant the bhumidhari sanad on the ground that the person who had applied had died. The plaintiff had filed a writ petition before this Court being Writ Petition No.997 of 1973 which was also dismissed on 12.9.1973 and he, therefore, submitted that Samujh never got the bhumidhari sanad. Learned counsel for the defendant-appellant further submitted that even the U.P. Laws (Amendment) Act, 1977, would not bring any relief to plaintiff as the enactment had not made the deceased brother of the defendant a bhumidhar. Learned counsel for the defendant also raised the question of limitation with regard to the filing of the suit itself.

7. Learned counsel appearing for the plaintiff-respondent, however, in reply submitted that the appellant was an extremely mischievous person. When the earlier second appeal being Second Appeal No.3123 of 1981 was dismissed in default on 15.9.2006 and when on 8.11.2006 the High Court had specifically pointed out that as the second appeal was filed only against the judgment and decree passed by the Civil Judge in Civil Appeal No.32 of 1980 and no second appeal was filed against the judgment and decree passed in Civil Appeal No.349 of 1980, the appellant in that Second Appeal would get no relief, yet the appellant waited for good four years thereafter to file the subsequent Second Appeal in the year 2010. He submitted that the Second Appeal was wrongly entertained after the condonation of delay.

8. Learned counsel for the plaintiff-respondent opposed the Second Appeal on the following grounds :-

(i) When the earlier Second Appeal was dismissed on 15.9.2006 and the fact that thereafter while deciding the Restoration application the High Court had on 8.11.2006 observed that no substantial relief could be granted to the appellant in the Second Appeal No.3123 of 1981, then there was absolutely no reason why the appellant should have waited for four full years to file the instant Second Appeal. Learned counsel for the respondent, therefore, submitted that the filing of the Appeal would be termed as initiating a vexatious litigation and the Supreme Court, he submitted, in a case reported in **(1977) 4 SCC 467 : T. Arivandandam vs. T.V. Satyapal & Anr.** had decried the initiation of any vexatious litigation. He submitted that the Second Appeal, therefore, ought to have been dismissed at the very initial stage itself.

(ii) Learned counsel for the respondent submitted that when the appeal was admitted, all the respondents were not represented and in fact for one respondent Jogender, Vakalatnama was filed on 28.7.2014 and, therefore, the other respondents whom the present counsel was representing, could, as per law laid down in **AIR 1917 PC. 179 : Krishnasami Panikondar vs. Ramasami Chettiar & Ors.,** once again assail the condonation of delay. Learned counsel submitted that delay could not have been condoned after 28 years of the passing of the decree. He submitted that in a period of 20 years a generation had grown from childhood to adulthood and in fact the decree for specific performance had also been executed by the Executing Court on 4.9.2010. Rights had accrued to the plaintiff and their legal heirs

which could not be now snatched away on account of the fact that the appellant had slept for good 28 years. He submitted that in the Revenue Law as also in the common laws possession had given a right to the plaintiffs. Even if the appellant had filed the Second Appeal against a wrong decree, then also the delay could not be condoned as after 2006 he waited for good four years to file the instant Second Appeal and, therefore, he submitted that if the Second Appeal was allowed, it would result in an irreversible injury and damage to the plaintiff-respondent.

(iii) Learned counsel for the respondent submitted that as per Explanation-4 of Section 11 of the Code of Civil Procedure, the instant Second Appeal was also barred by principles of constructive res-judicata as when the earlier appeal was filed and when it was held that it was not maintainable, then the subsequent Second Appeal could not have been filed on fresh grounds.

(iv) Learned counsel for the plaintiff-respondent further submitted that even on merits, the Second Appeal was to be dismissed as the First Appellate Court had clearly held that there was an agreement to sell the land and this agreement, the defendant had to honour, specially when the defendant had by operation of law become a bhumidhar with transferable rights and, therefore, he submitted that the substantial question of law also if is answered would go against the defendant-appellant.

9. Having heard learned counsel for the defendant-appellant and the learned counsel for the plaintiff-respondent, I am of the view that even though the Second Appeal had been entertained after condoning the delay, I feel that no substantial relief can be granted to the appellant. The Second Appeal was entertained after 28 years of the passing of the decree in First Appeal No.349 of 1980. A generation had grown since the decree in the First Appeal was passed. The decree had also been executed. Even though the respondent no.1 was represented on the date when the Appeal was admitted, for the other respondents notices were issued and in fact one respondent had also filed Vakalatnama in the year 2014 and, therefore, as per **AIR 1917 PC 179,** the question of limitation could be looked into at the time of hearing also. This Court upon going through the affidavit in support of the delay condonation application finds that there was absolutely no ground for the condonation of delay.

10. However, since the appeal was admitted, it was also, therefore, heard on merits. I find that the finding of fact regarding the agreement to sell was such a finding of fact which could not be now assailed at the second appellate stage as the agreement was writ large in the actions of the deceased Samujh. Even the registered sale deed dated 2.5.1969 was an indication of the fact that he intended to honour the agreement. Therefore, the question of law as was framed is also answered against the appellant. There is absolutely no merit in the Second Appeal. However, since on 19.1.2012, the counsel appearing for the respondent no.1 had agreed that if the appeal was dismissed, he would pay some more amount to the appellant, it is directed that a further amount of Rs.2,00,000/- be paid to the appellants.

11. With these observations, the Second Appeal is dismissed.

(2021)03ILR A1096
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.03.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Second Appeal No. 121 of 2020

Psa Impex Private Ltd. ...Appellant
Versus
Real State Appellate Tribunal Lko. & Ors. ...Respondents

Counsel for the Petitioner:
Prashant Kumar

Counsel for the Respondent:
Shobhit Mohan Shukla

RERA Act,2016---section 7-Procedure applicable to the Authority while taking decission u/s 7 does not requires authority to act judicially-if promoter/real Estate Agent adopting corrupt practice-Authority is empowered to revoke the registration-administrative power-rightly exercised-Authority is only required to issue notice to further inform its mind-Appeal dismissed. (E-7)

List of Cases cited:

1. Sahni Silk Mills Pvt. Ltd. Vs Employees' State Insurance Corporation; 1994 (5) SCC 346.

2. St. of W.B.I Vs Subhash Kumar Chaterjee; (2010) 11 SCC 694.

3. Automotive Tyre Manufacturers Association Vs Designated Authority & ors.; (2011) 2 SCC 258.

4. K. Arockiyaraj Vs Chief Judicial Magistrate & anr., 2013 SCC Online Madras.

5. Rajendra Pratap & ors. Vs Sadasiva Rao KTSSK Ltd.; (2012) 4 SCC 781.

6. Jagannath Temple Managing Committee Vs Siddha Matha.

7. U.P. Avas Evam Vikas Parishad & anr. Vs Friends Cooperative Housing Society Ltd. & anr., (1995) Supplement 3 SCC 456

8.Sahni Silk Mills Pvt. Ltd. & anr. Vs Employees' State Insurance Corporation 1994 (5) SCC 346

9. Harishankar Bagla Vs. St. of M.P. 31 AIR 1954 SC 465

10.Barium Chemicals Ltd. & anr. Vs Company Law Board & ors. AIR 1967 Supreme Court 295.

11. Automotive Tyre Manufacturers Association Vs Designated Authority & ors., 2011 (2) SCC 258

12. St. of W.B.I Vs Subash Kumar Chatterjee & ors., 2010 (11) SCC 694

13. K. Arockiyaraj Vs Chief Judicial Magistrate & anr., 2013 SCC online Madras 2576

14. Rajendra Prataprao & ors. Vs. Sadashivrao Mandalik K.T.S.S.K. Ltd. & ors. 2012 (4) SCC page 781

15.Jagannath Temple Managing Committee Vs Siddha Math & ors. reported in 2015 (16) SCC 542

16. Paramjit Singh Patheja v I.C.D.S Ltd. JT 2006 volume 10 Supreme Court 41

17. Sri Sitaram Sugar Company Ltd. & anr. Vs U.O.I. & ors., 1990 (3) SCC 223

18. Associated Provincial Picture Houses Ltd. Vs Wednesbury Corporation 1948 (1) Kings Bench 223

19. St. of H.P. Vs Raja Mahendra Pal, 1999 (4) SCC 43

20.Province of Bombay Vs Kusaldas S. Advani & ors., AIR 1950 Supreme Court 222

21. Radeshyam Khare & anr. Vs St. of M.P. & ors., AIR 1959 Supreme Court 107

22.R Vs Manchester Legal Aid Committee, 1952 (1) All England Reporter 480

23. Gullapalli Nageswara Rao Vs A.P. State Road Transport Corporation, 1959 (Supplement 1) SCR 319

24. Franklin Versus Minister of Town & Country Planning (1947) 2 All ER 289 (HL)

25.Provincial Picture Houses Ltd. Vs Wednesbury Corporation 1948 (1) Kings Bench 223

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

1. Heard the learned Senior Counsel Sri Sudeep Seth assisted by Sri Prashant Kumar, Advocate for the Appellant and Shri Shobhit Mohan Shukla, learned Standing Counsel for Real Estate Regulatory Authority (hereinafter referred to as a "the Authority").

2. The brief facts of the case as are relevant for deciding this appeal are being given here in below:-

3. On 18.3.2019, by Letter No.905, the Authority at Gautam Budh Nagar issued a show cause notice to the Appellant under Section 7 of the Act of 2016. The show cause notice has been annexed as Annexure-7 to the Application for Interim Relief. The Promoter had got the Project registered as Sampada Livia under Sections 3 and 4 of the Act, with registration No.UPRERAPRJ5855. The commencement date for the Project was mentioned as 01.12.2014 and date of completion was mentioned as 30.11.2019, and 24 allottees had approached the Authority by filing complaints against the violations of the Builder Buyers Agreement (hereinafter referred to as "BBA') by the Promoter. During the course of enquiry into the complaints made by the allottees under Section 38 of the Act, it was found that even the necessary conditions for registration of the Project as mentioned in Rule 14 had not been met and required details were not uploaded on the R.E.R.A. Website. There were no regular progress reports uploaded either. It was, therefore, decided to get an on the spot inspection done of the Project site.

4. A team was constituted of the Chief Engineer as the Technical Adviser, along with another Junior Engineer and it was found by the said team that although the Project was registered as "Sampada Livia" and the Promoter's name was given as PSA Impex Private Limited, the board on the site showed the name as "Alturio Residency". The approved plan had not been uploaded on the R.E.R.A. website. The Project completion date was 30.11.2019, however, on 24.2.2019, when the Team inspected the Project and tried to call the Project Coordinator on his mobile number, the same was found to be switched off and the on site inspection showed that the work had been stopped as no construction material was available on the site and only 10% of the structural work on the Project was completed. There were two floors built in Tower A, seven floors built in Tower B, six floors built in Tower C, and only basement was built in Tower D. There were other Towers to be built which had not even been started. It had become evident from the spot inspection report dated 26.2.2019 submitted along with photographs, that there was no likelihood of the Project being completed within time and the flats being handed over to the allottees. The security guard on the site revealed that work had stopped on the Project for the past two years.

5. The Authority surmised that in all likelihood, the hard earned money of the allottees had been diverted unauthorisedly

by the Promoter. On the request of the Authority, an audit of the Project was got conducted by the Chief Executive Officer of Greater Noida through M/s. Currie and Brown Auditors, who submitted a report that about Rs.47 Crores of allottees" money had been diverted. Because of the complaints made by the allottees and on the spot inspection report as well as the Auditors report and because of the incomplete details of the Project being uploaded on the website, the Authority had come to a, *prima facie*, satisfaction that the Promoter had violated the conditions of registration and the conditions for revocation of registration under Section 7(1)a, 7b, 7c and 7d existed for the Authority to issue a show cause notice under Section 7(2) of the Act to the Promoter to show cause why its registration may not be revoked. The reply to the notice had to be submitted within 30 days of issuance of such notice.

6. A reply to the said show cause notice was submitted on 5.4.2019, and supplementary replies were submitted on 30.4.2019, 6.5.2019, 13.5.2019. Another notice was issued to the Promoter on 17.05.2019 asking for its explanation on seven points as mentioned therein, including a correct up-to-date list of home buyers with their addresses who had given their consent to the Resolution plan of the new builder. The construction plan of the Project and the sanction given by the Competent Authority and the arrangement of financial resources and cash flow for completion of the Project was also demanded to be given along with documentary evidence that all the shares of the Company PSA Impex Pvt. Ltd. had been transferred to the new builder M/s Rudra Build Well Constructions Ltd. The Promoter submitted its reply to the letter dated 17.05.2019 on 20.05.2019, saying that the owner of M/s Rudra Build Well Sri Raj Kumar had been taken on board as Director of M/s PSA Impex Pvt. Ltd. and 99.75% shares had been transferred to him.

7. The Authority deliberated upon the replies submitted by the Promoter in the light of the provisions of the Act and the Rules, as also the circular of U.P. Real Estate Regulatory Authority published on 15.05.2018. An order dated 11.07.2019 was issued asking the Promoter to contact either personally or through e-mail, the Secretary of UP Real Estate Regulatory Authority with his personal affidavit along with the consent letters of at least two thirds of the allottees to the proposed transfer of the Project to the new builder. The Authority would then arrange publication of the information in various newspapers and fix a date, time and place for public hearing of all home buyers as well as other affected parties. The further proceedings under Section 7 of the Act as proposed in the show-cause notice dated 08.03.2019 would be kept in abeyance to enable the Promoter to comply with the requirements of the Circular dated 15.05.2018.

8. The Promoter did not comply with the order dated 11.07.2019. A reminder was sent but still the Promoter did not make any effort to comply with the directions given in the order dated 11.07.2019.

9. Taking into account the conduct of the Promoter, a meeting was held on 26.09.2019 by the Authority and conclusions drawn on the basis of the conduct of the Promoter, the complaints made by the home buyers, the report dated 26.02.2019 of the on-spot inspection including photographs of the Project site,

and the Auditor's report, and appropriate orders were passed, observing that the Promoter had not complied with the provisions of Section 4 and 11 and Rule 14 of the Act and the Rules and had not provided the necessary documents nor uploaded quarterly progress report in time. The Promoter had also not respected the BBA where the date of commencement of the Project was shown 01.12.2014 and completion date was given as 30.11.2019. There were only two months left for completion of the Project but the Promoter had completed only 10% of the structural work on the Project. The work had also been stopped some two years ago. The Promoter was in jail and there was no genuine attempt to complete the Project within time. Since different dates were being given in each of the replies for completion of the Project, there was no hope that the Promoter would keep the promise and there was a genuine doubt which had matured into a decision regarding his intentions.

10. It was therefore directed that the registration of the Promoter be revoked under Section 7 of the Act and various consequences would follow as a result of this revocation. The Authority decided to proceed as per Section 8 of the Act to ensure the completion of the Project. The decision of the Authority was conveyed by the Secretary through the Office Order dated 30.9.2019. Aggrieved by the order dated 30.09.2019, the Promoter approached the Appellate Tribunal in Appeal which has been rejected by the order impugned.

11. In this Appeal against the order of the learned Appellate Tribunal the Learned Senior Counsel appearing on behalf of the Appellant has raised mainly two questions of law to be decided by this Court. It is the case of the Appellant who is the Promoter of the Real Estate Project named as Sampada Livia (hereinafter referred to as "the Project") that (a) the Authority had not given oral/personal hearing to the Appellant while deciding the case of deregistration/revocation of registration of the Appellant. Even if the language of Section 7 of the Act only provided for issuance of a show cause notice and consideration of reply given to it by the Promoter, the act of revocation of registration had civil consequences and therefore the right of personal/oral hearing should be read into the procedure prescribed by the Act. (b) it has been argued that the Authority acted in a quasi-judicial capacity while ordering revocation of registration under section 7 of the Act and therefore it could not have sub-delegated its power to decide the issue in the case of the Appellant, the Authority had only approved the draft of the order passed by the Secretary, R.E.R.A. The Secretary, R.E.R.A. is only an officer appointed by the State Government to assist the Authority in the exercise of its duties and responsibilities under the Act. The Secretary, R.E.R.A. had passed the order dated 30.09.2019 revoking the registration of the Appellant which order was passed without jurisdiction as the jurisdiction lies only with the Authority.

12. It has also been argued that the Authority has been wrongly held to be exercising its power *Suo Moto* by the Tribunal as the Authority in its order impugned dated 30.09.2019 itself says that it has taken action the basis of complaints made by the allottees. There were two parties to the lis and therefore the R.E.R.A. had a duty to decide quasi-judicially. Quasi judicial power is conferred by the Act on R.E.R.A. and not on its Secretary. The

R.E.R.A. could not have delegated the power under Section 7 to the Secretary.

13. It has been argued that as many as six replies were submitted to the Authority and that none of these replies were considered by the the Authority while passing the order revoking the registration of the Appellant.

14. It has been argued that in the reply dated 05.04.2019, it was mentioned that the Promoter was in jail for the past six to seven months and was trying to contact an experienced builder to take over the Project. M/s Rudra Build Well Construction Pvt. Ltd. had proposed to take over the Project and complete the same latest by March, 2020. The detailed Resolution plan would be made available by 30.04.2019.

15. In the reply dated 30.04.2019, the Promoter stated that the new builder had taken over the Project and had started work like cleaning up the site and also undertaking strengthening of structural columns which had weakened due to the work having been stalled for a long time. Nearly, 200 home buyers were presented with a Resolution plan, some of them had taken the option of refund, some had taken the option of shifting to already constructed flats in Rudra Build Well's other the Project, while others had given their consent to continue with the Project and wait for its completion. In the reply dated 30.04.2019, time was again requested to be given and it was assured that actual progress on the site would be evident from 21.07.2019.

16. In the reply dated 06.05.2019, it was informed that all the shares/assets and liabilities of the Promoter had been transferred to the new builder that is M/s Rudra Build Well Constructions Pvt. Ltd. and the new Promoter had contacted the architect to update the plan of the Project as per the Green Building Norms and to get it registered under "GRIHA" or "IGBC". A revised construction schedule for each of the towers has been given by the new Promoter.

17. In the reply dated 13.05.2019, it was informed to Real Estate Regulatory Authority that at least Rs.10 crores had been disbursed as refund through cheques to various home buyers and arrangements were being made for cash inflow to complete the Project. The builder had proposed to complete two towers by March, 2020 and another two towers by October, 2020. There was no reference to remaining five being completed any time soon.

18. It was argued that despite submission of replies categorically stating that the Appellant had sorted out the problem and transferred all shares to a new Promoter and possession of flats to the allottees would be given in a phased manner commencing from October, 2020, the Appellant has been de-registered. The Secretary, R.E.R.A. by a letter dated 11.7.2019 demanded consent of 2/3rd of the allottees from the Appellant for transferring its share to a third-party and other relevant documents. It has been further argued that the Appellant was not communicated this letter dated 11.7.2019 on account of which, it could not reply in time. Only on receiving the reminder notice dated 8.8.2019, a reply was submitted on 20.8.2019, but the same was not considered by the Authority. It has been argued that in the reply dated 20.8.2019, it was pointed out that 485 buyers out of 533, i.e. more

than 2/3rd of the allottees, have submitted the consent to continue with the Project and a request was made to convert the case under Section 15 of the Act and not to de-register the Project. In the two meetings held 26.9.2019 and 27.9.2019, the Authority passed a resolution for de-registering the Project of the Appellant.

19. It has been argued that the operative portion of the order dated 30.09.2019 to de-register the Project of the Appellant, and the approved draft of detailed order of the Authority were prepared by some unknown person, the Authority concluded the meetings with a direction to the Secretary, R.E.R.A. to communicate the order under his signature. Neither did the Appellant get any personal nor any oral hearing by the Authority by fixation of date, time and place, nor any detailed order was passed by the Authority regarding revocation of registration of the Project. It was argued that the Agenda of the meeting dated 27.9.2019 clearly shows that no discussion of the reply submitted by the Appellant was undertaken by the Authority and only a one page (operative portion of the order) was passed by the Chairman of the Authority, while approving the draft of the order prepared by some other person.

20. Sri Shobhit Mohan Shukla, on the other hand, has argued that on 17.5.2019, the Authority directed the Promoter to furnish clarification/action plan along with updated list of home buyers, who had opted for ready to move in houses, those who had opted for refund/exit from the Project, and those who had consented to continue in the Project, the cash flow plan to manage the finances for the proposed construction plan and documentary evidence which supported the claim of the Promoter that Rudra Build Well Construction Private Limited had become hundred percent shareholder of the Company. The Appellant submitted its reply on 20.5.2019 saying that Shri Raj Kumar, the Chairman of Rudra Build Well Constructions Private Limited had joined the Board of Directors of the Company and 99.75%, of the shares of the Company had been transferred to him.

21. The Authority after considering the reply of the Promoter and with a view to giving it opportunity to comply with the provisions of Section 15 of the Act, passed an order on 11.7.2019. The Promoter was directed to submit within 15 days, the consent for transfer of the Project of the majority of the shareholders supported by their affidavits. Based on consent of not less than 2/3rd of the allottees, a public notice was to be issued thereafter with proper advertisement about date and place of hearing and method for filing objections before the Authority, if any. The final decision on the show cause notice dated 8.3.2019 was put on hold till the decision on the proposal of the Promoter to be taken by the majority of the home buyers.

22. The Promoter did not comply with the order dated 11.7.2019 and keeping in view the conduct of the Promoter, the matter was thoroughly deliberated by the Authority in its meeting dated 26.9.2019 and 27.9.2019, where the Authority came to the conclusion that the Promoter had not given details with documentary evidence as required under the Act and the Rules i.e. under the provisions of Sections 4 and 11 of the Act, and Rule 14 of the Rules on the R.E.R.A. Website. On the website, the Promoter had declared 1.12.2014 as the date of commencement of the Project and 30.11.2019 as the date of completion of the

Project. However, only 10% of the work on the Project was done and only two months' time was left to complete the Project as per the date of completion declared on the website. The report of on the spot inspection carried out by the team of Engineers and the facts as were mentioned in the complaints of the allottees clearly made out that the Promoter was detained in jail and for the past two years or more, no construction work was done on the Project. The report submitted by M/s Currie and Brown India Ltd., was also considered where it was stated that the Promoter had diverted Rs.47 Crores collected from the allottees, which amounted to a breach of trust and constituted a criminal offence.

23. In view of the deliberation carried out on 26.9.2019 and the conclusions reached from the said deliberations on 27.9.2019, in order to protect the interests of the allottees and to facilitate the remaining work of the Project to be completed as per the provisions of the Act and the Rules, the Authority decided to revoke the registration of the Project with immediate effect and also to proceed under Section 8 of the Act.

24. It was argued by Sri Shobhit Mohan Shukla that in the written submissions before the Appellate Tribunal, the Authority also undertook to produce the original records relating to the 22nd Meeting held on 27.9.2019 at the time of hearing of the case by the Tribunal. The Authority had noted that although the transfer of shares etc. comes within the domain of Companies Act, still as per Section 15 of the Act, the majority shares of the Project can be transferred only with the *prior written consent of 2/3rd of the allottees and prior approval of the Authority*. The Authority found that the Promoter had transferred majority shares to one Mr. Raj Kumar of Rudra Build Well Construction Private Limited without following the provisions of the Companies Act as well. Such a transfer being against the Companies Act, the name of Mr. Raj Kumar was not even mentioned in the list of Directors of the Company available on the Website of Registrar of Companies.

25. The Authority in its meeting dated 26.9.2019 noted several irregularities and directed for framing of a draft order, giving reasons for revocation of registration. In the meeting held on 27.9.2019, the Authority approved the draft order for revocation of registration.

26. It was argued by Sri Shobhit Mohan Shukla that the decision with regard to the Appellant had been taken by the Authority as it had been mentioned at Page 353, which is in line with the power of the Authority given to it under Section 7 of the Act and includes revocation of registration of the Appellant; the debarring of the Promoter from accessing the R.E.R.A. website in relation to the project; mentioning his name in the list of defaulters and displaying his photograph on the website and informing all other Real Estate Regulatory Authorities in the country about revocation of such registration; as also freezing the account maintained by the Promoter in relation to the Project in ICICI Bank till further orders.

27. The Authority had also taken a decision to constitute a the Project Monitoring Committee under the Chairmanship of the R.E.R.A. Member, Mr. Balvinder Kumar; with the Chief Executive Officer of Greater Noida; and Mr. R.D. Paliwal, a Conciliation

Consultant; the Finance Controller of U.P. the Authority; and the Technical Advisor of U.P. the Authority as its Members. This Committee was constituted to suggest ways to the Authority to carry out its obligations under Section 8 of the Act for completion of the Project consequent upon revocation of registration of the Promoter.

28. Further, the Authority in discharge of its mandate under Section 8 of the the Authority Act, issued a public notice on 7.12.2019, calling upon the Association of allottees to submit a viable proposal for completion of the remaining development work of the Project. A public notice was issued after expiry of two months' period stipulated for filing the Appeal before the Tribunal. The Sampada Livia Buyers Welfare Association submitted a proposal to carry out the remaining development work of the Project, which was thoroughly examined by the Project Advisory Monitoring Committee appointed for such purpose. The Committee found the proposal of the Buyers' Association to be feasible and the report of the Committee was considered by the Authority in its meeting held on 02.06.2020 and it permitted the Sampada Livia Buyers' Association to carry out the remaining development work of the Project as per the terms and conditions laid down in its order dated 6.6.2020.

29. An authorisation letter was issued on 26.6.2020. Another letter was issued by the Authority to the Promoter directing him to handover the possession of the Project along with the structures and entire assets standing thereon to the Association.

30. The Authority had also proposed policy guidelines to be followed by the Authority to facilitate completion of the Project under Section 8 of the Act and the Government has subsequently approved the proposal of the Authority and issued policy guidelines to be followed in all such matters by a Government Order dated 26.6.2020.

31. It has been submitted by Sri Shobhit Mohan Shukla that the Appellant had earlier taken the plea that the order passed by the Authority under Section 38 had been passed by a single Member, which was turned down by the High Court in Writ-C No.3259 of 2020: *PSA Impex Private Limited versus State of U.P. and others*, decided on 6.2.2020. In yet another writ petition, namely, Writ-C No.2248 of 2020: *M/s KDP Build Well Private Limited Versus State of U.P. and four others*, the High Court has again turned down the plea of the builder that the order passed by the Authority had, in fact been passed by the single Member, which was without jurisdiction. It has been held by the Division Bench of this Court that the Authority has the power to take decision authorising not only the Secretary to communicate the decision of the Authority, but also a single Member to decide cases.

32. Sri Shobhit Mohan Shukla has further emphasized that in the instant case, the decision had been taken by the Authority, not by a single Member, and it had only been communicated by the Secretary. The Agenda for the 22nd Meeting held on 26.6.2019 has also been filed at Page 342 of the paper book. It contains ten Items of which, Agenda Item No.22.1 relates to the Appellant, M/s. PSA Impex Private Limited.

33. In rejoinder to the arguments of the counsel appearing for the Appellant, Sri Sudeep Seth, learned Senior Counsel

appearing for the Appellant has read out the last sentence on Page 343 of the paper book, which is as follows:

"uparyukt ullikhit paristhitiyon mein pradhikaran ke samaksh prakaranvistrit vichar vimarsh evam nirnay hetu evam prastawit aadesh ke aalekh sahit prastut hai."

34. It has been argued by the learned Senior Counsel that the draft of the order to be passed by the Authority had been prepared by the Secretary and it was placed before the Authority only for its approval.

35. Sri Shobhit Mohan Shukla, on the other hand, has read out Pages 352 and 353 of the paper book to emphasize that Agenda Item may have been prepared by the Secretary, the actual deliberation on such Agenda Item was done on 26.9.2019 and 27.9.2019 by the Authority. The decision on each of the Agenda Items was taken thereafter by the Authority itself.

36. Learned Senior Counsel to substantiate his arguments has relied upon the following case laws:

(i) Sahni Silk Mills Pvt. Ltd. vs. Employees' State Insurance Corporation; 1994 (5) SCC 346.

(ii) State of West Bengal vs. Subhash Kumar Chaterjee; (2010) 11 SCC 694.

(iii) *Automotive Tyre Manufacturers Association vs. Designated Authority and others*; (2011) 2 SCC 258.

(iv) K. Arockiyaraj vs. Chief Judicial Magistrate and another, 2013 SCC Online Madras.

(v) Rajendra Pratap and others vs. Sadasiva Rao KTSSK Ltd.; (2012) 4 SCC 781.

(vi) Jagannath Temple Managing Committee vs. Siddha Matha.

37. This Court has carefully perused the order dated 30.09.2019 issued by Real Estate Regulatory Authority. It is apparent that in the first two pages, the Authority has referred to 24 complaints being filed by home buyers under Section 31 of the Act regarding various irregularities and violation of the provisions of the Act and the Rules on the part of the Promoter, which have been summarised and mention has also been made that despite notices having been sent through e-mail, the Promoter did not respond to the notices. Later the complainants informed the Real Estate Regulatory Authority that the Promoter was in jail. Taking into account the complaints under Section 31 of the Act, Real Estate Regulatory Authority examined the information uploaded by the Promoter on the website till 25.02.2019. The information has to be provided under Section 11 and Rule 14 and continuous and regular updation of such information on UP Real Estate Regulatory Authority web page has to be done by the Promoter. No Quarterly Progress Report had been uploaded. Taking into account the lapse on the part of the Promoter, the Authority had asked its technical advisor i.e. the Chief Engineer to constitute a team and to make a spot inspection of the site and submit a report. The spot inspection of the site was done and the report submitted on 26.02.2019 along with photographs.

38. In the BBA, the date of commencement of the Project was given as 01.12.2014. In four years i.e. up to February, 2019, only 10% of the structural work was done and it was evident that there was no possibility of the Project being completed and handed over to the buyers in

time. There was also the possibility of diversion of the allottees' money. Hence, the Authority asked the Chief Executive Officer of Greater Noida to get an Audit conducted of the Project. The Auditors, M/s Currie and Brown Ltd, informed that about Rs.47 crores had been diverted by the Promoter.

39. In paragraph-7 of the order dated 30.09.2019, the reasons for issuing show-cause notice for revocation of registration have been given. The Authority found on the basis of complaints made by the buyers, and on the basis of incomplete information uploaded by the Promoter on UP Real Estate Regulatory Authority web page, and on the basis of the report of spot inspection and photographs of the Project, and on the basis of the Audit report, that the Promoter having registered the Project was not interested in completing the same. The Auditors' report also showed that the Promoter had diverted several crores of allottees' money. Hence conditions mentioned under Section 7(1) existed for taking action under Section 7(2) of the Act. The Promoter had committed a default on all counts as mentioned under sub-section 1 of Section 7 and its various clauses. There was a *prima facie* satisfaction that the Promoter was indulging in several fraudulent practices. The show-cause notice was therefore issued on 08.03.2019 asking the Promoter to submit his reply within 30 days.

40. In the order dated 30.09.2019, the Authority has referred to a personal hearing/meeting with the Promoter held on 25.04.2019, in paragraph-13. Therefore, the argument of the learned Senior Counsel regarding personal hearing having not been given and the order having been passed without following the principles of natural justice fails.

41. In paragraph-14 of the order dated 30.09.2019 there is reference of majority shares of the earlier Promoter being transferred to the new Promoter, but the same had been done in contravention of Section 15 of the Act. Section 15 of the Act imposed an obligation on the Promoter in case of transfer of a Real Estate the Project to a third party, to obtain prior written consent from 2/3 of the allottees, and also to obtain prior written approval of the Authority, and on the transfer or assignment being permitted by the allottees and the Authority under sub-section 1, the intending Promoter was required to independently comply with all the pending obligations under the Act and the Rules and Regulations and as per the Agreement for Sale entered into by the erstwhile Promoter with the allottees. The transfer or assignment of assets and liabilities would not result in extension of time to the intending Promoter to complete the real estate the Project and he was required to complete the same as per the Builder Buyer Agreement.

42. In ***U.P. Avas Evam Vikas Parishad and another Versus Friends Cooperative Housing Society Limited and Another*** reported in ***(1995) Supplement 3 SCC 456,*** the Supreme Court observed that there is a distinction between permission or "prior approval" and "approval." The difference between approval and prior approval or permission is that in the first case the action holds good until it is disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently granted still validates the previous act. It is

not necessary to obtain previous consent before taking any action and its approval would mean that such action is validated.

43. Where a statute uses the term prior approval, anything done without prior approval is a nullity; where a statute employs the expression approval, however, in such cases subsequent ratification can make the act valid. In some cases, the word "prior' and "previous' may be implied if the contextual situation or circumstances justify such reading otherwise if an act requires only approval the action holds good until it is disapproved. Since Section 15 of the Real Estate (Regulation and Development) Act required prior approval and not simply approval and there was no prior approval either of the allottees or of the Authority when shares of Appellant was transferred to M/s Rudra Builders Pvt. Ltd, the said transfer became vitiated and could not be countenanced.

44. **Section 34 of the Act** provides for the functions of the Authority and enumerates the same in several Sub-clauses from a to h quoted hereinbelow:-

"34. The functions of the Authority shall include--

(a) to register and regulate real estate projects and real estate agents registered under this Act;

(b) to publish and maintain a website of records, for public viewing, of all real estate projects for which registration has been given, with such details as may be prescribed, including information provided in the application for which registration has been granted;

(c) to maintain a database, on its website, for public viewing, and enter the names and photographs of promoters as defaulters including the project details, registration for which has been revoked or have been penalised under this Act, with reasons therefor, for access to the general public;

(d) to maintain a database, on its website, for public viewing, and enter the names and photograhps of real estate agents who have applied and registered under this Act, with such details as may be prescribed, including those whose registration has been rejected or revoked;

(e) to fix through regulations for each areas under its jurisdiction the standard fees to be levied on the allottees or the promoter or the real estate agent, as the case may be;

(f) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder;

(g) to ensure compliance of its regulations or orders or directions made in exercise of its powers under this Act;

(h) to perform such other functions as may be entrusted to the Authority by the appropriate Government as may be necessary to carry out the provisions of this Act."

