# THE
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## ALLAHABAD SERIES


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HIGH COURT OF JUDICATURE AT ALLAHABAD

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**(2021)10ILR A1**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 18.10.2021**

**BEFORE**

**THE HON'BLE JASPREET SINGH, J**

Bail No. 5501 of 2017

**Suryamani Mishra @ Sanju Mishra ...Applicant**

**Versus**

**State of U.P. ...Opposite Party**

**Counsel for the Applicant:**
Sumit Kumar Srivastava, Rajendra Prasa Mishra

**Counsel for the Respondents:**
Govt. Advocate, Ashok Kumar Srivastava

**A. Criminal Law - Code of Criminal Procedure,1973-Section 439 - Indian Penal Code,1860-Section 302, 307, 386 & 34-application-rejection-deceased died of gun shot injury and the role of firing the said shot has been ascribed to the applicant as per statement of complainant and eye-witness-applicant has criminal history-the role of co-accused is quite different to that ascribed to the applicant-Hence, the applicant cannot seek parity.(Para 1 to 34)**

**B. Grant of bail though being a discretionary order, but, however, calls for exercise of such a discretion in a judicious manner and not as a matter of course. Order for bail bereft of any cogent reason cannot be sustained. Needless to record, however, that the grant of bail is dependent upon the contextual facts of the matter being dealt with by the court and facts, however, do always vary from case to case. The nature of offence is one of the basic considerations for the grant of bail-more heinous is the crime, the greater is the chance of rejection of the bail, though, however, dependent on the factual matrix of the matter.(Para 27)**

**The application is rejected.** (E-6)

**List of Cases cited:**

1. Harjit Singh Vs Inderpreet Singh @ Inder & anr.(2021) SCC Online SC 633

2. Ash Mohammad Vs Shiv Raj Singh (2012) 9 SCC 446

3. St. of Mah. Vs Sitaram Popat Vetal (2004) 7 SCC 521

4. Mahipal Vs Rajesh Kumar (2020) 2 SCC 118

5. Paras Nath Vishnoi Vs The Director, CBI in CRLA No.693 of 2021

6. Gokarkonda Naga Saibaba Vs St. of Mah. (2018) 2 SCC 505

7. Satya Brat Gain Vs St. of Bih. (2000) AIR SCW 1545

8. Vijay Kumar Vs St. of U.P. B.A. No. 11815 of 2019

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

1. The applicant namely Sri Surya Mani Mishra @ Sanju Mishra, son of Rama Kant Mishra has moved the instant bail application under Section 439 Cr.P.C, being arraigned in Case Crime No. 1073 of 2016 under Sections 302, 307, 386 & 34 I.P.C., P.S.Kotwali Nagar, District Pratapgarh.

2. The record indicates that Sri Om Prakash Patel lodged a First Information Report with P.S. Wali, District Pratapgarh bearing Case Crime No. 1073 of 2016. It is alleged that the complainant namely Om Prakash Patel was the Gram Pradhan of Gram Kopa Jethawar, P.S. Kotwali Nagar, District Pratapgarh (At the time of the lodging of the First Information Report). It

was alleged by him that the applicant Surya Mani Mishra @ Sanju Mishra Son of Rama Kant Mishra is a man of dubious and overpowering antecedents and frequently used to demand gunda tax from the complainant.

3. That on 29.12.2016, the complainant received a phone from the applicant who demanded a sum of Rs. 50, 000/- before commencement of the work of laying khadanza in Gram Kopa leading to the Pal Basti Road. He further threatened that in case if the complainant did not pay the money before start of the work, he would have to face dire consequences. On 30.12.3016, the complainant along with his brother Lal Bahadur, Shiv Bahadur and his cousin brothers namely Ravindra Kumar Patel, Dinesh Kumar Patel had commenced the work of laying the Khadanja. At around 09:30 AM, the applicant along with his brother namely Rudra Mani Mishra and Chandra Dutt Mishra being duly armed reached the house of Shashi Bhushan and started abusing. While using offensive language, the complainant stated that how dare you start the work without paying the sum of Rs. 50,000/- as demanded. The complainant stated that since it was a Government work how could he pay the aforesaid amount. At this juncture, Chandra Dutt Mishra exhorted and incited to kill and at that very moment, the applicant Surya Mani Mishra and his brother Rudra Mani Mishra drew their weapons and shot Shiv Bahadur and Lal Bahadur. Shiv Bahadur died on the spot while Lal Bahadur received grievous injuries and was admitted in District Hospital from where he was referred to Higher Center at Allahabad.

4. It is in respect of the aforesaid incident that the First Information Report was lodged on 30.12.2016 at 11:30 AM. Upon the statement of the witnesses including that of the injured Lal Bahadur both Surya Mani Mishra, Rudra Mani Mishra and Chandra Dutt Pandey were apprehended.

5. The record further indicates that Rudra Mani Mishra has been enlarged on bail by means of an order dated 03.10.2018 passed in Bail Application No. 3089 of 2018 by a coordinate Bench of this Court. Sri Chandra Dutt Pandey has also been enlarged on bail by means of an order dated 03.05.2017 in Bail Application No. 3285 of 2017 passed by a coordinate Bench of this Court.

6. The applicant has filed several supplementary affidavits so also the counsel for the complainant/the informant has filed their counter affidavits as well as supplementary counter affidavits. The State has also filed its counter affidavit to the supplementary affidavits filed by the applicant.

7. The Court has heard the learned counsel for the applicant Sri R.P. Mishra, the learned A.G.A. for the State and Sri Ashok Srivastava, learned counsel for the complainant.

8. Sri R.P. Mishra, learned counsel for the applicant while pressing his bail application has primarily stated that there is an interpolation in the First Information Report, inasmuch as, the First Information Report is only against Rudra Mani Mishra later on by adding the words, the applicant has also been roped in. Elaborating his submissions, it is urged that from the bare perusal of the First Information Report, it would indicate that it has been stated that "इतने में सूर्य मणि मिश्र उर्फ संजू मिश्र उनका भाई रूद्र मणि असलहा निकाल कर मेरे भाई शिव बहादुर व लाल बहादुर को गोली मार दिया।".

9. It has been emphasized that from the perusal and reading of the aforesaid sentence, it would indicate that it was Rudra Mani who had drawn the weapon and shot at Lal Bahadur and Shiv Bahadur and in order to identify the name of Surya Mani Mishra i.e. the name of the applicant has been used. It is further urged that only one gun shot injury has been reported. Thus, there could be no way that both Rudra Mani and Surya Mani would have been present.

10. The learned counsel for the applicant has further submitted that through the investigation, the prosecution has changed its stand, inasmuch as, in the First Information Report as lodged indicated only Rudra Mani who is assigned the role of shooting, however, later when the statement of Lal Bahadur and Ravindra Kumar Patel was recorded, it introduced the name of the applicant as well that both Rudra Mani Mishra and the applicant drew weapon and shot at Shiv Bahadur and Lal Bahadur.

11. It has further been urged that subsequently Supplementary (Majid) statements were recorded wherein there was a convenient departure from the case and the role of firing was assigned only to the applicant and a stand was taken that the name of Rudra Mani was introduced under the pressure of other workers, though, he was not present at the time of occurrence.

12. The learned counsel for the applicant has further urged that later with the change of Investigation Officer, fresh statements were again recorded wherein again names of both the applicant and Rudra Mani Mishra were reiterated. Subsequently, upon recording of the statement of Om Prakash Patel, the complainant, under Section 164 Cr.P.C., it was stated that the applicant had shot Shiv Bahadur while Rudra Mani had shot Lal Bahadur.

13. It has further been submitted that only one gun shot injury was found on the body of the deceased Shiv Bahadur, however, since the names of both the applicant and Rudra Mani were incorporated but it was nowhere stated that from whose weapon Shiv Bahadur actually sustained the gun shot injury which lead to his death. It is only in the statement under Section 164 Cr.P.C. that this statement was introduced and the same was recorded on 22.06.2017 i.e. almost 6 months after the date of occurrence.

14. The learned counsel for the applicant has further urged that the applicant himself had sustained serious injuries, however, there is no explanation by the prosecution in so far as the injuries of the applicant is concerned. The applicant was apprehended and was examined by the doctor under police supervision and was also advised for skull x-ray which was done while the applicant was in jail but the report of the said skull x-ray has not been provided. The emphasis is that the applicant was also injured in the outbreak of the violent scuffle, however, the First Information Report of the applicant was not lodged but since the complainant was the Gram Pradhan, at this instance, the First Information Report was lodged, falsely implicating the applicant. It is urged that once the applicant was attacked, it was open for him to raise the ground of self-defence and in the aforesaid circumstances, the applicant has been castigated while the true and correct sequence of events have not emerged.

15. It has further been submitted that the applicant has been in custody since 31.12.2016 and almost 5 years have lapsed.

The other co-accused namely Rudra Mani Mishra has been enlarged on bail on 03.10.2018 so also the other co-accused Chandra Dutt Mishra and in the aforesaid circumstances, the applicant is also entitled to bail especially when the charge sheet has already been filed, four witnesses of fact have already been examined and there is no apprehension that the applicant would tamper with the evidence or attempt to influence the witnesses.

16. The learned A.G.A. and the learned counsel for the informant/complainant has urged that the issue regarding interpolation in the First Information Report is misconceived. It has been submitted that the First Information Report was lodged on the basis of a written complaint filed by Sri Om Prakash Patel. While drawing the attention of the Court to the copy of the written complaint made to the police station concerned, a copy of which has been brought on record as Annexure No. CA-1 with the Counter affidavit filed by Sri Om Prakash Patel dated 27.08.2017, it is urged that it has clearly been stated therein that " "इतने में सूर्य मणि मिश्र उर्फ संजू मिश्र उनका भाई रूद्र मणि असलहा निकाल कर मेरे भाई शिव बहादुर व लाल बहादुर को गोली मार दिया।".

17. It has been urged that the written complaint clearly states the presence of both the applicant and Rudra Mani Mishra and it has also been clearly stated that both drew their weapons and shot at Shiv Bahadur and Lal Bahadur. Any typographical error on the part of the police authorities in recording the First Information Report is not going to change the factual matrix, coupled with the fact that even in the statements of the complainant and other eye-witnesses including the statement of the injured which clearly stated that both the applicant and Rudra Mani Mishra had shot with their weapons. The complainant himself was an eye-witness who has stated that the applicant shot Shiv Bahadur who died on the spot whereas Rudra Mani shot Lal Bahadur (the injured) and thus at this stage, it is not open for the applicant to state that there is interpolation in the First Information Report and that he has been falsely implicated.

18. It is further been urged that the applicant has been clearly named in the First Information Report and even in investigation his role has been clearly defined and that he had shot Shiv Bahadur who died on the spot. It is also urged that a country made pistol was also recovered at the pointing out of the applicant.

19. The learned A.G.A. has further submitted that from the perusal of the recovery memo, it would indicate that while the search for the applicant was underway, the police received the information that both the applicant and the other co-accused Chandra Dutt Pandey were near the Kusumi Raliway Gate and were waiting to flee and were looking for an opportunity to procure a vehicle. It has been urged that while running and hiding the applicant sustained injuries and he had bandaged himself somewhere and in the aforesaid condition, he was apprehended and thereafter examined by the doctors under the police supervision.

20. It is urged that the injuries were not required to be substantiated by the prosecution as alleged by the applicant rather from the recovery memo, it is clear that while running and hiding, the applicant sustained the said injuries.

21. The learned counsel for the complainant has further submitted that the applicant while filing the bail application

did not disclose his criminal history. It is only after the informant filed the counter affidavit specifically stating the criminal history of the applicant that the applicant subsequently filed a supplementary affidavit explaining the criminal history.

22. The learned counsel for the complainant submits that the applicant was previously convicted in Sessions Trial No. 700 of 2008 where he was sentenced for 7 years of rigorous imprisonment. He has filed an appeal bearing No. 943 of 2016 which is pending before this Court. It is also urged that the applicant is also facing trial in Case Crime No. 674 of 2005 under Section 147, 148, 149, 188, 307, 332, 353, 435 and 440 I.P.C., P.S. Kotwali Nagar, District Pratapgarh.

23. It has further been pointed out that the applicant has such dubious credentials that he was charged under Section 3 (1) of the Control of Gundas Act and an order was passed by the Competent Authority dated 21.10.2015 expelling the applicant for a period of 6 months from the District of Pratapgarh and he was prohibited to enter the said district, a copy of the said order has also been placed on record by the complainant vide supplementary affidavit dated 23.05.2019.

24. It is further urged that the applicant has not cooperated in the trial and had been seeking adjournments and despite the Trial Court having fixed short dates and granted adequate opportunity yet only four witnesses have been examined while there are 13 witnesses in all.

25. It is submitted that while the applicant was convicted in Sessions Trial No. 700 of 2008 and was sentenced to 7 years of rigorous imprisonment and he preferred the criminal appeal No. 943 of 2016 which is pending before this Court wherein he was granted bail but during his release on bail, the applicant has committed the above heinous offence and under such circumstances, grant of bail to the applicant would be jeopardizing the safety and security of the witnesses as well as the complainant, hence, in the aforesaid circumstances, the applicant is not entitled to be enlarged on bail.

26. The Court has heard the learned counsel for the parties and has meticulously perused the record.

27. Before adverting to the present facts and circumstances, it will be appropriate to notice the decision of the Apex Court in the case of ***Harjit Singh Vs. Inderpreet Singh @ Inder and Another*** reported in ***2021 SCC Online SC 633*** wherein the Apex Court has considered the manner in which the Court must exercise its discretionary power for grant of bail. The Apex Court in the aforesaid decision has also referred to earlier decisions on the aforesaid points and relevant para 7.2 to 7.5 and 8 is being noted hereinafter for ready reference:

*"7.2 In the case of **Ash Mohammad v. Shiv Raj Singh, (2012) 9 SCC 446,** this Court in paragraphs 17 to 19 observed and held as under:*

*"17. We are absolutely conscious that liberty of a person should not be lightly dealt with, for deprivation of liberty of a person has immense impact on the mind of a person. Incarceration creates a concavity in the personality of an individual. Sometimes it causes a sense of vacuum. Needless to emphasise, the sacrosanctity of liberty is paramount in a civilised society. However, in a democratic*

*body polity which is wedded to the rule of law an individual is expected to grow within the social restrictions sanctioned by law. The individual liberty is restricted by larger social interest and its deprivation must have due sanction of law. In an orderly society an individual is expected to live with dignity having respect for law and also giving due respect to others' rights. It is a well-accepted principle that the concept of liberty is not in the realm of absolutism but is a restricted one. The cry of the collective for justice, its desire for peace and harmony and its necessity for security cannot be allowed to be trivialised. The life of an individual living in a society governed by the rule of law has to be regulated and such regulations which are the source in law subserve the social balance and function as a significant instrument for protection of human rights and security of the collective. It is because fundamentally laws are made for their obedience so that every member of the society lives peacefully in a society to achieve his individual as well as social interest. That is why Edmond Burke while discussing about liberty opined, "it is regulated freedom".*

*18. It is also to be kept in mind that individual liberty cannot be accentuated to such an extent or elevated to such a high pedestal which would bring in anarchy or disorder in the society. The prospect of greater justice requires that law and order should prevail in a civilised milieu. True it is, there can be no arithmetical formula for fixing the parameters in precise exactitude but the adjudication should express not only application of mind but also exercise of jurisdiction on accepted and established norms. Law and order in a society protect the established precepts and see to it that contagious crimes do not become epidemic. In an organised society the concept of liberty basically requires citizens to be responsible and not to disturb the tranquillity and safety which every well-meaning person desires. Not for nothing J. Oerter stated:*

*"Personal liberty is the right to act without interference within the limits of the law."*

*19. Thus analysed, it is clear that though liberty is a greatly cherished value in the life of an individual, it is a controlled and restricted one and no element in the society can act in a manner by consequence of which the life or liberty of others is jeopardised, for the rational collective does not countenance an anti-social or anti-collective act."*

*7.3 In the case of* **State of Maharashtra v. Sitaram Popat Vetal, (2004) 7 SCC 521,** *it is observed and held by this Court that while granting of bail, the following factors among other circumstances are required to be considered by the Court:*

*1. The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;*

*2. Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant; and*

*3. Prima facie satisfaction of the court in support of the charge.*

*It is further observed that any order dehors such reasons suffers from non-application of mind.*

*7.4 In the case of* **Mahipal v. Rajesh Kumar (2020) 2 SCC 118,** *where the High Court released the accused on bail in a case for the offence under Section 302 of the IPC and other offences recording the only contention put forth by the counsel for the accused and further recording that "taking into account the*

*facts and circumstances of the case and without expressing the opinion on merits of case, this Court deems fit just and proper to enlarge/release the accused on bail", while setting aside the order passed by the High Court granting bail, one of us (Dr. Justice D.Y. Chandrachud) observed in paragraphs 11 and 12 as under:*

*"11. Essentially, this Court is required to analyse whether there was a valid exercise of the power conferred by Section 439 CrPC to grant bail. The power to grant bail under Section 439 is of a wide amplitude. But it is well settled that though the grant of bail involves the exercise of the discretionary power of the court, it has to be exercised in a judicious manner and not as a matter of course. In Ram Govind Upadhyay v. Sudarshan Singh (2002) 3 SCC 598, Umesh Banerjee, J. speaking for a two-Judge Bench of this Court, laid down the factors that must guide the exercise of the power to grant bail in the following terms:*

*"3. Grant of bail though being a discretionary order -- but, however, calls for exercise of such a discretion in a judicious manner and not as a matter of course. Order for bail bereft of any cogent reason cannot be sustained. Needless to record, however, that the grant of bail is dependent upon the contextual facts of the matter being dealt with by the court and facts, however, do always vary from case to case. ... The nature of the offence is one of the basic considerations for the grant of bail -- more heinous is the crime, the greater is the chance of rejection of the bail, though, however, dependent on the factual matrix of the matter.*

*4. Apart from the above, certain other which may be attributed to be relevant considerations may also be noticed at this juncture, though however, the same are only illustrative and not exhaustive, neither there can be any. The considerations being:*

*(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.*

*(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.*

*(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.*

*(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."*

*12. The determination of whether a case is fit for the grant of bail involves the balancing of numerous factors, among which the nature of the offence, the severity of the punishment and a prima facie view of the involvement of the accused are important. No straitjacket formula exists for courts to assess an application for the grant or rejection of bail. At the stage of assessing whether a case is fit for the grant of bail, the court is not required to enter into a detailed analysis of the evidence on record to establish beyond reasonable doubt the commission of the crime by the accused. That is a matter for trial. However, the Court is required to examine whether there is a prima facie or reasonable ground to believe that the*

*accused had committed the offence and on a balance of the considerations involved, the continued custody of the accused subserves the purpose of the criminal justice system. Where bail has been granted by a lower court, an appellate court must be slow to interfere and ought to be guided by the principles set out for the exercise of the power to set aside bail.*

*7.5 That thereafter this Court considered the principles that guide while assessing the correctness of an order passed by the High Court granting bail. This Court specifically observed and held that normally this Court does not interfere with an order passed by the High Court granting or rejecting the bail to the accused. However, where the discretion of the High Court to grant bail has been exercised without the due application of mind or in contravention of the directions of this Court, such an order granting bail is liable to be set aside. This Court further observed that the power of the appellate court in assessing the correctness of an order granting bail stand on a different footing from an assessment of an application for cancellation of bail. It is further observed that the correctness of an order granting bail is tested on the anvil of whether there was a proper or arbitrary exercise of the discretion in the grant of bail. It is further observed that the test is whether the order granting bail is perverse, illegal or unjustified. Thereafter this Court considered the difference and distinction between an application for cancellation of bail and an appeal before this Court challenging the order passed by the appellate court granting bail in paras 13, 14, 16 and 17 as under:*

*"13. The principles that guide this Court in assessing the correctness of an order [Ashish Chatterjee v. State of W.B., CRM No. 272 of 2010, order dated 11-1-2010 (Cal)] passed by the High Court granting bail were succinctly laid down by this Court in Prasanta Kumar Sarkar v. Ashis Chatterjee (2010) 14 SCC 496. In that case, the accused was facing trial for an offence punishable under Section 302 of the Penal Code. Several bail applications filed by the accused were dismissed by the Additional Chief Judicial Magistrate. The High Court in turn allowed the bail application filed by the accused. Setting aside the order [Ashish Chatterjee v. State of W.B., CRM No. 272 of 2010, order dated 11-1-2010 (Cal)] of the High Court, D.K. Jain, J., speaking for a two-Judge Bench of this Court, held:*

*"9. ... It is trite that this Court does not, normally, interfere with an order [Ashish Chatterjee v. State of W.B., CRM No. 272 of 2010, order dated 11-1-2010 (Cal)] passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:*

*(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;*

*(ii) nature and gravity of the accusation;*

*(iii) severity of the punishment in the event of conviction;*

*(iv) danger of the accused absconding or fleeing, if released on bail;*

*(v) character, behaviour, means, position and standing of the accused;*

*(vi) likelihood of the offence being repeated;*

*(vii) reasonable apprehension of the witnesses being influenced; and*

*(viii) danger, of course, of justice being thwarted by grant of bail.*

*10. It is manifest that if the High Court does not advert to these relevant considerations and mechanically grants bail, the said order would suffer from the vice of nonapplication of mind, rendering it to be illegal."*

*14. The provision for an accused to be released on bail touches upon the liberty of an individual. It is for this reason that this Court does not ordinarily interfere with an order of the High Court granting bail. However, where the discretion of the High Court to grant bail has been exercised without the due application of mind or in contravention of the directions of this Court, such an order granting bail is liable to be set aside. The Court is required to factor, amongst other things, a prima facie view that the accused had committed the offence, the nature and gravity of the offence and the likelihood of the accused obstructing the proceedings of the trial in any manner or evading the course of justice. The provision for being released on bail draws an appropriate balance between public interest in the administration of justice and the protection of individual liberty pending adjudication of the case. However, the grant of bail is to be secured within the bounds of the law and in compliance with the conditions laid down by this Court. It is for this reason that a court must balance numerous factors that guide the exercise of the discretionary power to grant bail on a case-by-case basis. Inherent in this determination is whether, on an analysis of the record, it appears that there is a prima facie or reasonable cause to believe that the accused had committed the crime. It is not relevant at this stage for the court to examine in detail the evidence on record to come to a conclusive finding.*

*16. The considerations that guide the power of an appellate court in assessing the correctness of an order granting bail stand on a different footing from an assessment of an application for the cancellation of bail. The correctness of an order granting bail is tested on the anvil of whether there was an improper or arbitrary exercise of the discretion in the grant of bail. The test is whether the order granting bail is perverse, illegal or unjustified. On the other hand, an application for cancellation of bail is generally examined on the anvil of the existence of supervening circumstances or violations of the conditions of bail by a person to whom bail has been granted. In Neeru Yadav v. State of U.P. (2014) 16 SCC 508, the accused was granted bail by the High Court [Mitthan Yadav v. State of U.P. [2014 SCC OnLine All 16031]. In an appeal against the order [Mitthan Yadav v. State of U.P., 2014 SCC OnLine All 16031] of the High Court, a two-Judge Bench of this Court surveyed the precedent on the principles that guide the grant of bail. Dipak Misra, J. held:*

*"12. ... It is well settled in law that cancellation of bail after it is granted because the accused has misconducted himself or of some supervening circumstances warranting such cancellation have occurred is in a different compartment altogether than an order granting bail which is unjustified, illegal and perverse. If in a case, the relevant factors which should have been taken into consideration while dealing with the application for bail have not been taken note of, or bail is founded on irrelevant considerations, indisputably the superior court can set aside the order of such a grant of bail. Such a case belongs to a different category and is in a separate realm. While dealing with a case of second nature, the Court does not dwell upon the violation of conditions by the accused or*

*the supervening circumstances that have happened subsequently. It, on the contrary, delves into the justifiability and the soundness of the order passed by the Court."*

*17. Where a court considering an application for bail fails to consider relevant factors, an appellate court may justifiably set aside the order granting bail. An appellate court is thus required to consider whether the order granting bail suffers from a non-application of mind or is not borne out from a prima facie view of the evidence on record. It is thus necessary for this Court to assess whether, on the basis of the evidentiary record, there existed a prima facie or reasonable ground to believe that the accused had committed the crime, also taking into account the seriousness of the crime and the severity of the punishment. The order [Rajesh Kumar v. State of Rajasthan, 2019 SCC OnLine Raj 5197] of the High Court in the present case, insofar as it is relevant reads:*

*"2. Counsel for the petitioner submits that the petitioner has been falsely implicated in this matter. Counsel further submits that, the deceased was driving his motorcycle, which got slipped on a sharp turn, due to which he received injuries on various parts of body including ante-mortem head injuries on account of which he died. Counsel further submits that the challan has already been presented in the court and conclusion of trial may take long time.*

*3. The learned Public Prosecutor and counsel for the complainant have opposed the bail application.*

*4. Considering the contentions put forth by the counsel for the petitioner and taking into account the facts and circumstances of the case and without expressing opinion on the merits of the case, this Court deems it just and proper to enlarge the petitioner on bail." Thereafter this Court set aside the order passed by the High Court releasing the accused on bail."*

*Thereafter, this Court set aside the order passed by the High Court releasing the accused on bail.*

*8. At this stage, a recent decision of this Court in the case of Ramesh Bhavan Rathod v. Vishanbhai Hirabhai Makwana (koli) (2021) 6 Scale 41 is also required to be referred to. In the said decision, this Court considered in great detail the considerations which govern the grant of bail, after referring to the decisions of this Court in the case of Ram Govind Upadhyay (Supra); Prasanta Kumar Sarkar (Supra); Chaman Lal v. State of U.P. (2004) 7 SCC 525; and the decision of this Court in Sonu v. Sonu Yadav 2021 SCC OnLine SC 286. After considering the law laid down by this Court on grant of bail, in the aforesaid decisions, in paragraphs 20, 21, 36 & 37 it is observed and held as under:*

*"20. The first aspect of the case which stares in the face is the singular absence in the judgment of the High Court to the nature and gravity of the crime. The incident which took place on 9 May 2020 resulted in five homicidal deaths. The nature of the offence is a circumstance which has an important bearing on the grant of bail. The orders of the High Court are conspicuous in the absence of any awareness or elaboration of the serious nature of the offence. The perversity lies in the failure of the High Court to consider an important circumstance which has a bearing on whether bail should be granted. In the two-judge Bench decision of this Court in Ram Govind Upadhyay v. Sudharshan Singh, the nature of the crime was recorded as "one of the basic considerations" which has a bearing on the grant or denial of bail. The considerations which govern the grant of bail were*

*elucidated in the judgment of this Court without attaching an exhaustive nature or character to them. This emerges from the following extract:*