45. This Court has also carefully perused the order of the Tribunal impugned in this Appeal dated 20.10.2020. The Tribunal has referred to the brief facts of the case as mentioned by the Appellant in its Appeal in Paragraphs-1 and 2 of its order. It has also referred to the reply/written submissions in Paragraph 3. Keeping in view the several replies of the Promoter and his representatives, the matter was thoroughly deliberated by the Regulatory Authority in its meeting dated 26.9.2019 and 27.9.2019 and the draft of the impugned order dated 30.9.2019 was approved by the Authority. The Secretary,

R.E.R.A. had only communicated the decision of the Authority for which, he was duly authorised. In Paragraph 4 of its judgment, the Tribunal has considered the issues raised by the learned counsel for the Appellant in the memo of the Appeal. It has referred to the fact that although several grounds were written in the Appeal, the counsel for the Appellant during the course of hearing had confined his whole argument for assailing the order passed by the the Authority principally on the grounds; (a) that the Authority's order was passed without jurisdiction by the Secretary of the Authority; (b) It was in violation of the provisions of Sections 20 and 21 of the Act; (c) the order was passed without considering the replies preferred by the Appellant; (d) no reasons were assigned by the Regulatory Authority for taking *suo moto* action under Section 7 of the Act; (e) no authorisation was done by the Regulatory Authority in favour of the Secretary to pass the impugned order; (f) in none of the complaints, the relief of revocation of the registration of the Promoter was sought; (g) the Appellant-Company had changed its Promoter with the approval of 2/3rd of the allottees and failure to take prior approval of the Regulatory Authority under Section 15 of the Act does not warrant the de-registration of the Project.

46. The Tribunal thereafter summarised the facts as culled out from the information supplied by the Appellant in the grounds of the Appeal and the Regulatory Authority in its written submissions, and also examined the record of the case sent from Gautam Buddha Nagar.

47. The Tribunal has mentioned these facts in Paragraph Nos.5, 5.01, 5.02, 5.03 of its order that the Project was registered as an ongoing the Project in the month of August, 2017 by the Promoter M/s. P.S.A. Impex Private Limited in the name of Sampada Livia. The commencement date was given as 01.12.2014 and the proposed completion date was 30.9.2019. The original commencement date of construction was not uploaded. The Promoter had provided very few details about the Project on its web-page on U.P.R.E.R.A. Website and only the cost of the Project was given. The geographical location, details like longitude and latitude were not provided. The development work and the structural construction carried out was also not given in the description. The column regarding details of the land was left blank. The details of encumbrances etc. were also not provided. The approved map was not uploaded. The affidavit of the Promoter under Section 4(2)(1) was also not uploaded. There was no certificate of the Chartered Accountant, no certificate of the Engineer and no certificate of the Architect. The ownership documents of the land were not uploaded by the Promoter. The annual audited balance sheets were also not uploaded. No quarterly progress report was uploaded. REG 5 Form as provided in the Regulations was also not uploaded. The floor plans of all types of flats were not provided in the format required and only unit plans were uploaded, which were also not approved by any Competent Authority. The uploaded unit plans only mentioned about the super area of the unit and the information was not as per Section 4 of the Act read with Rules 3 and 14 of the Rules, i.e. in violation of the transparency provisions. Further as per the Regulatory Authority records, the Promoter was given opportunity to provide/upload details through various letters issued in pursuance of order dated 7.5.2018. The

copy of the Circular dated 7.5.2018 of the Authority was sent to the Promoter on its Email address registered with the Regulatory Authority and through another letter dated 14.12.2018, opportunity was provided to complete all information on the website. A penalty of rupees two lacs was imposed upon the Promoter by the Regulatory Authority by its order dated 31.8.2019 for failure to update quarterly progress report. The Promoter neither updated the quarterly progress report nor deposited the penalty.

48. In the complaints filed by 24 allottees of the Project under Section 31 of the Act, it was alleged that the Promoter had promised to hand over possession of the units by the end of 2017 and to pay the Bank's EMIs in case of failure to do so. The Promoter having diverted and misappropriated the money deposited by them was now not traceable and no work was going on at the site. The Tribunal considered the inspection report dated 26.2.2019 of the Technical Advisor, examined all the records as also the report submitted by M/s. Currie and Brown. As per the Auditor's report, the total sold units were 355 and unsold units were 371. The amount received from the sold units was Rs.94 Crores out of which Rs.5 Crores was refunded to the allottees for cancellations. As per the assessment of the Auditors, the percentage cost incurred should be 15%, whereas the developers had claimed percentage cost incurred as 29%, and there were several other discrepancies with regard to structural construction and the estimated cost of such construction. As per the assessment of the Auditors, only 15% of the construction was completed and the Promoter had diverted about Rs.47 Crores of funds received from the customers.

49. The Tribunal in its judgment has also referred to the initiation of action under Section 7 for revocation of registration of the Project in great detail in Paragraph-6 along with its several sub paragraphs. It has considered in detail the provisions of Section 4 read with Rules 34 and 14 of the Rules, and the requirement under the Act and the Rules for the Promoter to upload exhaustive details on the website of the Regulatory Authority on its web page. Detailed mention of Section 4 and the relevant Rules has been made by the Tribunal in its order. Even basic information like allotment letters, Lease Deeds, Sanctioned Plan, details of encumbrances, details of land and its ownership was not provided by the Promoter.

50. The Tribunal has considered the provisions of Section 7 thereafter and the requirement under the Act is that at least 70% of the amount received from the allottees should be utilised towards cost of construction and land cost, and the amount so collected should be deposited in a separate Escrow Account to be withdrawn only after it is certified by an Engineer, and Architect and a Chartered Accountant, in proportion to the percentage of completion of the Project and the balance 30% of the amount can be utilised for marketing cost and administrative expenses etc. The Act further casts duty upon the Promoter to submit audited accounts within six months of the end of every financial year to ensure the compliance of the various provisions of the Act.

51. As per the Audit Report, the Promoter had collected about Rs.94 Crores from buyers and paid approximately Rs.10 Crores to Greater Noida Authority towards land charges and spent Rs.33 Crores on

construction and refunded Rs.5 crores towards refund for cancelled units. No certificate of the Chartered Accountant or the Engineer or the Architect was submitted with respect to cost incurred on the Project and the amount collected from the customers. The Auditors had also mentioned in the report that the builder had not paid the dues of Greater Noida Authority to the tune of Rs.30.8 Crores and had diverted about Rs.47 Crores from the Project. The Promoter had also created encumbrances by way of loan to the tune of Rs.5 Crores.

52. The Tribunal has observed that Section 7 of the Act empowers the Authority to revoke the registration granted under Section 5 in three circumstances, firstly on a complaint, secondly, on the recommendation made by the Competent Authority and thirdly, even *Suo Moto*. It has only to record its satisfaction that the Promoter has made a default in doing anything required by or under the Act or the Rules or Regulations made thereunder, or the Promoter has violated the terms and conditions of approval given by the Competent Authority; or the Promoter is involved in any kind of unfair practice or irregularities which includes making any statement or falsely representing that the services are of a particular standard or that the Promoter has approval or affiliation, or makes a false or misleading representation concerning the services offered or the Promoter permits publication of any advertisement in a Newspaper or otherwise, of services that are not intended to be offered or indulges in any fraudulent practices.

53. The only requirement under Section 7(2) of the Act is that the registration shall not be revoked unless the Authority has given the Promoter not less than 30 days' notice in writing stating the grounds, on which it is proposed to revoke the registration and has considered any cause shown by the Promoter within the period of that notice, against the proposed revocation.

Under sub-section (3) of Section 7, the Authority is empowered either to revoke the registration or it may permit the same to remain in force, subject to such terms and conditions as it thinks fit to impose in the interest of the allottees. Upon revocation of the registration, the Authority shall debar the Promoter from accessing its website in relation to that the Project, and specify his name in the list of defaulters and also inform other Real Estate Regulatory Authorities in the country about such a revocation of registration; The Authority shall also facilitate the remaining development works to be carried out in accordance with the provisions of Section 8; The Authority shall direct the bank holding the Projects bank account, to freeze the account and thereafter take such further necessary actions towards facilitating the remaining development works; and Authority may do such acts as to protect the interest of the allottees or in public interest, issue such directions as it may deem necessary. The Tribunal held that the Authority had rightly passed the order dated 30.09.2019.

54. Under Section 34 Sub-clause (f), it has to ensure the compliance of the obligations cast upon the Promoters, the allottees and the real estate agents under the Act and the Rules and Regulations made thereunder. Under Section 38 the Powers of the Authority have been enumerated where the Authority shall have the power to impose penalty or interest in regard to any

contravention of obligations cast upon the Promoters, the allottees and the real estate agents under the Act or the Rules and the Regulations made thereunder.

55. Section 38 only provides that the Authority shall be guided by the Principles of Natural Justice and subject to other provisions of the Act and the Rules made thereunder, Authority shall have power to regulate its own procedure. Thus even under section 38 where the Authority deals with complaints and imposes penalty alongwith interest etc., the Authority has been given the power to regulate its own procedure and is not bound by the procedure prescribed under the Civil Procedure Code or any other Civil Law.

56. The learned counsel for the Appellant has placed reliance on the observation of the Supreme Court in ***Sahni Silk Mills Private Limited and Another Vs Employees' State Insurance Corporation reported in 1994 (5) SCC 346***, and has read out several paragraphs to argue that there cannot be any Sub delegation or even delegation of quasi judicial function. This Court has perused the judgement rendered in ***Sahni Silk Mills*** **(Supra),** it is apparent therefrom that the Appellants therein had challenged the recovery notices issued by Regional Director of ESI Corporation for delayed payment of Contribution in Employees State Insurance on behalf of the employer. It was argued that such recovery orders could have been issued either by the Corporation or by the Director General of the Corporation and not by Regional Directors. Under Section 85-B, the Corporation can recover from the employer such damages as it may think fit, whenever an employer fails to pay the amount due towards contribution or any other amount payable under the Act subject to reasonable opportunity of being heard being given to the employer. Under section 94A the Corporation may delegate any of its powers to any officer or Authority subordinate to the Corporation in relation to such matters and subject to such conditions if any, as may be specified also by the Corporation.

57. In exercise of power under Section 94-A the Corporation delegated its power to impose and recover damages from the Employees and by a Resolution dated 28.02.1976 provided that for the purpose of levy of damages the Director General or any other Officer authorized by him may levy and recover damages from the employers. It was argued that the power of the Corporation was delegated to the Director General but the Director General could also specify any other officer or Authority subordinate to it to exercise that power. Such other officer had neither been named nor had been described by designation in the Resolution of the Corporation dated 28.02.1976. It was argued that it is essential that the delegated power should be exercised by the Authority upon whom it is conferred and by no one else.

58. The Court observed that Section-94A only conceived direct delegation by the Corporation to different officers or Authorities, there was no scope for such delegate to sub-delegate that power. It observed that the power under Section 85-B to impose damages is quasi judicial in nature and it requires a reasonable opportunity of being heard to be given to the Employers. Once objections are filed they have to be considered and thereafter alone an order of recovery of damages has to be passed.

59. The Supreme Court observed that if Section-94A had a provision enabling the Corporation not only to delegate its power

to any other officer or Authority subordinate to the Corporation, but also to empower such officer or Authority in its own turn to authorize any other officer to exercise that power, the Resolution could have been sustained on the principle indicated in the cases of ***Harishankar Bagla Versus State of Madhya Pradesh AIR 1954 SC 46***5 and ***Barium Chemicals Ltd. and another Versus Company Law Board and others*** reported in ***AIR 1967 Supreme Court 295.*** However, the clear indication of the language of the Section 85-B was such that the delegation by the Corporation was only to the Director General. There was no further liberty to the Director General to authorize any other officer to exercise the power under Section 85B. It held that part of the Resolution of the Corporation which permitted the Director General to further delegate his powers to Subordinate Officers as ultra-virus of its power under Section 94A.

60. However, the Court observed in Paragraph-5 that in the present administrative set up extreme Judicial aversion to delegation cannot be carried to an extreme. A public Authority is at liberty to employ agents to exercise its powers. That is why in many statutes, delegation is authorized either expressly or impliedly. Due to the enormous rise in the nature of the activities to be handled by the statutory authorities the maxim *"delegatus non-protest delegare"* is not being applied specially when there is a question of exercise of administrative and discretionary Power. It observed in Paragraph-6 that by now it is almost settled that the Legislature can permit any statutory Authority to delegate its power to any other Authority.

61. Learned counsel for the Appellant has also relied upon ***Automotive Tyre Manufacturers Association vs. Designated Authority and others, 2011 (2) SCC 258***, wherein the Supreme Court was considering a bunch of Civil Appeals under Section 130 E of the Customs Act arising out of a common judgement and order passed by The Customs Excise and Service Tax Appellate Tribunal, where the Appeals filed by the Appellants were dismissed and levy of anti-dumping duty imposed under Section 9 of the Customs Tariff Act was affirmed. The learned senior counsel for the Appellant has placed reliance upon paragraphs 76 and 80 to 84 of the judgement to say that even if the Statute does not provide for personal hearing to be given to a party whose interest is being affected, such personal hearing has to be read into the language of the Act as the Rule of Law requires fair play in action and fair play in action means that the Rules of natural justice be followed which are summarised as (1) No one shall be a judge in his own cause and (2) No one shall be Condemned unheard.

62. The Supreme Court observed that it is not always easy to draw a line demarcating and administrative decision from a quasi judicial decision. Nevertheless, the aim of both a quasi-judicial function as well as an administrative function is to arrive at a just decision. The dividing line between an administrative power and a quasi judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power, regard must be had to (1) the nature of the power conferred; (2) the person or the persons on whom it is conferred; (3) the framework of the law conferring that power; (4) the consequences ensuing from the exercise of that power; and (5) the manner in which that power is

expected to be exercised. The Supreme Court held that whether the power is to be exercised administratively or quasi judicially is immaterial as the Authorities are expected to act fairly in each case.

63. The principles that have to be kept in mind are the express language and basic scheme of the provision conferring the power; the nature of the power conferred and the purpose for which power is conferred on the final effect of the exercise of the power. It is not always easy to draw a line demarcating an administrative decision from a quasi judicial decision. Nevertheless, the aim of both quasi judicial function as well as other administrative function is to arrive at a just decision.

64. The learned counsel for the Appellant has also placed reliance upon ***State of West Bengal Vs. Subash Kumar Chatterjee and others, 2010 (11) SCC 694***, and has referred to paragraph 8 to 24, 26 and 27, to say that the power conferred upon the Administrative Tribunal under the Act flows from Article 323 of the Constitution and therefore, the Administrative Tribunal cannot delegate the power to decide, and the dispute regarding pay scales was required to be decided exclusively by it and it could not have shifted its responsibilities by remitting the original application made to it to the Chief Engineer. Such delegation is void ab initio and such practice by the Administrative Tribunals was strongly disapproved by the Supreme Court. The Supreme Court observed that the practice adopted by the Tribunals directing applications filed before them to be treated as representations before the executive authorities for their decision on merits should be deprecated. The Tribunals cannot delegate their essential function and duty to decide service related disputes. In the aforecited case, the Administrative Tribunal was considering a dispute regarding pay-scale and parity sort by one group of employees with that of another.

65. The learned counsel for the appellant has also relied upon a Full Bench decision of the Madras High Court in the case of ***K. Arockiyaraj V Chief Judicial Magistrate and Another*** reported in **2013 SCC online Madras 2576,** and has read out Paragraph-16 thereof. The writ petitioners had challenged the power of the Chief Judicial Magistrate to pass orders under Section- 14 of the SARFAESI Act as the provision empowered only the Chief Metropolitan Magistrate and District Magistrate to exercise the powers under the provision. The Full Bench held that under section 14 of the SARFAESI Act, the language is very clear and unambiguous, it states that the Chief Metropolitan Magistrate or the District Magistrate can help the secured creditors in taking possession of the secured assets. In cities where there is no Chief Metropolitan Magistrate the secured creditors can seek the assistance of the District Magistrate and not the Chief Judicial Magistrate. However, the said judgement is no longer good law in view of the Supreme Court judgement rendered in Civil Appeal No.6295 of 2015 dated 23.09.2019.

66. Learned counsel for the Appellant has placed reliance upon **Rajendra Prataprao and Others Versus Sadashivrao Mandalik K.T.S.S.K. Ltd. and Others** reported in **2012 (4) SCC page 781**, and has read out Paragraph Nos. 1, 5 to 9, 11 to 15 and 19. It was held that if Statutory Appeal is made to the State Government under the provisions of Maharashtra Cooperative Societies Act,

there is a provision for the Minister Incharge of the Department to hear such a case and decide and there can be no delegation of the function to the Secretary of the Department. When any Minister is likewise unable to discharge his functions, the Chief Minister may direct any other Minister to discharge all or any of his functions. When the Minister for Cooperatives had expressed his inability to hear the appeal the Chief Minister could have directed any other Minister to decide the same and not the Secretary of the Department.

67. The learned counsel for the Appellant has also placed reliance upon ***Jagannath Temple Managing Committee Versus Siddha Math and Others*** reported in ***2015 (16) SCC 542,*** and referred to Paragraphs 58.2, 62, 63 and 64 to substantiate his argument. In the said case the Supreme Court was considering the Orissa Estates Abolition Act, 1951 enacted to protect the interest of cultivators and to do away with the evils of Zamindari system by abolishing intermediaries and the effect thereof on the properties of Shri Jagannath temple which were governed by a special enactment, Shri Jagannath Temple Act, 1955, where all the endowments of Jagannath Temple Puri stood statutorily vested with its Temple Committee. Under an order of the Tehsildar one of such endowments was settled in favour of the respondent Math which in fact contravened Sections 5 and 30 of Shri Jagannath Temple Act, on the ground that by way of an Amendment in 1974, the Orissa Estate Abolition Act, became applicable to endowments made to temples also. The Supreme Court held that the intention of the 1974 amendment could not have been to render the entire 1955 Act meaningless. The Supreme Court held that the order passed in 1982 under the Orissa Estate Abolition Act in favour of the respondent Math had been passed by the Tehsildar Puri, whereas Section 8-A of the Act clearly provides that the claims have to be filed before the Collector. Although the learned Senior Counsel appearing for the respondents had contended that the definition of "Collector" in the of Orissa Estate Abolition Act, 1951, is an inclusive one, and therefore the Tehsildar has Authority to determine the rights of the respondent. Such an argument was rejected by the Supreme Court by observing that the proceedings under section 8A of the 1951 Act were quasi-judicial in nature; the Supreme Court observed in Paragraph 63 that it is a well settled law that quasi-judicial function cannot be delegated and therefore the inclusive definition of "Collector' under Section 2D of the Orissa Estate Abolition Act, 1951, to also include the "Tehsildar', can be applied only in so far as it pertains to the discharge of administrative powers of the Collector like service of notices under the Orissa Estate Abolition Act, or like inspecting and submitting a report of the disputed property. The Tehsildar, however cannot perform the quasi judicial function of settling claims under Sections 6 or 7 or 8 of the Act.

68. It is clear from the perusal of the Sections 7(1), 7(2) and 7(3) as stated hereinabove, that the Authority is empowered to revoke the registration of a builder on finding the builder guilty of any of the offences as mentioned in sub-section (1), and sub-clauses thereof. The only requirement under sub-section (2) is for the Authority to give a 30 days' notice of the proposed action to the builder and if the builder submits his explanation within 30 days period, to consider the same and then

pass appropriate orders. There is no requirement of giving repeated notice or giving unlimited time at the request of the Promoter. There is also no requirement of giving personal/oral hearing. The Rules of natural justice are not a straight jacket formula that have to be adopted in all cases, even dehors the intent of the Legislature and in violation to the specific and clear language of the Act. Moreover, as has been observed hereinabove, the appellant was given a personal hearing on 25.04.2019.

69. It has been argued that as per the provisions of Sections 35, 36, 37, 38, 39, 56 and 79 of the Act and Rules 22 and 24 of the Rules, the Authority is a Court or at least a quasi judicial Authority and therefore, cannot delegate its power to decide to the Secretary or even a single Member of the Authority

70. Under Section 35, the Authority has power to call for information, and conduct investigation and also appoint one or more persons to make enquiry in relation to the affairs of any Promoter or allottee or Real Estate Agent. The Authority has also been given the same powers as are vested in the Civil Court in respect of discovery and production of books and of accounts and other documents, and other matters prescribed under the Rules and Regulations.

71. The Authority under Section 36 has the power during the course of an enquiry, to pass interim orders restraining any Promoter or allottee or a Real Estate Agent from carrying on any act until the conclusion of such enquiry or until further orders, which may be considered prejudicial to such enquiry.. Power of the Authority to issue directions is further emphasised under Section 37 of the Act. The Authority can under Section 38 impose penalty or interest in regard to contravention of obligations cast upon the Promoters, the allottees or the Real Estate Agents. The Authority in imposing such penalty or interest shall be guided by the principles of natural justice, but it shall have power to regulate its own procedure. The Authority can in certain cases make *suo moto* reference to the Competition Commission of India.

72. Under Section 39, the Authority may at any time within a period of two years from the date of an order, rectify any mistake apparent from the record and rectify or amend its order, if the mistake is brought to its notice by the parties, however, such amendment shall not be carried out in respect of an order against which an Appeal has been preferred under the Act. Also, while rectifying any mistake apparent from the record, the Authority cannot substitute or amend the substantive part of the order, which means simply that it cannot by way of an amendment render it a nullity.

73. Under Section 56, the applicant or the Promoter may either appear in person or authorize one or more Chartered Accountants, Company Secretaries, or Cost Accountants or Legal Practitioners or any Officer or Agents to represent its case before The Tribunal or the Regulatory Authority or the Adjudicating Officer, as the case may be.

74. Under Section 79, no Civil Court shall have jurisdiction to entertain any Suit or proceeding in respect of any matter which the Authority or the Adjudicating Officer or the Appellate Tribunal is empowered by the Act to determine, nor any injunction shall be granted by any

Court or Authority in respect of any action taken or proposed to be taken in pursuance of a power conferred by or under the Act.

75. Under Rule 22, the Authority in addition to the powers specified under sub-section (2) of Section 35, shall also have the additional power requiring a Promoter, allottee or Real Estate Agent to furnish in writing such information or explanation or produce such documents within such reasonable time as it may consider necessary to decide a case; it may also requisition any public record or document or its certified copy from any office. The Authority may call upon such experts or consultants from the fields of Economics, Commerce, Accountancy, Real Estate, Competition, Construction, Architecture or Engineering or from any other discipline as it deems necessary, to assist the Authority in the conduct of any enquiry or proceeding before it. The Authority may also prior to the grant of registration, enquire into the nature of rights and interests of the Promoter, the extent and location of the area of land, the layout plan of the Project, financial and technical and managerial capacity of the Promoter to develop the Project; plan regarding the development works to be executed in the Project; and the conformity of development of the Project with the neighbouring areas. The Authority may, in the interest of allottees, also enquire into the payment of amounts imposed as penalty, interest or compensation paid or payable by the Promoter in order to ensure that the Promoter has not withdrawn the said amount from the account maintained by it under Section 4; or use any amount that was paid to such Promoter by the allottees for that Real Estate Project for which the penalty, interest or compensation is payable or any other Real Estate Project; or recover the amount paid as penalty, fine or compensation from the allottees of the relevant Real Estate Project or any other Real Estate Project.

76. Under Rule 24, every order passed by the Adjudicating Officer, Regulatory Authority or the Appellate Tribunal, as the case may be, shall be enforced by the Adjudicating Officer, Regulatory Authority or the Tribunal in the same manner as if it was a Decree or order made by the principal Civil Court in a Suit pending therein. The Regulatory Authority or the Appellate Authority in the event of its inability to execute the order, may send this order to the principal Civil Court to execute it within the local limits of whose jurisdiction the Real Estate Project is located or person against whom the order has been issued, actually resides or carries on business or personally works for gain.

77. In view of the Sections and Rules cited hereinabove, can it be said that R.E.R.A. is a Court or a Quasi-Judicial body and has to act Quasi-Judicially when taking a decision under Section 7 of the Act?

78. In *Messers Supertek Ltd versus Subrata Sen*, Second Appeal (Def) 341 of 2018, decided on 01.10.2018 by a Co-ordinate Bench of this Court was deciding a Reference under Section 5 of the Court Fee Act.

79. The Court has observed that the proceedings before the Real Estate Regulatory Authority are summary in nature to which the Code of Civil Procedure is not applicable. The order of the Appellate Tribunal is not a "decree" under Section 2(2) of the C.P.C. This court considered the objects of Real Estate

(Development and Regulation) Act and observed that it is a special Legislation which provides for the regulation and promotion of Real Estate by promoting sale of Real Estate in an efficient and transparent manner. It proposes to protect the interest of the purchaser of the real estate and to provide a speedy adjudicating mechanism of the disputes in matters connected therewith. In substance while promoting real estate, it endeavours to protect and safeguard the interest of the investors in real estate. It is, therefore, a kind of beneficial Legislation for the protection of the investor/purchaser of the real estate. The Appellate Tribunal is not a Court subordinate to the High Court and the order of the Appellate Tribunals is not a "decree" as defined under Section 2(2) of the C.P.C. which means "a formal expression of an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit".

80. The Court observed that in the definition of decree as given under the C.P.C., three words are important namely; *adjudication, court and suit.* The suit commences with the plaint and ends when the judgement or order is pronounced which culminates into a decree, the order of the Tribunal does not conform to any of the above requirements of a decree as it is rendered on a complaint and is not the result of adjudication in a suit. The proceeding before Real Estate Regulatory Authority is not in the nature of a suit instituted by filing a plaint. Real Estate Regulatory Authority derives jurisdiction on the complaint. Proceedings before it are not governed by strict Rules of Evidence as in a civil Suit. The order passed by Real Estate Regulatory Authority or by the Appellate Tribunal on Appeal arising out of such proceedings maybe executable as a decree of a civil court but the Appellate Tribunal will have all the powers of the civil court only in respect of execution of its orders. Sometimes, it may also send its orders to a civil court having local jurisdiction for execution in case the person or the property of the Promoter or builder or real estate agent is situated within the local jurisdiction of that Civil Court.

81. The Supreme Court has observed in *Paramjit Singh Patheja v I.C.D.S Ltd.* **JT 2006 volume 10 Supreme Court 41,** in paragraph 36 that a legal fiction must be limited to the purpose for which it was created. In applying a legal fiction, one should not travel beyond the limits for which it has been created. Therefore the order of the Tribunal can only be considered to be a decree to facilitate its execution. It is otherwise similar to Income Tax Appeals filed under Section 260 of the Income Tax Act, which are not to be characterised as Second Appeal even if they are arising out of an Appellate order.

82. This Court in *Messers Supertek Ltd (supra*), was considering whether orders passed by the Tribunal could be said to be a "decree" and found that unlike regular Civil Court's adjudicating civil suits, the decision on a complaint by an allottee against a Promoter or a real estate agent cannot be said to be arising out of a plaint in a Suit, wherefore the order of the Tribunal cannot be termed to be a "decree".

83. This Court shall now consider whether an order passed by the Authority under Section 7 of the Act of 2016 can be considered to be a judicial or quasi judicial adjudication. In *Sri Sitaram Sugar Company Ltd. and another vs. Union of India and others,* **1990 (3) SCC 223,** a

Constitution Bench of the Supreme Court was considering the question of determination of price of levy sugar by the Central Government in the exercise of its powers under sub-section (3i) of Section 3 of the Essential Commodities Act, 1955. The petitioners' counsel argued that the expression "determine" used in sub-section (3c) indicates that the order to which the expression refers is quasi judicial. The Supreme Court observed in paragraph-32 of its judgement as follows:- *"judicial decisions are made according to law while administrative decisions emanate from administrative policy. Quasi judicial decisions are also administrative decisions, but they are subject to some measure of judicial procedure, such as rules of natural justice...."*.

84. A judicial enquiry investigates, declares and enforces liabilities as they stand on the present or past facts and under law supposed already to exist. A quasi-judicial order emanates from adjudication which is part of the administrative process resembling a judicial decision by a court of law. Adjudication operates concretely upon individuals in their individual capacity, as per Bernard Schwartz in "Administrative Law".

85. The Constitution Bench referred to Associated *Provincial Picture Houses Ltd. vs. Wednesbury Corporation 1948 (1) Kings Bench 223,* to observe that a repository of power acts *"ultra vires'*, when it acts in excess of his power in the narrow sense, or when he abuses his power by acting in bad faith, or for an inadmissible purpose, or on irrelevant grounds, or without regard to relevant considerations, or with gross unreasonableness.

86. In *State of Himachal Pradesh vs Raja Mahendra Pal,* **1999 (4) SCC 43,** the Supreme Court was considering the question whether the pricing committee constituted by the Himachal Pradesh Government for determining the price of forest produce with respect of transactions between the Government and Himachal Pradesh Forest Corporation can be said to be a quasi-judicial body, whose decisions are binding not only on the Government and the Himachal Pradesh Forest Corporation but also between the Government and the respondent who was a Zamindar holding the Jagir of Kutlehar forest.

87. The Court observed that quasi judicial acts are such Acts which mandate an officer the duty of looking into certain facts not in a way in which it is specially directed but after exercising a discretion, in its nature judicial. The exercise of power by such Tribunal or authority contemplates the adjudication of rival claims of persons by an act of the mind, or judgement upon the proposed course of official action for the consequences of which the official will not be liable, although his act was not well judged. A quasi-judicial function has been termed to be one which stands midway between a judicial and an administrative function. The primary test as to whether the authority is alleged to be a quasi judicial one is whether it has any express statutory duty to act judicially in arriving at the decision in question. If the reply is in the affirmative, the authority would be deemed to be quasi-judicial, and if the reply is in the negative, it would not be. The dictionary meaning of the word" quasi" is "not exactly."

88. It follows, therefore, that an authority is described as quasi-judicial when it has some of the attributes or "trappings" of a judicial function but not

all. The Court relied upon judgement rendered in *Province of Bombay vs. Kusaldas S. Advani and others*, AIR 1950 Supreme Court 222, where the Court had laid down a test for ascertaining whether the action taken by a statutory body was a quasi-judicial act or an administrative act. The Court referred to English decisions to say that whenever any body of persons having the legal authority to determine questions affecting rights of subjects and having the duty to act judicially undertakes any action it shall be said to be acting in a quasi judicial manner. The decision rendered in *Kusaldas S. Advani* (supra) was followed in *Radeshyam Khare and another vs. State of Madhya Pradesh and others*, AIR 1959 Supreme Court 107, where the Supreme Court observed that the definition given in *Kusaldas S. Advani* insists on three requisites, each of which must be fulfilled in order that the act of the body may be quasi judicial act, that Court or person (1) must have a legal authority (2) To determine questions affecting the rights of parties, and (3) must have the duty to act judicially. Real and determining test to ascertain whether an act authorised by a Statute is quasi judicial act or an administrative act is whether the statute has expressly or impliedly imposed upon the statutory body the duty to act judicially. Relying upon paragraphs 149 and 150 of the *Halsbury's Laws of England*, and citing the case *of R Vs. Manchester Legal Aid Committee*, 1952 (1) All England Reporter 480, it had been submitted by the counsel for the Appellants that where a statute requires a decision to be arrived at purely from the point of view a policy or expediency the authority is under no duty act judicially or quasi judicially. On the other hand, where the order has to be passed on evidence either under an express provision of the Statute, or by implication and determination of particular facts on which its jurisdiction to exercise its power depends, or if there is a proposal and an opposition the authority is under a duty to act judicially. In paragraph 150 of the *Halsbury's Laws of England*, it was mentioned that the duty to act judicially may arise in widely differing circumstances which it would be impossible to attempt to define exhaustively. The question whether or not there is a duty to act judicially must be decided in each case in the light of the circumstances of the particular case, and the construction of the particular statute, with the assistance of the general principles laid down in the judicial decisions.

89. The principles deducible from various judicial decisions were considered by the Supreme Court in *Kusaldas S. Advani (supra)*, and were thus formulated: *"(i) If a statute empowers an authority, not being a court in the ordinary sense, to decide disputes arising out of a claim made by one party under the Statute, which claim was opposed by another party, and (ii) determine the respective rights of the contesting parties who are opposed to each other, there is a lis and prima facie, and in the absence of anything in the Statute to the contrary, it is the duty of the authority to act judicially and the decision of the authority is a positive judicial act; and (iii) if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are no two parties apart from the authority and the contest is between the authority Proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi judicial act provided the authority is required by the Statute to act Judicially"*.

90. In view of the aforesaid statement of law where there are two or more parties contesting each other's claim and the

statutory authority is required to adjudicate the rival claims between the parties, such a statutory authority was held to be quasi judicial and the decision rendered by it a quasi judicial order. Where there is a lis or two contesting parties are making rival claims and the statutory authority under the statutory provision is required to decide such a dispute, in the absence of any other attributes of a quasi judicial authority, such statutory authorities acquire the quasi judicial authority. There are other cases where there is no lis or two contending parties before statutory authority, yet such a statutory authority has been held to be quasi judicial and the decision rendered by it as quasi-judicial decisions when such a statutory authority is required to act judicially.

91. The Supreme Court went on to observe thus *"the legal principles laying down when an act of a statutory authority would be a quasi judicial act, which emerge from the aforecited decisions are these:(a) where a statutory authority empowered under the statute to do any act,(b) which would prejudicially affect the subject, although there is no lis or two contending parties and the contest is between the authority and the subject, and, (c) the statutory authority is required to act judicially under the Statute, the decision of said Authority is quasi judicial." It was further observed that "in some cases administrative authority may determine question of fact before arriving at a decision which may affect the rights of but such a decision would not be a quasi judicial act. It is a different thing that in some cases, policy may demand affording of an opportunity to the claimant whose right is going to be affected by the act of the administrative authority, still such an administrative authority would not be a quasi judicial authority. What distinguishes an administrative act from a quasi-judicial act is, in the case of quasi judicial functions under the relevant law the statutory authority is required to act judicially. In other words, where the law requires that an authority before arriving at a decision must make an enquiry, such a requirement of law makes the authority a quasi judicial authority."*

92. After referring to three decisions that lay down whether an administrative Tribunal has a duty to act judicially, the Supreme Court observed in Paragraph-21 that *"in each case the conclusion should be gathered from the provisions of the particular statute and the Rules made thereunder"* and their Lordships clearly expressed the view that if an Authority is called upon to decide respective rights of the contesting parties or if there is a lis, ordinarily there would be a duty on the part of the said Authority to act judicially.