*"4. Apart from the above, certain other which may be attributed to be relevant considerations may also be noticed at this juncture, though however, the same are only illustrative and not exhaustive, neither there can be any. The considerations being:*

*(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.*

*(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.*

*(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.*

*(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."*

*21. This Court further laid down the standard for overturning an order granting bail in the following terms:*

*"3. Grant of bail though being a discretionary order -- but, however, calls for exercise of such a discretion in a judicious manner and not as a matter of course. Order for bail bereft of any cogent reason cannot be sustained."*

*xxxxxxxxx*

*36. Grant of bail under Section 439 of the CrPC is a matter involving the exercise of judicial discretion. Judicial discretion in granting or refusing bail - as in the case of any other discretion which is vested in a court as a judicial institution - is not unstructured. The duty to record reasons is a significant safeguard which ensures that the discretion which is entrusted to the court is exercised in a judicious manner. The recording of reasons in a judicial order ensures that the thought process underlying the order is subject to scrutiny and that it meets objective standards of reason and justice. This Court in Chaman Lal v. State of U.P. (2004) 7 SCC 525 in a similar vein has held that an order of a High Court which does not contain reasons for prima facie concluding that a bail should be granted is liable to be set aside for nonapplication of mind. This Court observed:*

*"8. Even on a cursory perusal the High Court's order shows complete non-application of mind. Though detailed examination of the evidence and elaborate documentation of the merits of the case is to be avoided by the Court while passing orders on bail applications. Yet a court dealing with the bail application should be satisfied, as to whether there is a prima facie case, but exhaustive exploration of the merits of the case is not necessary. The court dealing with the application for bail is required to exercise its discretion in a judicious manner and not as a matter of course.*

*9. There is a need to indicate in the order, reasons for prima facie concluding why bail was being granted particularly where an accused was charged of having committed a serious offence..."*

*37. We are also constrained to record our disapproval of the manner in*

*which the application for bail of Vishan (A-6) was disposed of. The High Court sought to support its decision to grant bail by stating that it had perused the material on record and was granting bail "without discussing the evidence in detail" taking into consideration:*

*(1) The facts of the case;*

*(2) The nature of allegations;*

*(3) Gravity of offences; and*

*(4) Role attributed to the accused."*

28. Applying the principles as outlined by the Apex Court to the present case at hand, it would indicate that prima facie, there are clear statement of the complainant, the injured as well as the other eye-witness Ravindra Kumar Patel which indicate the alleged involvement of the applicant in the offence. The record further indicates that Shiv Bahadur died of gun shot injury and the role of firing the said gun shot which caused the death of Shiv Bahadur has been ascribed to the applicant. It is to be noticed that despite the statements and supplementary statements having been recorded by different investigation officers, yet one thing in common is that in all such versions, the name and role of the applicant has been reiterated and maintained which is of firing a gun shot which has taken the life of Shiv Bahadur. The record also indicates and it could not be disputed by the learned counsel for the applicant that the applicant was previously convicted in Sessions Trial No. 700 of 2008 and while the applicant was on bail, he is alleged to have committed the aforesaid offence. The involvement of the applicant in the other cases also could not be disputed apart from the fact that the applicant did not disclose his criminal history candidly but only later it was explained. It will be relevant to notice that though the State had also filed its counter affidavit but for the reasons best known, the criminal history of the applicant was not disclosed by the State while filing its counter affidavit dated 29.07.2017 which is also not appreciable.

29. In so far as the grant of bail to the other co-accused is concerned, their role is quite different to that ascribed to the applicant and therefore in the humble consideration of this Court, the applicant cannot seek parity of the said bail orders.

30. As already noticed above that out of 13 witnesses only four witnesses have been examined and though it is true that a person cannot be incarcerated for an indefinite period yet at the same time, it also has to be noticed that the right of personal liberty of a person cannot be elevated to such a high pedestal that it may give rise to societal disorders and anarchy.

31. The learned counsel for the applicant has relied upon the decision of the Apex Court in the case of ***Paras Nath Vishnoi Vs. The Director, Central Bureau of Investigation in Criminal Appeal No. 693 of 2021*** decided on ***27.07.2021***. In the aforesaid case, the Apex Court enlarged the accused on bail as he was in custody for more than 8 and a half years. The learned counsel for the applicant has also relied upon the decision of ***Gokarkonda Naga Saibaba Vs. State of Maharashtra reported in 2018 (2) SCC 505*** wherien the Apex Court enlarged the accused on bail considering the medical condition of the accused in the said case. Further, the learned counsel for the applicant has also relied upon a decision of the Apex Court in the case of ***Satya Brat Gain Vs. State of Bihar*** reported in ***2000 AIR SCW 1545*** wherein the accused was granted bail as he

was in custody for more than five years. The learned counsel for the applicant has also relied upon a decision of coordinate Bench of this Court in the case of ***Vijay Kumar Vs. State of U.P.*** in Bail Application No. ***11815 of 2019*** decided on 09.08.2021 wherein the coordinate Bench of this Court by relying upon the case of ***Satya Brat Gain (Supra)*** and ***Paras Nath Vishnoi (Supra)***, in the facts of the aforesaid case had enlarged the accused on bail.

32. Having considered the aforesaid decisions, it would be clear that the said decisions are distinguishable on facts and in light of the decision of the Apex Court in the Case of ***Harjit Singh (Supra)*** and for the reasons already incorporated hereinabove, this Court is of the considered view that it is not a fit case to grant bail to the applicant which is accordingly rejected, however, the Trial Court is directed to expedite the trial and shall proceed without granting any unnecessary adjournments to either of the parties and an endevour be made that the trial is completed within a period of six months from the date, a certified copy of this order is placed before the Court concerned.

33. It is made clear that this order shall not be construed as an expression of opinion on merits of the case and shall in no manner affect the trial as it has been made only for the purposes of consideration of the bail application.

34. Accordingly, the bail application is ***rejected.***

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**(2021)10ILR A13**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 10.08.2021**

**BEFORE**

**THE HON'BLE RAHUL CHATURVEDI, J**

Bail U/S 438 CR.P.C. No. 12714 of 2021

**Ivan Masood & Ors. ...Applicants**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicants:**
Sri Ashok Nath Tripathi

**Counsel for the Opposite Parties:**
G.A.,Sri Rajiv Lochan Shukla

**A. Criminal Law - Code of Criminal Procedure, 1973-Section 438 & Indian Penal Code,1860-Sections 498-A, 307, 504, 506 & Dowry Prohibition Act, 1961-Section ¾ & Muslim Women(Protection of Rights on Marriage)Act, 2019-Section ¾-application-allowed-FIR lodged by wife after receiving notice of Talaq-e-Ahsan from the applicant-FIR was a counterblast to the alleged first notice of talaq-no injuries on the record attracting section 307-relationship was already sour, after lodging FIR it became bad to worse-in order to save parties from permanent and irrevocable damage, in the interest of justice applicant granted bail.(Para 1 to 11)**

**The application is allowed.** (E-6)

**List of Cases cited:**

1. Ankit Bharti & ors. Vs St. of U.P. & anr. (2020) 3 ADJ 575

2. Arnesh Kumar Vs St. of Bih. & anr. (2014) 8 SCC 273 Joginder Kumar Vs St. of U.P.& ors. (1994) 4 SCC 260 Sanaul Haque Vs St. of U.P. & anr. (2008) Cri L J 1998

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

(1) Heard Shri Ashok Nath Tripathi, learned counsel for the applicants; Shri Rajiv Lochan Shukla, learned counsel for

the opposite party no.2 as well as learned A.G.A. for the State. Perused the records of the case.

(2) Instant application u/s 438 Cr.P.C. on behalf of the applicants, namely, Ivan Masood, Masudur Rab, Smt. Fatmi Iqbal and Asif, being preferred before this Court straightaway, who are apprehending their arrest pursuant to F.I.R. lodged by opposite party No.2 as Case Crime No.499 of 2021, u/s 498-A, 307, 504, 506 I.P.C., Section ¾ of Dowry Prohibition Act and Section ¾ of Muslim Women (Protection of Rights on Marriage) Act, 2019, P.S.-Karaili, District-Prayagraj.

(3) From the records of the case, it is evident that the applicants have approached this Court directly without getting their anticipatory bail application rejected from the Court of Session, Prayagraj. Capitalizing this issue, Shri Rajiv Lochan Shukla, learned counsel for the opposite party no.2 has raised two fold preliminary objections with regard to the maintainability of the instant application itself. They are :

(a) That the applicants without exhausting the forum i.e. approaching the Court of Session at the first instance, have directly approached this Court in exercise of power u/s 438 Cr.P.C. (U.P. Act No.4 of 2019) and without specifying those "special and extraordinary circumstances" for this bye-pass, as propounded in the Full Bench judgment of this Court in ***Ankit Bharti and others vs State of U.P. and another*** reported in ***2020 (3) ADJ 575*** and thus the instant Anticipatory Bail Application is liable to be dismissed on this score alone, in the light of above judgment.

(b) Secondly, it was argued by the learned counsel for the opposite party no.2 that since the F.I.R. among many other sections of I.P.C. and D.P. Act, is also under Section ¾ of Muslim Women (Protection of Rights on Marriage) Act, 2019, thus, the provisions of Section 7(c) of the Act 2019 are also attracted in this case. For the sake of brevity, the above provisions of Section 7(c) are spelled out herein below :-

***"7. Notwithstanding anything contained in the Code of Criminal Procedure, 1973,-***

***(c) no person accused of an offence punishable under this Act shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom talaq is pronounced, is satisfied that there are reasonable grounds for granting bail to such person."***

From the above provisions, it was argued that 'the Magistrate while entertaining bail application filed by the accused, shall have to give an opportunity of hearing to that married muslim woman upon whom *talaq* is pronounced before adjudging the bail application. Thus, a notice is required to be served upon the *"triple talaq victim"* before adjudicating the present anticipatory bail.

(4) Let us examine these two initial objections raised by the learned counsel for the opposite party no.2 one by one:-

(I) So far as approaching this Court directly u/s 438 Cr.P.C. is concerned, as to the maintainability of present anticipatory bail application, without exhausting the first ladder i.e. approaching to the Court of Sessions, without spelling out that special and extraordinary situation which prompted the applicants to approach this Court directly. In this regard, Shri Ashok Nath Tripathi, learned counsel for the applicants has drawn attention of this

Court to Clause 7 of Section 438 Cr.P.C. (U.P. Act No.4 of 2019), which states :

***"(7) If an application under this section has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Session."***

On the plain reading of above clause, as argued by learned counsel for the applicants, it is explicit and self-contained, that the High Court and the Court of Sessions, both have been given concurrent powers to deal and decide the anticipatory bail, with only one rider that, if a person approaches the High Court at the first instance without exhausting his earlier remedy i.e. approaching to the Court of Sessions, then he would not be relegated back to approach the Court of Sessions after loosing this case from the High Court.

*Shri Tripathi, learned counsel for the applicants further submits for applying* ***Lord Wensleydale's Golden Rules of Interpretation*** *for any statute. [According to him "Interpretation is the method by which the true sense or meaning of the world is understood. 'The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. The purpose of the interpretation of the statute is to unlock the locks put by the legislature. For such unlocking, keys are to be found out. These keys may be termed as aids of interpretation and the principles of interpretation. .....'*

*It is a very useful rule in the construction of a statute to adhere to ordinary meaning of the words used, and to the grammatical construction unless that is at variance with intention of the Legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further."]*

Learned counsel for the applicants argued that, with the help and aid of above Golden Rules of Interpretation for knowing the true import of Clause (7) of Section 438 Cr.P.C. (U.P. Act No.4 of 2019), it is explicit that the statute nowhere speaks about the "exceptional or extraordinary circumstance" which was hammered and pointed out by Shri Shukla, learned counsel for opposite party no.2 in his preliminary objections.

Learned counsel for the opposite party no.2 strenuously backed his argument after deriving strength from the latest Full Bench Court judgment; ***Ankit Bharti and others vs State of U.P. and another, 2020 (3) ADJ 575*** . Learned counsel has emphasized upon paragraphs 16 and 18 of said judgment, which are quoted herein below:

*"16. We, therefore, hold that the conclusions as recorded in Vinod Kumar on the meaning to be ascribed to exceptional or special circumstances needs no reconsideration. It must, as was noted there, be left to the concerned Judge to exercise the discretion as vested in him by the statute dependent upon the facts obtaining in a particular case.*

*"18. Viewed in that backdrop it is manifest that it was open for the learned Judge to assess the facts of each case to form an opinion whether special circumstances existed or not entitling the applicant there to approach the High Court directly. Considered from the aforesaid perspective, it is manifest that Question (i) as framed by the learned Judge is really unwarranted. If the learned Judge was of the opinion that the averments made in support of the existence of special circumstances were "not appealing" [as he chooses to describe it] or unconvincing, nothing hindered the Court from holding so."*

On this, it has been argued by the counsel for the opposite party no.2, that no special circumstances has been mentioned by the counsel for the applicants in his pleadings.

The Full Bench decision of this Court explicitly clear in this regard, as it casts the burden upon the Judge concerned to assess the "Special Circumstance" and its sufficiency or insufficiency to entertain the anticipatory bail.

In this regard, learned counsel for the applicants, in para 4 of his petition mentioned the reason for approaching to this Court straightaway, which reads thus:

*"4. That this is First Anticipatory Bail Application of the applicants before this Hon'ble Court. The applicants have directly approached this Hon'ble Court without filing any Anticipatory Bail Application in the court below. It is relevant to mention here that due to pandemic Covid-19, applicants are unable to approach the Court below and are directly approaching to this Hon'ble Court for consideration of their Anticipatory Bail Application."*

In these times of utter uncertainty, where nobody can predict that from when the district administration would promulgate the lock-down on account of recent pandemic and markets, schools, institutions, offices are often closed. It is highly unjust and risky to adhere to the alleged self-created rider and an additional technicality regarding the forum entertaining anticipatory bail. On the other hand, when the police personnel are hotly chasing the applicants to any how nab them in connection with above F.I.R., in this time of utter confusion and uncertainty, to ask the named accused to adhere with self-created restrictions by the Courts would be mockery of justice and the system. In addition to this, the accused-applicants consciously have given up their one remedy available to them and approached the High Court directly, instead of approaching to the Court of Sessions with the risk, that if they loose their case from the High Court, no second innings would be available to them.

However, keeping in view the judicial propriety, discipline and following the conservative mode and the ratio laid down in the Full Bench judgment, it is the satisfaction of the judge concerned to entertain any anticipatory bail application. From Para-4 of the petition, quoted herein above, I find that the reasons spelled out in it are quite convincing and to my utmost satisfaction. Thus, first objection raised by learned counsel for opposite party no.2 is hereby turned down.

(II) Now coming to the second objection, that is, before deciding the present anticipatory bail application on behalf of applicants, it was argued by learned counsel that keeping in view the provisions of Section 7(c) of the Muslim Women (Protection of Rights on Marriage) Act, 2019, it is mandatory to give notice to the victim of triple *talaq* and as such the instant anticipatory bail application can not be heard and decided in the absence of victim or she being represented.

On this, it has been argued by Shri Tripathi, learned counsel for the applicants that the present F.I.R. is in retaliation of the written notice for *talaq* given by the Husband to his wife on 28.4.2021 (Annexure-2) and its service upon opposite party no.2 on 11.5.2021. Soon after the receipt of the first written notice for *talaq* on 11.5.2021, the father of the wife after due consultation with the lawyers has managed to draft the present F.I.R. levelling all sorts of bogus acquisitions and canards, with the allegation of triple *talaq* upon her daughter

Sana Nasir. It is further contended by the applicants' counsel, that had there been any motive to adopt the procedure of *Talaq-e-biddat* (having instantaneous and irrevocable divorce), the husband would not have given the first notice of *talaq* dated 28.4.2021. All the allegations are bogus, well-thought and after due legal consultation to paste more serious and grim look to entire episode.

It has been further argued by the applicants' counsel that the Muslim Women (Protection of Rights on Marriage) Act, 2019 provides a deterrent shield to those muslim married ladies who suffer atrocities from their husbands and are always on tentacle hooks, who in fit of anger or frustration adopt worst kind of *Talaq* i.e. *Talaq-e-Biddat*. This type of *talaq* was made punishable and strongly deprecated. But it does not mean, that all forms of *talaq* are prohibited by this enactment. As mentioned above, that the husband had chosen *Talaq*-e-Ahsan, an ideal way of dissolving the muslim marriage, accepted and acknowledged by Shariyat Law. This is why, first written notice was given by the husband. On this, it was argued that the provisions of Muslim Women (Protection of Rights on Marriage) Act, 2019 would not apply in the facts of the present case. Thus, there is no question of giving any notice to the victim lady as per Section-7(c) of this Act. Consequently, second objection also goes to shambles.

**Now coming to the merits of the case :**

(5) It has been contended by the learned counsel for the applicants that the applicants have got no criminal antecedents and they have not undergone any imprisonment after conviction by any court of law in relation to any cognizable offence previously. An assurance was also advanced by learned counsel for the applicants on behalf of the applicants that they would render all requisite co-operation and assistance in the process of law and with the investigating agency and shall not create any hindrance to reach to its logical conclusion and shall not flee away from the course of justice.

(6) Learned counsel for the applicants has strenuously argued that the applicants have been made target just to besmirch their reputation and belittle him in the public estimate by the informant. Number of arguments were advanced by learned counsel for the applicants to demonstrate the falsity of the accusation made in the FIR against the applicants by the informant. Learned counsel for the applicants has also relied upon the judgments in the cases of ***Arnesh Kumar vs State of Bihar and another, (2014) 8 SCC 273; Joginder Kumar vs State of U.P. and others (1994) 4 SCC 260*** *and* ***Sanaul Haque vs State of U.P. and another, 2008 Cri. LJ 1998,*** to buttress his contentions.

(7) In the case of Arnesh Kumar *(supra)* Hon'ble Apex Court has opined that the pith and core is that the police officer before arrest must put questions to himself, Why arrest?, Is it really required?, What purpose it will serve? What object it will achieve? If it is only after these questions are addressed and one or other conditions, as enumerated above, are satisfied, the power of arrest needs to be exercised. Before the arrest the police office should have a reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to satisfy further that the arrest is necessary for one or more purposes envisaged in sub-clauses (a) to (e) to Clause-1 of Section 438 Cr.P.C.

(8) In the background of said legal proposition, it has been argued by learned counsel for the applicant that the present FIR was got registered by opposite party no.2 under the aforesaid sections against the husband (applicant no.1) and rest of the accused persons who are his close related family members. It is further contended by the counsel for applicants that this F.I.R. was lodged by the father of the victim on 2.6.2021 at Police Station Kareili, Prayagraj only after receiving a letter/written notice of *Talaq*-e dated 28.4.2021/11.5.2021 received by Smt. Sana Nasir w/o applicant no.1. It has been argued by the counsel for the applicants that the opposite party no.2 got infuriated by this notice of husband and in retaliation to it, the present F.I.R. was got registered leveling an usual allegation prevailing now-a-days for alleged dowry demand and its related harassment by the applicant no.1 and his family members. The applicant no.1 got married with Sana Nasir on 14.9.2016. Nasir Zen, informant and father of the lady is working at Saudi Arabia. Initially Sana Nasir got her schooling from Saudi Arabia and thereafter went to Canada for her higher education. It is contended by the learned counsel for the applicants that after the marriage with applicant no.1 and Sana Nasir, there were deep rooted differences on account of their respective attitude, behavior, temperament etc between them. This was resulted into serious discord between them. It was quite obvious, there was yawning differences in their values, their family background, as it is evident from their Whatsapp chatting, ever low conversation between them.

First notice of *talaq* dated 28.4.2021 is self explanatory about the quantum of differences and discord between them, besides the Whatsapp conversations. From the F.I.R. it is clear that the informant Nasir Zen met with S.H.O. Kareli on 22.5.2021 and the concerned S.H.O. has rendered his good offices to settle down the issue. Exercising his power, the S.H.O. has summoned the applicant no.1 and his parent to the police station and it was decided that the applicant would take her wife along with him. This calling by S.H.O. to the police station might have flared up the tempers of the applicant against opposite party no.2. From the text of the F.I.R., it is evident that the relationship between the husband and wife, which was already sour, but the things have gone bad to worse after lodging the instant F.I.R. Learned counsel for the applicants has argued that there would be further irrevocable and permanent damage in the relationship, if the applicants are sent to jail. Undercurrent of the F.I.R. is a matrimonial discord between the husband and wife. No useful purpose would be served, if the applicants are sent to jail. It has been further submitted by the counsel that the present F.I.R. is a counterblast to the alleged first notice of *talaq*. There is no injuries on the record attracting Section 307 I.P.C. as alleged in the F.I.R. It has been urged by the counsel that in order to save the parties from the permanent and irrevocable damage, in the interest of justice the present anticipatory bail should be allowed.

(9) Per contra, learned counsel for opposite party no.2 and learned A.G.A. vehemently opposed the anticipatory bail application by mentioning that though the applicants have got no criminal antecedents but there is nothing on record to satisfy that the police personnel are after the applicants to arrest them. The alleged apprehension on behalf of applicants is imaginary and unfounded one. Learned A.G.A. has also

submitted that in view of the seriousness of the allegations made in the F.I.R., the applicants are not entitled for any relaxation from this Court.

(10) After considering the record of the case as available before the Court, in the light of rival submissions made at the Bar and keeping in view the nature and gravity of the accusation, antecedents of the applicants, their undertaking to make themselves available to the authorities whenever required, the Court feels satisfied that it would be expedient to grant an order of anticipatory bail in favour of the applicants. Thus instant Anticipatory Bail stands ALLOWED.

(11) Without expressing any opinion upon ultimate merits of the case either ways which may be adversely affect the investigation and subsequent stage of the case, the Court directs that in the event of arrest of the applicants in aforesaid case crime, they shall be released on bail on furnishing a personal bond of Rs. 50,000/- with two sureties each in the like amount to the satisfaction of the Arresting Officer till the submission of report u/s 173 (2) Cr.P.C. by the I.O., with the conditions that :

*(i) The applicants shall make themselves available for the interrogation by the police as and when required. The Investigating Officer of the case would give 48 hours prior notice or telephonically inform the concerned accused-applicant to remain available to him for the purposes of interrogation and the accused-applicants are obliged to abide by such directions.*

*(ii) The applicants shall not directly or indirectly make any inducement, threats or comments to any person acquainted with the facts of the case so as to dissuade him from disclosing the correct facts to the court or to the police officer.*

*(iii) The Investigating Officer of the case would make all necessary endeavour to gear up the investigation in utmost transparent and professional way and would try to conclude the same within a maximum period of 90 days. During this period the accused-applicants would not leave the State of Uttar Pradesh without informing the Investigating Officer of the case and sharing his contact number.*

*(iv) In the event the applicants are having their passports, they will have to surrender the same before the concerned SP/SSP of the District till the submission of report u/s 173(2) Cr.P.C.*

(12) In the event, the applicants breach or attempt to breach any of the aforesaid conditions or willfully violate above conditions or abstains themselves from the investigation, it would be open for the Investigating Officer or the concerned authority to apply before the court of Session for cancellation of bail and the Court of Session has every liberty and freedom to revoke the anticipatory bail after recording the reasons for the same.

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**(2021)10ILR A19**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 08.09.2021**

**BEFORE**

**THE HON'BLE SAMIT GOPAL, J**

Criminal Misc. Bail Application No. 24591 of 2021

**Kamlesh Yadav & Anr. ...Applicants**
**Versus**
**State of U.P. ...Opposite Party**

**Counsel for the Applicants:**
Sri Aditya Narayan Singh

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

**A. Criminal Law - Code of Criminal Procedure, 1973-Section 439 - Indian Penal Code, 1860-Sections 328, 302**- application filed mischieviously by person for the best known reason in the name of Aditya Narayan Singh Advocate who was died in the year 2014-application on behalf of two applicants filed in a clandestine manner-the court cannot shut its eye to the said issue-the present case is a shame litigation-The Registrar General directed to register First Information Report for which investigation is needed to be done seriously so as to cull out the truth and appropriate action be taken against persons involved in the bogus and clandestine filing of bail application.(Para 1 to 16)

**The application is disposed of.** (E-6)

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

1. The present bail application under Section 439 of the Code of Criminal Procedure purports to have been filed on behalf of the applicants Kamlesh Yadav and Rajesh Chauhan in Case Crime No. 104 of 2020, under Sections 328, 302 IPC, Police Station Bahariyabad, District Ghazipur who are stated to be in jail since 09.04.2021.

2. Sri Abhishek Kumar, Advocate (Advocate Roll No. A/A-0060/2012) has appeared in the matter.

3. No one appears on behalf of the applicants to press this bail application even when the matter has been taken up in the revised list.

4. Sri B.B. Upadhyay, learned Additional Government Advocate for the State is present.

5. Sri Amit Srivastava, Advocate appears on behalf of Saurabh Singh Chauhan the purported deponent of the present bail application.

6. The present bail application is an example of a mischievous filing of a case before a Court of law by fictitious person(s).