93. In ***Gullapalli Nageswara Rao versus Andhra Pradesh State Road Transport Corporation,*** 1959 (Supplement 1) SCR 319, the Supreme Court considered a judgement *of the House of Lords in Franklin Versus Minister of Town and Country Planning (1947) 2 All ER 289 (HL).* The Supreme Court considered the provisions of the New Towns Act, 1946, which required that for developing a new town, the Minister proposed a Scheme designating a particular area as the site of the proposed new town and the draft would be published in the Official Gazette inviting objections. On objections being made, a public local enquiry was to be held and the Minister would consider the report of the person by whom the enquiry was held and then pass appropriate orders. The Minister was entrusted with the discretion

to decide whether to go on with the Scheme or not, it was his left to his subjective satisfaction. The action of holding the enquiry and then taking of the decision by the Minister concerned, which was being considered by the House of Lords did not contemplate a judicial act as the Rules of natural justice were not applied to the Minister's decision making for the simple reason *"that the initiative was wholly his, and on him was placed the responsibility of seeing that the intention of the Parliament is carried out." (emphasis supplied)*

94. The Supreme Court referred to several commentaries on Administrative Law where the judgement rendered in *Franklin* case was referred to and analyzed and it was held that the Court looked at the Act as a whole, applying a theory of interpretation similar to the Rule in Haydens case. It was held that the Franklin's case is based upon the interpretation of the provisions of that Act and particularly on the ground that the object of the enquiry is *"to further inform the mind of the Minister and not to consider any issue between the Minister and the objectors." (emphasis supplied)*

95. The language of Section 7 of the Act and the procedure applicable to the Authority while taking decision under Section 7 does not require the Authority to act judicially. The Act only requires that where the Authority is satisfied that condition for the exercise of its power of revocation of registration of the Promoter or real estate agent exist viz. it is established that the Promoter/ Real Estate Agent is adopting corrupt practices then the Authority may pass an order revoking the registration and the consequences mentioned under the Section would follow. The Authority may issue show-cause notice and consider any reply submitted to it within thirty days of issuance of notice. The Authority therefore is only required to issue notice to *"further inform its mind"* with regard to action proposed to be taken by it, in this case *Suo Moto*. The power under Section 7 is an Administrative Power. Therefore, the power given under Section 81 of the Act to sub delegate the actual drafting of the order giving detailed reasons for invoking its power under Section 7 of the Act against the promoter, the appellant herein, was rightly exercised by the Authority.

96. This Court finds no illegality, or infirmity either in the order dated 30.09.2019 or in the order dated 20.10.2020 passed by the Tribunal in this Appeal.

97. The Appeal is ***dismissed***. The Appellant shall comply with the order of the Authority and of the Tribunal within thirty days from today.

(2021)03ILR A1120
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.03.2021

BEFORE

THE HON'BLE JASPREET SINGH, J.

Second Appeal No. 138 of 1982

Ram Asrey & Ors. ...Appellants
Versus
Ram Jeet Dubey & Anr. ...Respondents

Counsel for the Appellants:
H.S. Sahai, Mohd. Aslam Khan, Mohd. Shadab Khan, Preeti Saxena, Raj Kumar Maurya, Ved Prakash Verma

Counsel for the Respondents:

Umesh Chandra, Ishwar Dutt Shukla, Pramod Kumar, Santosh Kumar Mehrotra

Suit for permanent injunction -ancesstral property-Plaintiff claimed possession-defendedon th ebasis of allged sale deed executed by one Smt. Sughari, widow of Nohar and her daughter -possession now interfered-no effort in the pleading that Nohar was Appeallant's relative and in which degree or class-or how is he higher in order of succession than the widow /daughter-plea of adverse possession is based on bald statement-Appeal dismissed. (E-7)

List of Cases cited:

1.Lakshmi Ammal Vs Thangavel Asari reported in AIR 1953 Madras 977

2.Mst. Bhuri Bai Vs Mst. Champi Bai & anr. reported in AIR 1968 Rajasthan 139

3.Velamuri Venkata Sivaprasad (Dead) By Lrs. Vs Kothuri Venkateswarlu (Dead) by Lrs. & ors. reported in 2000 (2) SCC 139

4. Sona Dei Vs Mst. Tulsa (Dead) through Lrs. AIR Online 2019 CHH 1261

5.Savitri & ors. Vs Surendra Mohan Mohana,1987 Volume 5 LCD 137

6. Anathulla Sudhakar Vs P. Buchi Reddy 2008 (4) SCC 594

7. Deena Nath Verma Vs Gokaran reported in 2003 (94) RD 323

8. State of Bihar Vs Radha Krishnan Singh & ors. reported in 1983 (3) SCC 118

9. State of Bihar & ors. Vs Radha Krisha Singh & ors.,1983 (3) SCC 118

10. Smt. Dharma Devi & ors. Vs Narayan Prasad Jaiswal reported in 1988, (6) LCD 459

11. Javitri Vs Gendan Singh & ors. ,AIR 1927 Alld. 727

12. Gurdwara Sahib Vs Gram Panchayat, Village Sirthala & anr. reported in 2014 (1) SCC 669

13.Abdul Salam Vs Imrana Siddiqui reported in 2019 SCC Online Alld 3924

14. St. of Har. Vs Mukesh Kumar & ors. reported in 2011 (10) SCC 404

15.Hemaji Waghaji Jat Vs Bhikhabhai Khengarbhai Harijan reported in 2009 (16) SCC 577

16. M.S. Jagadambal Vs Southern Indian Education Trust & ors. reported in 1988 Suppl. SCC 144

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

1. This is the plaintiff's second appeal against the concurrent judgments and decree passed by Munsif, Akbarpur, District Faizabad in a Regular Suit No. 191 of 1976 whereby the suit of the plaintiff was dismissed which was carried forward before the Lower Appellate Court in Civil Appeal No. 288 of 1979 which was also dismissed by means of judgment and decree dated 16.01.1982 passed by the District Judge, Faizabad.

2. Being aggrieved against the aforeasaid judgment and decree, the instant second appeal was preferred which was admited by this Court by means of order dated 26.03.2014 on the following substantial questions of law as which are being reproduced hereinafter for ready reference:

(I) Whether the courts below after recording a finding that Smt. Subra remarried with Jhunnu which finding had also become final as a result of the orders passed under the consolidation operations, the courts below in not considering the fact that no custom having been established or

proved by the defendant-respondents to the effect that notwithstanding the marriage the widow will continue rights over the property of her former husband, could hold the sale deed valid ?

(II) Whether the courts below in not considering the possessory title of the plaintiff and Dwarika, the predecessor-in-interest of the plaintiffs-appellants the findings recorded as such stand vitiated ?

(III) Whether the plea of adverse possession specifically having been taken a specific issue having been framed to that effect, the courts below in not considering the valuable plea and valuable rights accrued to the plaintiffs on account of adverse possession had any right and in the alternative the findings stand vitiated ?

(IV) Whether the specific plea and evidence having been led to the effect that immediately after the death of Nohar, Smt. Subra remarried and migranted to other village and started living with her subsequent husband and also no evidence of possession having been led or established with respect to Smt. Lalli, the Courts below in not accepting the position of the plaintiffs and Dwarika, predecessor-in-interest of the plaintiffs, the findings stand vitiated?

(V) Whether no issue having been framed to the effect that there was any family custom whereby the remarried widow will continue her rights over the property of her husband and non-framing of issues causing serious prejudice to the plaintiff's case, the findings recorded by the Courts below stand vitiated?

(VI) Whether the plaintiffs having been established their possessory title over the property in dispute and at any rate the plaintiffs having matured their rights on the basis of possession. The Courts below in not decreeing the suit of the plaintiffs and in not considering their rights on the basis of their posessory title could dismissed plaintiff's suit?

(VII) Whether the Courts below in not considering the fact that the house being ancestral and Dwarika father of the appellant no. 1 having been found to be nephew of Nohar at any rate the plaintiffs will not get right over the property in dispute at least to the extent of half share?

Factual Matrix:-

3. Before adumerating the substantial questions of law, brief facts giving rise to the instant second appeal are being noted first:

4. One Sri Dwarika instituted a suit for permanent injunction against Ramjeet, Abdul Kalam and Ram Sunag Singh which was registered as R.S. No. 191 of 1976. It was pleaded that the property in question was ancestral of which the plaintiff was in possession. It was further pleaded that the defendants on the basis of an alleged sale deed having got exected from one Smt. Sughari widow of Nohar and Smt. Lalli (alleged daugther of Sri Jhinnu and Sughari) were attempting to interfere in the peaceful possession of the plaintiff.

5. It was specifically pleaded that the property in question initially belonged to one Sri Nohar who was the cousin uncle (chachere chacha as pleaded in para 3 of the plaint). Upon death of Sri Nohar (about 28 years ago from the date of institution of the suit) he was survived by his two year old son and his widow Smt. Sughari. When the son was 5 years old, he also expired. Thereafter Smt. Sughari re-married as per custom (Ghar Baithwa Riti) and since then had been living and residing with Sri Jhinnu. It was also pleaded that Smt. Lalli was the daughter of Sri Jhinnu with his first

wife and that Smt. Lalli was not the daughter of Sri Nohar. It was apprehended that the defendant who had got a sale deed executed from Smt. Sughari and Smt. Lalli had made an attempt to occupy the said property, hence the suit for permanent injunction.

6. It was also pleaded that no rights in the property in question accrued to either Smt. Sughari or Smt. Lalli and that the plaintiff is entitled to injunction restraining the defendants from interfering in the peaceful possession of the property in question. Subsequently by way of an amendment it was pleaded that after the death of Sri Nohar, the plaintiff has been in possession of the property in question and with the passage of time, the plaintiff had also perfected his rights by adverse possession.

7. The defendant no. 1 Sri Ramjeet filed a separate written statement whereas defendant nos. 2 and 3 jointly filed a separate written statement.

8. Primarily the defence as pleaded in the written statement was that the property belonged to Sri Nohar and upon his death the same devolved on his widow Smt. Sughari and his daughter Smt. Lalli. Both joined and sold the property to the defendants on the 01st of July, 1970 and the defendants were put in possession. However, the plaintiff in order to occupy the property forcibly created a door on the western wall in order to give an impression and show his possession. It was specifically denied that the plaintiff had any right. It was also denied by the defendants that Smt. Sughari had remarried with Sri Jhinnu. The defendant also filed an additional written statement wherein they also raised a plea that they had perfected their rights by adverse possession.

9. On the basis of the pleadings, the Trial Court framed 8 issues, however, the issues germane to the controversy are issue nos, 2, 4, 5, 6 and 8 which read as under:-.

10. Issue No. (2) Whether the plaintiff is the owner of the property in dispute; (4) whether the pedigree shown in para 9-A of the written statement of the defendant no. 1 is correct (5) whether Smt. Sughari re-married to Sri Jhinnu as alleged in paragraph 2 and 3 of the plaint; (6) Whether Smt. Lalli is not the daughter of Nohar as alleged in para 3 of the plaint and (8) whether the defendant had become the owner of the proeperty by adverse possession.

11. The parties led their respective evidence and the Trial Court considering issues nos. 2, 5 and 6 together held that the property in question did belong to Sri Nohar. On the issue regarding re-marriage of Smt. Sughari it held that the plaintiffs were unable to prove that Smt. Sughari had re-married with Sri Jhinu as per Ghar Baithwa Custom. However, it relied upon a document filed before the Consolidation Authorities i.e. a decision dated 23.06.1972 wherein it was indicated that Smt. Sughari had re-married and was shown as wife of Sri Jhinnu and on the aforesaid basis it held that Smt. Sughari had re-married with Sri Jhinnu but since the plaintiff did not plead or lead any evidence regarding the custom that upon re-marriage the widow i.e. Smt. Sughari would lose her right in the property inherited from her husband, therefore, it held that she continued to have rights in the property inherited by her husband and even though she re-married, the same would not affect her right or title over the property.

12. The Trial Court also relied upon an extract of register relating to births wherein there was an entry dated

18.01.1940 indicating that a daughter was born to Sri Nohar. The Trial Court relied upon the evidence of Sri Bukkal, husband of Smt. Lalli and concluded that Smt. Lalli was the daughter of Sri Nohar. It also recorded a finding that since the name of Smt. Sughari after the death of Sri Nohar continued to be recorded in the revenue record and even as per the plaintiff-witness no. 2 who stated that after the death of Sri Nohar, Smt. Sughari continued to reside in the premise, hence, it concluded that Smt. Sughari continued to be in possession and that the plaintiff had failed to prove that he had perfected his rights by adverse possession. In the aforesaid manner, the issues nos. 2, 5 and 6 were decided in the negative against the plaintiff/appellant.

13. The Trial Court while dealing with issue no. 4 held that the defendant failed to establish the geneology. It also decided issue no. 8 regarding the adverse possession which was framed on the pleadings of the defendant against the defendants and by means of the judgment and decree dated 17.05.1979 dismissed the suit.

14. The First Appellate Court upon hearing Civil Appeal No. 288 of 1979 concured with the findings recorded by the Trial Court. It also considered another aspect and expressed its opinion that since it was proved that Smt. Lalli was the daughter of Sri Nohar then even assuming if Smt. Sughari (widow of Nohar) re-married with Sri Jhinnu and may have lost the right in the property even then Smt. Lalli being the daughter was competent to convey the title and for the said reason the suit of the plaintiff could not succeed and with the aforesaid reasoning affirmed the findings of the Trial Court and dismissed the appeal.

15. From the perusal of the substantial questions of law upon which the instant second appeal has been admitted as noted above, it would indicate that questions of law at serial nos. (I) and (V) relate to the question of re-marriage of Smt. Sughari and her loosing right in the property upon re-marriage. The questions of law framed at serial no. (II) and (IV) relate to possessory title of the plaintiff in context with that of Smt. Lalli and similarly the question of law at serial no. 3 relates to adverse possession so also the question framed at serial no. (VI), whereas question of law at serial no. (VII) is in respect of the right of the plaintiff in the property in question.

Submissions of the learned counsel for the parties:-

16. Sri Mohd. Arif Khan, learned Senior Counsel assisted by Sri Mohd. Aslam Khan and Deepankar Kumar, learned counsel for the plaintiff/appellant while pressing the aforesaid second appeal on the questions of law as mentioned above has primarily urged that (i) the plaintiff by amending the plaint had specifically raised an issue of adverse possession. It was specifically pleaded in paragraph 4-A and its contents were denied by the defendant but no issue was framed. It is further urged that since the issue was not framed, the plaintiff was prevented from leading any evidence and the Trial Court while considering issues nos. 2, 5 and 9 has also recorded a finding that the plaintiff could not establish his right of adverse possession. It is urged that the Trial Court had committed a grave error in returning such a finding when there was no issue or evidence in respect thereto.

(ii) It is also urged that the Trial Court further committed an error in

deciding the issue of adverse possession in context of the defendants while deciding issue no. 8 whereas apparently the sale deed of the defendants was dated 04.07.1970 and prior thereto the defendants did not claim possession, moreover, ths suit itself was preferred in the year 1970. For the said reason, the plea of adverse possession raised by the defendants was apparently bad yet the same has been decided but though the plaintiffs who had substantively raised the aforesaid plea by pleading that after the death of Sri Nohar in the year 1942, the plaintiffs came in possession and had perfected their right by adverse possession and this aspect of the matter not having been decided nor the issue having been framed has causes substantial injustice and for this reason alone the second appeal deserves to be allowed.

(iii) It is further submitted by the learned Senior Counsel for the appellant that both the Courts have failed to notice that the property in question belonged to Sri Nohar. It has been recorded by the two courts that Sri Nohar died in the year 1942. Upon his death, the property would be inherited by his widow Smt. Sughari, however, upon her re-marriage with Sri Jhinnu, she would loose her right and thus the property would devolve on the reversioners and since Nohar was the "Cousin Uncle" of the plaintiff, hence, the property devolved on him and he being in its possession was entitled to protect the same against all strangers including the defendants.

(iv) It is further submitted that once it was held by the Trial Court that Smt. Sughari had remarried with Sri Jhinu, the necessary consequence would be that she would lose her right in the property inherited from her earlier husband, the moment she re-married. There was no material available on record to establish that Smt. Lalli was the daughter of Nohar and that being so, the property would then devolve upon the reversioners i.e. the plaintiff and this aspect of the matter has not been considered resulting in sheer miscarriage of justice.

(v) It is also urged that the Trial Court has committed an error in relying upon the notion that where a custom is pleaded regarding a type of marriage, then it was also necessary to plead and prove that upon re-marriage the lady would lose her right in the property of her first husband. It is submitted that the finding of the Trial Court in this regard is inconsistent, inasmuchas, it agreed that Smt. Sughari had remarried but failed to take note of the fact that upon her re-marriage, she would lose the right in the property inherited from her earlier husband Sri Nohar which was by operation of law and not mere custom. It is also urged that there was no effort made by the defendant to prove the geneology and moreover issue no. 4 has been decided against the defendant which indicated that they could not establish the geneology, hence the defendant could not get the benefit and for the said reason, the suit of the plaintiff could not have been dismissed especially when the possession was admitted by the defendant, as in the pleadings of the defendants, it was stated that the plaintiff had forcibly opened a door on the western wall demarcating the property to show his possession.

(VI) *Lastely,* It was also urged that both the Courts also committed an error in treating Smt. Lalli as the daughter of Sri Nohar and affirmed the finding of the Trial Court. Thus, the second appeal deserves to be allowed.

17. In support of his submissions has relied upon the provisions of the Hindu Widows Remarriage Act, 1856 as well as the provisions of Hindu Womens Right to Property Act 1937. He has also relied upon the case of ***Lakshmi Ammal Vs. Thangavel***

Asari reported in ***AIR 1953 Madras 977, Mst. Bhuri Bai Vs. Mst. Champi Bai and Another*** reported in ***AIR 1968 Rajasthan 139, Velamuri Venkata Sivaprasad (Dead) By Lrs. Vs. Kothuri Venkateswarlu (Dead) by Lrs. And Others*** reported in ***2000 (2) SCC 139,*** a decision of the Chhatisgarh High Court in the case of ***Sona Dei Vs. Mst. Tulsa (Dead) through Lrs***. Reported in ***AIR Online 2019 CHH 1261*** and on the case of ***Savitri And Others Vs. Surendra Mohan Mohana*** reported in ***1987 Volume 5 LCD 137.***

18. Per contra, Sri I.D. Shukla, learned counsel appearing for the respondent-defendant while refuting the submissions of the appellant has submitted (i) that once the defendant while delivering its defence had clearly indicated that they were claiming the property on the basis of a sale deed dated 04.07.1970 then it was not open for the plaintiff to have maintained the suit for simplicitor injunction and that it was necessary for the plaintiff to have sought a declaration of his title. In support of his submissions, he relied upon the decision of the Apex Court in the case of ***Anathulla Sudhakar Vs. P. Buchi Reddy*** reported in ***2008 (4) SCC 594.*** (ii) Sri Shukla also urged that a person who pleads a custom must prove the same. It is submitted that though the plaintiff pleaded that Smt. Sughari had re-married by Ghar Baithwa Custom but he did not prove the same, coupled with the fact that not only the aforesaid custom of marriage was required to be proved but it was also incumbent on the plaintiff to prove that upon re-marriage by Ghar Baithwa Custom, the lady would lose her right in the property of her earlier husband. In support of his submission, he relies upon a decision of this Court in the case of ***Deena Nath Verma Vs. Gokaran*** *reported in* ***2003 (94) RD 323*** wherein it has been held that Ghar Baithwa Custom is not a legal marriage unless Satpati is performed. Relying upon it, it has been urged that since the re-marriage of Sughari was not legal, consequently, the Smt. Sughari was not divested of her right in the property inherited from her earlier husband especially when there was no custom pleaded and proved to the contrary.

(iii) It is also urged by Sri Shukla that the plaintiff had urged that Sri Nohar was his cousin uncle, then it was neceesary for the plaintiff to have proved the necessary geneology connecting the plaintiff to Sri Nohar and unless and until every link thereof is proved, it could not be said that the plaintiff would have inherited the property from Sri Nohar. In absence of any proper pleadings and proof regarding the relationship of the plaintiff with Nohar, the plaintiff at best would be a stranger to the property who would not have any right to file the said suit and for the aforesaid reason, the suit as well as the appeal were rightly dismissed by the two courts below. He relies upon the decision of the Apex Court in the case of ***State of Bihar Vs. Radha Krishnan Singh & Others*** *reported in* ***1983 (3) SCC 118.***

(iv) Sri Shukla further urged that since the findings was returned by the Trial Court relying upon an extract of the birth register which indicate that a daughter was born to Sri Nohar and even the husband of Smt. Lalli had deposed before the Court that Smt. Lalli was the daughter of Sri Nohar and Smt. Sughari. This being a pure finding of fact based on evidence cannot be assailed, hence, even though for the sake of argument, if the right of Smt. Sughari was not perfected but since the sale deed was executed by Smt. Lalli as well hence as far as the title of the defendants is concerned, it was complete and no interference is called for by this Court.

(v) It has further been urged that the plaintiff could not be permitted to raise

the plea of adverse possession as it was a mutually destructive plea. The plaintiffs had pleaded ownership on the basis of inheritence and thereafter by amendment raised the plea of adverse possession. Since the plaintiff did not lay proper foundation in the pleadings nor lead any evidence nor made any attempt to get any issue framed hence at this second appellate stage the plaintiff cannot be permitted to plead foul.

(vi) Moreover, it is urged that the plaintiff had to contest the suit on its own strength and could not take the benefit of any weakness of the defence. As the plaintiff failed to establish the relationship with Sri Nohar nor could prove his right over the property nor his possession and even though the plaintiff was in the knowledge of the sale deed in favour of the defendant yet the same was never challenged, hence for all the reasons the appeal deserves to fail.

Evaluation of arguments advanced and analysis of law:-

19. The Court has considered the rival submissions and also perused the Lower Court records.

20. The controversy between the parties and involved in the instant second appeal can succinctly be stated as under:-

(i) The plaintiff claims title to the property of Sri Nohar being a reversioner heir and as per their stand, upon death of Sri Nohar his property devolved upon his widow Smt. Sughri who lost the same upon re-marriage with Sri Jhinu. Smt. Lalli was not the daughter of Nohar hence the plaintiff being reversioners would inherit the property.

(ii) The defendant state that upon death of Sri Nohar his estate was inherited by his widow Smt. Sughri and his daughter Smt. Lalli. Through Smt. Sughri did not re-marry but even assuming she re-married then at best the right of Smt. Sughri would be lost but then it would vest with Smt. Lalli who had executed the sale deed hence title of the defendant is complete.

21. In view of the aforesaid exposition and to adjudicate the instant second appeal and to answer the questions of law so framed, this Court is required to note and ascertain on the given facts of the case, the following:-

(a) As per the prevalent law, upon the death of Sri Nohar who would succeed to his estate.

(b) What would be the effect of remarriage of Smt. Sughri with Sri Jhinu and whether upon re-marriage Smt. Sughri would loose her right in the property of her earlier husband.

(c) If Smt. Sughri lost her right in the property of her earlier husband upon re-marriage then whether that right would vest with the daughter or with the reversioners.

22. The material on record as well as from the perusal of the statement, certain facts which are borne out is, that the plaintiff has claimed Nohar to be his cousin uncle. Apart from a bare statement in the pleadings, there is no geneology which has been set up nor it has been explained or indicated either in the plaint, additional pleadings or even in the evidence as to how the plaintiffs was related to Sri Nohar.

23. From the evidence it could be deciphered that Sri Nohar expired sometime in the year 1942. At that relevant time, the Hindu Law (based on Shastras) was applicable. The succession/inheritence for the present purposes would have to be

considered as per the prevailing law in the year 1942.

24. ***As per Mulla on Hindu Law 21st Edition in Section 38,*** 3 classes of heirs are recognized by the Mitakshara namely (a) Gotrajas Sapindas (b) Samanodakas (c) Bandhus. It further provides that the first class succeeds the second and the second succeeds before the third.

25. Section 39 which is the first Class, the Gotrajas Sapindas provides for the sapinda relationship which extends to 7 degrees recknoned from and inclusive of the deceased.

26. In the aforesaid class a certain order has been devised which is reproduced hereinafter for clarity:-

38. The classes of heirs:- (1) There are three classes of heirs recognised by Mitakshara, namely;

(a) gotraza sapindas;

(b) Samanodakas; and

(c) bandhus.

(2) The first class succeeds before the second, the second succeds before the third.

39. The gotraza sapindas of a person, according to Mitakshara, are:

(i) His six male descendents in the male line; i.e. his son, son's son, etc. being S1 to S6 in Table IV. 1.

(ii) His six male ascendents in the male line, the wives of the first three of them, and probably also of the next three; i.e. his father, father's father, father's father's father, etc. being F1 to F6 in the table and their wives, that is M1 to M6, being the mother, father's mother, father's father's mother, etc.

(iii) The six male descendents in the collateral male line of each of his male ascendents; i.e. x1 to x6 in the line of F1, being his brother, brother's son, brother's son's son, etc.

x1 to x6 in the line of F2, being his paternal uncle, paternal uncle's son, etc;

x1 to x6 in the line of F3, being his parental grand-uncle, parental grand-uncle's son, etc;

x1 to x6 in the line of F4;

x1 to x6 in the line of F5; and

x1 to x6 in the line of F6.

(iv) His wife, daughter, and daughter's son.

The sapindas as 57 in number as shown below:-

S1 to S6 6

F1 to F6 and their wives M1 to M6 12

x1 to x6 in each of the six lines from F1 to F6 36

wife, daughter and daughter's son. 3

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27. From the perusal of the aforeaid, it would indicate that apart from the 6 male descendents, 6 male ascendents in the male line, 6 male descendents in the collateral male line it also includes the wife, daughter and daughter's son. The order of succession amongst the Sapinda has been noted in Section 43.

28. At this stage, it will also be relevant to notice that the provisions of Hindu Women Right to Property Act, 1937 which was already in existence as the aforeasid Act had come into effect from 14.04.1937.

29. Section 3 of the said Act relating to devolution of property reads as under:-

*"**3. Devolution of property. -***

(1) When a Hindu governed by the Dayabhaga School of Hindu Law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow, all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son:]

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son:

Provided further that the same provision shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends to a single heir or to any property to which the Indian Succession Act, 1925, (XXXIX) of 1925) applies."

30. Thus, it would be seen that the widow would also be entitled to the share in the property of her deceased husband.

31. At this stage, it will also be relevant to notice that with the advent of the Hindu Widows Remarriage Act 1856, the Act ameliorated the conditions of a Hindu widow and provided that no marriage contracted between Hindus shall be invalid and no such marriage shall be illegitimate by the reason of women having previously married or betrothed to another person who was dead at the time of such marriage or any custom and any interpretation

32. Section 2 of the aforesaid Act of 1856 provided that any right or interest which a widow gets in her husband's property, by way of maintenance or inheritence or by virtue of any testimentary disposition and without express permission to re-marry then only a limited interest in such property with no power to alienate the same would be available to such a widow and upon her remarriage she shall cease to have any right in the property of her deceased husband and the next heirs of her deceased husband or the persons entitled to her property on her death shall thereon succeeds to the same.

33. Section 2 of the Hindu Widows Re-marriage Act, 1856 reads as under:-

***"2. "Rights of widow in deceased husband's property to cease on her re-marriage-** All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritence to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, with no power of alienating the same,*

shall upon her re-marriage cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same."

34. From the conjoint reading of the aforesaid sections and the interplay of the aforesaid Acts what transpires is, that upon the death of Nohar in the year 1942, his rights would devolve on his widow as well as the daughter who being in the class of Gotra Sapinda would inherit and have a right in the property unless any heir higher in order is present. It is also clear from the provisions of the Hindu Womens Right to Property Act 1937 as well as Section 2 of Hindu Widows Remarriage Act, 1856 that in so far as the widow is concerned upon her re-marriage she would lose her right in the property of her deceased husband. It would also be relevant to notice that this contingency/liability which the widow incurs is recognised through a Statute and is not based purely on custom.

35. It is only when that the persons as enumerated in the preceeding class lose their right to inherit the property that the property then vests with the reversioners. It would also be seen that a reversionary heir although had contingent interest which is recognised by the courts of law as having a right to demand from the estate to be kept free from danger during its enjoyment by a widow or other limited heir, however, the rights can only be exercised once they are matured.

36. In the instant case, if the aforesaid principles are applied, it would be for the plaintiff to have clearly pleaded his right of having succeeded to the property as a reversionery heir as that he was higher in order of succession to the widow/daughter. In order to claim the aforesaid, it was necessary for the plaintiff to have specifically pleaded and explained how he was related/connected with Nohar. He also ought to have explained and proved that upon the death of the Nohar, who were the legal heirs and when the plaintiff succeeded at that time there was no nearer heir of the deceased than the plaintiff.

37. The Apex Court in the Case of ***State of Bihar and Others Vs. Radha Krisha Singh and Others*** reported in ***1983 (3) SCC 118*** had the occasion to consider the issue of succession, the geneology, its importance and how the same is to be proved. In paragraph ***19, 24, 147*** and ***195,*** the Apex Court has held as under:-

"19. The principles governing such cases may be summarised thus:

"(1) Genealogies admitted or proved to be old and relied on in previous cases are doubtless relevant and in some cases may even be conclusive of the facts proved but there are several considerations which must be kept in mind by the courts before accepting or relying on the genealogies:

a. Source of the genealogy and its dependability.

b. Admissibility of the genealogy under the Evidence Act.

c. A proper use of the said genealogies in decisions or judgments on which reliance is placed.

d. Age of genealogies.

e. Litigations where such genealogies have been accepted or rejected.

(2) On the question of admissibility the following tests must be adopted:

a. The genealogies of the families concerned must fall within the four-corners of Section 32(5) or Section 13 of the Evidence Act.

b. They must not be hit by the doctrine of post litem motam.

c. The genealogies or the claims cannot be proved by recitals, depositions or facts narrated in the judgment which have been held by a long course of decisions to be inadmissible.

d. Where genealogy is proved by oral evidence, the said evidence must clearly show special means of knowledge disclosing the exact source, time and the circumstances under which the knowledge is acquired, and this must be clearly and conclusively proved."

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24. It is well settled that when a case of a party is based on a genealogy consisting of links, it is incumbent on the party to prove every link thereof and even if one link is found to be missing then in the eye of law the genealogy cannot be said to have been fully proved. In the instant case, although the plaintiffs have produced oral and documentary evidence to show that Ramruch Singh and Debi Singh were brothers being the sons of Bansidhar Singh this position was not accepted by the trial court as also by M.M. Prasad, J., who dissented from the other two Judges constituting the Special Bench who had taken a contrary view and had held that the plaintiffs had fully proved the entire genealogy set-up in the plaint. This, therefore, makes our task easier because we need not discuss in detail the evidence and documents to show the connection of the plaintiffs up to the stage of Gajraj Singh though we may have to refer to the evidence for the purpose of deciding the main issue viz. whether or not Gajraj Singh was the son of Ramruch Singh and Ramruch Singh a brother of Debi Singh and son of Bansidhar Singh."

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146. We would now discuss the evidence both oral and documentary in the light of the principles laid down by the aforesaid decisions. By way of introduction, it may be noted that in the present case the onus lies squarely on the plaintiff Radha Krishna Singh to prove his case by showing that he was the next reversioner of the late Maharaja and that every link in the genealogical tree which he has set out in the plaint was proved. Only after he has discharged his burden by proving the aforesaid facts, could the defendants be called upon to rebut their case. On a careful scrutiny of the evidence it seems that what the plaintiff has done is to file any and every document, deposition, statement, declaration, etc., where there is any genealogy which connects him with either the Maharaja of Banaras or his gotias without making any attempt to prove the main link on which rests the entire fabric of his case. The result has been that the plaintiffs have landed themselves into a labyrinth of delusion and darkness from which it is difficult for them to come out and the case made out by them has been reduced to smithereens and smoulders and despite all their snaring and snarling they have miserably failed to prove the pivotal point viz. the link between Ramruch Singh, Gajraj Singh, Debi Singh and Bansidhar Singh."

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195. In order to appreciate the evidence of such witnesses, the following principles should be kept in mind :

"(1) The relationship or the connection however close it may be, which

the witness bears to the persons whose pedigree is sought to be deposed by him.

(2) The nature and character of the special means of knowledge through which the witness has come to know about the pedigree.

(3) The interested nature of the witness concerned.

(4) The precaution which must be taken to rule out any false statement made by the witness post litem motam or one which is derived not by means of special knowledge but purely from his imagination, and

(5) The evidence of the witness must be substantially corroborated as far as time and memory admit."

38. This aspect of the matter has also been considered by a Division Bench of this Court in the case of ***Smt. Dharma Devi and Others Vs. Narayan Prasad Jaiswal*** reported in ***1988, (6) LCD 459*** wherein again referrring to the geneology as well as considering the issue of succession in paragraph 38 and 39, it has been held as under:-.

"38. It is an elementary principle of law that where a person claims relief on the basis of title, he has to establish the title. If he claims title to a property on the basis of inheritence, he has not only to show that he would inherit the property, but also that there was no other preferential heir alive who would exclude him. It will be useful to reproduce here a few sentences from Mogha's treatise on the "Law of Pleadings In India" 13th Edition : Page 17, as under :-

" It is common to plead that the plaintiff is the legal heir of the deceased. This is an inference of law. What the plaintiff should show is how he is connected with the deceased. He should also account for other relations who were nearer to the deceased than the plaintiff."

39. Non-existence of a nearer has to be proved by the plaintiff but what will be quantum of evidence required to prove this fact will depend upon the facts of each case."

39. Since the plaintiffs were claiming the property on the basis of inheritence as reversionery heir then the burden was on the plaintiff to prove that they are the only heirs entitled to the property with no nearer heir. This proposition has long been settled as way back as in the year 1927 when a Division Bench of this Court in the case of Javitri ***Vs. Gendan Singh and Others*** reported in ***AIR 1927 Alld. 727*** held as under:-

"It is incumbent on a plaintiff seeking to succeed to property as a reversioner to establish affirmatively the particular relationship which he puts forward. He is bound to satisfy the Court that to the best of his knowledge, there are no nearer heirs and for this purposes , he can rely on the statement of witnesses called for defence".

40. Thus, in the aforesaid backdrop, from the record, it would indicate that as far as the plaintiff is concerned, apart from making a bald statememt in the pleadings that Nohar was his cousin uncle, there has been no effort either in the pleadings or evidence to establish the link of relationship of the plaintiff with Nohar, nor it has been pleaded or proved the degree of relationship and in what class or order the plaintiff claims or how he is higher in order of succession than the widow/daughter of Nohar or of being the nearest heir of Sri Nohar upon which his right of reversionery inheritence could be established. Rather

there is no pleadings to establish the relationship of Nohar with the plaintiffs nor any evidence to said effect including on the point that at the time of plaintiff claiming right of inheritence who were the other heirs and that the plaintiffs was the nearer heir.