7. This matter was initially taken up on 26.07.2021 and the following order was passed by this Court:-

*"Matter taken up in the revised list.*

*No one appears on behalf of the applicants to press this bail application. Sri Sanjay Singh, learned A.G.A. is present for the State.*

*Sri Abhishek Kumar, Advocate has appeared in this matter and informed the court that although he is not a counsel in the present matter but the present bail application has been shown to be filed by Sri Aditya Narayan Singh Advocate having Roll No. A/A-0132/12 and Sri Rajesh Chandra Tiwari having Advocate Roll No. A/R-1202/12 and states that same is a mischief by some one as Sri Aditya Narayan Singh has expired around two years back and as per the Advocate Roll No. A/R-1202/12 the same is some one else and not of Sri Rajesh Chandra Tiwari.*

*Stamp Reporter has reported that the certified copy of first information report and free copy of bail rejection order is required.*

*From perusal of bail application it is apparent that the mobile number of Sri Aditya Narayan Singh Advocate as mentioned has 11 digits which is not possible even the memo of appearance/parcha has filed with the bail application is hand written parcha which*

*has the same details as have been mentioned in the bail application.*

*Registrar General of this Court is directed to give a report regarding the details of both the counsels as printed in the bail application within three days from today.*

*Let the matter be listed on 30.07.2021 as fresh."*

8. The Registrar General of this Court gave a report dated 29.07.2021 which reads as under:-

*"..... In compliance to the above directions, the details regarding above mentioned Advocates-on-Roll nos. A/A0132/12 and A/R1202/12 have been sought from the AOR Sectioin and in response, AOR Section has submitted three pages in which following details are mentioned:*

*1. Roll no. A/A0132/2012* ***(Flag-''B')*** *is assigned on the name of Aditya Narayan Singh, S/o Udai Narayan Singh, Chamber No. 118 and Mobile No. 9450611089. The office peon went to the above Chamber No. 118 where Sri Anil Kumar Aditya (A/A0745/2012 s/o Sri Aditya Narayan Singh, Advocate found. Sri Anil Kumar Aditya came in may chamber and informed me that his father Sri Aditya Narayan Singh had died on 16.05.2014 and submitted his father's death certificate* ***(Flag- ''C').***

*2. Roll No. A/R1202/2012* ***(Flag-''D')*** *is assigned on the name of Ravi Tiwari S/o Madhu Sudan Tiwari, Chamber No. 17 and Mobile No. 9335113219. I personally called on the Mobile No. 9335113219 and asked him about this Bail Application. Sri Ravi Tiwari came in my chamber and informed me that he has not submitted any Bail Application in this matter.*

*On page no. 75 of this Bail Application, the name of two Advocates are mentioned. The Name, AOR No., Chamber no. and Mobile no. of the one advocate is mentioned as Sri Aditya Narayan Singh, A/A0132/2012, 111 and 94450611089, respectively and the Name, AOR No and Chamber no. of another advocate is mentioned as Rajesh Chandra Tiwari, A/R1202/2012 and 111.*

*Page No. 04 of this Bail Application is having same name of Sri Rajesh Chandra Tiwari with same AOR but Chamber no. is different which is mentioned as Chamber No. 127, Old Building, High Court, Allahabad.*

*The office peon went to the above mentioned Chamber Nos. 111 and 127, Old Building, High Court, Allahabad but none of advocate having name Rajesh Chandra Tiwari is found in both the Chambers.*

*In this regard, an information about the purchasing authority of the Welfare Stamp having serial number S.R. No. HCBA 0167796 affixed on the back of page no. 75 from the Secretary, High Court Bar Association, Allahabad and in response, the Hony. Secretary, High Court Association, Allahabad has submitted that the Welfare stamp has been taken by Sri Aditya Narayan Singh, Advocate having Advocate Roll No. A/A0132/2012 on 22.06.2021* ***(Flag- ''E').***

*On the perusal of the above facts, it is clear that advocate Aditya Narayan Singh has passed away long back and AOR no. A/R1202/2012 is assigned to Sri Ravi Tiwari instead of Sri Rajesh Chandra Tiwari. On being search on the official website of Allahabad High Court, no record found on the name of Rajesh Chandra Tiwari* ***(Flag- ''F').''***

9. The matter was then taken up on 30.07.2021 and the following order was passed by this Court:-

*"Sri Abhishek Kumar, Advocate has appeared in the matter. No one appears on behalf of the applicants to press this bail application even when the matter has been taken up in the revised list.*

*Sri B.B. Upadhyay, learned A.G.A. is present for the State.*

*This Court on 26.7.2021 has passed the following order:-*

*"Matter taken up in the revised list.*

*No one appears on behalf of the applicants to press this bail application. Sri Sanjay Singh, learned A.G.A. is present for the State.*

*Sri Abhishek Kumar, Advocate has appeared in this matter and informed the court that although he is not a counsel in the present matter but the present bail application has been shown to be filed by Sri Aditya Narayan Singh Advocate having Roll No. A/A-0132/12 and Sri Rajesh Chandra Tiwari having Advocate Roll No. A/R-1202/12 and states that same is a mischief by some one as Sri Aditya Narayan Singh has expired around two years back and as per the Advocate Roll No. A/R-1202/12 the same is some one else and not of Sri Rajesh Chandra Tiwari.*

*Stamp Reporter has reported that the certified copy of first information report and free copy of bail rejection order is required.*

*From perusal of bail application it is apparent that the mobile number of Sri Aditya Narayan Singh Advocate as mentioned has 11 digits which is not possible even the memo of appearance/parcha has filed with the bail application is hand written parcha which has the same details as have been mentioned in the bail application.*

*Registrar General of this Court is directed to give a report regarding the details of both the counsels as printed in the bail application within three days from today.*

*Let the matter be listed on 30.07.2021 as fresh."*

*A report of the Registrar General of this Court has been submitted. The said report is on record. A perusal of the said report goes to show that Sri Aditya Narayan Singh, Advocate, who is shown as one of the counsels in the bail application, has died on 16.5.2014. His death certificate has been provided by his son which is on record. It is further reported that the Advocate Roll No. A/R1202/2012 is assigned on the name of Sri Ravi Tiwari, Advocate, having his chamber in Chamber No. 17 and not to Sri Rajesh Chandra Tiwari who is also shown as another counsel in the bail application. Even a report from Hony. Secretary, High Court Bar Association, Allahabad was called for verification about the details of purchasing authority of Welfare Stamp having Serial No. HCBA 0167796 which is affixed on the back of page-75 being the memo of appearance/purcha filed on behalf of the applicant and a report has been submitted stating that the said Welfare Stamp has been taken by Sri Aditya Narayan Singh, Advocate, having Advocate Roll No. A/A0132/2012. It is again reiterated that Sri Aditya Narayan Singh has been reported to have died on 16.5.2014 but the said Welfare Stamp has even then been purchased in his name.*

*Even the free copy of bail rejection order has not been filed in this bail application.*

*The deponent in the present bail application is Saurabh Singh Chauhan whose details are mentioned as under:-*

*"Affidavit of Saurabh Singh Chauhan, Aged about 22 years, Son of Amrendra Singh Chauhan, Resident of*

*Semaria, Bhikhaipur, Police Station Bahariyabad, District Ghazipur.*

*Religion:- Hindu*

*Occupation:- student*

*Adhar Card No. 7752 5693 3901*

*Mob. No. 9792990709."*

*He in para No. 1 of the affidavit claims himself to be the son of the applicant which is also incorrect as he states himself to be the son of Amrendra Singh Chauhan, but the present bail application has been filed on behalf of Kamlesh Yadav the applicant no. 1 and Rajesh Chauhan the applicant no. 2. The photocopy of Aadhar Card of the said deponent is annexed at page-15 of the paper book.*

*Issue notice to Saurabh Singh Chauhan, son of Sri Amrendra Singh Chauhan for his appearance before this Court at 10.00 A.M. on 10.8.2021 through C.J.M., Ghazipur, to be served on him through concerned police station for which office shall taken appropriate steps within four days from today.*

*The said action be taken by the office through Fax.*

*The matter being urgent in nature as the two applicants are in jail be put up before this Court on 10.8.2021 at 10.00 A.M. as fresh.*

*C.J.M., Ghazipur shall send his compliance report by fastest mode to this Court before the next date fixed."*

10. Subsequently, on the matter being taken up on 10.08.2021 the following order was passed by this Court:-

*"Sri Abhishek Kumar, Advocate appears in the matter.*

*No one appears on behalf of the applicant to press this bail application evenwhen the matter is taken in the revised list.*

*Sri B.B. Upadhyay, learned A.G.A. for the State is present.*

*Sri Prabha Shanker Mishra, Honorary Secretary of the High Court Bar Association, Allahabad is present on behalf of the Bar Association.*

*The deponent of the present bail application, Saurabh Singh Chauhan is present before the Court in compliance of the order dated 30.07.2021.*

*Sri Amit Kumar Srivastava, Advocate appears in the matter and states that the deponent who has been summoned vide order dated 30.07.2021 is present and as he is the deponent in the bail application of co-accused Amrendra Singh Chauhan, as such, he is appearing on his behalf.*

*Sri Amit Kumar Srivastava prays for and is granted 04 days time to file an affidavit in the matter of the summoned person.*

*Sri Prabha Shanker Mishra, Honorary Secretary of the High Court Bar Association states that he may be granted 05 days time to ascertain certain facts regarding Sri Rajesh Chandra Tiwari who is shown as a counsel appearing in the present bail application and also the other counsel who has been allotted Advocate Roll No. A/R1202/2012 which is assigned in the name of Sri Ravi Tiwari, Advocate.*

*Time as prayed is allowed to take necessary steps at his end.*

*In the meantime, the Registrar General of this Court is directed to accept the bail application of the applicants which as per the statement of Sri Abhishek Kumar, Advocate has been presented for reporting in the office on behalf of Kamlesh Yadav and Rajesh Chauhan and present the same before the Court having roster.*

*List this case on 16.08.2021 as fresh for further arguments.*

*In the meantime, Sri Amit Kumar Srivastava shall file the said affidavit and*

*Sri Prabha Shanker Mishra may produce the relevant report which he proposes to prepare and provide it to the Court on the next date.*

*The deponent of the present bail application, Saurabh Singh Chauhan shall remain present, when the matter is listed next."*

11. An affidavit dated 13.08.2021 has been filed by Saurabh Singh Chauhan the so called deponent of the present bail application. Paras 2 to 12 of the said affidavit are quoted hereinbelow:-

*"2. That the deponent in the present affidavit has been shown to be the deponent of present Criminal Misc. Bail Application, although he is not the deponent in the said bail application nor he ever instructed any counsel including Sri Aditya Narayan Singh and Sri Rajesh Chandra Tiwari, Advocates to file the present bail application on behalf of Kamlesh Yadav and Rajesh Chauhan. It is also relevant to mention here that the deponent has never been authorized by the accused/applicants to file the present bail application before this Hon'ble Court on their behalf.*

*3. That it is relevant to mention here that the deponent does not know Sri Aditya Narayan Singh and Sri Rajesh Chandra Tiwari, Advocates nor he ever met with them despite that the present bail application has been filed mentioning his particulars and annexing his Adhar Card, as the deponent in the present bail application, although the deponent has never instructed them to file the present bail application.*

*4. That the deponent has come to Allahabad and to engage Sri Amit Kumar Srivastava, Advocate for filing the bail application of his father Amrendra Chauhan which was filed by Sri Amit Kumar Srivastava, Advocate as Criminal Misc. 1st Bail Application No. 28431 of 2021 which was allowed by the order dated 12.08.2020 passed by this Hon'ble Court.*

*5. That it appears that the present bail application has been filed on behalf of Kamlesh Yadav and Rajesh Chauhan mischievously to keep them behind the bars indefinitely and it also appears that for filing the present bail application no instruction has been given by the accused applicants as neither certified copy of the First Information Report nor the free/certified copy of rejection order passed by court below has been annexed along with present bail application. It transpires that the copy of Criminal Misc. 1st Bail Application No. 28431 of 2021 (Amrendra Chauhan Vs. State of U.P.) has been obtained by someone and photocopy of the documents / annexures have been annexed in the said bail application which can be verified by this Hon'ble Court after perusing the annexures of present bail application and of Criminal Misc. 1st Bail Application No. 28431 of 2021.*

*6. That the averments in paragraph Nos. 1 to 22 and 24 of the affidavit filed in support of present bail application are exactly same as averred in paragraph Nos. 1 to 22 and 24 of affidavit filed in support of Criminal Misc. 1st Bail Application No. 28431 of 2021. For kind perusal of this Hon'ble Court a photo copy of the Criminal Misc. 1st Bail Application No. 28431 of 2021, Amrendra Chauhan Vs. State of U.P. is being filed herewith and marked as* ***ANNEXURE NO. 1*** *to this affidavit.*

*7. That the Aadhaar Card of the deponent has been annexed alongwith Criminal Misc. 1st Bail Application No. 28431 of 2021 and therefore the same was obtained and mischievously been used*

*annexing alongwith present bail application, although the deponent never provided his Aadhaar Card to the counsel or any other persons for filing the present bail application, rather same was misused after obtaining the copy of Criminal Misc. 1st Bail Application No. 28431 of 2021, Amrendra Chauhan Vs. State of U.P.*

*8. This mischief while filing the present bail application would also apparent from the perusal of the bail application which would reveal that eleven digit mobile number of Sri Aditya Narayan Singh Advocate has been mentioned, who has already died on 16.05.2014, but mobile number of Sri Rajesh Chandra Tiwari, Advocate, who has mentioned his wrong advocate roll number, has not been mentioned in the bail application. In these circumstances, it is apparent that at the behest of persons inimical to the applicants the present bail application has been filed while showing the deponent as the deponent in the present bail application.*

*9. That the deponent has no concern with the applicant no.1 Kamlesh Yadav but it has been mentioned in paragraph-1 of the present bail application that the deponent is the son of applicant, although the deponent is the son of Amrendra Singh Chauhan. The aforesaid averments also show that the deponent has never instructed any person to file the present bail application on behalf of Kamlesh Yadav and Rajesh Chauhan.*

*10. That the deponent is a young boy, aged about 22 years and he is a student of B.Sc. He is having absolutely clean antecedent, despite that he has been falsely and mischievously shown as deponent in the present bail application although he has no concern at all with the applicants in the present bail application. In support of aforementioned averments the photo copies of educational certificates of deponent are being filed herewith and marked as* ***ANNEXURE NO.2*** *to this affidavit.*

*11. That there was no occasion for the deponent to file the present bail application. He came to Allahabad only for the pairvi of his father. He was never authorized to do pairvi on behalf of Kamlesh Yadav and Rajesh Chauhan nor he ever did any pairvi on their behalf. His Aadhaar Card which has been annexed alongwith Criminal Misc. 1st Bail Application No. 28431 of 2021 has surreptitiously been obtained and filed along with the present bail application. The deponent has not made his signature in the bail application nor is signatures are available in the present bail application. Under these circumstances it is apparent that he has not been involved in filing the present bail application in any manner, despite that he is being harassed unnecessarily.*

*12. That is is most respectfully stated here that the deponent has not been involved in filing of present bail application in any manner. The present bail application has been filed by some person mischievously in order to keep the applicants behind bars for indefinite period as no counsel ever appeared before this Hon'ble Court and whenever bail application was taken up. The deponent is wholly innocent and he was not aware about the present bail application. His Aadhaar Card has been misused for oblique purposes regarding which he had no knowledge."*

12. Sri Abhishek Kumar, Advocate has produced before the Court an order dated 23.11.2020 passed in Criminal Misc. Anticipatory Bail Application (U/s 438 Cr.P.C.) No. 7610 of 2020 (Gram Pradhan Rajesh Chauhan and two others Vs. State of

U.P. and two others), a perusal of which goes to show that the said anticipatory bail application was filed on behalf of Rajesh Chauhan, Amarendra Chauhan and Kamlesh Yadav in which an order has been passed on 23.11.2020 granting them anticipatory bail till submission of police report, if any, under Section 173(2) Cr.P.C. before the competent Court. The said application also purports to have been filed by Sri Aditya Narayan Singh Advocate.

Further, an order dated 19.01.2021 has been produced before the Court which has been passed in Criminal Misc. Application (U/s 482 Cr.P.C.) No. 135 of 2021 (Gram Pradhanpati Rajesh Chauhan and two others Vs. State of U.P.), a perusal of which goes to show that none appeared in the matter when it was taken up and as such the case was directed to be listed in the ordinary course vide order dated 19.01.2021. The said petition also purports to have been filed by Sri Aditya Narayan Singh Advocate.

Further, another order dated 28.09.2020 has been produced before the Court which has been passed in Criminal Misc. Writ Petition No. 7968 of 2020 (Rajesh Chauhan and two others Vs. State of U.P. and 3 others), a perusal of which goes to show that even in the said writ petition no one had appeared on behalf of the petitioners when the matter was called up in the revised list. The said writ petition was dismissed for want of prosecution vide order dated 28.09.2020. The same was purported to have been filed by Sri Aditya Narayan Singh and Sri Rajesh Shukla, Advocates in which Sri Ram Yash Chauhan, Advocate had appeared on behalf of the private respondent apart from the learned Additional Government Advocate for the State.

The said three orders have been taken on record.

13. The common feature in all the three above petitions is that Sri Aditya Narayan Singh, Advocate (who is reported to have died on 16.05.2014) has been the sole counsel in two matters and one of the counsels in the writ petition.

14. From perusal of the entire records, the report of the Registrar General of this Court and the affidavit filed by Saurabh Singh Chauhan, it is apparent that the present bail application has been filed in a clandestine manner for the reasons best known to the person(s) who have played mischief by filing the same and then not appearing before the Court to press the same. The present bail application is a bogus bail application and this Court thus cannot shut its eye to the said issue and let the same go by after prima facie coming to the opinion that the filing of the present bail application on behalf of the two applicants Kamlesh Yadav and Rajesh Chauhan is in a clandestine manner. The present case is a sham litigation. This Court is resourceful enough to take appropriate action in the matter and as such deems it appropriate to take action in the present matter pertaining to the bogus filing of the present bail application of which notice was given in the office of the learned Government Advocate, High Court, Allahabad on 22.06.2021 which was allotted Notice No. 22575 of 2021 and the bail application was presented for reporting in the office of the Stamp Reporter (Criminal) of this Court on 28.06.2021 and then the same was presented in the concerned office for being placed before the Court on 02.07.2021 and is thus before this Court.

15. The Registrar General of this Court is thus directed to register a First Information Report in the present matter for which an investigation is needed to be done seriously so as to cull out the truth and appropriate action be taken against person(s) involved in the bogus and clandestine filing of the bail application before this Court. The needful be done within one month from today.

16. The Senior Superintendent of Police, Prayagraj is directed to ensure that the investigation is done by a responsible and a competent police officer efficiently.

17. A copy of this order be forwarded by the office to the learned Additional Government Advocate for its compliance.

18. Let the matter be listed on 25.10.2021 before this Court along with a compliance report of the Registrar General and the learned Additional Government Advocate for further orders.

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**(2021)10ILR A27**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 01.10.2021**

**BEFORE**

**THE HON'BLE SAMIT GOPAL, J**

Criminal Misc. Bail Application No. 31695 of 2021
with
Criminal Misc. Bail Application No. 20006 of 2021
with
Criminal Misc. Bail Application No. 30288 of 2021

**Dharmendra @ Patra ...Applicant**
**Versus**
**State of U.P. ...Opposite Party**

**Counsel for the Applicant:**
Sri Sanjay Pathak, Sri Arvind Kumar Tewari

**Counsel for the Respondents:**
A.G.A.

**A. Criminal Law - Code of Criminal Procedure,1973-Section 439 & Indian Penal Code,1860-Sections -376, 452, 506-In the instant case, victim after giving her statement u/s 161 of the Code levelling allegations of rape against the accused, has given up the same in her statement recorded u/s 164 of the Code-the investigating officer then records the statement of the victim again u/s 161 of the code and puts specific questions to her with regard to the said variations in her statements-The said action of the Investigating Officer is not appreciable-It shows disrespect to the courts who have recorded statements u/s 164 of the code by judicial magistrate in discharge of his judicial functions-The act of putting specific questions pertaining to the variations in the said two statements by the I.O. is viewed with the impression of clearly challenging the authority of judicial act-the I.O. clearly exceeded his jurisdiction with a sole purpose to frustrate the statements recorded by a Magistrate.(Para 3 to 15)**

**B. The statement made by the victim u/s 164 of the code before the magistrate stands on a high pedestal and sanctity during the course of investigation than that of her statement recorded u/s 161 of the code by the I.O. The said statement u/s 164 is relevant under section 35 and 72 of Indian Evidence Act, and as such, assumes the character of being a public document. Though the Investigating Agency has unfettered powers to investigate the matter, but they cannot on their whims and fancy adopt a procedure which would clearly be challenging the sanctity of an act done by a court of law while discharge of a judicial function.(Para 9 to 12)**

**The petition is disposed of.** (E-6)
**List of Cases cited:**

Raju Vs St. of U.P. & ors. (2012) 78 ACC 11

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

1. Heard Sri Sanjay Pathak learned counsel for the applicant Dharmendra @ Patra, Sri Saroj Kumar Dubey learned counsel for the applicants Prem Narayan Vishwakarma and Vijay Kumar Vishwakarma, Sri Shesh Narayan Mishra learned counsel for the applicant Nandlal, Sri Sanjay Kumar Singh, learned Additional Government Advocate and Sri Akhilesh Kumar Tripathi, learned Brief Holder for the State and perused the material on record.

2. These three bail applications have been connected together and have been argued on a particular issue which is common in all of them. Even in other matters, the same is being encountered by this Court.

3. As of now the merits of the cases are not being gone into. The only specific question which is being dealt with is as follows:

"Whether the Investigating Officer of a case can after recording the statement of a prosecutrix/victim once under Section 161 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') who has supported the prosecution case and then in her statement recorded under Section 164 of the Code recorded before a Magistrate has given a different version and more particularly does not state about any wrongful act being committed on her as has been recorded in her statement under Section 161 of the Code earlier, can again interrogate the prosecutrix/victim under Section 161 of the Code and put specific questions to her pertaining to the two different versions given by her in the said two statements and then record the statements and proceed with the Investigation further ?"

4. These three cases in hand are examples of the same activity as done in the matter during investigation.

5. The powers of Police to investigate a matter is not under dispute. Reiterating the same, Investigation usually starts on information regarding to the commission of an offence given to the Police Officer, In-charge of a Police Station and recorded under Section 154 of the Code. If from information so received or otherwise the Officer In-charge of the Police Station has reason to suspect the commission of an offence, he or some other officer deputed by him, has to proceed to the spot to investigate the facts and circumstances of the case, and if necessary, to take measures for the discovery and arrest of offenders. Investigation thus primarily consists of the ascertainment of the facts and circumstances of the case. As per the definition of the word "investigation" as per Section 2(h) of the Code, it includes the proceedings under the Code for collection of evidence conducted by a Police Officer. The Investigating Officer is given the power to require before himself the attendance of any person appearing to be acquainted with the circumstances of the case. He has the authority to examine the said person orally either by himself or by a duly authorized person on his behalf. The Officer may reproduce his statement into writing and such writing is available in the trial that may follow for use in the manner

provided in this behalf in Section 162 of the Code. Section 155 of the Code empowers the Officer In-charge of a Police Station to make a search at any place for seizure of anything which is believed to be necessary for the purpose of investigation. He also has the power to arrest person or persons suspected of the commission of the offence under Section 41 of the Code.

6. He has to enter the proceedings in a diary on day to day basis, copy of which has to be sent to the Magistrate concerned. Upon completion of investigation he may decide to release the suspected accused if he is in custody on his executing a bond. If further it appears to him that there is sufficient evidence or reasonable ground to put the accused to trail, he may take necessary steps therefor under Section 170 of the Code. In either case he has to submit a report to the Magistrate under Section 173 of the Code in the prescribed Form.

7. Thus as per the Code, the investigation consists of the following steps:-

(i) proceeding to the spot;

(ii) ascertainment of the facts and circumstances of the case;

(iii) discovery and arrest of a suspect;

(iv) collection of evidence regarding to the commission of offence which may consists of examination of various persons including the accused and reducing their statements into writing, if he needs so fit, search of places for seizure of things necessary for investigation to be produced at the trial, and lastly;

(v) formation of an opinion as to whether the material collected is sufficient to be placed before the Magistrate for putting the accused to trial.

8. Section 164 of the Code also gives power to the investigating agency to forward any person for recording of his confession and the statements before a Magistrate. In the case of **Raju Vs. State of U.P. and others : 2012 (78) ACC 111**, a Division Bench of this Court in paragraph 9 has observed as follows:

*"9. We are of the opinion that the statement of an accused or victim or a witness which is to be recorded under Section 164 Cr.P.C., might be a statement recorded during the course of investigation of a case but that is quite different from the statement of witnesses recorded under Section 161 Cr.P.C. The reason is that there is a full fledged provision under Section 164 Cr.P.C. authorizing the recording of such a statement by a judicial Magistrate. The practise and the procedure which is followed in recording such a statement is that the police has to file an application before the head of Magistracy, who is presently the Chief Judicial Magistrate, requesting for the statement of such a person to be recorded. On receipt of such an application, the Chief Judicial Magistrate gets the relevant record before him and thereafter passes an order in token of receipt of such an application and further passes an order upon the same and thereafter direct by the same order for deputation of a Magistrate to record the statement. He may also record the statement himself. In case of other judicial Magistrate being deputed for recording the statement under Section 164 Cr.P.C., the witness along with the judicial record is transmitted to the deputed judicial Magistrate, who records the receipt of the record for the purpose and proceeds to record the statement and as soon as it is recorded, he again records the recording of such a statement in the order-sheet of the*

*same record and transmits the record along with the recorded statement under Section 164 Cr.P.C. to the Chief Judicial Magistrate. Thus, the whole exercise appears judicial in nature. Not only that, it further indicates that the orders drawn in the above behalf as also the statement recorded are the records of the judicial acts performed by him in discharge of official and judicial functions by a Judge. The recording of the statements is enjoined by the law of the country and the record in the form the recorded statement under Section 164 Cr.P.C. is the record of the act of a public servant discharging his official and judicial functions. In addition to that the statement recorded under Section 164 Cr.P.C. is never taken out of the judicial record nor it is handed over to the Investigating Officer or any other police officer. The copy of the statement is allowed to be copied in the relevant part of the case dairy. Thus, the recorded statement under Section 164 Cr.P.C. assumes the part of the judicial record of that particular case and, as such, it is the part of the case. This is the reason that we have pointed out that in spite of being a statement of a witness or any other interested person during the course of investigation, the recorded statement under Section 164 Cr.P.C. could not, strictu sensu, be said to be a mere statement during investigation which could be treated as part of the case dairy. It could never be put at par with a statement under Section 161 Cr.P.C. and as such it could never be said to be a part of case dairy."*

9. In the matters in hand the prosecutrix/victim after giving her statement under Section 161 of the Code levelling allegations of rape against the accused, has given up the same in her statement recorded under Section 164 of the Code. The Investigating Officer then records the statement of the prosecutrix/victim again under Section 161 of the Code and puts specific questions to her with regards to the said variations in her statements and records her answers to the said questions.

10. The said action of the Investigating Officer is not appreciable. Putting questions to the prosecutrix/victim with regards to the change in version by her in the statements under Section 161 of the Code and in the statement under Section 164 of the Code, clearly shows disrespect to the courts who have recorded the statements under Section 164 of the Code. The said statements under Section 164 of the Code recorded by Judicial Magistrates is in discharge of their judicial functions and the act of recording of the said statements was a judicial act which was performed by a public servant while discharging his judicial functions. The said document is relevant under Section 35 of Indian Evidence Act and also under Section 72 of Indian Evidence Act and, as such, assumes the character of being a public document.

11. The statement made by the prosecutrix/victim under section 164 of the Code before the Magistrate stands on a high pedestal and sanctity during the course of investigation than that of her statement recorded under section 161 of the Code by the Investigating Officer.

12. Though the Investigating Agency has unfettered powers to investigate a matter, but they cannot on their whims and fancy adopt a procedure which would clearly be challenging the sanctity of an act done by a court of law while discharge of a judicial function. By putting questions to

the prosecutrix/victim in her second statement under Section 161 of the Code after recording of the statement under Section 164 of the Code relating to the different versions in the said two statements, the Investigating Officer cannot frustrate the same and also make an attempt to make the purpose of the said exercise look a farce.

13. The act of putting specific questions pertaining to the variations in the said two statements by the Investigating Officer is viewed with an impression of clearly challenging the authority of a judicial act. The Investigating Officers have clearly exceeded their jurisdiction by proceedings to investigate in such a manner. The same appears to be with a sole purpose to frustrate the statements recorded by a Magistrate.