41. On the other hand, it is not disputed that Smt. Sughari was the widow who would have inherited the property. Though, as per the claim of the plaintiff Smt. Lalli was not the daughter of Sri Nohar whereas the defendants have specifically stated that Smt. Lalli was the daughter of Nohar.

42. The two Courts below have proceeded on the premise that Smt. Sughari had re-married with Jhinnu. In order to arrive at the aforesaid conclusion though the oral evidence as well as the evidence on the point of Ghar Baithwa Customary Marriage did not find favour with the Trial Court, however, it relied upon a decision rendered by the Consolidation Authorities wherein there was a mention regarding Smt. Sughari being the wife of Sri Jhinnu. Though, this finding was returned by the Trial Court, however, while the first appeal was filed by the plaintiff, the defendant whose specific case was that Smt. Sughari had not re-married did not file any cross appeal to assail the aforesaid finding. The aforesaid finding regarding re-marriage even though based on scanty evidence, yet the same having not been assailed, this Court is not inclined to permit the defendants to raise the aforesaid plea at this stage in exercise of powers under Section 100 C.P.C. to put the plaintiff in an even worse situation than he already is in.

43. Thus, it would evolve that upon the death of Nohar, his property would be inherited by his widow Smt. Sughari and Smt. Lalli who is said to be the daughter. Upon the re-marriage of Smt. Sughari with Jhinu in terms of Section 2 of the Hindu Widows Re-marriage Act, 1856 and The Hindu Women Rights to Property Act, 1937 she would lose her right in the property of her earlier husband.

44. Now what is required to be considered is, whether Smt. Lalli is the daughter of Nohar as pleaded by the defendants or is the daughter of Smt. Sughari or Jhinu. In this regard, apart from bald statement of the plaintiff, there is nothing on record to substantiate the version of the plaintiff. On the other hand, the defendants have filed an extract of the register of birth which indicates that a daughter was born to Sri Nohar in the year 1940 and the same has been considered by the courts below.

45. There is no evidence contrary to the aforeaid document. The relationship of Smt. Lalli and Nohar has further been corroborated by producing Sri Bukkal, the husband of Smt. Lalli who stated that Smt. Lalli was the daughter of Smt. Sughari and Nohar. This statement has been relied upon by both the two Courts below and have recorded their findings that Smt. Lalli is the daughter of Sri Nohar and Smt. Sughari. This being a finding of fact, this Court is not inclined to interfere or upset the same merely because another view may be possible.

46. Thus, the effect would be that even though Smt. Sughari lost her right of widow's estate upon re-marriage and thereupon the daughter Smt. Lalli being the nearer heir would succeed having right and title to the property to the widow's estate. Smt. Lalli thus being the owner and as she

executed the sale deed in favour of the defendantsm thus right of Smt. Lalli to execute the sale deed is upheld and this view has also been taken by the Lower Appellate Court. This Court does not find any perversity requiring any interference from this Court.

47. Now adverting to the submissions as to whether the plaintiff had perfected their rights by adverse possession. In this regard, it has been urged that though the plea was taken by the plaintiff but since no issue was framed nor any evidence was led and it has prejudiced the plaintiff. Considering the material available on record, the plea of adverse possession though incorporated in the pleading by way of an amendment, however, at no point of time any effort was made by the plaintiff to make any application under Order 14 Rule 5 for getting an additional issue framed. Even though, the aforesaid ground was raised before the First Appellate Court, yet never a real attempt was made to establish any prejudice or that the matter required a re-look nor any attempt to lead evidence before the Lower Appellate Court.

48. At this stage, it has been vehemently urged that this was a substantive plea which ought to have been considered by the two Courts below. Apparently, in the first place, this Court is of the view that the plea of adverse possession as raised by the plaintiff along with his claim as the reversioner heir is a mutually destructive plea.

49. It has now been well settled that where a party pleads adverse possession then it has to be specifically pleaded. Evidence has to be properly led. In the instant case, the basic ingridients which are required to be pleaded for adverse possession have not been pleaded. It would be noticed that a bald plea stating that the plaintiff is in possession has perfected his rights by adverse possesion has been made. It has not been averred as to who was the actualy owner against whom the possession is being claimed to be hostile and adverse. It has also not been pleaded as to when the plaintiff came in possession so that he has matured his rights as provided in Article 65 of the Limitation Act, 1960.

50. Thus, what this Court finds is that the pleading of adverse possession in the first place could not be set up by the plaintiff to claim ownership over the property when he had already taken the plea of having inherited the same as a reversioner heir. This plea being mutually destructive was not available for the plaintiff. This Court is fortified in its view in light of the decision of the Apex Court in the case of ***Gurdwara Sahib Vs. Gram Panchayat, Village Sirthala and Another*** reported in ***2014 (1) SCC 669***.

51. Even otherwise the plaintiffs have failed to lay the proper foundation regarding the plea of adverse possession. It is not the mere length of the possession which is material rather what is necessary to be pleaded and prove is that the possession must be hostile expressly or implied in denial to the title of the true owner and such possession must be adequate in continuity, publicly to show that it is adverse to the true owner. The open and hostile possession must be to the notice of the actual owner and the plaintiff is bound to prove that his possession has been for more than 12 years.

52. Another aspect needs to be noticed. The plaintiff did not lay adequate pleadings regarding the plea of adverse

possession. It was incumbent on the plaintiff to have specifically pleaded (a) on what date he came in possession; (b) what was the nature of his possession (c) whether the factum of possession was not known to the other party; (d) for how lay the possession continued; (e) and that his possession was open and undisputed.

53. This Court in the case of ***Abdul Salam Vs. Imrana Siddiqui*** reported in ***2019 SCC Online Alld 3924*** had the occasion to consider the requisites and the law regarding adverse possession and had noticed the decision of the Apex Court in the case of ***State of Haryana Vs. Mukesh Kumar and Others*** reported in ***2011 (10) SCC 404*** and also of ***Hemaji Waghaji Jat vs Bhikhabhai Khengarbhai Harijan*** reported in ***2009 (16) SCC 577*** and the relevant paragraph of the said report reads as under:-

"The court further observed that plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

54. In the aforesaid case, it has not been indicated either in the pleadings or in the evidence regarding the essential ingredients of adverse possession nor prejudice has been shown as to how and why the plaintiff could not lead the evidence, hence, merely to say that an issue has not been framed and the plaintiff could not lead the evidence, per se this submission does not impress the Court.

55. It is one thing to say that the issue was not framed and it is another that in absence of any issue, the evidence could not be led. The plaintiff has not indicated any circumstance that he could not lead the evidence merely because the issue was not framed. There was really no effort to lead the evidence on the aforesaid point nor any attempt was made before the Lower Appellate Court.

56. In view of the aforesaid, this Court does not find merit in the plea that for non-framing of the issues on the question of adverse possession though it was raised by the plaintiff in its pleadings any prejudice has been caused nor for the reasons already indicated above, this Court is not inclined to remand the matter for the aforesaid purpose and this Court is also fortified in its view in light of the decision of the Apex Court in the case of ***M.S. Jagadambal Vs. Southern Indian Education Trust and Others*** reported in ***1988 Suppl. SCC 144*** (para 12 of the said report reads as under):-

"12. We are not persuaded by the alternate contention urged by learned Counsel for the respondents. The trial court did not frame an issue as to the defendants perfecting title to the suit property by adverse possession. The defendants did not produce any evidence in support of the plea of adverse possession. It is not the case of the defendants that they were misled in their approach to the case. It is also not their case that they were denied

opportunity to put forward their evidence. It is, therefore, not proper for us at this stage to remand the case to enable the defendants to make good their lapse."

57. Thus, in view of the aforesaid discussions, this Court finds that there is no error committed by the two Courts and accordingly, the instant second appeal fails and the judgment and decree dated 17.05.1975 passed in R.S. No. 191 of 1970 and the Judgment and decree of the Lower Appellate Court dated 16.11.1982 in Civil Appeal No. 288 of 1979 are affirmed.

58. The second appeal stands dismissed, there shall be no order as to costs.

59. The office is directed to remit the record of the Trial Court to the Court concerned within a period of two weeks.

(2021)03ILR A1136
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.03.2021

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Application U/S 482 No. 12371 of 2020

Sukhraj ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Syed Wajid Ali, Sri Jai Prakash Prasad, M/s. Rachna Vyas

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

Code of Criminal Procedure -Sec. 340 and 341-Impugned order states-application u/s 340 Cr.P.C.-filed against Applicant-will be considered on merit at the time of disposal of complaint case filed by the applicant-challenged-rallel enquiry is neither proper nor feasible-Section 341 Cr.P.C. provides statutory remedy-Application dismissed. (E-7)

List of Cases cited:

1. Pritish Vs St. of Mah. & ors. (2002) 1 SCC 253

2. Iqbal Singh Marwah Vs Meenakshi Marwah 2005(2) SCC 549

3. St. of Goa Vs Jose Maria Albert Vales @ Robert Vales, (2018) 11 SCC 659,

4.Sharad Pawar Vs Jagmohan (2010) 15 SCC 290

5.St. of Punj. Vs Jasbir Singh (2020) 12 SCC 96

6. St. of Har. Vs Bhajanlal 1992 (1) SCC 335, Girish Kumar Suneja Vs C.B.I. (2017) 14 SCC 809

7. Google India (P) Ltd. Vs Visaka Industries, (2020) 4 SCC 162

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

1. Heard Shri Wajid Ali, learned counsel for the applicant, Shri Pankaj Saxena, learned A.G.A. for the State and perused the record.

2. This application/petition under Section 482 of the Code of Criminal Procedure 1973 has been filed for quashing the entire proceedings of Misc. Case No. 1064 of 2017, under Section 340 Cr.P.C. pending before the Judicial Magistrate, Sant Kabir Nagar (Abdul Taiyab versus Sukhraj) Police Station-Dudhara, District-Sant Kabir Nagar.

3. The facts of the case as per the petition as also the submission made by

learned counsel for the applicant are that one Eklakh Ahmad filed an application under Section 156(3) Cr.P.C. on 30.08.2012, against Mohd. Tayyab @ Abdul Taiyab opposite party no. 2 and others, registered as complaint case no. 1075 of 2013, which, after recording of the statement of the complainant therein under Section 200 Cr.P.C. and of the present applicant as P.W.-1 in that case was rejected in non prosecution under Section 203 Cr.P.C. by order dated 08.08.2017 passed by the Magistrate.

4. The applicant on 17.01.2017 filed an application under Section 156(3) Cr.P.C. in which the Judicial Magistrate Sant Kabir Nagar issued direction to the concerned Police Station to register a first information report against the opposite party no. 2 and in pursuance thereof an F.I.R. in Case Crime No. 1590 of 2017, Police Station-Dhudara, District-Sant Kabir Nagar, under Sections 419, 420 I.P.C., was registered. After investigation a final report was submitted against which, the applicant filed a protest petition upon which the final report was rejected and the Complaint Case No. 19/2018 was registered against the opposite party no. 2.

5. The complaint related to the alleged forged caste certificate dated 31.05.2000 on the basis of which the opposite party no. 2 contested the election of Gram Pradhan of a Gram Panchayat. Later on the Caste Certificate was cancelled by the District Level Caste Scrutiny Committee by order dated 28.12.2018, finding that the opposite party no. 2 did not belong to that caste for which the caste certificate was issued.

6. The opposite party no. 2 filed an application under Section 340 Cr.P.C. on 04.10.2017, against the applicant, which was registered as Misc. Case No. 1064 of 2017 and is pending before the Judicial Magistrate, Sant Kabir Nagar.

7. The application under Section 340 Cr.P.C. has been filed on the averments interalia that the present applicant although was a witness as P.W. 1 in Complaint Case No. 1075/2013, which was dismissed in non-prosecution on 08.08.2017, but without disclosing those facts, the applicant himself filed application under Section 156(3) Cr.P.C. against the opposite party no. 2, and as such action be taken against him.

8. By the impugned order dated 19.07.2019, the Magistrate directed that the application filed by the opposite party no. 2 under Section 340 Cr.P.C. will be decided on merits along with the Complaint Case No. 19/2018 filed by the applicant.

9. Learned counsel for the applicant submits that the application under Section 340 Cr.P.C. has been filed with ill will as the applicant was a witness under Section 202 Cr.P.c. in the Complaint Case No. 1075 of 2013, although no action has been taken by opposite party no. 2 against Iqlaq Ahmad the complainant of Case No. 1075 of 2013. He submits that the Caste Certificate of the opposite party no. 2 having been cancelled by the District Level Caste Scrutiny Committee as forged one, the applicant is not liable to be proceeded against in Case No. 1064 of 2017 under Section 340 Cr.P.C.

10. Learned counsel for the applicant further submits that the Magistrate ought to have decided the application u/s 340 Cr.P.C. at this stage and ought not to have directed for decision on merits with Complaint Case No. 19/2018.

11. Learned A.G.A. submits that by order dated 19.07.2019 only this much has been provided that the application filed by the opposite party no. 2, under Section 340 Cr.P.C. shall be considered on its own merit at the time of disposal of the complaint case filed by the applicant and so long as the Magistrate does not pass order for filing of the complaint against the applicant, the applicant has no right to challenge the proceedings of Misc. Case No. 1064 of 2017. The Magistrate has yet not directed to register complaint against the applicant.

12. Learned A.G.A. further submits that considering the stage of the proceedings and the nature of the order passed by the Magistrate the inherent powers deserves not to be invoked.

13. I have considered the submissions advanced by the learned counsel for the applicant and the learned A.G.A.

14. To appreciate the rival contentions it is necessary to consider the nature of the proceedings, the procedure prescribed, the stage of the proceedings and the right of the applicant to invoke the inherent power of this Court in a petition filed under Section 482 Cr.P.C.

15. It is apt to refer to the legal provisions of Sections 195, 340, 341 and 343 Cr.P.C. as follows:-

"195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.

(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;

(b) (i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub- clause (ii), except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.

(2) Where a complaint has been made by a public servant under clause (a) of sub- section (1) any authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the Court; and upon its receipt by the Court, no further proceedings shall be taken on the complaint: Provided that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded.

(3) In clause (b) of sub- section (1), the term" Court" means a Civil, Revenue or Criminal Court, and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this section.

(4) For the purposes of clause (b) of sub- section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within whose local jurisdiction such Civil Court in situate: Provided that-

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed.

340. Procedure in cases mentioned in section 195.

(1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub- section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,-

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by sub- section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub- section (4) of section 195.

(3) A complaint made under this section shall be signed,-

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court.

(4) In this section," Court" has the same meaning as in section 195.

*"**341. Appeal.***

(1) Any person on whose application any Court other than a High Court has refused to make a complaint under sub- section (1) or sub- section (2) of section 340, or against whom such a complaint has been made by such Court, may appeal to the Court to which such former Court is subordinate within the meaning of sub- section (4) of section 195, and the superior Court may thereupon, after notice to the parties concerned, direct

the withdrawal of the complaint, or, as the case may be, making of the complaint which such former Court might have made under section 340, and if it makes such complaint, the provisions of that section shall apply accordingly.

(2) An order under this section, and subject to any such order, an order under section 340, shall be final, and shall not be subject to revision."

343. Procedure of Magistrate taking cognizance.

(1) A Magistrate to whom a complaint is made under section 340 or section 341 shall, notwithstanding anything contained in Chapter XV, proceed, as far as may be, to deal with the case as if it were instituted on a police report.

(2) Where it is brought to the notice of such Magistrate, or of any other Magistrate to whom the case may have been transferred, that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen, he may, if he thinks fit, at any stage, adjourn the hearing of the case until such appeal is decided."

16. Section 195 Cr.P.C. deals with distinct categories of offences prescribed under Clauses (a), (b)(i), (b)(ii) and (b)(iii). Section 195(1) mandates a complaint in writing of the court for taking cognizance of the offences enumerated in clause (b) thereof. The offences mentioned in clause (b) relate to giving or fabricating false evidence or making a false declaration in any judicial proceeding or before a court of justice or before a public servant who is bound or authorized by law to receive such declaration, and also to some other offences which have a direct good co-relation with the proceedings in a court of justice.

17. Section 340 Cr.P.C. provides the procedure for filing complaint; as per the procedure prescribed, when an application is made to the Court, or even otherwise, if a Court is of the opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in Clause (b) of sub Section (1) of Section 195 Cr.P.C. which appears to have been committed in or in relation to proceedings in that court or, as the case may be in respect of a document produced or given in evidence in a proceeding in that court, such court may record a finding to that effect after such preliminary inquiry, if any, as it thinks necessary.

18. In ***Pritish versus State of Maharashtra and others (2002) 1 SCC 253*** the Hon'ble Supreme Court has held that the hub of Section 340 Cr.P.C. is formation of an opinion by the Court, before which proceedings were held, that it is expedient in the interest of justice that an inquiry should be made into an offence which appears to have been committed but, even when the court forms such an opinion it is not mandatory that the court should make a complaint. Sub section (1) of Section 195 Cr.P.C. confers power on the court to do so, but, it does not mean that the court should, as a matter of course, make a complaint. In **Iqbal Singh Marwah versus Meenakshi Marwah 2005(2) SCC 549** the Constitution Bench of the Hon'ble Supreme Court has held that under Section 340 Cr.P.C. the Court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(b), as the Section is conditioned by the words "Court is of opinion that it is expedient in the interest of justice." This shows that such a course will be adopted only if the interest of justice requires and not in every case. This expediency will normally be judged by the Court by weighing not the magnitude of injury suffered by the person

affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in Court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the Court may not consider it expedient in the interest of justice to make a complaint.

19. In **Pritish (Supra), Iqbal Singh Marwah (Supra)**, and also in the **State of Goa Vs. Jose Maria Albert Vales @ Robert Vales, (2018) 11 SCC 659,** the Hon'ble Supreme Court has held that the Court at the stage envisaged in Section 340 of the Code would not decide the guilt or innocence of the party against whom the proceedings are to be instituted before the Magistrate and at that stage the Court is to be examine as to whether it was expedient in the interests of justice that an inquiry should be made into any offence affecting the administration of justice and that no expression of the guilt or innocence of the persons should be made while passing the order under Section 340 of the Code.

20. So far as holding of a preliminary enquiry as contemplated by Section 340 Cr.P.C. is concerned in Pritish (supra) it was held that the court is empowered to hold a preliminary enquiry although it is not peremptory that such an enquiry should be held and even without such a preliminary enquiry the court can form an opinion when it appears to the court that an offence of the nature contemplated by Section 195(1)(b) has been committed in relation to a Court. In Pritish (supra) it was also held that in such preliminary enquiry, if held, an opportunity to the would-be accused before the filing of the complaint is not mandatory. However, the Hon'ble Apex Court in *Sharad Pawar versus Jagmohan (2010) 15 SCC 290* observed that it was necessary to conduct a preliminary inquiry under Section 340 Cr.P.C. and to afford an opportunity of hearing to the would-be accused. Learned A.G.A. has placed before this Court the judgment in S*tate of Punjab versus Jasbir Singh (2020) 12 SCC 9*6 wherein the Hon'ble Supreme Court has referred the matter to the Larger Bench for consideration of the questions as to whether Section 340 Cr.P.C. mandates a preliminary inquiry and an opportunity of hearing to the would-be accused, before a complaint is made under Section 195 of the Code, by a Court.

21. Section 341 Cr.P.C. provides remedy of appeal to any person on whose application a court, other than the High Court, has refused to make a complaint under sub section (1) or sub section (2) of Section 340 Cr.P.C. as also to a person against whom such a complaint has been made by such court. The appeal lies to the court to which the court passing the order is subordinate. In view of Section 341 Cr.P.C., if on the application filed under Section 340 Cr.P.C. the court passes an order for making a complaint against a person, such person may appeal to the next higher court.

22. In the present case, the opposite party no. 2 has filed an application under Section 340 Cr.P.C. upon which the Magistrate has passed the order that the same shall be decided alongwith the Complaint Case No. 19 of 2018. The

Magistrate has neither recorded any finding that in his opinion it is expedient in the interests of justice that an inquiry should be made in the offence under Section 195 (1)(b) Cr.P.C. nor has made a complaint of such an offence in writing against the applicant. It is also not the submission of the learned counsel for the applicant that the Magistrate has refused to make a preliminary inquiry as contemplated by Section 340 Cr.P.C. or that any opportunity of hearing, in such preliminary enquiry, if and when held, would not be given to the applicant.

23. So far as the submission of the learned counsel for the applicant on merits of the application under Section 340 Cr.P.C. is concerned, it is for the court concerned, at the first instance, to consider and decide the said application.

24. A parallel enquiry into the application under Section 340 by this Court under Section 482 Cr.P.C. is neither proper nor feasible. The correctness or genuineness of the averments in the application under Section 340 Cr.P.C. being question of fact can best be determined by the Court concerned for the purposes of making or not making a complaint by such Court to the court concerned. If the applicant feels aggrieved from an order of the Magistrate making a complaint against him, Section 341 Cr.P.C. provides for statutory remedy of appeal which it would be open for the applicant to avail, if required and so advised.

25. It is by now well settled that a power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of the rare cases. 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 F.I.R. or the complaint, as has been held in so many cases; to refer few, ***State of Haryana versus Bhajanlal 1992 (1) SCC 335, Girish Kumar Suneja versus C.B.I. (2017) 14 SCC 809.***

26. Recently in **Google India (P) Ltd. Vs. Visaka Industries, (2020) 4 SCC 162** the Hon'ble Supreme Court reiterated the contours of the jurisdiction of the High Court under Section 482 Cr.P.C. as also the scope of the expression "rarest of rare of cases'. Paragraphs 42, 43 and 78 read as under:-

"42. The contours of the jurisdiction of the High Court under Section 482 is no longer res integra. We would think that it is sufficient if we only advert to the judgment of this Court in State of Haryana and others v. Bhajan Lal and others17. This Court held as follows:

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

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their

face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

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

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

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

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

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

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

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."

43. As to what is the scope of the expression "rarest of rare cases" indicated in paragraph 103, we may only refer to the judgment of this Court in Jeffrey J. Diermeier and another v. State of West Bengal and another18 wherein the law laid down by a Bench of three Judges in Som Mittal v. Govt. of Karnataka19 has been referred to:

"23. The purport of the expression "rarest of rare cases", to which reference was made by Shri Venugopal, has been explained recently in Som Mittal (2) v. Govt. of Karnataka [(2008) 3 SCC 574 : (2008) 1 SCC (L&S) 910 : (2008) 2 SCC (Cri) 1] . Speaking for a Bench of three Judges, the Hon'ble the Chief Justice said: (SCC pp. 580-81, para 9) (2010) 6 SCC 243 (2008) 3 SCC 753.

"9. When the words "rarest of rare cases' are used after the words "sparingly and with circumspection' while describing the scope of Section 482, those words merely emphasise 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 emphasise that the power under Section 482 CrPC to quash the FIR or criminal proceedings should be used sparingly and with circumspection." (Emphasis supplied)

78. "..... It was in these circumstances, this Court took the following view in regard to the manner in which the matter must be approached when a party approaches High Court under Section 482 of the Cr.PC:

"28. The High Court, in exercise of its jurisdiction under Section 482 CrPC, must make a just and rightful choice. This is not a stage of evaluating the truthfulness or otherwise of the allegations levelled by the prosecution/complainant against the accused. Likewise, it is not a stage for determining how weighty the defences raised on behalf of the accused are. Even if the accused is successful in showing some suspicion or doubt, in the allegations levelled by the prosecution/complainant, it would be impermissible to discharge the accused before trial. This is so because it would result in giving finality to the accusations levelled by the prosecution/complainant, without allowing the prosecution or the complainant to adduce evidence to substantiate the same. The converse is, however, not true, because even if trial is proceeded with, the accused is not subjected to any irreparable consequences. The accused would still be in a position to succeed by establishing his defences by producing evidence in accordance with law. There is an endless list of judgments rendered by this Court declaring the legal position that in a case where the prosecution/complainant has levelled allegations bringing out all ingredients of the charge(s) levelled, and have placed material before the Court, prima facie evidencing the truthfulness of the allegations levelled, trial must be held.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:

30.1.Step one: whether the material relied upon by the accused is sound, reasonable, and indubitable i.e. the material is of sterling and impeccable quality?

30.2.Step two: whether the material relied upon by the accused would rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint i.e. the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?

30.3.Step three: whether the material relied upon by the accused has not been refuted by the prosecution/complainant; and/or the material is such that it cannot be justifiably refuted by the prosecution/ complainant?

30.4.Step four: whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5. If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to quash such criminal proceedings in exercise of power vested in it under Section 482 CrPC. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as proceedings arising therefrom) specially when it is clear that the same would not

conclude in the conviction of the accused."(Emphasis supplied)"

27. Learned counsel for the applicant has not been able to demonstrate before this Court as to under which provision of law, the applicant has a right for disposal of the application under Section 340 Cr.P.C. at this stage, as also that the Court had no jurisdiction to direct consideration of the application at the time of disposal of the applicant's Complaint Case No. 19 of 2018, on merits.

28. It could also not be established by the learned counsel for the applicant that any legal right of the applicant has been adversely affected by the order passed by the Magistrate nor that such an order or proceeding amounts to an abuse of the process of the Court.

29. I am of the considered view that it would not be in the ends of justice that the application under Section 340 Cr.P.C. be not enquired into by the court concerned as per law.

30. For the reasons aforesaid, as also that the Code of Criminal Procedure is a Complete Code, which provides for a remedy of an appeal to the person against whom an order making a complaint is passed, this Court refuses to invoke its extraordinary jurisdiction under Section 482 Cr.P.C. in the present matter. The application under Section 482 Cr.P.C. is hereby **rejected.**

31. It is clarified that this Court has not adjudicated nor commented on the merits of the application under Section 340 Cr.P.C.

32. No orders as to costs.

(2021)03ILR A1145
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.02.2021

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 16768 of 2020

Aashish Kumar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Adarsh Kumar, Sri Dipankar Chaudhari

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

(A) Criminal Law - Indian Penal Code, 1860 - Sections 498A - Husband or relative of husband of a women subjecting her to cruelty, Sections 323 - punishment for voluntry causing hurt , Sections 494 - Marrying again during lifetime of husband or wife , Sections 506 - Punishment for criminal intimidation , Dowry prohibition Act,1961 - Sections 3 - Penalty for giving or taking dowry, Section 4 - Penalty for demanding dowry - 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 - High Court cannot embark upon the appreciation of evidence while considering the petition filed under Section 482 CrPC for quashing criminal proceedings - 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. (Para - 12,26)

Applicant is husband of opposite party no.2 - opposite party no.2 lodged an F.I.R. against seven named accused persons - allegation - marriage of opposite party no.2 solemnized with the applicant - After her

marriage, she was being mentally and physically tortured by the husband-applicant as well as family members of her in-laws for non-fulfilment of additional dowry demand - Investigating Officer, after proper investigation submitted the charge sheet only against the applicant - cognizance taken by Magistrate - summoned the applicant.(Para - 5)

HELD:- Adjudication on pure questions of fact and on points of law may adequately and appropriately be adjudicated upon only by the trial court . This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. 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.(Para - 27)

Application u/s 482 Cr.P.C. disposed of. (E-6)

List of Cases cited:-

1. Rajesh Talwar Vs C.B.I. (Delhi) & anr. , 2012 (76) ACC 598

2. Iftekhar Ahmad & anr. Vs St. of U.P. & anr. , U/s 482 No. 17231 of 2006

3. Mohd. Allauddin Khan Vs The St. of Bihar & ors. , 2019 0 Supreme (SC) 454

4. Rajeev Kaurav Vs Balasahab & ors. , 2020 0 Supreme (SC) 143

5. R.P. Kapur Vs St.of Punj., AIR 1960 SC 866

6. St. of Har.& ors. Vs Ch. Bhajan Lal & ors., 1992 Supp.(1) SCC 335

7. St. of Bihar & anr. Versus P.P. Sharma & anr., 1992 Supp (1) SCC 222

8. Zandu Pharmaceuticals Works Ltd. & ors. Vs Mohammad Shariful Haque & anr., 2005 (1) SCC 122

9. M. N. Ojha Vs Alok Kumar Srivastava, 2009 (9) SCC 682

10. M.N. Ojha Vs Alok Kumar Srivastava, 2009 (9) SCC 682

11. Nallapareddy Sridhar Reddy Vs The St. of A.P. & ors. , 2020 0 Supreme (SC) 45

12. Amrawati & anr. Vs St. of U.P. ,2004 (57) ALR 290

13. Lal Kamlendra Pratap Singh Vs St. of U.P., 2009 (3) ADJ 322 (SC)

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Supplementary affidavit filed by learned counsel for the applicant today in the Court, is taken on record.

2. The present 482 Cr.P.C. application has been filed to quash the cognizance order dated 27.09.2018 as well as the entire proceedings of Criminal Case No. 51902of 2018, arising out of Case Crime No.23 of 2018, under Sections 498A, 323, 494, 506 I.P.C. as also under Sections 3/4 D.P. Act, Police Station-Mahila Thana, District-Kanpur Nagar, pending in the court of Metropolitan Magistrate-Ist, Kanpur Nagar.

3. Heard Mr. Adarsh Kumar, learned counsel for the applicant and Mr. Pankaj Srivastava, learned A.G.A. for the State as well as perused the entire material available on record.

4. Since legal submissions are being placed by the learned counsel for the applicant, therefore, this application is being heard at this stage without issuing notice to opposite party no.2 in view of the order proposed to be passed today. It is not necessary to issue notice to opposite party

no.2, as he has no right to be heard at pre-cognizance stage.

5. From perusal of material on record, it transpires that the opposite party no.2, namely, Pinki Ahirwar has lodged an F.I.R. against seven named accused persons with the allegation that the marriage of opposite party no.2 was solemnized with the applicant on 10.12.2014. After her marriage, she was being mentally and physically tortured by the husband-applicant as well as family members of her in-laws for non-fulfilment of additional dowry demand. It has also been alleged that the applicant asked the opposite party no.2 to go and reside at her parental place and after leaving her near the resident of her parents, the applicant went away. Thereafter, the applicant never contacted the opposite party no.2 and never used to receive the call of opposite party no.2. Subsequently, on 24.01.2018, the opposite party no.2 went to the place where the applicant resides and she was told by the neighbours that he had gone suddenly with his wife. When the opposite party no.2 told the neighbours that she is wife of the applicant, they told her that the applicant had told them that he was going with his wife, namely, Sumanlata, who is working in the Police Department, to Kanpur Nagar. The aforesaid fact was confirmed by the opposite party no.2 from Santosh Kumar, elder brother of applicant. When no option was left, the present F.I.R. was lodged under Sections 498A, 323, 494, 506 IPC and Section ¾ D.P. Act, Police Station-Mahila Thana, District-Kanpur Nagar. The Investigating Officer, after proper investigation, has submitted the charge sheet only against the applicant on 23.09.2018 under Sections 498A, 323, 494, 506 IPC and Section ¾ D.P. Act. On the basis of charge-sheet, cognizance has been taken by the concerned Magistrate on 27.09.2018 and summoned the applicant.

6. It has been argued by learned counsel for the applicant that the applicant is husband of opposite party no.2 and no case under the relevant sections is made out against the applicant as there is no averment either in the F.I.R. or in the statement of the witness under Section 161 Cr.P.C., that the marriage ceremony of the applicant was legally performed as per Hindu Rites and Rituals. It has been argued by learned counsel for the applicant that the concerned Magistrate without taking cognizance in accordance with law issued notices to the applicant to appear on 29.10.2018, which cannot be said to be the cognizance order in the matter. As per Rule 22 of General Rules (Criminal), upon the institution of a case an order-sheet in the prescribed form shall be opened. Upon it shall be recorded, every routine order passed by the court in the case and a note of every other order passed, including every order regarding a document produced before the court and also a note of the date of each hearing and the proceedings on that date. Rule 22 of Chapter IV of General Rules (Criminal) is reproduced herein below:-

"22. Order-Sheet-Upon the institution of a case an order-sheet in the prescribed form (Part IX, no. 10) shall be opened. Upon it shall be recorded (i) every routine order passed by the court in the case; (ii) a note of every other order passed, including every order regarding a document produced before the court; and (iii) a note of the date of each hearing and the proceedings on that date. An order the reason for which require to be recorded at length, shall not be written on the order-sheet, but only a note of the order and of

the date on which it was made, shall be entered on it. Every entry upon the order-sheet, shall be made at the earliest opportunity and shall be signed by the presiding officer."

On the basis of aforesaid Rule, he argued that the impugned order is ex-facie, illegal, arbitrary, unwarranted in law and liable to be quashed by this Court. In support of his contention, he has relied upon the Judgement of the Hon'ble Apex Court in the case of ***Rajesh Talwar vs. C.B.I. (Delhi) and another reported in 2012 (76) ACC 598.***

7. Secondly, it has been argued by learned counsel for the applicant that the offence under Section 494 IPC is non-cognizable. According to Section 498 (1)(b) of the Code, such cognizance can be taken only on the complaint filed by the person authorized under the said Section. Learned Magistrate cannot take the cognizance of such offence on Police Report. Hence, the order passed by the learned Magistrate is against the provision of law and impugned order as well as criminal proceedings is liable to be quashed. In support of his contention, he has relied upon the judgment of the Co-ordinate Bench of this Court in the case of ***Iftekhar Ahmad and another vs. State of U.P. and another passed in Application U/s 482 No. 17231 of 2006.***

8. Learned counsel for the applicants, therefore, submitted that the present criminal proceedings initiated against the applicant is 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 applicant that the proceedings of the above mentioned criminal case are liable to be quashed by this Court.

9. Per contra, Mr. Pankaj Srivastava, learned A.G.A. for the State has opposed the prayer made by the learned counsel for the applicant by contending that charge-sheet is of the year 2018, but there is no explanation in the application for the long delay of more than 2 years in challenging the criminal proceedings at such a belated stage.

10. Regarding submissions on the legal questions, learned A.G.A. has submits that there is no illegality or infirmity in the impugned cognizance order dated 27.09.2018 by which the cognizance has been taken by the learned Magistrate. The applicant can agitate his grievance at appropriate stage before the learned Magistrate. Therefore, the impugned order passed by the learned Magistrate cannot be quashed at this stage.

11. Learned A.G.A. submits that perusal of F.I.R. as well as statements of the witnesses, goes to show that, prima facie case for the alleged offence is made out against the applicant. Lastly, the learned A.G.A. states that this High Court may not quash the entire criminal proceedings under Section 482 Cr.P.C. at the pre-trial stage, 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,*** wherein 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 stage is yet to come.

12. 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.

13. 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.