14. Even the Uttar Pradesh Police Regulations while dealing with the particular duties of Police Officers for "Investigations" in its Chapter XI do not in any manner authorize Investigating Officers to act as such. Although Paragraph-107 of the same states that the Investigating Officer would not act as a mere clerk while recordings of statements but has to observe and infer. Paragraph-109 empowers for recording of supplementary statements. But the manner in which supplementary statements in the present matters have been recorded clearly show that they are for the sole purpose to put the variations to the witnesses and record the same.

15. This court thus finds that the manner in which the supplementary statements are recorded and the purpose for recording of the same is only and solely for frustrating the purpose of statements recorded under Section 164 of the Code and to negate and defeat the earlier statement of the prosecutrix/victim given under section 164 of the Code whether it is in favour or against the accused otherwise the sanctity of the statement under section 164 of the Code will loose its value. The same is neither the intent of Investigation nor is the purpose of it.

16. **The Director General of Police, Uttar Pradesh Lucknow is directed to look into the said new trend of Investigation as adopted and issue suitable guidelines for such matter so that the sanctity and authority of judicial proceedings are maintained and they should not be frustrated by any act done during Investigation.**

17. The Registrar (Compliance) of this Court and the learned counsels for the State are directed to communicate this order to the Director General of Police, Uttar Pradesh Lucknow for its compliance and necessary action within a period of one month from today and submit a compliance report within one week thereafter.

18. In so far as the matter relating to the prayer made under Section 439 of the Code of Criminal Procedure is concerned, let the matters be detagged with each other and be listed on 25-10-2021, as fresh before the appropriate Bench for consideration of the same.

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

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

21. 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.

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**(2021)10ILR A32**
**REVISIONAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 26.08.2021**

**BEFORE**

**THE HON'BLE SARAL SRIVASTAVA, J**

Civil Revision No. 4 of 2021

**Babu Lal & Ors. ...Revisionists**
**Versus**
**Ravi Narayan & Ors. ...Respondents**

**Counsel for the Revisionists:**
Sri Ram Kishore Pandey, Sri Himanshu Raghav Pandey

**Counsel for the Respondents:**

**A. Civil Law - Code of Civil Procedure,1908 - Section 115 - public religious trust is not being managed properly according to trust deed conditions-proceeds of trust are being utilized by the applicants for their personal use which is prohibited in the trust deed-it had been a public trust, no question of partition of property of the trust between private individuals -all the conditions which must exist to invoke Section 92 CPC are present-Even if the stipulation in the trust deed that any dispute be referred to Panch will not override statutory provision since section 92 has been incorporated with an object that the trust which is charitable or public religious trust should be managed as per the wish of the Founder of the trust-Hence, no illegality committed by the trial court.(Para 1 to 38)**

**The revision is dismissed.** (E-6)

**List of Cases cited:**

1. Deoki Nandan Vs Murlidhar (1957) AIR SC 133

2. Ambrish Kumar Singh Vs Raja Abhushan Bran Bramhshah & ors. (1989) All 194

3. Mahant Sita Ram Das & anr. Vs Ram Chandra Arora & ors. (1988) ALL L J 259

4. Swami Parmatmanand Saraswati & anr. Vs Ramji Tripathi & anr .(1974) AIR SC 2141

5. R.M. Narayana Chettiar & anr. Vs N. Lakshmanan Chettiar & ors. (1991) AIR SC 221

6. B.S. Adityan & ors. Vs B. Ramachandran Adityan & ors.(2004) 9 SCC 720

7. Ashok Kumar Gupta & anr. Vs Sitalaxmi Sahuwala Medical Trust & ors. (2020) 4 SCC 321

8. Dhirendra Singh & ors. Vs Dhanai & ors. (1983) AIR All 2016

9. Sri Satnarayan Ji Maharaj Virajman Mandir Sat Narayan Dharmshala & ors. Vs Rajendra Prasad Aggarwal & ors. (1997) AIR ALL 413

10. Karunanadhi & ors. Vs Gyan Prakash & ors. (2014) 5 ADJ 467

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

1. The present revision has been preferred by the defendants (hereinafter referred to as 'applicant') against the judgment and order dated 16.12.2020 passed by Additional District Judge, (FTC), Mahoba granting leave to suit under Section 92 of Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC')

2. The facts, in short, are that the respondents-plaintiffs (hereinafter referred to as 'respondent') instituted a suit under Section 92 of CPC praying for a decree to remove the applicants from the trustee in Shree Ram Laxman Janakiji Vakai Mandir, Dubiyana, District Mohoba and further, the

applicant no.1 be directed to submit the account of trust and to return the money of trust which is in the hands of applicant no.1. Further relief prayed was that a trustee be appointed in the trust to manage the property and temple as per the trust deed.

3. The plaint case is that one Shiv Charan Lal was the owner of a one-story house, the shops situated in Khanga Bazar Grantganj, District Mahoba, two-third part of Khata Khewat Number-2, Mauja Tindauli Mohal Dariyaw Patti Murtaja Hussain Khan, Pargana Mohaba, and one Bagh adjacent to Ramleela. He got constructed a Devalya known as Ram Laxman Janakiji. He executed a trust deed dated 06.10.1909 registered on 07.10.1909 to manage the temple. The aforesaid properties owned by Shiv Charan Lal were dedicated to Shree Ram Laxman Janakiji by the trust deed and proceeds of said property are to be used for maintenance, Pooja, and Bhog of the temple. Trust is a public charitable trust. The temple is in a dilapidated condition, and the applicant no.1 who manages the trust is not maintaining the temple from the income of the properties of the trust. Further, the allegation in the plaint is that the trust owns a big market consisting of small shops over the house owned by the Trust which has been let out on rent. The income of the trust is being used by applicant no.1 for his personal use. It is further stated that a part of shops owned by the trust has been let out to Union Bank of India at the rate of Rs.17,738/- per month and rent paid by the bank is also used by applicant no.1 for his personal use. The respondents claim that they belong to the family of the applicants and used to visit the temple for Pooja and as such, they have an interest in the temple of trust. The relevant paragraphs of the plaint are extracted herein-below:-

*"1- यह कि श्री शिवचरन लाल पुत्र श्री भैरो प्रसाद तिवारी निवासी महोबा खास एक मंजिल दुकान पुख्ता वाकै खनगा बाजार स्थित ग्रान्टगंज कस्बा महोबा व खाता खेवट नम्बर-2 मौजा तिन्दौली मोहाल दरयाव पट्टी मुरतजा हुसैन खां परगना महोबा को दो तिहाई व एक बाग जो रामलीला से मिला हुआ है के मालिक व काबिज थे। उन्होने एक शिवाला पुख्ता श्री राम लक्ष्मण जानकी जी का कस्बा महोबा में बनवाया था। उसी मरम्मत व भोग व पूजा आदि के सम्बंध में जायदाद हस्ब तफसील जैल को उक्त श्री रामलक्ष्मण जानकी जी ट्रस्ट को जरिये रजिस्ट्रीशुदा ट्रस्टनामा दिनांकित 6 अक्टूबर 1909 को तहरीर किया जिसकी रजिस्ट्री बही नम्बर 1 जिल्द नम्बर 22 के सफा 154 ता 156 बनम्बर 188 तारीख 07 अक्टूबर सन्-1909 को रजिस्ट्री की गयी।*

*2- यह कि उक्त ट्रस्टनामा के अंतर्गत आराजियात हस्ब तफ्सील जैल क मालिक श्री रामलक्ष्मण जानी जी वाकै कस्बा महोबा हुये और उपरोक्त जायदाद से उक्त मंदिर की देख रेख पूजा व भोग आदि का किया जाना तय किया गया था।*

*4- यह कि उपरोक्त ट्रस्ट राम लक्ष्मण जानकी जी एक सार्वजानिक धार्मिक पब्लिक चैरीटेबुल ट्रस्ट है जिसके कि उक्त सर्वराहकारान कायम किये गये थे।*

*8- यह कि उक्त ट्रस्ट का मंदिर बड़ी जीर्ण शीर्ण स्थिति में है और उस पर कोई खर्च प्रतिवादी नम्बर 1 जो ट्रस्ट का इन्तजाम करता है खर्च नहीं कर रहा है और वह मंदिर स्वतः गिराऊ हालत में है।*

*9- यह कि उपरोक्त ट्रस्ट की सम्पत्ति भवन/दुकान स्थित ग्रान्टगंज जो मुन्दर्जा शेड्यूल अ मे है वह एक बहुत बड़ा मार्केट है और उस दुकान में बहुत सी छोटी छोटी दुकाने बनी है मे*

*ट्रस्ट के बहुत से किरायेदारान आबाद है जिससे ट्रस्ट की आमदनी लाखों रूपया माहवार किराया आता है जो प्रतिवादी नम्बर 1 स्वतः वसूल कर रहा है। यहॉ तक कि उक्त ट्रस्ट की सम्पत्ति में दुकान का जुज भाग जिसका क्षेत्रफल 1267 वर्ग फिट है का किरायेदार यूनियन बैंक आफ इण्डिया मुबलिग 17738/-रू० माहवार का है इसके अतिरिक्त अन्य दुकाने अन्य किरायेदारों को अलहदा अलहदा बड़ी बड़ी किराये की रकमो में उठायी गयी है और उक्त दुकानों से लाखों रूपया माहवार किराया जो ट्रस्ट का आता है वह सब प्रतिवादी नम्बर 1 वसूल करता है लेकिन ट्रस्ट का कोई बैंक खाता नहीं खोला गया है और न ही ट्रस्ट के किसी बैंक एकाउन्ट में वह रूपया जमा किया जाता है और न ही उक्त मंदिर की पूजा पाठ मरम्मत देख रेख में ही खर्च किया जाता है बल्कि वह रूपया प्रतिवादी नम्बर 1 अपने निजी खर्च में लाता है और उसने ट्रस्ट की अमानत मे खयानत की है जिससे कि ट्रस्ट का बहुत बड़ा नुकसान होता है।*

*10- यह कि जो ट्रस्ट का बाग स्थित है उसकी भी जो आमदनी होती है वह प्रतिवादी संख्या 1 स्वयं अपने इस्तेमाल मे लाता है और ट्रस्ट में या मंदिर में पूजा पाठ आद मे कतई खर्च नहीं करता है और उसका भी वह दुरूपयोग अपने स्वयं इस्तेमाल में लाता रहता है।*

*11- यह कि ट्रस्ट भूमि जो मौजूदा तंदौली में स्थित है उसकी भी बहुत कसीर रकम ट्रस्ट की आती है जिसको भी प्रतिवादी नम्बर 1 स्वतः लेता है और अपने निजी प्रयोग मे लाता है जबकि यह सारी आमदनी ट्रस्ट की सम्पत्ति से है और प्रतिवादी नम्बर 1 उसका दुरूपयोग कर रहा है और उक्त ट्रस्ट एक पब्लिक ट्रस्ट होने के नाते जो उसने अमानत मे खयानत करके ट्रस्ट का रूपया हजम कर लिया है इसलिये प्रतिवादी नम्बर 1 सर्वराहकार रहने का हकदार नहीं है और न ही ट्रस्ट की सम्पत्ति का इन्तजाम ही करने का हकदारी है।*

*13- यह कि यह नहीं जो सम्पत्ति उपरोक्त ट्रस्ट की सम्पत्ति है उसकी एक दुकान भूखण्ड 1267 वर्गफिट यूनियन बैंक आफ इण्डिया को 17738/- रू० माहवार किराये पर जो उठाया है उसका रजिस्ट्रीशुदा किरायानामा 13 जनवरी सन् -2011 को 15 वर्ष लीज पर यूनियन बैंक आफ इण्डिया को श्री मनोज तिवारी के जरिये उठा दिया जबकि मनोज तिवारी न उक्त भवन का मालिक है और न ही काबिज है और न ही उपरोक्त ट्रस्ट राम लक्ष्मण जानकी का ट्रस्टी ही है बल्कि वह प्रतिवादी नम्बर 1 का लड़का चन्द्रशेखर का लड़का है उसको उक्त दुकान किराये पर उठाने का कोई हक नहीं है और इस तरीके से ट्रस्ट की आमदनी 17738/- रूपया माहवार यह लोग मिलकर जब्त कर रहे है और ट्रस्ट को नुकसान पहुँचा रहे है।*

*14- य़ह कि वादीगण चूंकि गया प्रसाद के वारिसान है इसलिए उनका हित ट्रस्ट में निहित है और वह मंदिर भी बराबर जाते रहते है और उसी मंदिर के पास रहते है। इसलिए उनका इस मंदिर के इन्तजाम करने में बहुत कुछ योगदान पहले रहा।"*

4. Based on aforesaid pleadings, the respondents have prayed for the following reliefs.

*"(अ) यह कि प्रतिवादी नम्बर 1 बाबूलाल के विरूद्ध यह वाद डिक्री किया जावे और उन्हें श्री रामलक्ष्मण जानकी जी मंदिर वाकै महोबा ट्रस्ट व ट्रस्टी के पद से हटाया जावे।*

*(ब) यह कि प्रतिवादी नम्बर 1 से उपरोक्त ट्रस्ट का हिसाब किताब आज तक का करने के उपरांत जो रकम की प्रतिवादी नम्बर 1 के जिम्मे निकले उसे ट्रस्ट को दिलाया जावे।*

*(स) यह कि अ रामलक्ष्मण जानकी जी का कोई योग्य सर्वराहकार मुकर्रर किया जावे जो उक्त ट्रस्ट की सम्पत्ति व मंदिर का इन्तजाम नियमानुसार करता रहे।*

*(द) यह कि खर्चा मुकदमा वादीगण को प्रतिवादीगण से दिलाया जावे।*

*(य) यह कि अन्य न्यायोचित उपशम जो करीने इन्साफ अदालत हो बहक वादीगण विरूद्ध प्रतिवादीगण सादिर फरमायी जावे।"*

5. The respondents also filed an application on the same averments as in the plaint to leave for the institution of the suit as contemplated under Section 92 (1) of CPC along with plaint.