14. I have considered the submissions made by the learned counsel for the parties and gone through the records of the present application.

15. This Court finds substance in the contention raised by the learned A.G.A. that prima facie case for the alleged offence is made out against the applicant. There is consistency in the prosecution story as unfolded in the first information report and statement of the informant under Section 161 Cr.P.C. In the F.I.R., there is specific allegation against the applicant regarding beating, torturing of the opposite party no.2.

16. So far as the first argument placed by the learned counsel for the applicant regarding maintaining of order sheet, the Court is of the opinion that perusal of entire records, goes to show that a proper order-sheet has already been maintained by the concerned court below mentioning therein that the charge-sheet has been placed before the court, on perusal of which, summon has been issued. The judgment of ***Rajesh Tawar (supra)*** on which learned counsel for the applicant relied upon has no relevance in the present facts of this case as in the aforesaid case, itself it has been mentioned that the taking of cognizance means the point in time when a Court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence which appears to have been committed. At the stage of taking of cognizance of offence, the Court has only to see whether prima facie there are reasons for issuing the process and whether the ingredients of the offence are there on record.

17. Second argument, made by the learned counsel for the applicant regarding fact that since Section 494 IPC is non-cognizable, therefore, learned Magistrate erred in taking cognizance of such an offence on Police Report, has also no force as the learned Magistrate has passed the cognizance order in other Sections also, which are cognizable. The judgment of ***Iftekhar Ahmad (supra)*** on which learned

counsel for the applicant relied upon has no relevance in the present facts of this case.

18. 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.

19. 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)."

20. 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."

21. 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."

22. 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)

23. 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)

24. 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. 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)

25. 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)**

26. 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)*

27. In view of the aforesaid, this Court finds that the submissions made by the applicant's learned counsel call for adjudication on pure questions of fact which may adequately be adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone

into by the trial court in this case. 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. The charge sheet has been submitted before the court concerned on 23.09.2018 but the same has been challenged before this Court on 10.11.2020 the delay whereof is about nearly two years and two months and the delay in challenging the same is also a ground for quashing the charge sheet by this Court while exercising its powers under Section 482 Cr.P.C.

28. 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.

29. 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.

30. However, it is observed that if the bail has not been obtained as yet, the applicant may appear before the court below and apply for bail within one month from today. The court below shall make an endeavour to decide the bail application keeping in view the observations made by the Court in the Full Bench decision of ***Amrawati and another Vs. State of U.P. 2004 (57) ALR 290*** and also in view of the decision given by the Hon'ble Supreme Court in the case of ***Lal Kamlendra Pratap Singh Vs. State of U.P. 2009 (3) ADJ 322 (SC).***

31. In the aforesaid period or till the date of appearance of the applicant in the court below, whichever is earlier, no coercive measures shall be taken against the applicant.

32. With the aforesaid observations, the present application under Section 482 Cr.P.C. is, accordingly**, disposed of.**

(2021)03ILR A1160
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.02.2021

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Application U/S 482 Cr.P.C. No. 35542 of 2017

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

Counsel for the Applicants:
Sri Satendra Singh, Sri Sarvesh Kumar Dubey, Sri Ajay Vikram Yadav

Counsel for the Opposite Parties:
A.G.A., Sri Hemendra Pratap Singh

Criminal Law - Code of Criminal Procedure, 1973 - Section 482- Section 202(1) – Section 2(g) - Inquiry by Magistrate-"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 which is envisaged under section 202 Cr.P.C. the witnesses are examined. 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 under section 202 of the Code.It is settled in law 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 and in the inquiry envisaged under section 202 Cr.P.C the witnesses are examined. This exercise of examination of the witnesses by the Magistrate is an inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding against those accused. If witnesses have been examined it cannot be said that any inquiry, as contemplated by Section 202 Cr.P.C. was not held.

Where the accused is residing beyond the place of jurisdiction, it is mandatory for the Magistrate to postpone the issuance of process and conduct an inquiry, which would mean the examination of witnesses u/s 202(2) of the CrPc.

Criminal Law - Code of Criminal Procedure, 1973- Section 482- Section 204- Issue of Process- Summoning an accused to face criminal trial is a serious matter. The 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 allegation in the complaint and the Magistrate, merely in view thereof, has to set the Criminal law into motion. The Magistrate has to examine the nature of the allegations made in the complaint and the evidence both oral and documentary in support thereof. The Magistrate has to apply his judicial mind to the facts of the case and the law applicable therein. He has to, prima-facie, arrive at satisfaction that the offence is made out and the accused deserves summoning for trial. Not only this, the application of judicial mind and the satisfaction must also be reflected from the order. Although, it is not required that the Magistrate should discuss in detail or make a comparative assessment of the evidence, but, mere statement that the Magistrate had gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient to demonstrate application of judicial mind; the Magistrate cannot act in a mechanical manner. At the same time, the order of summoning under section 204 Cr.P.C. does not require any explicit reasons to be stated and a detailed expression of his views is neither required nor warranted.

It is settled law that the proposed accused cannot be summoned in a mechanical manner - Order summoning the accused must reflect that the Magistrate has arrived at the satisfaction, by application of mind in a reasonable and judicious manner, that a prima facie case is made out from the contents of the complaint and from the statements of the witnesses but a detailed order is not necessary.

Criminal Law - Code of Criminal Procedure, 1973- Section 482- Exercise of jurisdiction under Section 482 Cr.P.C.- It is well settled that this power is to be exercised only in exceptional circumstances and only when a prime facie case is not made out against the accused and the criminal prosecution amounts to abuse of the process of the Court or to secure the ends of justice it is necessary to interfere. The Magistrate has been given an undoubted discretion in the matter which has to be applied judicially and once it has been applied judicially it is not for the higher Courts to substitute their discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved,

would ultimately end in conviction of the accused nor the disputed defence of the accused can be considered at that stage

It is settled law that the power u/s 482 CrPc has to be exercised sparingly and only to prevent the abuse of the process of Court or where the Magistrate has failed to exercise his discretion in a judicious manner,, however, the High Court cannot either consider the defence of the accused or appreciate disputed questions of fact as the same are matters of evidence and can be adjudicated upon only during the course of trial. (Para 11, 15, 18, 28, 31)

Criminal Application accordingly rejected. (E-2)

Judgements/ Case law cited / relied upon:-

1. National Bank of Oman Vs Barakara Abdul Aziz & anr. (2013) 2 SCC 488(cited)

2. Ram Dev Food Products Pvt. Lt. Vs St. of Guj., (2015) 6 SCC 439(cited)

3. M/s Pepsi Foods Ltd. Vs Special Judicial Magistrate, AIR 1998 SC 128(cited)

4. Vijay Dhanuka Vs Najzma Mamtaj (2014) 14 SCC 638

5. "Birla Corporation Ltd Vs Adventz Investments & Holdings (2019) 16 SCC 610.

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

7. Bhushan Kumar Vs State (NCT of Delhi) AIR 2012 SC 1747

8. Anil Kumar Vs M. K. Aiyappa & anr, (2013) 10 SCC 705

9. R.R. Kapur Vs St. of Punj.,AIR 1960 SC 866

10. St. of Har. Vs Bhajan Lal, AIR 1992 SC 604

11. Sonu Gupta Vs Deepak Gupta, (2015) 3 SCC 424

12. Harshendra Kumar D. Vs Rebatilata Koley & ors. (2011) 3 SCC 351

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

1. Heard Sri Ajay Vikram Yadav, learned counsel for the applicants, Sri Azad Singh, learned AGA appearing for the State/opposite party.

2. No one responded for the opposite party no.2 even in the revised call.

3. This application under Section 482 of the Criminal Procedure Code, 1973 (Cr.P.C.) has been filed with prayer to quash the order dated 06.05.2017, passed by the learned Additional Chief Judicial Magistrate, Sadabad, District Hathras, in Criminal Complaint Case No.1256 of 2016 (Murarilal Vs. Omprakash and others), under Sections 323, 342, 379 and 504 IPC, Police Station Sadabad, District Hathras, as also the entire proceedings of the said complaint case.

4. Briefly stated facts of the case as per the application/petition are that the marriage of the daughter of applicant no.1 was solemnized with the son of opposite party no.2 as per Hindu Rites and Rituals, in which huge amount was spent and so many gifts were presented to the opposite party no.2. The opposite party no.2 and his family persons after sometime of marriage, started demanding additional dowry and as the demand could not be fulfilled the opposite party no.2 alongwith his family persons started harassment and ill treatment to the daughter of the applicant and also committed maar-peet with her. On 25.09.2016 she was thrown out of matrimonial home. On 26.09.2016, the daughter of the applicant no.1 lodged a first information report against the opposite

party no.2 and his family members which was registered as Case Crime No. 1211 of 2016, under Sections 323, 498-A, IPC and Section 3/4 D.P. Act, Police Station Kotwali, District Mainpuri. She was medically examined at District Hospital, Mainpuri on 26.09.2016.

5. The opposite party no.2, as a counter blast and to create pressure to make settlement moved an application under Section 156(3) Cr.P.C. on 20.10.2016 which was treated as a complaint case by the Additional Chief Judicial Magistrate, Sadabad, District Hathras. After recording the statement of the complainant under Section 200 Cr.P.C. and of the witnesses under Section 202 Cr.P.C., the Magistrate passed the summoning order dated 06.05.2017 summoning the applicants to face trial under Sections 323, 342, 379, 504, IPC.

6. Learned counsel for the applicant submits that the accused persons are residents of a place outside the territorial jurisdiction of the Magistrate, concerned and as such an enquiry under Section 202 Cr.P.C. must have been held which was not held and therefore, the order is bad. He further submits that the order under challenge has been passed mechanically and without judicious application of mind. Learned counsel for the applicant has placed reliance on the judgments of Hon'ble the Supreme Court in ***National Bank of Oman versus Barakara Abdul Aziz & Another (2013) 2 SCC 488; Ram Dev Food Products Pvt. Lt. Vs. State of Gujarat, (2015) 6 SCC 439 and M/s Papsi Foods Limited Vs. Special Judicial Magistrate, AIR 1998 SC 128,*** in support of his above submissions.

7. Learned A.G.A. appearing for the State submits that the summoning order has been passed on the basis of the material available on record before the learned Civil Judge (JD)/Judicial Magistrate. The Magistrate was satisfied that a prima-facie case for summoning was made out. The satisfaction is based on the material on record. He further submits that the enquiry under Section 202 Cr.P.C., was held as two witnesses were examined. He submits that any particular mode of enquiry is not prescribed under the Code. He has placed reliance on the judgments in the cases 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 submission as advanced by the learned counsel for the applicant, learned A.G.A. and perused the material on record.

9. I proceed to consider the first submission of the learned counsel for the applicants. The submission is that from the complaint itself it was evident that the accused applicants are residents of District Mainpuri which fell out side the territorial jurisdiction of the concerned Magistrate, as such, it was incumbent on the Magistrate to hold enquiry as provided by Section 202 Cr.P.C.

10. So far as, holding of an inquiry by the 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 Section 202 Cr.P.C. as amended w.e.f. 23.06.2006 provides 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 over 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 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. As, 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 accused persons in general; and the law further imposes a mandate to hold enquiry under Section 202 Cr.P.C, if the accused is residing at a place beyond the area of exercise of jurisdiction of the concerned Magistrate. Issuance of process is not to be mechanical nor can it be made an instrument of harassment to the accused. Lack of material particulars, non-application of mind to the materials and not holding enquiry in cases, where it is mandatory, 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. He failed to carry out any inquiry or order investigation as contemplated under the amended section 202 Cr.P.C. The said amendment was not noticed by the Magistrate. 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 that order. Paragraph nos. 8, 9, 10 , 11 and 12 of ***National Bank of Oman (Supra)*** read 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 is 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"*** the residence of the accused was shown at a place beyond the territorial jurisdiction of the Magistrate. The Magistrate had issued process after examination of the complainant and two witnesses. The questions arose for determination were (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 Magistrate before issuing summons held inquiry as mandated by section 202 Cr.P.C. ?

14. In ***Vijay Dhanuka (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, the Hon'ble Supreme Court in Vijay Dhanuka (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 which is envisaged under section 202 Cr.P.C. the witnesses are examined. 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 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 inUdai Shankar Awasthiv.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 ***"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, it is settled in law 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 and in the inquiry envisaged under section 202 Cr.P.C the witnesses are examined. This exercise of examination of the witnesses by the Magistrate is an inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding against those accused. If witnesses have been examined it cannot be said that any inquiry, as contemplated by Section 202 Cr.P.C. was not held.

19. In the present case, the statement of the witnesses were recorded under Section 202 Cr.P.C. as is admitted to the applicants vide paragraph no.9 of the affidavit, wherein, it has been stated that the statement of PW-1, Balkishan, and PW-2 Mukesh Chandra were recorded under Section 202 Cr.P.C. by the court concerned.

20. The statement of the complainant/opposite party no.2 was recorded on 08.03.2017 and the statement of the witnesses P.W.-1 and P.W.-2 were recorded on 07.04.2017.

21. In view of the above, this Court finds that there was postponement of issuance of process, after recording the statement of the complainant and by recording the statements of the witnesses on a later date i.e. 07.04.2017, the enquiry under Section 202 Cr.P.C. was also held before passing the summoning order.

22. **National Bank of Oman (Supra)** relied upon by the learned counsel for the applicants, was a case of no enquiry under Section 202 Cr.P.C, as is evident from

paragraphs 8 and 11 of the report. The amended provision of Section 202 Cr.P.C. was not noticed by the concerned Magistrate and the process was issued merely on the statements recorded under Section 200 Cr.P.C.

23. Now I proceed to consider the next submission of the learned counsel for the applicants that the summoning order has been passed mechanically and without application of judicial mind.

24. In **M/s Pepsi Foods Ltd. (Supra)** the Hon'ble Supreme Court held in paragraph no.28 that 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. 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."

25. In **Birla Corporation Limited (Supra)**, the Hon'ble Supreme Court has held as under in paragraph 54:-

"54. While ordering issuance of process against the accused, the Magistrate must take into consideration the averments in the complaint, statement of the complainant examined on oath and the statement of witnesses examined. As held in Mehmood Ul Rehman, since it is a process of taking a judicial notice of certain facts which constitute an offence, there has to be application of mind whether the materials brought before the court would constitute the offence and whether there are sufficient grounds for proceeding against the accused. It is not a mechanical process."

26. In **GHCL Employees Stock Option Trust Vs. India Infoline Ltd. (2013) 4 SCC 505**, the Hon'ble Supreme Court has held as under in paragraph 14:-

"14. Be that as it may, as held by this Court, summoning of accused in a criminal case is a serious matter. Hence, criminal law cannot be set into motion as a matter of course. The order of Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The Magistrate has to record his satisfaction with regard to the existence of a prima facie case on the basis of specific allegations made in the complaint supported by satisfactory evidence and other material on record."

27. In the case of **Bhushan Kumar Vs. State (NCT of Delhi) AIR 2012 SC 1747**, the Hon'ble Supreme Court has reiterated the above principles. It has been further held that the summoning order under Section 204 of the code requires no explicit reasons to be stated, because, it is imperative that the Magistrate must have taken notice of the accusations and applied his mind to the allegations made in the

police report and the material filed therewith. Paragraph nos. 13 to 15 of Bhushan Kumar (supra), read as follows:

"13) In Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi & Ors. (1976) 3 SCC 736, this Court held that it is not the province of the Magistrate to enter into a detailed discussion on the merits or demerits of the case. It was further held that in deciding whether a process should be issued, the Magistrate can take into consideration improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. It was further held that once the Magistrate has exercised his discretion, it is not for the High Court, or even this Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused.

14) In Dy. Chief Controller of Imports & Exports vs. Roshanlal Agarwal & Ors. (2003) 4 SCC 139, this Court, in para 9, held as under:

9. In determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is 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. This question was considered recently in U.P. Pollution Control Board v. Mohan Meakins Ltd.(2000) 3 SCC 745 and after noticing the law laid down in Kanti Bhadra Shah v. State of W.B. (2000) 1 SCC 722, it was held as follows: (SCC p. 749, para 6)

"The legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process. There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons. The process issued to accused cannot be quashed merely on the ground that the Magistrate had not passed a speaking order."

15) In U.P. Pollution Control Board vs. Dr. Bhupendra Kumar Modi & Anr., (2009) 2 SCC 147, this Court, in paragraph 23, held as under:

It is a settled legal position that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused."

28. The law is clear and settled that summoning an accused to face criminal trial is a serious matter. The 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 allegation in the complaint and the Magistrate, merely in view thereof, has to set the Criminal law into motion. The Magistrate has to examine the nature of the allegations made in the complaint and the evidence both oral and documentary in support thereof. The Magistrate has to apply his judicial mind to the facts of the case and the law applicable therein. He has to, prima-facie, arrive at satisfaction that the offence is made out and the accused deserves summoning for trial. Not only

this, the application of judicial mind and the satisfaction must also be reflected from the order. Although, it is not required that the Magistrate should discuss in detail or make a comparative assessment of the evidence, but, mere statement that the Magistrate had gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient to demonstrate application of judicial mind; the Magistrate cannot act in a mechanical manner, as has been held also in **Anil Kumar Vs. M. K. Aiyappa and another, (2013) 10 SCC 705**. At the same time, the order of summoning under section 204 Cr.P.C. does not require any explicit reasons to be stated and a detailed expression of his views is neither required nor warranted as held in **Bhushan Kumar Vs. State (NCT of Delhi) AIR 2012 SC 1747.**

29. In view of the above position in law, the submission of the learned counsel for the applicants is correct on principles, but, the question is if the order under challenge does or does not stand the test of the above settled law.

30. Before dealing with the above question the scope of interference with the summoning order in the exercise of jurisdiction under Section 482 Cr.P.C. also deserves consideration.

31. So far as the power of this Court under Section 482 Cr.P.C. against the summoning order is concerned it is well settled that this power is to be exercised only in exceptional circumstances and only when a prime facie case is not made out against the accused and the criminal prosecution amounts to abuse of the process of the Court or to secure the ends of justice it is necessary to interfere. The Magistrate has been given an undoubted discretion in the matter which has to be applied judicially and once it has been applied judicially it is not for the higher Courts to substitute their discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused nor the disputed defence of the accused can be considered at that stage, as has been held by Hon'ble the 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 AIR 1992 SC 604,** and in **Bhushan Kumar (Supra).**

32. 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."

33. **In Birla Corporation Limited (Supra)**, also the Hon'ble Supreme Court laid down the scope of Section 482 Cr.P.C..

It is apt to reproduce paragraph 84 thereof as under:-

84. It is well settled that the inherent jurisdiction under Section 482 Cr.P.C. is designed to achieve a salutary purpose and that the criminal proceedings ought not to be permitted to degenerate into a weapon of harassment. When the Court is satisfied that the criminal proceedings amount to an abuse of process of law or that it amounts to bringing pressure upon the accused, in exercise of the inherent powers, such proceedings can be quashed. In Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Others (1976) 3 SCC 736, the Supreme Court reviewed the earlier decisions and summarised the principles as to when the issue of process can be quashed and held as under:-

"5. ..... Once the Magistrate has exercised his discretion it is not for the High Court, or even this Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These considerations, in our opinion, are totally foreign to the scope and ambit of an inquiry under Section 202 of the Code of Criminal Procedure which culminates into an order under Section 204 of the Code. Thus it may be safely held that in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside:

(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings."

34. In ***Harshendra Kumar D. 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. The same has been reiterated in **Anita Malhotra Vs. Apparel Promotion Council, (2012) 1 SCC 520.**

35. Keeping in view the above principles, I proceed to consider if the order passed by the Magistrate summoning the accused is legal or not, in the light of the submissions advanced by the learned counsel for the applicants.

36. A perusal of the order shows that it is not mechanical one. It reflects consideration of

the statements of the complainant and of the witnesses. The Magistrate has summoned not all the opposite parties arrayed as accused in the complaint, but, has summoned only the applicants. The Magistrate has recorded in his order that prima facie case for summoning under Sections 323, 342, 379, 504, IPC was made out. This clearly demonstrates consideration of the statements of the complainant and the witnesses, and of application of judicial mind to arrive at the satisfaction for summoning under the sections for which offences were prima facie made out against the applicants only.

37. Learned counsel for the applicants could not successfully demonstrate before this Court as to how the summoning order suffers from illegality or perversity or improper exercise of jurisdiction or that any case for summoning the accused persons, was not made out even prima facie, on the basis of the averments in the complaint and the material on record.

38. So for as the submission of the learned counsel for the applicants that the applicants have been falsely implicated, the same cannot be determined at this stage in the exercise of the jurisdiction under Section 482 Cr.P.C. as the said submissions require adjudication on the basis of evidence and can be determined during trial. The submission that the applicants have been implicated due to the F.I.R. lodged by them against the opposite party no.2 and his family members, as a counter blast, cannot form the basis for interference with the summoning order, particularly when it could not be established that the averments of the complaint alongwith the material on record do not make out prima-facie, commission of any offence by the applicants and also when the date of the incident as mentioned in the FIR and the complaint filed by opposite party no.2 is the same.

39. Lastly, it was also submitted that the complaint was filed with delay, as it was filed on 20.10.2016 whereas the alleged incident is dated 26.09.2016. The Court is not convinced for the reasons more than one. Ordinarily, delay in filing complaint by itself cannot be a ground to quash the criminal prosecution. Further, the delay does not appear to be inordinate. Besides paragraph 4 of the complaint mentions that on 26.09.2016 when the complainant approached the concerned Police Station, his report was not lodged. An application to the Superintendent of Police concerned is also said to have been sent through registered post but when any action was not taken, the complaint under Section 156(3) Cr.P.C. was filed on 20.10.2016.

40. The order passed by the 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 order and the further proceedings of the complaint case is refused.

41. This application under Section 482 Cr.P.C. is hereby **rejected**.

42. No order as to costs.

(2021)03ILR A1173
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.02.2021

BEFORE

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

Application U/S 482 Cr.P.C. No. 19804 of 2020

Ajmer ...Applicant

Versus

State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Atul Tej Kulshrestha

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

Criminal Law - Code of Criminal Procedure, 1973- Section 311- Section 482- Criminal Application against order rejecting application under section 311 CrPc- Maintainability of -The orders issued by the trial court on an application filed under Section 311 Cr.P.C. are interlocutory in nature and a revision against such order is barred under Section 397(2) Cr.P.C.- Even otherwise the availability of alternative remedy of revision under Section 397 Cr.P.C. by itself would not constitute a bar for entertaining an application under Section 482 Cr.P.C.

As the orders passed by the trial court upon an application filed u/s 311 of the CrPc are interlocutory in nature, hence the same can only be challenged through an application u/s 482 of the CrPc instead of a criminal revision.

Criminal Law - Code of Criminal Procedure, 1973- Section 311 - The power conferred has been held to be discretionary and is to enable the court to determine the truth after discovering all relevant facts and obtaining proper proof thereof to arrive at a just decision in the case. The power conferred under Section 311 is to be invoked by the court to meet the ends of justice, for strong and valid reasons and it is to be exercised with great caution and circumspection. The determinative factor in this regard would be whether the summoning or recalling of the witness is in fact, essential to the just decision of the case keeping in view that fair trial - which entails the interests of the accused, the victim and of the society - is the main object of the criminal procedure and the court is to ensure that such fairness is not hampered or threatened in any manner.

The power u/s 311 CrPc, though discretionary, is to be exercised sparingly and with circumspection for the just decision of the case and for ensuring fairness of the trial. (Para 4,5, 20,21)

Criminal Application rejected. (E-2)

Case Law/ Judgements relied upon:-

1. Seturaman Vs Rajamanickam (2009) 5 SCC 153

2. Dhariwal Tobacco Products Ltd. Vs St. of Maha., 2009 AIR (SC) 1032

3. Prabhu Chawla Vs St. of Raj. & anr. 2016 AIR (SC) 4245

4. Mohanlal Shamji Soni Vs U.O.I & anr., AIR 1991 SC 1346

5. U.T. of Dadra & Nagar Haveli Vs Fatehsinh Mohansinh Chauhan, (2006) 7 SCC 529

6. Zahira Habibullah Sheikh & anr. Vs St. of Guj. & ors., (2004) 4 SCC 158

7. P. Sanjeeva Rao Vs St. of A.P. (2012) 7 SCC 56

8. Natasha Singh Vs CBI, (2013) 5 SCC 741

9. Rajaram Prasad Yada Vs St.of Bih. & anr, (2013) 14 SCC 461

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

1. Heard Sri Atul Tej Kulshrestha, learned counsel for the applicant and Sri Ratnendu Kumar Singh, learned Additional Government Advocate appearing for the State - opposite party.

2. The present application under Section 482 Cr.P.C. has been filed seeking to quash the order dated 11.09.2020 passed by the learned Additional Sessions Judge, Court No.11, Muzaffarnagar in S.T. No.575 of 2015 (State Vs. Jai Singh and others), under Section 307 I.P.C., P.S. Bhopa, District Muzaffarnagar to the extent that the request for summoning Dr. Sandeep Bansal, Guru Teg Bahadur

Hospital, Dilshad Garden, Delhi and the doctors at Anand Hospital, Meerut and AIIMS Hospital, New Delhi as witnesses to prove the medical reports prepared by them, has been refused.

3. In response to an objection taken by the learned Additional Government Advocate with regard to the entertainability of the present application the learned counsel for the applicant submits that the order passed by the learned Additional Sessions Judge under Section 311 Cr.P.C. is of an interlocutory nature and accordingly the remedy of revision against the said order is barred in terms of Section 397(2) Cr.P.C. To support his contention reliance has been placed on the decision in **Seturaman v Rajamanickam**1, wherein it has been held that the orders issued by the trial court on an application filed under Section 311 Cr.P.C. are interlocutory in nature and a revision against such order is barred under Section 397(2) Cr.P.C. The relevant observations made in the decision are as follows:-

"5. Secondly, what was not realised was that the orders passed by the trial court refusing to call the documents and rejecting the application under Section 311 CrPC, were interlocutory orders and as such, the revision against those orders was clearly barred under Section 397(2) CrPC. The trial court, in its common order, had clearly mentioned that the cheque was admittedly signed by the respondent-accused and the only defence that was raised, was that his signed 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 CrPC for production of documents and other on the application under Section 311 CrPC 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…"

4. Having regard to the aforesaid, the objection with regard to the entertainability of the petition cannot be sustained inasmuch as the remedy of revision is not available against the order passed under Section 311 Cr.P.C.

5. Even otherwise the availability of alternative remedy of revision under Section 397 Cr.P.C. by itself would not constitute a bar for entertaining an application under Section 482 Cr.P.C., as held in **Dhariwal Tobacco Products Ltd. *v* State of Maharashtra**2 and affirmed in **Prabhu Chawla *v* State of Rajasthan** and another3.

6. As per the case set up by the applicant/informant, upon an F.I.R. lodged on 22.07.2014, registered as Case Crime No.176 of 2014, under Sections 147, 148, 149, 452, 307, 506 I.P.C., P.S. Bhopa, District Muzaffarnagar, the case was investigated and Charge Sheet No.261 of 2014 was submitted on 16.10.2014.

7. An application (paper no.175 *Kha*) under Section 311 Cr.P.C. is stated to have been filed by the applicant/informant on 02.09.2020 before the learned Additional District and Sessions Judge, Court No.11, Muzaffarnagar wherein it was contended that certain medical reports had not been proved and for the said purpose the doctors may be summoned as witnesses.

8. Learned Additional Sessions Judge partly allowed the aforesaid application and summoned the doctor at Meerut for being examined as witness whereas the request for summoning the other doctors has been refused. Aggrieved against the aforesaid order, the present application has been preferred.

9. The order passed by the learned Additional Sessions Judge indicates that against the application filed by the applicant/informant, objections (paper no.176 *Kha*) were filed by the accused questioning the maintainability of the said application on the ground that powers under Section 311 Cr.P.C. were to be exercised by the court concerned on its discretion and not at the behest of the applicant/informant. It was also stated that the prosecution evidence having already been closed the application seeking summoning of witnesses had been filed only with a view to delay the proceedings, and accordingly, the application was liable to be rejected.

10. The learned Additional Sessions Judge upon a due consideration of the material facts and the contentions raised by the parties has held that the injured, Ashok, was initially examined at the District Hospital, Muzaffarnagar and the medical report was prepared which is on record. He was thereafter referred to Anand Hospital, Meerut for further treatment and the doctor at the said hospital prepared a supplementary report which was also on record alongwith the case diary. It was only thereafter that the injured went to Guru Teg Bahadur Hospital, Delhi for further treatment. The court below has held that the treatment at Delhi was only in respect of some swelling in his leg and for the purpose of the case the necessary evidence by way of the injury reports prepared by the doctors at Muzaffarnagar and Meerut were already on record.

11. The court below exercising its discretion has partly allowed the application filed by the applicant/informant and summoned the medical expert/doctor from Meerut and held that the subsequent treatment of the injured at Delhi would not be of any material consequence to the trial and accordingly the prayer to summon the doctor at New Delhi has been declined.

12. Learned counsel for the applicant has sought to contend that all the doctors in question having examined the injured and prepared the medical reports were required to be summoned and the court below has erred in allowing the application only for summoning of one of the doctors. He submits that the applicant being the informant there was no question that the application had been filed to delay the trial.

13. Learned Additional Government Advocate has controverted the aforesaid submissions by contending that the power to summon witnesses under Section 311 Cr.P.C. is purely discretionary and in the present case the prosecution evidence having been closed, the application filed by the applicant/informant could not be said to be *bona fide* and the court below having exercised its discretionary jurisdiction in the matter no interference was called for.

14. The nature and scope of the power of the court to summon, examine, recall and re-examine any witness in the context of Section 311 Cr.P.C. (and also the corresponding provision as contained in Section 540 of the Old Code of 1898) was subject matter of consideration in **Mohanlal Shamji Soni v Union of India**

and another4, and it was held that the power in this regard is in the widest terms exercisable at any stage so long as the court is in *seisin* of the proceeding as may be considered essential for a just decision of the case. It was stated thus:-

"9. The very usage of the words such as 'any court', 'at any stage', or 'of any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. 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.

10. 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. Nonetheless if either of the parties withholds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the court can draw a presumption under illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the presiding officer of a court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a court must discharge its statutory functions - whether discretionary or obligatory - according to law in dispensing justice because it is the duty of a court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the New Code) are enacted whereunder any court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

15. In **U.T. of Dadra and Nagar Haveli v Fatehsinh Mohansinh Chauhan**5, while considering the power of the court to summon material witnesses under Section 311 Cr.P.C., it was held that the said power can be exercised only with the object of finding out the truth or obtaining proper proof of facts which may lead to a just and correct decision. The observations made in the judgment in this regard are as follows:-

"15. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 CrPC 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 the 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."

16. The nature, scope and object of Section 311 Cr.P.C. came to be extensively discussed in **Zahira Habibullah Sheikh (5) and another v State of Gujarat and others**6, and it was held that the underlying object of the provision 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 observations made in the judgment are as follows:-

"26. In this context, reference may be made to Section 311 of the Criminal Procedure Code which reads as follows:

"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."

The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequences, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon any one as a witness, or (b) to examine any person present in court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

27. 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 Magistrate 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 any 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 the wider the power the greater is the necessity for application of judicial mind.

28. As indicated above, the section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short, 'Evidence Act') are based on this rule. 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 side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be "filling of loopholes". This is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

29. The object of the Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society..."

17. A similar view was reiterated in **P. Sanjeeva Rao v State of A.P.**7, after referring to the earlier decisions in **Hoffman Andreas v Inspector of Customs**8**, Mohanlal Shamji Soni v Union of India**4 **and Maria Margarida Sequeria Fernandes v Erasmo Jack de Sequeria**9, and it was stated as follows:-

"20. Grant of fairest opportunity to the accused to prove his innocence is the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs, Amritsar (2000) 10 SCC 430. The following passage is in this regard apposite: (SCC p. 432, para 6)

"6. ...In such circumstances, if the new Counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and

courts should afford the opportunity to them in the fairest manner possible."

21. The extent and the scope of the power of the court to recall witnesses was examined by this Court in Mohanlal Shamji Soni v. Union of India 1991 Supp (1) 271, wherein this Court observed: (SCC p. 283, para 27)

"27. The principle of law that emerges from the views expressed by this court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair-play and good sense appear to be the only safe guides and that only the requirements of justice command and examination of any person which would depend on the facts and circumstances of each case."

22. Discovery of the truth is the essential purpose of any trial or enquiry, observed a three-Judge Bench of this Court in Maria Margarida Sequeira Fernandes v. Erasmo Jack de Sequeira (2012) 5 SCC 370. A timely reminder of that solemn duty was given, in the following words: (SCC p. 384, para 35)

"35. What people expect is that the court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice."

23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself."

18. Considering the scope and object of Section 311 Cr.P.C. in **Natasha Singh v CBI**10, it was held that the power conferred is to 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. It was stated as under:-

"15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause

serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal, however, must be given to the other party. The power conferred under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as "any court', "at any stage', or "or any enquiry, trial or other proceedings', "any person' and "any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should, therefore, be whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardised. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. (Vide Talab Haji Hussain v. Madhukar Purshottam Mondkar AIR 1958 SC 376, Zahira Habibulla H. Sheikh v. State of Gujarat AIR 2004 SC 3114, Zahira Habibullah Sheikh (5) v. State of Gujarat AIR 2006 SC 1367, Kalyani Baskar (Mrs.) v. M.S. Sampoornam (2007) 2 SCC 258, Vijay Kumar v. State of U.P (2011) 8 SCC 136 and Sudevanand v. State (2012) 3 SCC 387)"

19. The nature and scope of the powers to be exercised by the court under Section 311 Cr.P.C. was elaborately considered in the case of **Rajaram Prasad Yadav *v* State of Bihar and another**11 and after considering the earlier precedents, the principles to be followed by the courts with regard to exercise of powers under the said section have been explained and enumerated. It has been stated thus:-

"14. A conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "*any*" has been used as a prefix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the

just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 CrPC. It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

x x x

17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 CrPC read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the courts:

17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?

17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a 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.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for

further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that 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.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power under Section 311 CrPC must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

20. The power to summon material witnesses under Section 311 Cr.P.C. which falls under Chapter XXIV containing the general provisions as to inquiries and trials has been held to confer a very wide power on the courts for summoning witnesses and accordingly the discretion conferred is to be exercised judiciously as wider the power the greater is the necessity for application of judicial mind.

21. The power conferred has been held to be discretionary and is to enable the court to determine the truth after discovering all relevant facts and obtaining proper proof thereof to arrive at a just decision in the case. The power conferred under Section 311 is to be invoked by the court to meet the ends of justice, for strong and valid reasons and it is to be exercised with great caution and circumspection. The determinative factor in this regard would be whether the summoning or recalling of the witness is in fact, essential to the just decision of the case keeping in view that fair trial - which entails the interests of the accused, the victim and of the society - is the main object of the criminal procedure and the court is to ensure that such fairness

is not hampered or threatened in any manner.

22. In the case at hand the court below has duly considered the facts and circumstances of the case and the material evidence on record to exercise its discretionary jurisdiction to partly allow the application filed by the applicant/informant to summon the doctor from Meerut who had examined the injured and prepared the report which was on record alongwith the case diary, and taking note of the fact that the subsequent treatment at Guru Teg Bahadur Hospital, Delhi and AIIMS Hospital, New Delhi was only in respect of some swelling in the leg of the injured and that the same would not be of any material consequence to the trial, the request to summon the other doctors has been declined.

23. Counsel for the applicant has not been able to dispute the aforestated legal position with regard to the exercise of power of the court under Section 311 Cr.P.C. and has not been able to point out any material error or illegality in the exercise of the aforesaid discretion by the court below so as to warrant interference.

24. Having regard to the aforesaid, this court is not inclined to exercise its inherent jurisdiction under Section 482 Cr.P.C. to interfere in the matter.

25. The application stands accordingly dismissed.

(2021)03ILR A1184
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.02.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 2278 of 2015

Hansraj Singh ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Ajay Pandey, Sri Vindeshwari Prasad

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

Criminal Law - Indian Penal Code, 1860 - Section 302 - Indian Evidence Act, 1872- Section 25 & 27- The F.I.R. shows that deceased who was the wife of the appellant was in the matrimonial home when her dead body was found and the accused was found running from his house at night - He has been convicted because of the inculpatory statement made by him and because the knife alleged to be instrument of offence was recovered at his behest-The deceased died out of homicidal death- The accused had pointed out the dagger but this would be hit by the provisions of section 27 of the Evidence Act. whether the whole confessional statement in the first information report was banned by s. 25 of the Evidence Act or only those portions of it were barred which related to the actual commission of the crime-

It is settled law that although confession before a police officer is not admissible in evidence but that part of the statement where a disclosure is made leading in turn to the discovery and recovery distinctly relating to the offence, is admissible in evidence.

Evidence Law - Indian Evidence Act, 1872- Section 27- Even his statement under 27 of the Evidence Act he has mentioned "तैश में आके मैंने ये कदम लिया है**" which means that there was no premeditation but**

under sudden grave provocation the act was submitted, therefore we will have to look into the fact whether the offence if any is made out or not.

Where the evidence indicates that the accused acted out of grave and sudden provocation then the offence would fall under Section 304 of the IPC.

Criminal Law - Indian Penal Code, 1860 - Section 299- Section 302- Section 304- Culpable Homicide- Murder and culpable homicide not amounting to murder - It is a matter of fact as it transpires from the F.I.R. and as we have held that it is homicidal death but not murder- The accused husband had no intention of doing away of his wife but in heat of the moment the incident has occurred.

Where the accused has acted under grave and sudden provocation, in the heat of the moment with intention of causing death but without the knowledge that the act is likely to cause death, then the offence would be of culpable homicide not amounting to murder, as provided under section 304 of the IPC.Conviction accordingly altered to Section 304 read with Section 34 IPC. (Para 16, 19, 20, 21, 22)

Criminal Appeal partly allowed. (E-2)

Judgements/ Case law relied upon:-

1. Sharad Birdi Chandra Sharda Vs St. of Maha., 1984 SCC (Crl) 487(cited)

2. Padala Veerareddy Vs St. of A.P, AIR 1990 SC 79 (cited)

3. Amit Singh Bheekam Singh Thakur Vs St. of Maha., 2007 (1) ACR 543 (SC) (cited)

4. Palvinder Kaur Vs St. of Punj., 1952 AIR 354 (cited)

5. Aghnoo Nagisia Vs St. of Bih., 1966 AIR 119 (cited& relied)

6. Santosh Vs St. of U.P. dec. on 22.02.2021 in Crl. Appeal No.5657 of 2011(relied)

7. State of Orissa Vs Banabihari Mohapatra, S.L..P (Crl.) No.1156 of 2021(relied)

(Delivered by Hon'ble Kaushal Jayendra Thaker, J.
&
Hon'ble Gautam Chowdhary, J.)

1. Heard Shri Vindeshwari Prasad, learned counsel for the appellant and learned A.G.A. for the State.

2. This appeal, arises out of judgment and order dated 13.04.2015 passed by court of Additional Sessions Judge, Kaushambi, in Sessions Trial No. 218 of 2008, (State Vs. Hansraj Singh) arising out of Case Crime No. 181 of 2008, under Sections 302, 307 I.P.C., Police Station- Sarai Akil, District- Kaushambi, whereby the accused has been convicted for life imprisonment for commission of offence under section 302 I.P.C. with fine of Rs.10,000/- and for seven years for commission of offence under section 307 I.P.C. with fine of Rs.5,000/- and further period of 6 months additional imprisonment in default payment of fine.

3. The F.I.R. shows that deceased who was the wife of the appellant was in the matrimonial home; when her dead body was found and the accused Hansraj was found running from his house at night and on his way he injured Shiv Singh with the intention to cause his death. The F.I.R. was lodged on 15.5.2008. The informant of the incident is one Shiv Karan Singh who heard the sound of shouting and when he looked at Hansraj's house he saw his cousins Vinod Singh and Yogendra Singh and other people running towards Hansraj's

house. The accused was seen running out from his house with a dagger in his hand and her wife Rannodevi was found lying dead on the floor. On his way running through the field Hansraj also assaulted at his uncle Shiv Singh. The accused Hansraj had distrust on the character of his wife with one Vinod Singh who happens to be his cousin brother and for this reason the accused Hansraj committed the alleged offence. After occurrence of the said incident the police started investigation and led the charge-sheet.

4. The trial was to be conducted by the court of Sessions as it was Sessions triable case, hence the case was committed to the court of sessions.

5. The accused was charged on 29.07.2009 and alternative charge was framed on 02.12.2009 by the learned Additional Sessions Judge. The accused pleaded not guilty and claimed to be tried. The prosecution examined the following witnesses :-

1.	Shiv Karan Singh	P.W.1
2.	Shiv Singh	P.W.2
3.	Yogendra Singh	P.W.3
4.	Gulab Singh	P.W.4
5.	Vinod Singh	P.W.5
6.	Dr. S.M. Ahmad	P.W.6
7.	Imamuddin	P.W.7
8.	Ranjana Sachan	P.W.8
9.	Dr. Ashutosh Pandey	P.W.9
10.	Lavkush Singh	P.W.10
11.	Surendra Bahadur Singh	P.W.11
12.	Dr. Vibha Kumari	P.W.12

6. In order to substantiate the oral testimony of the witnesses and their medical evidence, documentary evidence were also produced which are as follows :-

1.	Written report	Ext. Ka-1
2.	F.I.R.	Ext. Ka-2
3.	P.M. Report	Ext. Ka-3
4.	Site Plan with Index of deceased	Ext. Ka-4
5.	Site Plan with Index of 2nd incidence	Ext. Ka-5
6.	Recovery memo of blood stained and plain earth	Ext. Ka-6
7.	Recovery memo of blood stained and plain earth	Ext. Ka-7
8.	Recovery memo of pieces of quilt	Ext. Ka-8
9.	Recovery memo of pieces of 'Kathari' and cover of pillow	Ext. Ka-9
10.	Recovery memo of shirt and arrest of accused	Ext. Ka-10
11.	X-Ray report	Ext. Ka-11
12.	Charge-sheet mool	Ext. Ka-12
13.	Paper no.13ग/12	Ext. Ka-13
14.	Panchayatnama	Ext. Ka-14

7. The learned counsel for the appellant has contended that he has been convicted because of the inculpatory statement made by him and because the knife alleged to be instrument of offence was recovered at his behest. It is submitted that the learned judge has materially added in relying on the judgment of **Sharad Birdi Chandra Sharda Vs. State of Maharashtra 1984 SCC (Crl) 487** and on **Padala Veerareddy Vs. State of Andhra Pradesh AIR 1990 SC 79** in convicting the accused for commission of offence.

8. Learned counsel for the appellant submits that P.W.4 has turned hostile. P.W.1 has partly supported the case of the prosecution as far as second incidence is concerned. The theory of dacoits has been not believed by the learned trial judge is the submission of the counsel for the State. The counsel for the State has heavily relied on provisions of section 106 read with 114 of the Indian Evidence Act and has contended

that P.W.1 and P.W.2 have testified. P.W.2 did see the accused. It is submitted by counsel for the State that P.W.8 saw the accused and the reliance of the learned judge in **Amit Singh Bheekam Singh Thakur Vs. State of Maharashtra 2007 (1) ACR 543 (SC)** we should concur with the said finding.

9. It is submitted by learned counsel for the appellant that it is very clear from the injuries and the statement of P.W.1 in the F.I.R. that they heard commotion in the house of accused and it is very clear that due to this commotion caused by dacoits they might have injured his wife and out of fear the accused ran away from the house. The inculpatory statement under section 27 of the Evidence Act which has been believed by the learned judge, could not and are not to be acted on but here is a reverse case and in the alternative it is submitted that entire statement be lead where he confesses that out of anger he committed this act and the injuries also go to show that and the evidence of P.W.1 and P.W.8 should satisfy us that this is a case of 304 (1) I.P.C. and not of 302 I.P.C. code.

10. Learned counsel for the appellant has further contended that if this Court feels that the case is made out against the accused and they are not to be accorded benefit of doubt, he presses into service the provisions of Section 304 of I.P.C. According to learned counsel, the learned Judge could not have framed fresh charge.

11. The following judgments of the Supreme Court are heavily relied by the learned counsel for the appellant so as to contend that offence under Section 302 I.P.C. is not made out :

(i) Palvinder Kaur Vs. State of Punjab, 1952 AIR 354

(ii) Aghnoo Nagisia Vs. State of Bihar, 1966 AIR 119

12. The police authorities who were thereafter examined as ocular version stated that they had taken the statement of the witnesses and testified the statements made by them during investigation. The accused was put to test as per section 313 Cr.P.C. and his statements was recorded.

13. It is further submitted by learned counsel for the appellant that the evidence was very scanty and oral testimony on the record of the trial Judge was not so on which conviction could be returned under Section 302 I.P.C., but it appears that the learned Judge has convicted the accused on the basis of his own ideology and on the basis of the testimony of hostile witnesses.

14. It is submitted that this is a case of no evidence as far as conviction under section 302 I.P.C. is concerned, however, the accused is in jail for more than ten years. The learned Judge had relied testimony which could not have been made the basis for conviction in fact the conviction of the accused should not have been recorded, but as the learned counsel for the appellant has submitted that it is not a case where conviction under Section 302 I.P.C. could be recorded but case for lesser sentence.

15. Learned A.G.A. has submitted that :-

P.W.1-

P.W.1 saw the accused come out of his own house with dagger (कटार). The

deceased Rannodevi was lying in pool of blood. He on way injured Shiv Singh in filed. He ran away on eastern side. He has proved the F.I.R.

In cross :-

He was at his home when incidence occurred. He has not seen accused beating or injuring or murdering the deceased. He woke up from sleep on hearing noise and yelling of people. Neither he nor those name in F.I.R. saw how the first incidence occurred. He did not see who injured his uncle Shiv Singh as it was dark. The incidence is of about 10 to 11 at night. He and his uncle (injured) had after consultation lodged the F.I.R.

P.W.2

He was sleeping in his field, when Hansraj came with dagger and injured him. The accused had given three blows to the injured. Other villagers informed him that accused had first done his wife to death and then was running away. Accused was inimical towards the son of the injured and injured had time and again scolded him (accused).

In Cross :-

There was no electricity at 11:00 pm in the fields. He was fast asleep and so could not say from which side the accused came, injured him and ran away. He had not seen the person who assaulted him.

P.W.3

On hearing people crying and screaming he came to the house of Hansraj, he saw people going in the house of Hansraj, he testifies that he saw Hansraj running with dagger. People chased the accused. He was sleeping with his uncle in the field and saw Hansraj attacking his uncle who got injured.

In Cross :- No light in the village. He had taken his dinner by 8:00 pm and had gone to sleep. He has admitted that he has not seen Hansraj attacking his wife or injuring Shiv Singh (injured)

P.W.4

P.W.4 has turned hostile but has in his chief stated about the fact that Ranno Devi has murdered. He came to know about the incidence when he heard screaming and commotion. He has not seen accused beating or injuring deceased or injured. He had given 161 statement as per section 161 Cr.P.C code but was not the one shown to him.

P.W.5

P.W.5 saw Ranno Devi in pool of blood in the dwelling house of accused. He saw Hansraj running with dagger. He had seen Hansraj running away. He has not seen incidence of causing death of deceased.

P.W.6

P.W.6 is the doctor who has treated the injured can't testify with what kind of weapon the injuries were caused.

P.W.7

P.W.7, the police officer who recorded G.D. entry some overwriting on figure 3 of 307 I.P.C.

P.W.8

P.W.8, the investigating officer. He has written the case diary.

P.W.9

P.W.9, the doctor who has performed the post-mortem. The post- mortem report shows the following injuries:-

(i) incised wound 28 cm x 3 cm present on left side of neck including right side of mendis . 4 cm below the left ear and 6 cm below the right ear, bone deep.

(ii) incised wound 5cm x 1 cm present on left palm into muscle deep.

(iii) incised wound 6cm x 1 cm present on right hand fingers into muscle deep.

From this evidence it is clear that theory of dacoits infiltrating the house of the accused and killing his wife belies the evidence on record. The injuries go to show that it was not a premeditated gruesome murder but was a homicidal death caused by whom will have to be decided. We do no go through the further testimony the reason being it is homicidal death as the death occurred due to injuries which was by a sharp edged instrument.

No injuries on head, thorax, trachea all normal.

Cause of death- loss of blood due to injures was by a sharp edged instrument. No injuries except neck and hands (palms and fingers)

P.W.10

P.W.10 saw dead body not in the house but outside. He is resident of the village. He reached after the Panchayatnama was written.

P.W.11

P.W.11, the doctor who X-rayed the injuries of Shiv Singh.

D.W.1 /D.W.2

Nothing turns on their evidence as they have not seen the incidence.

Section 114 of the Indian Evidence Act will come to the aid of prosecution as accused was seen running from his house with dagger by P.W.1, P.W.2, P.W.3, P.W.5. P.W.4 has seen the dead body in house of accused and theory of dacoits is rightly not believed by learned trial judge.

16. While going through the factual data it is clear that the deceased died out of homicidal death. The accused had pointed out the dagger but this would be hit by the provisions of section 27 of the Evidence Act. It is submitted by the counsel for the appellant that the provisions of section 27 of the Evidence Act which has been invoked by the State and on which reliance is placed by the learned judge must be read in totality for which he has relied on **Aghnoo Nagisia Vs. State of Bihar, 1966 AIR 119 :**

ACT:

Indian Evidence Act (1 of 1872), s. 25-Ban an confession made to a police officer-Confessional F.I.R. by accused-Ban whether applies to while statement or only those part showing actual commission of crime.

HEADNOTE:

The appellant was tried for murder. The principal evidence against him consisted of a first information report containing a full confession of the crime. The appellant was convicted under s. 302 Indian Penal Code by the trial court and the High Court upheld the conviction, By special leave he appealed to the Supreme Court. The question before the court was whether the whole confessional statement in the first information report was banned by s. 25 of the Evidence Act or only those portions of it were barred which related to the actual commission of the crime.
and has contended that even his statement under 27 of the Evidence Act he has mentioned "तैश में आके मैंने ये कदम लिया है" which means that there was no premeditation but under sudden grave provocation the act was submitted, therefore we will have to look into the fact whether the offence if any is made out or not.

17. While penning this judgment, this Court has come across the judgment passed by this Court in the case of Santosh Vs. State of U.P. decided on 22.02.2021 in Criminal Appeal No.5657 of 2011 and the Apex Court in the case of Special Leave to Petition (Crl.) No.1156 of 2021, **State of Orissa Vs. Banabihari Mohapatra (Coram: Hon'ble Mrs. Justice Indira Banerjee and Hon'ble Mr. Justice Hemant Gupta), reported in Live Law 2021 SC 103 wherein the Apex Court has held as under:**

"It is well settled by plethora of judicial pronouncements by this Court that suspicion, however strong cannot take the place of proof. An accused is presumed to be innocent unless proved guilty beyond reasonable doubt"

18. This takes us to the issue of whether the offence would be punishable under Section 299 I.P.C. or Section 304 I.P.C.

19. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellant and admission on part of accused. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.*

20. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 I.P.C. and Section

300 I.P.C. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299 I.P.C.	**Section 300 I.P.C.**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

21. The accused is the husband of the deceased, he is in jail for a period of more than 13 years. It is a matter of fact as it transpires from the F.I.R. and as we have held that it is homicidal death but not murder. We hold the accused guilty for Section 304 of I.P.C. read with Section 34 I.P.C. but not with 302 I.P.C. read with Section 34 I.P.C. The punishment is reduced to seven years incarceration, the fine of Rs.10,000/- is reduced to Rs.5,000/- as the medical evidence as well as the evidence of hostile witnesses permit us to substitute, we are of the confirmed opinion that the punishment of seven years with fine reduced to Rs.5,000/- if the fine is not paid, the sentence would be default sentence of three months.

22. While going through the record, we are convinced that the accused husband had no intention of doing away of his wife but in hit of the moment the incident has occurred. Learned Judge instead of writing philosophy, if he did not think it was a case of acquittal could have punished under Section 304 part I or II of I.P.C. which was attracted in the facts of this case.

23. Record and proceedings be sent back to the trial court.

(2021)03ILR A1192
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.02.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 1201 of 2011
with
Criminal Appeal No. 1202 of 2011
with
Criminal Appeal No. 1203 of 2011

Hoti Lal ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri S.K. Tyagi, Sri Rakesh Chandra Upadhyay

Counsel for the Opposite Party:
A.G.A., Sri R.B. Maurya

Criminal Law - Indian Penal Code, 1860- Section 300, Exception 1- Section 304 – Death caused by grave and sudden provocation- It is relevant to mention that in the F.I.R. it is alleged that the mother of the deceased was accompanying the deceased when this incident took place and the story starts that accused started abusing the deceased and then firing took place. It demonstrates that there was no intention or motive to kill the deceased. It happened all of a sudden.

Where the offence is not pre-meditated but is sudden being the result of grave and sudden provocation, the offence would fall under Section 304 of the IPC.

Evidence Law - Indian Evidence Act, 1872- Section 155(3) - Section 157- Section 158- Major Contradictions and Omissions- There are minor contradictions which can be ignored but if there are major contradictions the same will have to be weighed against the State - Omission in F.I.R. and in Section 161 Cr.P.C. would prove fatal if the evidence is substantially in variance with version given by the witnesses in the statements given to the Police.

Where there are major contradictions in the testimony of the witnesses and the testimony is at substantial variance with the version of the FIR and previous statements given u/s 161 of the CrPc, then the same would be fatal to the case of the prosecution.

Evidence Law - Indian Evidence Act, 1872- Section 114 (g)- Adverse Inference- Material witness and non examination of the same and effect of the same particularly when no allegation was made that if produced, he would not speak truth, adverse inference can be raised against prosecution - therefore, circumstances of his being withheld from court casts serious reflection on fairness of trial.

Where the prosecution withholds material witnesses the Court may presume that the said evidence would be unfavourable to the prosecution and therefore an adverse inference can be drawn against the prosecution.

As far as accused-appellant Hoti Lal is concerned there is no clear evidence against him who has only instigated and also nothing was recovered on pointing out of Hoti Lal. Therefore, the accused- Hoti Lal is exonerated.- other accused- Prem Singh and Shankar are concerned, the accused- Shankar is family member of deceased and the accused are in jail for a period of more than 15 years. It is a matter of fact as it transpires from the F.I.R. and as we have held that it is homicidal death but not murder. We hold the accused guilty for Section 304 of I.P.C. but not under 302 read with Section 34 I.P.C. The punishment of life imprisonment is reduced to ten years. (Para 13, 16, 18,26)

Criminal Appeal accordingly partly allowed. (E-2)

Judgements/ Case law relied upon:-

1. Narain Vs St. of Punj., 1959 AIR (SC) 484

2. Stephen Seneviratne Vs King, 1936 AIR (PC) 289

3. Habeeb Mohammad Vs St. of Hyderabad, 1954 AIR (SC) 51

4. Yudhishtir Rajkumar Vs St. of M.P, 1971 (3) SCC 436;

5. Jaikaran & anr. Vs St. of U.P., Crl. Appeal No. 431 of 1990

6. Vijay Kumar & ors. Vs St. of U.P., 2011 (8) SCC 136

7. St. of W.B. Vs Mir Mohammad Omar, Laws(SC) 2000 8 138

8. State of Orissa Vs Banabihari Mohapatra, SLP (Crl.) No. 1156 of 2021

9. Rajesh Vs St. of Har., (2021) 1 SCC 118

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. By way of these appeals the appellants have challenged the judgement and order dated 15.2.2011, passed in Sessions Trial No. 115 of 2006 (State of U.P. vs. Prem Singh and others), arising out of Case Crime No. 318 of 2005, under Section 302 I.P.C., S.T. No. 116 of 2006 (State of U.P. vs. Shankar), arising out of Case Crime No. 329 of 2005, under Section- 25 Arms Act and Sessions Trial No. 117 of 2006 (State of U.P. vs. Prem Singh @ Baba), arising out of Case Crime No. 25 of 2006, under Section 25 Arms Act, all cases were registered at Police Station- Allow, District Manipuri.

2. All these sessions trials were tried jointly and were decided by common judgment, whereby all the accused were convicted and sentenced for commission of offence u/s 302/34 I.P.C. for life imprisonment with fine of Rs. 10,000/- and for commission of offence u/s 25 Arms Act, accused- Shankar and Prem Singh were sentenced for two years rigorous imprisonment with fine of Rs.1000/-.

3. Brief facts of the case are that on 19.11.2005, the informant - Krishna Murari had given a written report to the Station House Officer, P.S.- Allow, District- Mainpuri, alleging therein that he has participated in V.D.C. election. One of his family members, namely, Shankar, was helping his opposite contestant Krishna Pal and opposed the informant from participating in that election but the informant participated in the alleged election at the behest of villagers, since then, Shankar was inimical and because of that resentment, on 19.11.2005 at about 11:00 am, when informant's wife and son were coming from fields, Shankar came there and hurled abuses in front of Ziledar's house. During this period, Prem Singh and Hoti Lal also came there. When the informant's wife and son opposed, the accused- Hoti Lal instigated other accused to kill the informant's wife and son at which all the accused, armed with country made pistol, with intention to kill the informant's son, fired at informant's son whereby he got one gun shot injury on his chest and another on his arm in result of which the informant's son- Bhanwar Pal, died on spot. On 24.12.2005, S.O. Ambarish Kumar Yadav (PW-7), along with police personnel, in order to recover the country-made pistol of accused- Shankar, went to village- Nihalpur, where he summoned Karvarilal and Udayveer Singh to make them witnesses of recovery of pistol. The police party alongwith the witnesses searched out themselves

personally and after satisfaction that no objectionable article was with them, they, along with the accused, went at the place pointed out by the accused- Shankar and recovered a country-made pistol. Ferd (Ex.ka.10) was prepared and site plan (Ex.ka-14) was also prepared. Again on 21.1.2006, S.O. Ambarish Kumar Yadav, along with police personnel, in order to recover 315 bore country-made pistol, reached village- Nihalpur, where he summoned Netrapal and Satyaram to make them witnesses of recovery. On pointing out of the accused- Prem Singh, a country-made pistol was recovered.

4. After the investigation was over, charge-sheet was filed against all the accused. As the case was exclusively triable by the court of sessions, the same was committed to the sessions court by the learned Magistrate. Charges were framed by the trial court against the accused/appellant who pleaded not guilty and claimed for trial.

5. The prosecution, in order to prove its case, examined 11 witnesses who are as under :-

1.	Krishna Murari	PW-1
2.	Ziledar Singh	PW-2
3.	Udayveer Singh	PW-3
4.	Dr. K.C. Bhardwaj	PW-4
5.	H.C.P. Kishanlal	PW-5
6.	Ram Kishor Dixit	PW-6
7.	S.I. Ambarish Kr. Yadav	PW-7
8.	S.I. Surendra Singh	PW-8
9.	S.I. Rajendra Singh	PW-9
10.	Ram Kishor	PW-10

6. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:-

1.	*Tehrir* (Report)	Ex.ka.1
2.	Post mortem report of deceased	Ex.ka.
3.	Chik F.I.R.	Ex.ka.
4.	*Nakal Rapat*	Ex.ka.
5.	Panchayat	Ex.ka.
6.	Letter to C.M.O.	Ex.ka.
7.	Recovery of dead body of deceased	Ex.ka.
8.	Form 379 Namuna Lash	Ex.ka.
9.	Namuna Mohar	Ex.ka.
10.	Recovery memo of blood stained and simple soil	Ex.ka.
11.	Recovery memo of empty cartidge	Ex.ka.
12.	Site Plan	Ex.ka.
13.	Charge sheet	Ex.ka.

7. On completion of the evidence of the prosecution, the accused were put to questions under Section 313 Cr.P.C. The accused also examined Chhote Lal as DW-1.

8. Heard Sri Rakesh Chandra Upadhyay, learned counsel for appellant in Crl. Appeal No. 1201 of 2011, Sri Satish Kumar Yadav, learned counsel for the appellants in Crl. Appeals No. 1202 of 2011 and 1203 of 2011 and Sri Vikash Goswami, learned counsel for the State. Sri N.K. Srivastava and Ms. Alpana Singha, learned counsels for State have assisted us in all the three matters. None has remained present for the private respondent on any of the days of hearing.

9. Both the learned counsels for the appellants have submitted that two of accused are in jail for more than 15 years.

The appellant- Hoti Lal was granted bail by this Court but has been recently sent to jail after his bail was cancelled. It is further submitted that the accused- Hoti Lal had only instigated and that there is no recovery of any incriminating material from his possession. So far as accused- Prem Singh and Shankar are concerned, there was no intention or motive to kill the deceased as the incident took place all of a sudden. It is further submitted that the mother of the deceased Vimala Devi, who was accompanying the deceased and who had witnessed the whole incident, had not been examined. It is further submitted that the doctor also opined that injury Nos.1 and 2 may be caused by a single shot. It is further submitted that direction of injury No.1 is upward towards backward which means that the fire was opened from lower surface but in the site plan all are shown to be on parallel or same surface, hence the medical evidence is not corroborated by the site plan. The informant has admitted in his testimony that there was no rivalry with the accused- Hoti Lal. Learned counsels for the appellants have further contented that if this Court feels that case is made out against the accused and they cannot to be accorded benefit of doubt.

10. The following judgments of the Supreme Court are relied by the learned counsel so as to contend that offence under Section 302 read with 34 I.P.C. is not made out in the facts of this case:

(i) Narain vs. State of Punjab, 1959 AIR (SC) 484.

(ii) Stephen Seneviratne vs. King, 1936 AIR (PC) 289;

(iii) Habeeb Mohammad vs. State of Hyderabad, 1954 AIR (SC) 51;

(iv) Yudhishtir Rajkumar vs. State of Madhya Pradesh, 1971 (3) SCC 436;

(v) Jaikaran and Anr. vs. State of U.P., Crl. Appeal No. 431 of 1990;

(vi) Vijay Kumar and others vs. State of U.P., 2011 (8) SCC 136.

11. Learned counsel for the State has taken us through the record and has contended that the intention was present and it is a case where all that common intention, the accused were armed with country-made pistols and on instigation of Hoti Lal the other accused fired at deceased which shows that it was pre-planned murder. It has been further contended that country-made pistols were recovered on the pointing of the accused- Shankar and Prem Singh. It completes the chain. The story narrated by the prosecution is well proved and corroborated by the medical evidence as well as other evidences. So there is no reason to differ from the judgement pronounced by the lower court. Learned A.G.A. has placed reliance on judgement of Apex Court in **State of West Bengal vs. Mir Mohammad Omar, reported in Laws(SC) 2000 8 138.**

12. The informant- Krishna (PW-1) in his testimony has deposed as under:-

"चुनाव लड़ने के लिए होतीलाल ने मना नहीं किया था लेकिन विरोध किया था मेरी होतीलाल से पहले से कोई रंजिश नहीं थी."

Here he admits that there was no rivalry with accused- Hoti Lal.

13. While considering the testimony of PW-1, PW-2 and PW-3, it comes out that accused- Shankar had fired on the chest of the deceased whereas accused- Prem Singh had fired on arm of the deceased. PW-2 and PW-3 have corroborated the prosecution story and all the three witnesses i.e. PW-1, PW-2 and PW-3 clearly state that by firing of accused- Hoti Lal, deceased was not

injured at all. It is relevant to mention that in the F.I.R. it is alleged that the mother of the deceased was accompanying the deceased when this incident took place and the story starts that accused started abusing the deceased and then firing took place. It demonstrates that there was no intention or motive to kill the deceased. It happened all of a sudden.

14. The accused are in jail for more than 15 years. It is submitted by learned counsel that the learned Judge had relied on evidence which could not have been done for the basis for conviction in fact the conviction of the accused Hoti Lal should not have been recorded and even if it was held that he was guilty then it is not a case under Section 302 I.P.C. but case for lesser sentence we are constrained to decide.

15. The submission of the learned counsel for the appellant will also have to be perused from the angle which it is pressed into service. The decision in **Jaikaran (supra)** goes to show that it will apply in full force. The fact that discrepancies in the prosecution story goes to show that Hoti Lal may not have been present there. The eye witnesses seem to have implicated the accused. There was a suggestion of enmity also. The injuries on the body appeared to have been inflicted by the other two but can it be said that there was a premeditated conspiracy. The survivor of the incident i.e. mother of the deceased has not deposed on oath. Analysing the testimony of all the witnesses unusual facts come out from the statements of PW-1. The testimony PW-1 has many improvements in his statement which is noticeable and weakens the prosecution story. In **Jaikaran (Supra)** the Apex Court has held as under:-

"The same principle has been reiterated in a recent judgment of the Apex Court in Yogesh Singh vs. Mahabeer Singh and others. Wherein the Apex Court has laid down that the evidence of a closely related witness/inimical witnesses 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.

So far as issue of discrepancies in the ocular evidence, it is well settled 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 discrepancies which do not shake the basic version of the prosecution must not be attached undue importance to discard the prosecution case. The discrepancies which are due to normal errors of perception or observation should not be given importance. 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 may be give due allowance."

16. The cumulative evidence and its probative values has to be put into the scales. There are minor contradictions which can be ignored but if there are major contradictions the same will have to be weighed against the State. The decision in **Yudhishtir @ Raj Kumar (supra)** will also come to the aid of accused. Omission in F.I.R. and in Section 161 Cr.P.C. would prove fatal if the evidence is substantially in variance with version given by the witnesses in the statements given to the Police.

17. The State as well as the appellants have relied on the decision in **Narain (supra)** but in our case we do not know whether the mother was a reluctant eye witness and, therefore, she was dropped but the fact that she was not examined goes into the root of the matter as it is alleged that she was the one who was essential to unfold the incident. Learned counsel has submitted that it was Hoti Lal whose case is akin to that of Narain (supra) and in our case also it was Hoti Lal who had directed the attack against the deceased.

18. The decision in **Habeeb Mohammad (supra)** will also help the accused as material eye witness has not been examined wherein it is held that as in Indian Penal Code, 1860 wherein Section 148, 302, 307, 342, 436 and Evidence act, 1872 of Section 114 and Code of Criminal Procedure, 1898 wherein it is held that material witness and non examination of the same and effect of the same particularly when no allegation was made that if produced, he would not speak truth, adverse inference can be raised against prosecution - therefore, circumstances of his being withheld from court casts serious reflection on fairness of trial.

19. The decision cited by the State in **State of West Bengal vs. Mir Mohammad Omar** which is pressed into service goes to show that where the evidence is to the satisfaction of the Court that it was Shankar and the other who had caused death. The circumstances of the case and the factual scenario would permit us to hold that there is no serious lacuna and irregularity but the question would be can all the three said to have harboured common intention as per Section 34 I.P.C., the answer is no.

20. This takes us to the issue of whether the offence would be punishable under Section 299 or Section 304 I.P.C.

21. Considering the evidence of these witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellants and admission on part of accused. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellants under Section 302 of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.*

22. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts

losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

23. While penning this judgment, this Court has come across the judgment of the Apex Court in the case of Special Leave to Petition (Crl.) No. 1156 of 2021, **State of Orissa Vs. Banabihari Mohapatra (Coram: Hon'ble Mrs. Justice Banerjee and Hon'ble Mr. Justice Hemant Gupta)**, reported in **Live Law 2021 SC 103** wherein the Apex Court has held as under:

"It is well settled by plethora of judicial pronouncements by this Court that suspicion, however strong cannot take the place of proof. An accused is presumed to be innocent unless proved guilty beyond reasonable doubt"

24. The evidence must be such that the guilt of the accused would have to be proved by consistent evidence which would be proved by the attending circumstances from which cogent evidence would emerge.

25. In a recent judgement in **Rajesh Vs. State of Haryana, (2021) 1 SCC 118,** the Apex Court has acquitted the accused where the depositions of the alleged eye witnesses were found suffering from material contradictions and there were improvements. In our case there are material improvements in the evidence of PW-1 which we have discussed at length. In our case also the ballistic expert has not been examined. The recovery is of a different kind of country-made pistol. The legal position regarding necessity of examination of ballistic experts in case of assault has been reiterated. It would be fatal qua accused - Hoti Lal is concerned. The related eye witnesses have been also disbelieved by us not just because they are related eye witnesses but their presence on the spot is not believable.

26. It is very clear from the F.I.R. and other witnesses of facts that deceased started abusing the accused and vice versa, thereafter, firing took place. It demonstrates that there was no intention or motive to kill the deceased. It happened all of a sudden. The most viable testimony would have been of Vimala Devi who was accompanying the deceased and who had actually witnessed the whole incident but she had not been examined and this goes in benefit of the accused. While going through the record, we are convinced that learned

Judge instead of writing philosophy, if he did not think it was a case of acquittal but could have punished under Section 304 part I or II of I.P.C. which was attracted in the facts of this case.

27. While we have decided that the provisions go to show that injuries were caused after altercation as from perusal of the statements of all the witnesses, it appears that abusing took place and then all of a sudden the offence occurred, therefore, it would fall within the scope of the provisions of Section 304 I.P.C. as narrated herein above as far as accused- Shankar and Prem Singh are concerned.

28. As far as accused-appellant Hoti Lal is concerned there is no clear evidence against him who has only instigated and also nothing was recovered on pointing out of Hoti Lal. Therefore, the accused- Hoti Lal is exonerated. Hoti Lal shall be released forthwith if not required in any other offence.

29. So far as other accused- Prem Singh and Shankar are concerned, the accused- Shankar is family member of deceased and the accused are in jail for a period of more than 15 years. It is a matter of fact as it transpires from the F.I.R. and as we have held that it is homicidal death but not murder. We hold the accused guilty for Section 304 of I.P.C. but not under 302 read with Section 34 I.P.C. The punishment of life imprisonment is reduced to ten years. The period of ten years is already over, the accused- Prem Singh and Shankar shall be released forthwith if not required in any other offence. However, this would be coupled with the fine imposed by the court below. The fine be deposited within four weeks of their release, failing which they shall undergo three months simple imprisonment in default.

30. In view of the aforementioned discussion, the appeal of accused- Hoti Lal, i.e. Crl. Appeal No. 1201 of 2011 is allowed. So far as appeals of other accused, namely, Shankar and Prem Singh, i.e. Crl. Appeal Nos. 1202 of 2011 and 1203 of 2011, are concerned, the same are partly **allowed.**

31. Record and proceedings be sent back to the trial court.

(2021)03ILR A1199
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.03.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Criminal Appeal No. 4506 of 2005

Ram Pal Singh & Ors. ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Rakesh Chandra Upadhyay, Sri Ambrish Kumar Kashyap, Sri Arimardan Singh, Sri Bhaiya Ram, Sri G.P. Singh, Sri J.N. Singh, Sri R.C. Yadav, Sri S.N. Singh, Sri V.K. Sharma, Sri Ambrish Kumar Kashyap

Counsel for the Opposite Party:
A.G.A., Sri R.K. Pathak, Sri Ankit Srivastava.

Criminal Law - Code of Criminal Procedure, 1973- Sections 154 & 157- Ante- Timed FIR- Specific to the plea of ante timed FIR set up by the appellants, in Mehraj Singh Vs State of U.P.; (1994) 5 SCC 188, two external tests had been relied, to decide that plea. First external test is the report made to the magistrate

under Section 157 Cr.P.C. and the second external test is the copy of the FIR sent with the dead body, for postmortem examination and its reference on the inquest report.- No cross examination on the point- The fact that the full FIR details (with respect to Case Crime Number etc.) are clearly and correctly mentioned on both the *'Panchayatnama',* there remains no reason to doubt that the FIR had been lodged on the date and time as disclosed therein. Therefore, the external tests as relied by the Supreme Court in Mehraj (supra) are not found to have failed.

The two tests for proving the ante-timing of FIR are the time when the special report was sent to the Magistrate and as to whether copy of the FIR was part of the police papers at the time of the inquest and post mortem examination. In absence of any effective cross-examination of the defence on these points and the presence of full details of the case crime no. on the panchayatnama show that the FIR is not ante-timed.

Evidence Law - Indian Evidence Act, 1872- Section 8- Section -Motive for commission of offence is not a primary factor to be established in a case where direct ocular evidence has been adduced by the prosecution yet, that evidence must be intrinsically reliable and inherently probable and not tainted with animosity- Though not self contradicted or patently false yet it may require corroboration in regard to material particulars from other prosecution evidence to eliminate any doubt that the same may be tainted with animosity.

Motive is insignificant in a case of direct ocular evidence but where the testimony of an interested witness is tainted with malice and animus then the Court has to look for corroboration of the same from other material evidence.

The fact that the Investigating Officer did not consider it necessary to get the injured medically examined and he further did not record the statements of those injured witnesses at the first met opportunity may not carry much weight, in face of the fact that in the FIR lodged promptly, at 11.20 am, the said witnesses were named as injured persons - The fact of medical examination actually carried out being proven the rest are matters that may point to deficiencies in the police investigation but may not discredit the testimony of the injured witness itself. As held by the Supreme Court in State of Rajasthan Vs Kishore, (1996) 8 SCC 217, an irregularity or even an illegality during investigation would not cast doubt on the otherwise trustworthy and reliable evidence.

It is settled law that the accused cannot benefit from a defective investigation where the testimony of the witnesses is reliable and trustworthy.

Evidence Law - Indian Evidence Act, 1872- Section 3- In such an occurrence where a large number of rounds of ammunition were fired indiscriminately by four or five assailants some of which were stated to have been fired from close range i.e. when the assailants had reached the 'Chabutra' and fired at the victims from that position, it is quite possible that one of the injuries suffered by a deceased may have remained from being specified in the ocular evidence.

In a case where a large number of accused have resorted to indiscriminate firing then it is naturally not possible for an eyewitness to specify the authors of the injuries sustained by the deceased.

Criminal Law - Code of Criminal Procedure, 1973- Section 157- Site Plan- The fact that exact depictions were not made on the site plan where each member of the victim party was seated, may also not be of great relevance. A site plan is not a piece of substantive evidence.

Only that part of the site plan may be admissible in evidence which indicates what was seen by the police officer himself at the spot but

that part of the site plan depicted on the basis of statements of the witnesses would be inadmissible in evidence as the same would be no more than a statement made to the police and therefore hit by Section 162 of the CrPc. (Para 17(i), 17(ii), 17 (iii), 18 (vi), 18 (x), 19(v), 20, 21 (i), 21(ii))

Criminal Appeal rejected. (E-2)

Case law/ Judgements relied upon:-

1. Mehraj Singh Vs St. of U.P.; (1994) 5 SCC 188

2. Rameshwar Vs The St. of Raj, AIR (1952) SC 54

3. Dalip Singh & ors. Vs St. of Punj., AIR (1953) SC 364

4. Pulicherla Nagaraju @ Nagaraja Vs The St. of A.P (2006) 11 SCC 444

5. St. of Raj. Vs Kishore, (1996) 8 SCC 217

6. Jagdish Narain & anr. Vs St. of U.P.; (1996) 8 SCC 199

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

. 1. Heard Sri Ambrish Kumar Kashyap, learned counsel for the appellants and Sri Ankit Srivastav, learned AGA for the State-respondent.

2(i). The appellants Rampal Singh, Udaibhan and Chandrabhan filed the present appeal against the common judgment and order dated 05.10.2005 passed by Sri Arvind Kumar Singh, Additional District and Sessions Judge/Fast Track Court No. 2, Mainpuri, in Sessions Trial No. 411 of 2012 (State Vs. Rampal Singh & Udaibhan) and Sessions Trial No. 128 of 2004 (State Vs. Chandrabhan). By that judgment and order, the appellants - Rampal Singh, Udaibhan and Chandrabhan were convicted for offences under Sections 147, 148, 307/149 and 302/149 IPC. Upon conviction, for the offence under Section 147 IPC each of the appellants was sentenced to six months' imprisonment. Upon conviction for the offence under Section 148 IPC, each of the appellants was sentenced to one year's imprisonment. Upon conviction for the offence under Section 307 read with Section 149 IPC, each of the appellants was sentenced to ten years' rigorous imprisonment together with fine Rs. 3,000/-. In the event of non-payment of fine, they were to undergo further imprisonment of one year. Upon conviction for the offence under Section 302 read with Section 149 IPC, each of the appellants was sentenced to imprisonment for life and fine Rs. 5,000/-. In the event of non-payment of that fine, the appellants were to undergo further imprisonment of one year and six months.

2(ii). Upon the present appeal being filed, appellant no.1-Rampal Singh (hereinafter also referred to as the 'deceased appellant') was enlarged on bail by order dated 24.10.2005 whereas the bail application of the other two appellants was rejected. During the pendency of this appeal, appellant no.1-Rampal Singh died and the appeal filed by him was declared to have abated, vide order dated 13.12.2019. Appeal filed on behalf of appellant no.3-Chandrabhan (hereinafter also referred to as the 'appellant granted remission') also did not survive as he was granted remission by the State Government. It was dismissed as not pressed, vide order dated 07.10.2020. Thus, the present appeal survives and has been heard on behalf of appellant no.2-Udaibhan.

3(i). The prosecution case is that a First Information Report **(Exhibit Ka-4)**

(hereinafter referred to as the FIR), in Case Crime No.63 of 2001, under Sections 147, 148, 149, 307 and 302 IPC, was lodged on 11.07.2001 at 11:20 a.m., at Police Station-Kurra, Sub-District-Karhal, District-Mainpuri, by **Sureshpal Singh (PW-1)**, son of Vishwanath Singh, upon a written application submitted in his handwriting. The FIR disclosed : on 10.07.2001 at 10:30 a.m., the first informant was sitting on a cot under a shed/'Chhappar' outside his house while his brother Devendra Singh along with Harvendra @ Tika, Chandra Pratap Singh and Shiv Vir Singh were sitting on a raised platform/"Chabutra' under a Neem tree, in front of his house, adjoining a public pathway running in the North-South direction. At about 10:30 a.m., the deceased appellant (appellant no.1 herein), Udaibhan and Chandrabhan (both sons of Mewaram), Mewaram (father of Udaibhan Singh and Chandrabhan) and Shailendra Singh @ Kintoo reached there on foot from the South side of the public pathway. Rampal Singh (deceased appellant) was armed with his licensed rifle, Chandrabhan with his double barrel gun and the others with illicit, single barrel guns. They fired indiscriminately at Devendra Singh, Harvendra Singh @ Tika, Chandra Pratap Singh and Shiv Vir Singh. Devendra Singh and Harvendra Singh @ Tika died on the spot, as a result of the firearm injuries suffered by them. Upon hearing the gun fire, besides the first informant, Makrand Singh, Ram Saran, Harendra Singh, Virendra Singh and Rajarshi Vir Singh reached the spot and witnessed the occurrence. Thereafter, the assailants fled - taking the same path, and in the same direction they had come from i.e. South. He also disclosed that the assailants bore old animus. The bodies of Devendra Singh and Harvendra Singh @ Tika were stated to be lying at the place of occurrence.

3(ii). Vide **Exhibit Ka-26**, drawn on 11.07.2001, the Investigating Officer (I.O.) obtained and sealed, a sample of plain earth and blood soaked earth obtained from the Crime Scene, in the presence of Ram Saran and Ram Ratan. A second sample of plain earth and blood soaked earth was obtained and sealed from the Crime Scene by the I.O. It was marked as Exhibit Ka-27. Vide Exhibit **Ka-28,** the I.O. recovered six empty cartridges of 12 bore caliber, bearing a red mark at the base and the marking 'Shaktiman 12 Express'; 4 empty cartridges of 12 bore with a marking KF 12 00 (on one) and KF 12 01 (on other three) and; one empty cartridge of .315 bore, with a marking 9 MM KF 00.

3(iii). It also appears, during the investigation, the house of Rampal Singh (deceased appellant), Mewaram, Chandrabhan, Udhaibhan and Shailendra Singh @ Kintoo were searched. The search memos are **Exhibit Ka-29, Ka-30** and **Ka-31.** However, no recoveries were made as a consequence of that search.

3(iv). The "Panchayatnama' with respect to the dead body of Devendra Singh **(Exhibit Ka-09)** was prepared on 11.07.2001. It bears the FIR details including Case Crime No.63 of 2001. However, there is an overwriting as to the time of the FIR being lodged. The over writing appears to read 11:20 a.m. As to the time of the "Panchayatnama' being prepared, it is disclosed to have started at 12:10 p.m. on 11.07.2001 and completed at 13:10 p.m. on the same day. Similarly, the "Panchayatanama' for the dead body of Harvendra Singh @ Tika **(Exhibit Ka-8)** was also prepared on 11.07.2001. It also bears the full details of the FIR, being Case Crime No.63 of 2001. In this "Panchayatnama' also there is an

overwriting as to the time of the FIR being lodged. It reads 11:20 a.m. As to the time of that "Panchayatnama' being prepared, it is disclosed to have started at 13:20 p.m. on 11.07.2001 and completed at 14:20 p.m. on the same day.

3(v). The postmortem examination report of Devendra Singh (Exhibit Ka-6) reveals, it was conducted at the District Hospital Mainpuri at 1:30 p.m. on 12.07.2001. It records the following ante-mortem injuries:

"(1) Wound of entry 5 cm x 3 cm x cranial cavity brain matter coming out of wound on occipital.

(2) Wound of entry 2 cm x 1 cm x muscle deep on back side of chest axillary fold.

(3) Wound of exit 3 cm x 1 cm on left shoulder 6 cm medial to top of left shoulder continuous to Inj No. (2).

(4) Wound of entry 1.5 cm x 1.5 cm on low back side at level L-4 vert.

(5) Gutter shaped firearm wound 2 cm x 1 cm muscle deep on lat. Side of prox. Phalanx of Rt index finger.

(6) Gutter shaped firearm wound 8 cm x 5 cm muscle deep on postero lat/lt firearm 2 cm elbow directed shown.

(7) Wound of entry three, in area 8 cm x 10 cm over left chest near left nipple."

3(vi). Similarly, the post mortem examination report of Harvendra Singh @ Tika **(Exhibit Ka-7)** reveals, it was conducted at the District Hospital Mainpuri at 2:00 p.m. on 12.07.2001. It records the following ante-mortem injuries:

"(1) Wound of entry 9 cm x 5 cm x oral cavity deep mid chin to floor to Rt side hard pellet fractured mandible floor of mouth. Blackening present.

(2) Wound of entry 3.0 cm x 2 cm on left sub-clavicular region.

(3) Wound of exit 3 cm x 2 cm from left side back 4 cm lateral T-1 mid-line continuous to inj. No. (2).

(4) Wound of entry 3 cm x 2 cm just adjacent and lat to inj. No. (2) on left side chest fractured Lt clavicle.

(5) Wound of entry 4 cm x 3 cm on back Rt thigh just below glatier fold

Fractured mandible and maxilla Rt side and base of Ant. Cranial fossa and left clavicle."

3(vii). The postmortem report re Devendra Singh also records recovery of three pellets from left thoracic wall and it also records placing in double sealed envelopes, cardboard-1, distorted metallic bullet-1, pellets-25 that were also recovered during the post mortem examination. Similarly, the post mortem report re Harvendra Singh @ Tika records recoveries of pellets from left shoulder to left chest. It further records placing in a sealed envelope - cardboard-1 and 21 pellets recovered from the dead body of Harvendra Singh @ Tika. Both reports record the cause of death as 'Coma' due to ante mortem injuries. The above postmortem examinations were conducted by **Dr. R.D. Pandey (PW-6)** - on the dead body of Devendra Singh at 1:30 p.m. and

on the dead body of Harvendra Singh @ Tika at 2:00 p.m., on 12.07.2001.

3(viii) . It is the further case of the prosecution that in the incident, **Chandra Pratap Singh (PW-3)** suffered injuries for which he was examined on 11.07.2001 at about 7:45 p.m. by **Dr. R.P.S. Chauhan (PW-4).** In that examination **(Exhibit Ka-2**), the following injuries were reported:

"1) Fire Arm wound of entry 0.3 cm x 0.3 cm x skin deep - left side of chest clotting blood.Kept HO Adv X Ray.

2) Fire Arm wound of entry over to lt arm upper in area 16 cm x 4 cm Size 0.3 cm x 0.3 cm x skin deep. Kept UO Adv X Ray.

3) Lacerated wound 1.5 cm x 0.5 cm x bone deep on left wrist part clotted blood present. Kept UO Adv X Ray.

4) Fire Arm wound of entry 0.3 cm x 0.3 cm x skin deep on back of left hand. Clotted blood present. Kept UO Adv X Ray.

5) Lacerated wound 2 cm x 0.5 cm x bone deep on middle side of Rt leg 8 cm below knee. Kept UO Adv X ray.

6) Lacerated wound 1.5 cm x 0.4 cm x bone deep on middle aspect of Rt leg 0.5 cm below to Inj No. 5. Clotted blood present. Kept UO Adv. X Ray.

7) Multiple abrasion over Rt Leg size 0.2 cm x 0.2 cm.

8) Multiple abrasion over Rt thigh size 0.2 cm x 0.2 cm.

9) Pin Head abrasion middle aspect of Rt thigh multiple in number size 0.1 cm x 0.1 cm."

3(ix). Similarly, the injured **Shiv Vir Singh (PW-2)** was also examined by Dr. R.P.S. Chauhan (PW-4) at 7.55 pm on 11.07.2001 **(Exhibit Ka-3**). The following injuries were reported:

"Three lacerated wounds at back of Rt thumb of Size 0.5 cm x 0.2 cm x muscle deep; 0.6 cm x 0.2 cm x muscle deep and; 1.5 cm x 0.2 cm x skin deep xxxx injury of nail of thumb. Clotted blood present. Kept UO Adv X Ray"

The injury reports of Chandra Pal Singh and Shiv Vir Singh are Exhibits Ka-2 and Ka-3, respectively.

3(x). Initial investigation in the case was carried out by the I.O. - Sri M.P. Singh Nagar. Upon his transfer from Police Station-Kurra, the investigation was transferred to the Sub Inspector **Surendra Nath (PW-7)** who completed the investigation. Sri M.P. Singh Nagar died before leading any evidence at the trial. Sub-Inspector **Surendra Nath (PW-7)** proved the investigation.

3(xi). Upon completion of the investigation and upon submission of the Charge Sheet, vide order dated 22.01.2003, charges were framed against Rampal Singh (deceased appellant) and Udaibhan - for offences under Sections 147, 148, 307 read with Sections 149 and 302 read with Section 149 IPC. Similar charges were framed against Chandrabhan by a separate order dated 22.03.2005. Both trials were clubbed. To the charges thus framed, all the appellants pleaded not guilty. Thus the trial commenced

4. At the trial, the prosecution examined seven witnesses while the defence examined one witness, as below:

(i) Sureshpal Singh/informant (PW-1) - witness of fact;

(ii) Shiv Vir Singh/injured witness (PW-2) - witness of fact;

(iii) Chandra Pratap Singh/injured witness (PW-3) - witness of fact;

(iv) Dr. R.P.S. Chauhan/expert witness (PW-4) - to prove the injury reports;

(v) Shiv Nath Singh (PW-5) - Constable Clerk who prepared the "Chik' report;

(vi) Dr. R.D. Pandey (PW-6) - to prove the postmortem examination reports;

(vii) Surendra Nath (PW-7) - to prove the investigation and;

(viii) Yashpal (DW-1) - to disprove implication of Ram Pal Singh.

5(i). Sureshpal Singh (PW-1), first proved the date, time and place of the occurrence as narrated in the FIR. He also described that the deceased and the injured persons received firearm injuries in the assault committed by Rampal Singh (deceased appellant) with his licensed rifle, Mewaram with his single barrel gun, Chandrabhan with his double barrel gun and Udaibhan and Shailendra @ Kintoo with their single barrel guns. According to him, the assailants arrived together at the place of occurrence and fired indiscriminately, at the victim party. It resulted in the instantaneous death of Devendra Singh and Harvendra Singh @ Tika whereas Chandra Pratap Singh and Shiv Vir Singh received firearm injuries. According to him, the occurrence was witnessed by Virendra Singh, Makrand Singh, Ram Saran and Rajarshi Vir Singh. It may be noted here itself that those persons/witnesses to the crime were not examined at the trial. He further stated to have lodged the FIR against a complaint written in his hand.

5(ii). According to him, the assault was committed on account of old village rivalry arising from successive elections to the post of village "Pradhan'. Ram Pal Singh had defeated two rival candidates from the family of the informant Sureshpal Singh (and the deceased Devendra Singh), being Munni Devi (wife of Brij Pal Singh - a maternal cousin brother of Navratan Singh) and Makrand Singh (brother of Navratan Singh).

5(iii). He further stated, prior to the present occurrence, a case had been registered against him, Navratan Singh, Brij Pal Singh and Makrand Singh under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, wherein the wife of the deceased appellant - Rampal Singh was a prosecution witness. During his cross-examination carried out on 22.02.2004, the said Sureshpal Singh further admitted that his son Sonu was an accused person in the murder case of Sandeep @ Dabloo, son of the deceased appellant - Rampal Singh. He further admitted that Chandrabhan (appellant granted remission) was the scribe of the FIR in that case, lodged against Sonu. His father Mewaram and brother Udaibhan (present appellant) were witnesses in that case. He also admitted that his son Sonu was absconding and that a reward of Rs.20,000/- had been announced for his arrest yet, he was absconding. He further elaborated as to the existence of two parties/groups in the village, one of which

he was a member along with Brijpal Singh, Navratan Singh, Makrand, Vakeel and the other of which Rampal Singh (deceased appellant), Mewaram, Chandrabhan, Udhaibhan and others were members. He however denied the suggestion of false implication of Rampal Singh (deceased appellant), whose house was stated to be about 2 furlong (220 yards) from the *'Chabutra*'.

5(iv). As to the manner of the occurrence, on being cross examined, he described that the assailants had approached the victims from the South, walking side by side (to each other). They opened fire at the victim from the 'Kharanja' near the 'Chabutra' where the deceased and the injured were sitting under a Neem tree. Also, according to him, the victim party had been surrounded by the assailants from all four sides and had been fired at from the 'Chabutra'. He confirmed that the bodies of the deceased lay where they fell upon being assaulted - about two feet apart from each other. He further described, upon being injured, Shiv Vir Singh and Chandra Pratap Singh fled to the East and that they were bleeding at that time. He also claimed, after the assailants fled, he found Devendra Singh dead while Harvendra Singh @ Tika was still alive.

5(v). He saw the entire incident from the time the assailants approached the victims from the 'Kharanja' and fired indiscriminately and thereafter escaped on the path, towards the South. He categorically stated, he had not been fired upon in the incident though he was about 24 steps from the assailants when he saw and had been seen by the assailants who were positioned besides him at the beginning of the assault. According to him, the incident lasted about 10-12 minutes during which time he remained present and cried for help. About 16-18 rounds were fired by the assailants, who were 5-6 in number. They had also reloaded their weapons.

5(vi). As to the report being lodged and arrival of the Police, he deposed to have travelled to the police station Kurra, alone, on his bicycle and to have written the complaint using a pen taken from a shop outside that Police Station. First, he claimed to have stayed at the Police Station for 20-25 minutes and obtained the copy of the FIR. However, on being confronted with the "Chik' report (that did not bear his signature), he admitted having received a copy of the "Chik' report, the next day, after the postmortem examination. He denied the suggestion that the FIR was ante timed. He claimed that the police had arrived after about one hour and thirty minutes to one hour and forty-five minutes after the incident.

5(vii). Regarding the injured witnesses Shiv Vir Singh and Chandra Pratap Singh, he stated they returned after the police had arrived, at about 12 noon. Shiv Vir Singh was described to have received one firearm injury on his right thumb while Chandra Pratap Singh had suffered four-five firearm injuries. They were stated to have bled while trying to escape the assault. Later, he further stated that the injured had been taken to the hospital at about 4.00 p.m. They returned the next day, in the morning, along with the police.

5(viii). Also, as to the conduct of the "Panchayatnama', he did state that the dead bodies were sealed between 12.20 p.m. to 2.20 p.m. and were dispatched, the same day.

5(ix). He specifically denied the suggestion that the FIR had been lodged after consultation or on the suggestions given by the police.

5(x). As to the arrival of the police, besides stating that the Police Inspector had visited the Crime Scene, one and half to two hours after the incident, during his cross-examination on 07.05.2004, he further stated that the Circle Officer also visited the crime scene at about 2.00 p.m. on 11.07.2001. Upon being questioned as to how the injuries were sustained by the victims, he stated that the assailants began firing from the South of the injured and the deceased. While Shiv Vir Singh and Chandra Pratap Singh were stated to have been shot from about 10-15 feet, he further stated that Harvendra Singh @ Tika was shot at while he was sitting. Devendra Singh was stated to have been first shot on his back while he was standing and that he fell to the ground on being hit. He was again fired at by the assailants when they reached the 'Chabutra'. All the assailants shot at Devendra Singh and Harvendra Singh @ Tika.

6(i). Shiv Vir Singh (PW-2), one of the two injured witness was also examined by the prosecution. He described the occurrence took place at about 10.30 a.m. on 11.07.2001 when he along with Harvendra Singh @ Tika, Shiv Vir Singh, Devendra Singh and Chandra Pratap Singh were sitting at the "Chabutra' in front of the house of Sureshpal Singh. According to him, the assailants approached from the South side. Rampal Singh (deceased appellant) was armed with his licenced rifle, Chandrabhan was armed with a double barrel gun and the rest of the assailants were armed with single barrel guns. Again, according to this witness, all the assailants opened fire, simultaneously. He claimed to have been hit on his right thumb. Harvendra Singh @ Tika and Devendra Singh succumbed on the spot while himself and Chandra Pratap Singh were also injured.

6(ii). He claimed to have met the Police Inspector about four hours after the incident. He also claimed to have shown him his injuries but that his statement was not recorded that time. It was recorded on the next day.

6(iii). The assailants were disclosed to have fled in the same direction from which they had come i.e. to the South of the Crime Scene.

6(iv). As to his own medical examination, he submitted, he had gone for medical examination at about 2.20 to 3.00 p.m. to Karhal, in a police jeep, with a constable upon an oral direction given by the Circle Officer to the Police Inspector. He reached Karhal at about 5.00-5.30 p.m. but did not get his X-ray examination done. As to the bleeding that may have taken place upon being hit with bullets and pellets, he did state that there was some bleeding but, upon cross examination, he could not establish whether any blood had fallen to the ground and if the same had been examined by the police, at the Crime Scene.

6(v). He denied knowledge of the direction in which Chandra Pratap Singh escaped. However, he also stated that assault began when the assailants were about 10-12 feet away and that 18-20 rounds were fired. He insisted to have run to save his life when he was chased down by the assailants for some distance and fired at. He claimed to have escaped,

having hidden in an open field behind the house of Virendra for 4-5 hours.

6(vi). As to arrival of the police, he disclosed that the police arrived at about 12.30 p.m. Yet, he could not name any of the 'Panch' witnesses.

6(vii). As to old animosity between the parties. He admitted to have been accused in one case of SC/ST Act wherein Rampal Singh (deceased appellant) was a prosecution witness.

7(i). Chandra Pratap Singh (PW-3), the second injured witness also described the time, date, and place of the occurrence at about 10.30 a.m. on 11.07.2001 at the "Chabutra' in front of the house of Sureshpal Singh. According to him as well, the assailants arrived at the spot from the South side of the "Kharanja' adjoining the "Chabutra'. Rampal Singh (deceased appellant) was armed with his licenced rifle, Chandrabhan with his double barrel gun and rest of the assailants, with single barrel guns. He stated, the assailants opened fire, simultaneously and indiscriminately, at the victim party wherein Devendra Singh and Harvendra Singh @ Tika died on the spot. The assailants fled in the same direction from which they had come, i.e., to the South. Additionally, he stated, Udaibhan had fired at Harvendra Singh @ Tika from a close range as well. That shot hit the deceased Harvendra on his face.

7(ii). During his cross-examination, he stated to have received three bullet injuries that caused bleeding, and that he had not received any injury other than the firearm injuries.

7(iii). As to the manner of the assault committed, this witness also described that the assailants had walked side by side (in a line) and started firing at the victims. He specified the distance between the 'Chabutra and the Chhappar' to be 24-25 paces and the place from where the assailants shot at the victims at about 10-12 paces from the 'Chhappar' (where the first informant was sitting). He also confirmed that not a shot was fired at the first informant.

7(iv). As to his own injuries, though the said witness insisted to have recieved three gunshot injuries and other pellet injuries, he further claimed to have suffered little blood loss (2-4 drops) that caused stains on his clothes. He also claimed to have shown his injuries to the Police Inspector when he first visited the Crime Scene but that he did not show his blood stained clothes at that time. He also confirmed that the Police Inspector did not send him for the medical examination but that the Circle Officer sent him for the medical examination though he had not himself shown his injuries to the said Circle Officer. He claimed to have left for medical examination at about 3:00 p.m. on 11.07.2001. He also claimed to have got done an X-ray examination on the third day.

7(v). As to his reaction to the assault, the said victims claimed to have stood up and run for his life upon being assaulted. He further claimed to have been first shot at on his wrist, then on his thigh and third on his chest. He also confirmed that total 18-20 shots were fired in the incident and that he came out of hiding only after the police arrived. Yet, he admitted to have not shown the Police Inspector the place where he hid to save his life.

8. Dr. R.P. Singh Chauhan (PW-4), the doctor who examined the injured witnesses Chandra Pratap Singh (PW-3)

and Shiv Vir Singh (PW-2), proved the two injury reports **(Exhibits Ka-2 and Ka-3)** stated to have examined the injured at about 7.45 p.m. on 11.07.2001 at the District Hospital, Mainpuri (where he was posted as EMO), upon reference made by the Community Health Centre, Karhal. He proved the injury reports and, in his opinion, injury nos. 1, 2, 4 and 9 caused to Chandra Pratap Singh (PW-3) were firearm injuries, about half day old. He further proved, he had advised an X-ray for the injury suffered by Chandra Pratap Singh (PW-3). He further proved to have examined the other injured Shiv Vir Singh (PW-2) at about 7.55 p.m. on 11.07.2001 at the same hospital, upon reference made by the Community Health Centre, Karhal. He proved that injury report as well. He opined that it was possible, the injuries may have been received at 10.30 a.m. on 11.07.2001 and that, according to him, Shiv Vir Singh may have suffered firearm injury. During his cross-examination, he stated that it was possible that the time of injuries caused, as disclosed by him, may carry a margin of 3 to 4 hours. None of the injuries suffered by the injured had blackening, tattooing, or scorching. He further denied of having noticed any traces of gun powder on any of the wounds. As to injury nos. 7 and 8, suffered by Chandra Pratap Singh, he opined that it was possible that such injuries may be abrasion injuries. Though, he admitted having not recovered any pellet or bullet or traces of gun powder from the wounds suffered by those injured persons, yet, in his opinion, those injuries were firearm injuries, considering their measurements and penetration. He denied the suggestion that the injuries were possible to be incurred by placing hot needle or a stick or rod.

9(i). Shiv Nath Singh, the Constable Clerk was examined as PW-5. He proved the fact of the preparation of "Chik' report no. 61 of 2001 in Case Crime No. 63 of 2001, under Sections 147, 148, 149, 307, 302 IPC, in his own handwriting (Exhibit Ka-4). He further proved that this case was disclosed in GD No. 15 at 11:20 a.m. on 11.07.2001. He denied the "Chik' report having been ante timed.

9(ii) . During his cross-examination, he could not disclose as to who prepared the *"Chitthi Majrubi'* of Shiv Vir Singh and Chandra Pratap Singh. He claimed that the "Chik' FIR had been promptly dispatched. However, he also admitted, it was received by the learned Magistrate on 16.07.2001. He was not questioned further as to the delay of about four days (including three working days), in that regard

10. Dr. R.D. Pandey (PW-6), who conducted the post-mortem on the dead bodies of Devendra Singh and Harvendra Singh @ Tika, proved the ante-mortem injuries reported in the two post-mortem examination reports **(Exhibits Ka-6 and Ka-7)** and the cause of death. He further established that pieces of cardboard (wad) and pellets were recovered from the dead bodies. According to him, (firearm) injury no.1 on Devendra Singh had been caused from the back side and that all (firearm) injuries suffered could have been caused either while the deceased was standing or sitting. Further, injury no.1 was opined to have been caused upon the deceased Devendra being shot at from close range, while the other firearm injuries may have been caused from more than 3 ft. Similarly, injury no.1 suffered by the deceased Harvendra @ Tika was opined to have been caused from close distance while the others may have been caused from a distance of more than 3 ft. Upon being questioned as to the intestinal contents, the doctor opined

that the deceased must have had food about six hours before his death.

11(i). Sub-Inspector **Surendra Nath (PW-7)** (the second Investigating Officer) was examined as the Investigating Officer. By that time, the first I.O. M.P. Singh Nagar (who was transferred mid way into the investigation), had died. He proved the steps of investigation, the recoveries made, and the statements recorded. During his cross-examination he deposed that the start time of investigation and the time when the I.O. first reached the Crime Scene were not recorded in the Case Diary. He was also questioned as to the genuineness of the *"Chitthi Majrubi'*. Here, he stated that the Case Diary records that the same were issued at the instruction of the Circle Officer. Those documents did not bear the Case Crime number. He described the place of occurrence as the "Chabutra'. On being questioned, he denied having been informed during the investigation that the licenced rifle of Rampal Singh (deceased appellant) had been deposited with any arms dealer. In fact, he stated to have been informed that the said rifle was in the custody of the brother-in-law of Rampal Singh (deceased appellant), namely Shailendra Singh @ Kintoo. Since that Shailendra Singh @ Kintoo could not be found, hence that rifle could not be recovered. He was not questioned either as to the overwriting on the '*Panchayatnama*' (as to time of the FIR being lodged or as to any delay in submitting the report u/s Section 157 (1) Cr.P.C.)

11(ii). Thereafter, all the incriminating circumstances appearing in the prosecution evidence were put to them and their respective statements were recorded under Section 313 CrPC. They attributed the earlier FIR - lodged against Sonu (for the murder of Sandeep @ Dabloo), as the real reason for their false implication. Rampal being the father of Sonu, Chandrabhan being the scribe of that FIR and Udaibhan being brother of Chandrabhan and prosecution witness. The Injury Reports of Shiv Vir Singh and Chandra Pratap Singh were stated to be fabricated. The deceased appellant - Rampal Singh also claimed to be not present and ill at the relevant time.

12. Thereafter, **Yashpal** was examined as **DW-1** wherein he sought to explain that the licenced rifle of Rampal Singh (deceased appellant) had been deposited with an arms repairer on 03.06.2001 and it was received back after repair on 20.07.2001. He further tried to establish that the appellant Rampal Singh (deceased appellant) was ill at the time of the incident and that he was 71 years old at the commencement of the trial. However, no proof arose to the licenced rifle of Rampal Singh (deceased appellant) having been given for repair, as claimed.

13. Upon hearing the parties, the learned trial court found the appellants guilty on all counts and, accordingly, passed it's judgment and order of conviction and punished Rampal Singh (deceased appellant), Chandrabhan Singh and Udaibhan Singh, as above.

14. Learned counsel for the appellants has first submitted that the entire prosecution story is an afterthought. In this regard, reference has also been made to the cross-examination of constable clerk Shiv Nath (PW-5) who admitted that the FIR was first received by the learned Magistrate on 16.07.2001, clearly indicating that the FIR was ante-timed. The real occurrence had not been truly reported. The FIR is

clearly ante timed is also borne out from the plain reading of the inquest "Panchayatnama' with respect to the dead bodies of Harvendra Singh @ Tika and Devendra Singh, wherein the time of the FIR being lodged has been clearly overwritten only to give sanctity to the otherwise ante timed FIR. Upto that time, no FIR existed. Further, the "Chitthi Majrubi' also does not bear the FIR number. Second, it has been submitted that the injuries claimed by the injured witnesses were wholly false and unsubstantiated. No X-ray examination was conducted with respect to any of the injuries reported and, in any case, there is a huge unexplained delay in the medical examination of the injured witnesses and in recording their statement u/s 161 Cr.P.C. The occurrence had taken place at about 10.30 a.m. in the morning of 11.07.2001 whereas the injured were examined at about 7.45 p.m. i.e., with a delay of about 9 hours and their statements were recorded, the next day. In the context of the injuries claimed, it is submitted, the same are wholly manufactured. In that regard, reference has also been made to the cross-examination statement of Constable Clerk Shiv Nath Singh (PW-5) who could not establish the authenticity of the "Chitthi Majrubi'. Third, referring to the post-mortem report whereby Dr R.D. Pandey, during his cross-examination, proved that Devendra Singh had also suffered gunshot injury from close range, it has been submitted that the same is wholly unexplained by the ocular evidence. Further, all injuries suffered by the deceased are on one side and, therefore, further doubt has been raised to the credibility of the ocular evidence that the accused had surrounded the victims from four sides and shot at them simultaneously. If that narration be correct, then, according to the learned counsel for the appellants, the deceased and victims would have suffered injuries from all directions and not one. Fourth, it has been submitted that the injuries suffered by Chandra Pratap Singh, being Injury Nos. 7 & 8 were not caused by firearm. The ocular evidence does not support any of those injuries. In fact, the presence of such injuries clearly discredits the ocular evidence. Last, it has been submitted that neither the site plan discloses the place where the deceased or the injured were sitting or were standing at the time of occurrence nor has any weapon been recovered nor had any blood soaked clothes of the injured been recovered and examined nor there is any independent witness in support of the testimony that is wholly partisan being of persons whose close family members had been accused in the murder case of Sandeep @ Dabloo. In short, the entire prosecution story is stated to be a bundle of lies put together only to falsely implicate the appellants arising from the prior animosity between the parties. In that regard, it has been further pointed out, though Sureshpal Singh (PW-1), who is the father of Sandeep @ Dabloo (accused in the case of murder of the son of Rampal Singh) was also present and, according to all the witnesses, remained present throughout the occurrence, he was not shot at. It clearly belies the suggestion made by the prosecution - of indiscriminate firing.

15. Learned Counsel for the appellant has relied on the following decisions:

1. Criminal Appeal No. 4857 of 2011 (Parshu Ram Vs. State of U.P.), and connected appeals, decided on 14.02.2019;

2. Criminal Appeal No. 1875 of 2007 (Shesh Narain Vs. State of U.P), and connected appeals, decided on 27.05.2016;

3. Criminal Appeal No. 5211 of 2011 (Madan singh Vs. State of U.P.), and another connected appeal, decided on 21.02.2019; and

4. Criminal Apeal No. 2560 of 2005 (Raj Kumar Khangar & Ors. Vs. State of U.P.), decided on 11.05.2017.

16. Opposing the appeal, learned AGA would submit that there is no delay in lodging the FIR and that there is no reasonable doubt of the same being ante-timed. It was promptly lodged. A simple cutting/overwriting on the inquest report as to the time of the FIR being lodged cannot and it does not create a reasonable doubt as to the date or time when the FIR was lodged. All other details of the FIR were duly and correctly recorded on the "Panchayatnama'. The injuries of the two injured witnesses are stated to be wholly genuine and duly proved. In an incident of this kind, where many rounds of ammunition were fired and two murders had been caused, merely because one close shot injury suffered by the deceased Devendra was not explained during ocular evidence, it could not lead to falsification of the entire prosecution evidence. Since the victim had no time or opportunity to escape when assaulted, the description of them being shot at after being surrounded, was duly explained. No injuries (other than firearm injuries) had been suffered by the injured Chandra Pratap Singh. The unexplained injuries claimed by the defence are really pellet injuries caused from a distance. Last, it has been submitted that the site plan was merely a rough depiction of the Crime Scene and it was, in no way, substantive evidence led by the prosecution to prove the charges. Non-disclosure/depiction of the exact place where each of the victim was sitting before being assaulted, is of no consequence in the face of clinching evidence available to establish the occurrence and the involvement of the present appellant. He has relied on the following decisions:

1. Gangabhavani Vs. Rayapati Venkat Reddy & Ors., (2013) 15 SCC 298;

2. Kamaljit Singh Vs. State of Punjab, (2003) 12 SCC 155;

3. Krishna Gope Vs. State of Bihar, (2003) 10 SCC 45;

4. Yogesh Singh Vs. Mahabeer Singh & Ors., (2017) 11 SCC 195;

5. Prithu @ Prithi Chand & Anr. Vs. State of H.P., (2009) 11 SCC 588 and;

6. Mallikarjun & Ors. Vs. State of Karanataka, (2019) 3 SCC (Cri) 563;

17(i) . Having heard learned counsel for the parties and having perused the record, first it is to be examined whether the FIR was lodged on the date and at the time disclosed by the prosecution. Specific to the plea of ante timed FIR set up by the appellants, in **Mehraj Singh Vs. State of U.P.; (1994) 5 SCC 188**, two external tests had been relied, to decide that plea. First external test is the report made to the magistrate under Section 157 Cr.P.C. and the second external test is the copy of the FIR sent with the dead body, for postmortem examination and its reference on the inquest report. In the present case, the FIR is disclosed to have been lodged on 11.07.2001, at 11.20 a.m. at Police Station Kurra, Sub-District Karhal, District Mainpuri. As per the requirements of Section 157 (1) Cr.P.C., the Officer-in-charge of the Police Station Kurra ought to

have sent his report to the concerned Magistrate, forthwith. The original FIR (Exhibit Ka-4) bears the endorsement made by the Magistrate "Seen". It is dated 16.07.2001. 11.07.2001 being a Wednesday, there was sufficient time of three working days (before 16.07.2001), for the report under Section 157(1) Cr.P.C. to have been prepared and sent to the learned Magistrate. According to the prosecution case, the Investigating Officer at the relevant time was Shri M.P. Singh Nagar. He could not be examined at the trial as he was dead. However, the defence did cross-examine the other Investigating Officer namely, Sub Inspector Surendra Nath (PW-7). No doubt was expressed during his cross examination as to the late preparation and submission of the report under section 157(1) Cr.P.C. In fact, he was not cross-examined to any extent as to the delay in submission of the report under Section 157 (1) Cr.P.C. At the same time, the Constable Clerk Shiv Nath Singh (PW-5), during his cross-examination, asserted that the said report had been promptly dispatched from the Police Station but that it was received by the learned Magistrate on 16.07.2001. He neither disclosed the exact date and time when the report was dispatched from the police station nor he was questioned any further as to that.

17(ii). In absence of any cross-examination either of the Investigating Officer Surendra Nath (PW-7) as to the cause of delay in submission of the report under Section 157 (1) Cr.P.C. and also on account of inadequate cross-examination of the Constable Clerk - Shiv Nath Singh (PW-5) - as to the date and time when the report under Section 157 (1) Cr.P.C. was actually dispatched, there is no reasonable doubt to the prosecution case that the first information report was lodged at 11:20 AM on 11.07.2001. That date and time is not only borne on the face of the FIR but the same was also corroborated from the General Diary entry, that was duly proved.

17(iii). Then, looking at the two inquest "*Panchayatnamas'* of the deceased Devendra Singh and Harvendra Singh @ Tika, they bear the Case Crime No. 63 of 2001, under Sections 147, 148, 149, 307, 302 IPC, Police Station Kurra, District Mainpuri in clear handwriting with no over writing or cutting. No cross-examination was conducted to doubt the existence of that endorsement on the aforesaid inquest *"Panchayatnamas'*. The cutting and over writing as to the time of the FIR mentioned on the two *'Panchayatnamas'* is identical. Though it stands out on the face of the '*Panchayatnamas'* yet, it cannot be ignored that during the elaborate cross-examination of Sri Shiv Nath Singh (PW-5) and Surendra Nath (PW-7), not a single question was thrown at those witnesses to doubt the correctness of the time "11:20 AM" mentioned on those *'Panchayatnamas*', as the time of the FIR being lodged. In absence of any cross-examination on that count, there is no reason to entertain any doubt as suggested by learned counsel for the appellant. It appears that a bona fide mistake may have occurred while recording the time of the FIR on the *'Panchayatnamas*'. That may have been corrected at the relevant time itself. The fact that the full FIR details (with respect to Case Crime Number etc.) are clearly and correctly mentioned on both the *'Panchayatnama'*, there remains no reason to doubt that the FIR had been lodged on the date and time as disclosed therein. Therefore, the external tests as relied by the Supreme Court **in Mehraj (supra)** are not found to have failed.

17(iv). Then, it is undisputed that the place of occurrence was not more than 4 to

6 kms from Police Station Kurra, District Mainpuri. The first informant Sureshpal (PW-1) Singh clearly described - after the incident, he travelled to that Police Station on his bicycle and lodged the FIR using a pen taken from a shop outside the police station. Again, in the entire cross-examination of that witness, which is rather lengthy and elaborate, no doubt emerged either that that witness was not present at the time and place of the occurrence or that he did not leave the Crime Scene immediately so as to travel to the Police Station on his bicycle or that he could not have reached the Police Station soon after the incident as may have allowed the FIR to be lodged at 11.20 a.m., i.e. within an hour from the incident having taken place, at 10.30 a.m. The cross-examination is also wholly inadequate. It does not allow any reasonable doubt to be entertained on that count either.

17(v). In view of the above, there is no reasonable doubt created by the appellant to the claim of the prosecution that the FIR was lodged at 11.20 a.m. on 11.07.2001. The Constable Clerk, Shiv Nath Singh (P.W.-5) proved the fact of the *''Chik*' FIR being prepared as disclosed. Thus, it has to be accepted that the FIR was lodged at 11.20 a.m. on 11.07.2001 at the Police Station - Kurra, District - Mainpuri, in Case Crime No. 63 of 2001.

18(i). As to the occurrence, it is seen that the prosecution produced three eye-witness account, being those of Sureshpal Singh **(P.W.-1)** - the first informant who was sitting under a *''Chhappar'*, almost due South to the 'Chabutra' (where the deceased and the injured were sitting). According to him, the assailants, who were 4 to 5 in numbers, approached from the South side of the "Kharnaja' and started firing simultaneously and indiscriminately at the victim party who were sitting under the Neem tree about 24 paces away. They had walked up to the "Chabutra', that was to the North of the "*Chhappar*' and fired a few shots from close distance also. The incident itself has been described to have taken place over a period of 10 to 12 minutes wherein the assailants had also reloaded their weapons and fired 16 - 18 rounds of ammunition (in all). It necessarily implies, the assailants would have walked past the "*Chhappar*' to reach the "Chabutra'. Besides the oral evidence, there are also the two 'Panchayatnama' and recoveries of blood-soaked earth and empty cartridges (duly proven) to establish the place of occurrence at the "Chabutra' in front of the '*Chhappar'* outside the house of Sureshpal Singh (PW-1). Those facts were proved. In absence of any doubt emerging thereat, during the cross-examination of any of the prosecution witnesses, the time and place of occurrence as claimed by the prosecution are also found proved.

18(ii). The assailants having walked in South-North direction upto the "Chabutra' that was to the East of the pavement, they would have had to walk past the *''Chhappar'* and in front of it (before reaching the 'Chabutra'), giving Sureshpal Singh (PW-1) (sitting to their right/East) a clear view of the occurrence. This is further corroborated from the stand taken by the said witness that he had clearly seen the assailants and they had seen him while being at a distance of about 24 paces from them. He also described that the assailants fled taking the same path, implying that they would have necessarily walked past the *''Chhappar'* again, where the informant was sitting.

18(iii). However, a doubt emerges as to allegation of indiscriminate firing resorted to by the assailants. According to

the testimony of Sureshpal Singh (PW-1), the victims had been completely over powered by the appellants and remained at the Crime Scene for about 10-12 minutes during which period they fired about 16-18 rounds of ammunition after reloading their weapons. If the firing was so indiscriminate and purposeful to eliminate as many members of the rival party/family, it stands out that not a bullet was fired at the first informant Sureshpal Singh (PW-1) who was positioned under the "*Chhappar*" at a similar distance as the two deceased victims-Devendra Singh and Harvendra Singh @ Tika. There is no evidence of the assailants having been fired back and there is also no evidence of they being challenged by any person. In fact, according to Sureshpal Singh (PW-1), he had only raised an alarm and cried out for help upon spotting the assailants.

18(iv). It may be noted, according to the first informant Sureshpal Singh (PW-1), the murders of Devendra Singh and Harvendra Singh @ Tika had been caused as a result of political rivalry/village *'party bandi'*. On the other hand, the defence has claimed that Rampal Singh (deceased appellant), Chandrabhan (appellant granted remission) along with the present appellant and Mewaram (father of Chandrabhan and Udaibhan) had been falsely implicated for the reason of an earlier FIR having been lodged against Sonu, son of Sureshpal Singh (PW-1), for the murder of Sandeep @ Dabloo (son of the deceased appellant/Ram Pal Singh). In that case, Chandrabhan (appellant granted remission) was the scribe of the FIR whereas his brother - Udaibhan (appellant herein) and his father Mewaram, were prosecution witnesses. The existence of that earlier case against Sonu, son of Sureshpal Singh (PW-1), stands proved by PW-1 himself.

18(v). Also, the defence has successfully established existence of another case lodged against Sureshpal Singh (PW-1), Navratan Singh, Brijpal Singh and Makrand Singh under the Scheduled Castes/Scheduled Tribes (Prevention of the Atrocities Act, 1989) wherein the wife of the Rampal Singh (deceased appellant) was a prosecution witness. Sureshpal Singh (PW-1) also admitted that Rampal Singh (deceased appellant) had defeated Munni Devi and Makrand Singh in successive elections to the post of Village Pradhan. Thus, it emerges that the parties were in a bitter relationship from before. The informant side had a grouse against the appellant side on three counts, all duly proven.

18(vi). Examined in this background of proven old animosity and doubts noted above, the testimony of Sureshpal Singh (PW-1) - an interested witness must be tested more carefully before any firm conclusion may be reached thereon. Motive for commission of offence is not a primary factor to be established in a case where direct ocular evidence has been adduced by the prosecution yet, that evidence must be intrinsically reliable and inherently probable and not tainted with animosity.

18(vii). In Rameshwar Vs. The State of Rajasthan, AIR (1952) SC 54, close relationship of the witness with the victim (in that case a mother) was held to be not relevant to the independent character of her deposition. Then in **Dalip Singh & Others Vs. State of Punjab, AIR (1953) SC 364,** close relationship of the witness to the victim was considered to be normally "a sure guarantee of truth" unless tainted with enmity with the accused etc.

18(viii). In Criminal Appeal No.1247 of 2000 (Sri Kant Pandey and Others Vs.

State of U.P.) decided on 11.11.2020 by my learned brother, in his astute opinion, has taken note of the ratio laid down by the Supreme Court in ***Hari Obula Reddy & Others Vs The State of Andhra Pradesh 1981 (3) SCC 675 and Jalpat Rai Vs The State of Haryana 2011 (14) SCC 208***. It had been thus observed:-

"20. In Hari Obula Reddy v. State of A.P., (1981) 3 SCC 675, a three-judge Bench of the apex court, with regard to the care and caution with which the testimony of an interested witness is to be appreciated and assessed, in paragraph 13 of the judgment, as reported, had observed as follows:

"..... it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon. Although in the matter of appreciation of evidence, no hard and fast rule can be laid down, yet, in most cases, in evaluating the evidence of an interested or even a partisan witness, it is useful as a first step to focus attention on the question, whether the presence of the witness at the scene of the crime at the material time was probable. If so, whether the substratum of the story narrated by the witness, being consistent with the other evidence on record, the natural course of human events, the surrounding circumstances and inherent probabilities of the case, is such which will carry conviction with a prudent person. If the answer to these questions be in the affirmative, and the evidence of the witness appears to the court to be almost flawless, and free from suspicion, it may accept it, without seeking corroboration from any other source. Since perfection in this imperfect world is seldom to be found, and the evidence of a witness, more so of an interested witness, is generally fringed with embellishment and exaggerations, however true in the main, the court may look for some assurance, the nature and extent of which will vary according to the circumstances of the particular case, from independent evidence, circumstantial or direct, before finding the accused guilty on the basis of his interested testimony. We may again emphasise that these are only broad guidelines which may often be useful in assessing interested testimony, and are not iron-cased rules uniformly applicable in all situations." (Emphasis Supplied)

21. In Jalpat Rai v. State of Haryana, (2011) 14 SCC 208, after reiterating the general principles as noticed above, in paragraph 42 of the judgment, as reported, the apex court cautioned the courts of the stark reality that where there is rivalry, hostility and enmity there is a tendency to over implicate and distort the true version against the person(s) with whom there is rivalry, hostility and enmity. In that context, it was observed as follows:

"42..... But it is a reality of life, albeit unfortunate and sad, that human failing tends to exaggerate,

over implicate and distort the true version against the person(s) with whom there is rivalry, hostility and enmity. Cases are not unknown where an entire family is roped in due to enmity and simmering feelings although one or only few members of that family may be involved in the crime."

22. Prior to that, in paragraph 41 of the judgment, with regard to the mode to be adopted by the court to assess the worth of the testimony of interested witnesses, it was observed:

"41.....To find out the intrinsic worth of these witnesses, it is appropriate to test their trustworthiness and credibility in light of the collateral and surrounding circumstances as well as the probabilities and in conjunction with all other facts brought out on record."

23. Thus, the law is clear that though testimony of an interested witness can alone form the basis of conviction but before acting on it the court must carefully test whether it is free from suspicion, embellishment and exaggeration and whether the substratum of the story narrated by the witness is such which is consistent with the other evidence on record, the natural course of human events, the surrounding circumstances and inherent probabilities of the case so that it carries conviction with a prudent person."

18(ix). Then, in **Pulicherla Nagaraju @ Nagaraja Vs. The State of Andhra Pradesh (2006) 11 SCC 444,** it has been observed as under:

"16. In this case, we find that the trial court had rejected the evidence of PW 1 and PW 2 merely because they were interested witnesses being the brother and father of the deceased. But it is well settled that evidence of a witness cannot be discarded merely on the ground that he is either partisan or interested or closely related to the deceased, if it is otherwise found to be trustworthy and credible. It only requires scrutiny with more care and caution, so that neither the guilty escape nor the innocent wrongly convicted. If on such careful scrutiny, the evidence is found to be reliable and probable, it can be acted upon. If it is found to be improbable or suspicious, it ought to be rejected. Where the witness has a motive to falsely implicate the accused, his testimony should have corroboration in regard to material particulars before it is accepted. (Vide Hari Obula Reddy v. State of A.P. [(1981) 3 SCC 675 : 1981 SCC (Cri) 795] , Ashok Kumar Pandey v. State of Delhi [(2002) 4 SCC 76 : 2002 SCC (Cri) 728] and Bijoy Singh v. State of Bihar [(2002) 9 SCC 147 : 2003 SCC (Cri) 1093] ....."

18(x). The conspectus of the law as applied to the facts of the present case leads us to a prima facie conclusion that Sureshpal Singh (PW-1) is a witness who may be expected, under normal circumstances, to be interested in seeking successful prosecution of the present appellant along with the co-accused Rampal Singh (deceased appellant) and Chandrabhan (appellant granted remission), for reason of two earlier criminal cases involving him and his close family members. Also, it is a fact that the said witness (PW-1) categorically admitted to existence of "party bandi" in the village wherein the appellants and the informant party were on opposite sides. Also, Rampal Singh (deceased appellant) was the victor in two electoral battles fought between the parties on the post of 'Pradhan'. Therefore, the testimony of Sureshpal Singh (PW-2)

though not self contradicted or patently false yet it may require corroboration in regard to material particulars from other prosecution evidence to eliminate any doubt that the same may be tainted with animosity.

19(i). As to the further evidence led by the prosecution, it is seen, Shiv Vir Singh (PW-2) had suffered only one injury - being a lacerated wound on his right thumb. However, the other injured witness Chandra Pratap Singh (PW-3) had suffered seven firearm injuries, allegedly caused by three shots fired - on the wrist of his left hand, another on his right leg and a third on the left side of his chest. Thus, numerous pellet injuries are claimed to have been suffered by him. According to the prosecution story, Devendra Singh, Harvendra Singh @ Tika, Shiv Vir Singh and Chandrapal Singh were sitting under the Neem tree on the "Chabutra' in front of the house of the first informant Sureshpal Singh for some time before the assault took place. According to Shiv Vir Singh (PW-2), upon being fired at, he ran for his life to the East of the "Chabutra', in an open field behind the house of one Virendra Singh. The third prosecution witness Chandra Pratap Singh (PW-3) also claims to have reacted similarly to the occurrence and to hide in a 'kachcha' room of Sureshpal Singh (PW-1).

19(ii). During his cross-examination, Shiv Vir Singh (PW-2) claimed to have met the Investigating Officer when he first arrived at the Crime Scene, yet his statement was not recorded by the I.O. at that time though according to the FIR (that had been recorded at 11.20 am), he along with Chandra Pratap Singh had been injured in the double murder of Devendra Singh and Harvendra Singh. At the same time, he claimed, he had shown his injuries to the Police Inspector, at that time itself. He was sent for medical examination at about 2.30 - 3.00 p.m. on 11.07.2001. He admitted that his statement was first recorded on the next date which would be on 12.07.2001. He however could not name any of the "Panch' witnesses. He further admitted to having not disclosed to the Investigating Officer on 11.07.2001, the names of the assailants, though it is otherwise clear from the deposition made by the said Shiv Vir Singh (PW-2) that the assailants were known to him from before and, in any case, they had already been named in the F.I.R. He denied, there was any blood on his clothes. He tried to explain the same by stating, he had held his right thumb with his other hand and ran to save his life. It is also a fact that neither any blood-soaked earth was recovered from the place of hiding of Shiv Vir Singh (PW-2) nor his blood-soaked clothes nor any blood-soaked bandage was recovered by the police nor any such item was examined to any extent. Further, he claimed to have hidden in a nearby open field and to have remained hidden almost till the arrival of the police. Thus, the testimony of Shiv Vir Singh (PW-2) and his description of the occurrence is found wholly consistent with the prosecution story. However, doubts remain as to peripheral facts as to why he could not name the 'Panch' witnesses and the delay in recording his statement under Section 161 Cr.P.C. and the delay in his medical examination. These may be considered later, while dealing with similar doubts in the testimony of Chandra Pratap Singh (PW-2).

19(iii). Then, as to the other injured witness Chandra Pratap Singh (PW-3), it is seen, he claimed to have saved his life by fleeing from the assault and hiding himself

in a *''kachcha'* room of Sureshpal Singh (PW-1) about 10 to 12 steps away. At the same time, this witness is disclosed to have been fired at thrice - first at his wrist, second at his thigh and a third on the left side of his chest. In that assault, he is alleged to have received various pellet injuries. Like Shiv Vir Singh (PW-2), this witness also claimed to have been present at the Crime Scene when the Police Inspector first visited, on 11.07.2001. He also claimed to have shown his injuries to the Police Inspector at that time itself yet, neither his statement was recorded at that time nor he was sent for medical examination. He denied having been sent for medical examination by the Police Inspector.

19(iv). The police Circle Officer is stated to have arrived at the Crime Scene half an hour after the Police Inspector as was also confirmed by the Sub-Inspector Surendra Nath (PW-7) from the Case Diary. Though it is undisputed that neither of the two *''Chitthi Majrubi'* bore the instant Case Crime number, according to the statement of the Sub-Inspector Surendra Nath (PW-7), the issuance of the *''Chitthi Majrubi'* was occasioned by an oral direction given by the Circle Officer, as recorded in the Case Diary. It is also undisputed that no X-ray plate or X-ray report was proved at the trial. Both witnesses denied having shown to the Police Inspector the place where they had hidden upon the assault being made. No blood (soaked) earth or clothes or bandages were recovered.

19(v). The fact that the Investigating Officer did not consider it necessary to get the injured medically examined and he further did not record the statements of those injured witnesses at the first met opportunity may not carry much weight, in face of the fact that in the FIR lodged promptly, at 11.20 am, the said witnesses were named as injured persons. Then, in face of no doubt emerging during the cross-examination of Dr. R.P.S. Chauhan (PW-4) as to the conduct of the medical examinations, it has to be accepted that the injured witnesses were sent for medical examination at about 2:30-3:00 pm by the Circle Officer, against *''Chitthi Majrubi'* that do not bear the Case Crime No. That fact and the fact of medical examination actually carried out being proven the rest are matters that may point to deficiencies in the police investigation but may not discredit the testimony of the injured witness Chandra Pratap Singh (PW-3) itself. As held by the **Supreme Court in State of Rajasthan Vs. Kishore, (1996) 8 SCC 217**, an irregularity or even an illegality during investigation would not cast doubt on the otherwise trustworthy and reliable evidence.

19(vi). Then, Dr. R.P. Singh Chauhan (P.W.-4), during his cross examination, admitted to absence of any X-Ray report with respect to any of the injuries suffered by either of the injured witness and he also negated the query as to presence of traces of gunpowder or pellets etc. from any of the wounds of either of the two injured witness. Yet, his opinion as to the other injuries suffered by Chandra Pratap Singh (PW-3) being injury numbers 1 to 6 and 9 remained undoubted, being firearm injuries. It clearly supports/corroborates the prosecution story. There is no patent inconsistency in the ocular and medical evidence as may discredit the former. Thus, in absence of any cross-examination of Chandra Pratap Singh (PW-3) to establish or suggest that injury numbers 1 to 6 and 9 were either not caused by firearm or that

they had been caused in any manner other than claimed by that witness, it has to be accepted that those injuries were caused as alleged by the prosecution.

19(vii). In view of the above, we find no reason to disbelieve the testimony of the injured witness Chandra Pratap Singh (PW-3) as to the occurrence and/or the manner in which he sustained seven firearm injuries. In absence of effective cross examination, his presence at the time and place of occurrence being the 'Chabutra' cannot be doubted. The narration of the event and the manner in which he sustained injuries also cannot be doubted as nothing came out during that cross examination as may point towards any patent or other fatal inconsistency. His injuries were duly proven to be firearm injuries being injury nos.1 to 6 and 9. That having been wholly proven by the medical opinion of Dr R.P. Singh Chauhan (PW-4), the weight of such evidence cannot be over looked, merely because the Police Inspector acted with ineptitude and did not get the injured witnesses medically examined, promptly. Yet, the conduct of those medical examinations is wholly proved, having been conducted on the same day at the District Hospital Mainpuri at 7:45 pm and 7:55 pm on 07.11.2001. Thus, it cannot be said with any conviction either that no medical examination was done or there is no evidence to believe the genuineness of the two injury reports.

19(vii). All other doubts would remain matters of unexplained chance. The substratum of the prosecution story is found wholly consistent and corroborated in all material parts. The fact that the two injured witness escaped with minor injuries and Sureshpal Singh (PW-1) escaped without being fired at are not facts or occurrences as may throw out the prosecution story in entirety as unbelievable. Similarly, the ineptitude of the police and/or the mistakes committed during the investigation - not recording the statement of the injured witness when they first became available at about 12:00 noon on 11.07.2001 or of having sent the injured witnesses for their medical examination with a delay of few hours or of not recovering the blood soaked earth or clothes etc, do not create any reasonable doubt in the basic allegation in the prosecution story that the appellant Udaibhan along with other assailants had caused the occurrence at 10:30 a.m. wherein Devendra Singh, Harvendra Singh @ Tika were killed and Shiv Vir Singh (PW-2) and Chandrabhan Singh (PW-3) received pellet injuries in a daring assault made at them with various firearms fired repeatedly in an indiscriminate manner. The number of rounds fired together with variety of cartridges recovered corroborates the prosecution allegation.

20. As to the third submission, the postmortem examination of the deceased clearly brings out multiple firearm injuries suffered by them on vital body parts as would have caused their instantaneous death, in the first place that fact supports the prosecution allegation of indiscriminate firing by all the assailants carried out using different weapons of which there is ample evidence in the shape of recoveries made of empty cartridges of different bore types and also by the different nature of injuries proven. The fact that one of the injuries suffered by the deceased Devendra Singh, caused from a close range may not have been explained by ocular evidence, may not be relevant. In such an occurrence where a large number of rounds of ammunition were fired indiscriminately by four or five

assailants some of which were stated to have been fired from close range i.e. when the assailants had reached the 'Chabutra' and fired at the victims from that position, it is quite possible that one of the injuries suffered by a deceased may have remained from being specified in the ocular evidence. Therefore, the submission advanced by learned counsel for the appellants to that extent, may not be accepted.

21(i). As to the last submission, the fact that exact depictions were not made on the site plan where each member of the victim party was seated, may also not be of great relevance. A site plan is not a piece of substantive evidence. In **Jagdish Narain & Anr. Vs. State of U.P.; (1996) 8 SCC 199,** it was observed:

"9. In responding to the next criticism of the trial court regarding the failure of the Investigating Officer to indicate in the site plan prepared by him the spot wherefrom the shots were allegedly fired by the appellants and its resultant effect upon the investigation itself, the High Court observed that such failure did not detract from the truthfulness of the eyewitnesses and only amounted to an omission on the part of the Investigating Officer. In our opinion neither the criticism of the trial court nor the reason ascribed by the High Court in its rebuttal can be legally sustained. While preparing a site plan an Investigating Police Officer can certainly record what he sees and observes, for that will be direct and substantive evidence being based on his personal knowledge; but as, he was not obviously present when the incident took place, he has to derive knowledge as to when, where and how it happened from persons who had seen the incident. When a witness testifies about what he heard from somebody else it is ordinarily not admissible in evidence being hearsay, but if the person from whom he heard is examined to give direct evidence within the meaning of Section 60 of the Evidence Act, 1872 the former's evidence would be admissible to corroborate the latter in accordance with Section 157 CrPC (sic Evidence Act). However such a statement made to a police officer, when he is investigating into an offence in accordance with Chapter XII of the Code of Criminal Procedure cannot be used to even corroborate the maker thereof in view of the embargo in Section 162(1) CrPC appearing in that chapter and can be used only to contradict him (the maker) in accordance with the proviso thereof, except in those cases where sub-section (2) of the section applies. That necessarily means that if in the site plan PW 6 had even shown the place from which the shots were allegedly fired after ascertaining the same from the eyewitnesses it could not have been admitted in evidence being hit by Section 162 CrPC. The law on this subject has been succinctly laid down by a three-Judge Bench of this Court in Tori Singh v. State of U.P. [AIR 1962 SC 399 : (1962) 1 Cri LJ 469 : (1962) 3 SCR 580] In that case it was contended on behalf of the appellant therein that if one looked at the sketch map, on which the place where the deceased was said to have been hit was marked, and compared it with the statements of the prosecution witnesses and the medical evidence, it would be extremely improbable for the injury which was received by the deceased to have been caused on that part of the body where it had been actually caused if the deceased was at the place marked on the map. In repelling the above contention this Court observed, inter alia:

"... the mark on the sketch-map was put by the Sub-Inspector who was obviously not an eyewitness to the incident. He could only have put it there after taking

the statements of the eyewitnesses. The marking of the spot on the sketch-map is really bringing on record the conclusion of the Sub-Inspector on the basis of the statements made by the witnesses to him. This in our opinion would not be admissible in view of the provisions of Section 162 of the Code of Criminal Procedure, for it is in effect nothing more than the statement of the Sub-Inspector that the eyewitnesses told him that the deceased was at such and such place at the time when he was hit. The sketch-map would be admissible so far as it indicates all that the Sub-Inspector saw himself at the spot; but any mark put on the sketch-map based on the statements made by the witnesses to the Sub-Inspector would be inadmissible in view of the clear provisions of Section 162 of the Code of Criminal Procedure as it will be no more than a statement made to the police during investigation."

(emphasis supplied)

21(ii). Similarly, the non-recovery of assault weapon is also not found decisive to the charge, as the ocular evidence led by the prosecution was reliable as to the manner of occurrence. Similarly, the absence of recovery of blood stained clothes etc. of the victim/injured witnesses, though not desirable in a trial such as this, at the same time, by very nature it would remain an inadequacy or defect in the police investigation that may not discredit the prosecution evidence, as the ocular evidence is otherwise credit worthy.

22. To conclude, we find that the prosecution had successfully proven that the appellant-Udaibhan alongwith others had assaulted Devendra Singh, Harvendra Singh @ Tika, Shiv Vir Singh (PW-2) and Chandra Pratap Singh (PW-3) while they were sitting/standing at the 'Chabutra' (adjoining the village pathway), outside the house of Sureshpal Singh (PW-1), at about 10:30 pm on 11.07.2001. It is also found proven that the assailants had fired indiscriminately at the victim party, over a period of about 10-12 minutes, close to twenty rounds resulting in six firearm injuries to the deceased Devendra Singh and four firearm injuries to the deceased Harvendra Singh @ Tika. Also, it is found proven that in the same occurrence, the other injured witness Chandra Pratap Singh (PW-3) received about seven firearm injuries whereas a single firearm injury was caused to the other injured witness Shiv Vir Singh (PW-2). That much of the prosecution story having been proven, no merit is found in the appeal as may lead to acquittal of the present appellant. We have also gone through the precedent relied upon by learned counsel for the appellant in paragraph 15 above. No new or other principle has been laid down in those decisions as may require separate consideration. Since upon appraisal of evidence, we have found the facts to be proven against the appellant, those precedents are found distinguished on facts.

23. Consequently, the appeal fails and is accordingly **dismissed.** The impugned judgment and order dated 05.10.2005 by which the appellant-Udaibhan was convicted and sentenced under Sections 147, 148, 307/149 and 302/149 IPC, is hereby affirmed.

24. Office is directed to communicate the order to the Court concerned for compliance.