6. The leave application was contested by the applicants contending *inter alia* that the respondents are not the family members of the applicants. It is also submitted that trust is a private trust and, therefore, the provisions of Section 92 of CPC are not applicable. It is also pleaded that the respondents have not submitted any claim according to which trust should be managed. Besides the above, applicants took several other grounds.

7. The trial court after noticing the contention of applicants as well as respondents and the conditions stipulated in the trust deed in terms of which the trust is to be managed, recorded a *prima facie* opinion that trust is a public trust. The trial court while recording the said finding has considered seven stipulations in the trust deed in terms of which trust is to be run. The **first condition** is that the Government tax is to pay from the income of the trust, and the income of the trust is to be used for expenses incurred in *Bhog and Pooja*, etc. of the temple. No trustee has the right to transfer the property of trust or can do any business for his benefit from the property of the trust. The **second condition** relates to the appointment of Pujari for the Temple. According to the **third condition**, the income accrued from the property of trust shall be used for *Bhog and Pooja*, and trustees and their heirs shall not object to the expenses which are to be incurred for bhog or pooja and they shall maintain the accounts of expenses. The **fourth condition** provides that if the trustee is ineligible or refuses to act as trustee, the Peshwakar Malik or head of the family of the Founder of Trust will act as trustee. The **fifth condition** provided that if any trustee wishes to start any new venture not mentioned in the trust deed, the accounts shall be maintained and audited by five reputable persons of the Panchayat. As per the **sixth condition**, if there arises any difficulty in paying the state revenue, the state revenue can be paid from other property of the trust. According to the **Seventh Condition**, the Founder reserves the right to change manager and management of the trust, and the manager shall strictly follow the conditions of the Trust in managing it; if any member does not wish to continue, he may be replaced by a generous and competent person by the Panchas who shall also abide by the conditions of the Trust.

8. After noticing several conditions of the trust deed, the trial court did not agree with the contention of applicants and opined that trust is not a private trust. Accordingly, it held that the conditions envisaged under Section 92 of CPC for grant of leave to institute a suit are present, consequently, it allowed the application of respondents and granted leave to institute the suit.

9. Challenging the aforesaid order, learned counsel for the applicants has submitted that the trial court has committed a manifest error of law in recording a finding that trust is a public trust since reading of trust deed discloses that the

beneficiaries are not public at large and, therefore, the **first condition** to invoke Section 92 of CPC that trust should be a public trust of religious character is lacking in the instant case. Thus, he submits that the trial court has erred in granting leave to institute the suit.

10. He further submits that the trust deed provides that if there exists any dispute of maintenance of trust, the same may be referred to the five Panch. Accordingly, he contends that since a forum for redressal of dispute is provided in the trust deed, therefore, proper remedy to the respondents is to approach five Panch of Panchayats who is entrusted with the job of resolving disputes. Accordingly, he submits that suit under Section 92 of CPC is not maintainable. Lastly, he submits that the respondents are stranger and they have no locus to file a suit. Accordingly, the suit is not maintainable at the behest of the respondents.

11. I have heard learned counsel for the applicants and perused the record.

12. To proceed with the aforesaid contentions of learned counsel for the applicants, it would be necessary to have a glance at Section 92 (1) of CPC which reads as under:-

*"**92. Public Charities.-- (1)** In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the leave of the Court may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree-*

*(a) removing any trustee;*

*(b) appointing a new trustee;*

*(c) vesting any property in a trustee;*

*[(cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;]*

*(d) directing accounts and inquires;*

*(e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;*

*(f) authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged;*

*(g) settling a scheme; or*

*(h) granting such further or other relief as the nature of the case may require."*

13. Reading of Section 92 of CPC suggests that three conditions must exist for the maintainability of the suit; (1) There shall be a trust created for the public purpose of charitable or religious nature. (2) There is a breach of trust or direction of the court is deemed necessary for better administration of the trust. (3) The suit must contain the relief as provided under Section 92 (1) of CPC. Thus, to maintain a Suit under Section 92 of C.P.C, the aforesaid three conditions must exist, and if any of the aforesaid conditions is lacking or missing, the suit under Section 92 (1) would fail.

14. At this point, it would be apt to refer to the judgment of the Apex Court in the case of ***Deoki Nandan Vs. Murlidhar 1957 AIR (SC) 133*** which has been relied upon by learned counsel for the applicants which define the distinction between a private trust and a public trust. Relevant paragraphs 5 and 7 of the judgment is reproduced as under:-

*"5. It will be convenient first to consider the principles of law applicable to a determination of the question whether an endowment is public or private, and then to examine, in the light of those principles, the facts found or established. The distinction between a private and a public trust is that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public or a class thereof.* While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment. The position is thus stated in Lewin on Trusts, Fifteenth Edition, pp. 15-16:

*By public must be understood such as are constituted for the benefit either of the public at large or of some considerable portion of it answering a particular description. To this class belong all trusts for charitable purposes, and indeed public trusts and charitable trusts may be considered in general as synonymous expressions. In private trusts the beneficial interest is vested absolutely in one or more individuals who are, or within a certain time may be, definitely ascertained....."*

*Vide also the observations of Mitter J. in Haji Mahammad Nabi Shirazi v. Province of Bengal I. L. R. [1942] 1 Cal. 211 at pp. 227, 228: (AIR 1942 Cal. 343 at p.349) (B). Applying this principle, a religious endowment must be held to be private or public, according as the beneficiaries thereunder are specific persons or the general public or sections thereof.*

*7. When once it is understood that the true beneficiaries of religious endowments are not the idols but the worshippers, and that the purpose of the endowment is the maintenance of that worship for the benefit of the worshippers, the question whether an endowment is private or public presents no difficulty. The cardinal point to be decided is whether it was the intention of the founder that specified individuals are to have the right of worship at the shrine, or the general public or any specified portion thereof. In accordance with this theory, it has been held that when property is dedicated for the worship of a family idol, it is a private and not a public endowment, as the persons who are entitled to worship at the shrine of the deity can only be the members of the family, and that is an ascertained group of individuals. But where the beneficiaries are not members of a family or a specified individual, then the endowment can only be regarded as public, intended to benefit the general body of worshippers."*

15. In the light of the principle enunciated by the Apex Court in ***Deoki Nandan (supra)***, this Court will analyze in the latter part of the judgment as to whether the finding of the trial court that the trust is a public trust is based upon the sound principle of law.

16. Now, it would be apposite to consider few judgments on the scope and purpose of grant of leave under Section 92 of CPC for instituting the suit, and whether the order granting of leave of the court to institute the suit under Section 92 of C.P.C would prejudice the rights of parties in the disposal of the suit.

17. This Court in the case of ***Ambrish Kumar Singh Versus Raja Abhushan Bran Bramhshah and others 1989 ALL 194*** has held that while granting leave, the court does not decide the rights of the parties. Paragraphs 10 and 11 of the said judgment is extracted herein-below:-

*"10...*

*While granting leave the court does not decide the rights of the parties. No right is adjudicated at this stage. The Court has merely to see whether there is a prima facie case for granting leave to file a suit. This order does not in any way affect the final decision which will be given on merit after the parties have led evidence in the suit.*

*11. So far as S. 92 C.P.C. is concerned it does not contemplate of giving any notice to the proposed defendants before granting leave. However, it has been held by the decision of this Court reported in 1987 All LJ 369, Mahanth Gurmukh Das v. Bhupal Singh, that the proceedings under S. 92, C.P.C. are judicial proceedings and the order of the District Judge is a judicial order. The Court should pass the order after hearing the defendants. It is not necessary to pass a detailed order. It is sufficient if the order indicates that it is the result of the due application of mind of the Judge. May be that he has not written very elaborate order which in my opinion it was actually not needed.*

*There is application of mind. Moreover, I see no jurisdictional error or illegal exercise of jurisdiction."*

18. Similar view has been reiterated by this Court in the case of ***Mahant Sita Ram Das and another Vs. Ram Chandra Arora and others 1988 ALL LJ 259.*** Relevant paragraphs of the said judgment are extracted herein-below:-

*"3. .... There can not be any doubt that when the court grants leave the same is in a judicial proceeding and the order passed by the District Judge is a judicial order. However, while granting leave the rights of the parties are not adjudicated and at this stage the court has merely to see whether there is a prima facie case that should be allowed to be filed. By giving consent the court does not affect the rights of the parties against whom the suit is filed as after granting the leave the parties will have an opportunity to present their case before the Court in which the suit is filed. As at the time of granting the leave the District Judge will have to see only a prima facie case the conclusion of the District Judge will in no way affect or influence the final decision which will be given in the suit after the parties had led evidence. So far as S. 92 CPC is concerned, it does not contemplate of giving any notice to the proposed defendants before granting the leave. In case the intention of the Legislature was that a notice was to be issued to the proposed defendants before granting leave there is no reason as to why the Legislature would not have specifically made a provision in this respect. The Legislature in its wisdom has thought it fit to confer the aforesaid power in this behalf on a Judicial Officer of the status of a District Judge, whose mind is well trained to act judicially. It has further to be seen whether the principles of natural justice would require of giving of a notice to the proposed defendants. The notice would have been necessary if the order adversely affects the rights of the proposed defendants. By merely giving the permission the District Judge does not affect the rights of the proposed defendants against whom the suit is allowed to be filed and thus even the principles of natural justice would not be attracted so as to make*

*it necessary for the District Judge to issue notice to the proposed defendants and to hear them. It can not thus be said that the proposed defendants as a matter of right can claim either issuing of notice or a hearing before the District Judge grants leave for filing the suit under Sec.92 CPC . However, in a given case the District Judge in order to satisfy himself may in his discretion like to hear the proposed defendants before granting the leave. The issuing of the notice by the District Judge was thus not necessary and the argument raised by the learned Counsel for the applicant has no force.*

*4. It has now to be seen as to whether the District Judge while granting leave under Section 92 CPC has to pass a detailed speaking order. It is true that the order granting leave by the District Judge is a judicial order and should indicate that the District Judge applied his mind before granting leave. However, as rights of the parties are not affected, it is not necessary to pass detailed order but it would suffice if the order indicates that it has been passed by the District Judge after due application of mind."*

*19.* The Apex Court in the case of ***Swami Paramatmanand Saraswati and another Versus Ramji Tripathi and another AIR 1974 SC 2141*** has held that the only allegation in the plaint is to be seen at the first instance to determine whether the suit falls within the ambit of Section 92 of CPC. Paragraph 14 of the said judgment is extracted herein-below:-

*"14. It is, no doubt, true that it is only the allegations in the plaint that should be looked into in the first instance, to see whether the suit falls within the ambit of Section 92* [see Association of R.D.B. Bagga Singh v. Gurnam Singh, AIR 1972 Raj 263; Solhan Singh v. Achhar Singh, AIR 1968 Punj and Har 463 and Radha Krishna v. Lachmi Narain AIR 1948 Audh 203]. *But, if after evidence is taken, it is found that the breach of trust alleged has not been made out and that the prayer for direction of the court is vague and is not based on any solid foundation in facts or reason but is made only with a view to bring the suit under the section, then a suit pur- porting to be brought under Section 92 must be dismissed. This was one of the grounds relied on by the High Court for holding that the suit was not maintainable under Section 92."*

20. In the context of the scope of the grant of leave to sue under Section 92 of CPC, it would be worth noticing the judgment of the Apex Court in the case of ***R.M. Narayana Chettiar and another Vs. N. Lakshmanan Chettiar and others AIR 1991 SC 221.*** The Apex Court has held that if no notice is issued to the defendant-applicant granting leave under Section 92 of CPC that would not render the suit invalid. It further held that though an order refusing to leave is appealable under Section 104(ffa) of CPC, it does not connote that it is obligatory upon the court to issue notices to the proposed defendant before granting leave. The Apex Court further opined that it is the plaintiff who is prejudiced by refusing to grant leave and not the defendant who shall suffer any prejudice by refusal to grant such leave. While laying down the aforesaid proposition of law, the Apex Court has also noticed the judgment of this court in the case of **Ambrish Kumar Singh (Supra)** wherein this court has held that the court does not adjudicate rights of the parties while granting leave to sue under Section 92 of the C.P.C. Paragraphs 16 17, and 18 of the said judgment are extracted herein-below:-

*"16. As far as the decisions of this Court which have been pointed out to us are concerned, the question as to whether before granting leave to institute a suit under S. 92 of the Code, the Court is required to give an opportunity of being heard to the proposed defendants did not arise for determination at all in those cases. As far as the High Courts are concerned, they have taken different views on this question. The legislative history of S. 92 of the Code indicates that one of the objects which led to the enactment of the said section was to enable two or more persons interested in any trust created for a public purpose of a charitable or religious nature should be enabled to file a suit for the reliefs set out in the said section without having to join all the beneficiaries since it would be highly inconvenient and impracticable for all the beneficiaries to join in the suit; hence any two or more of them were given the right to institute a suit for the reliefs mentioned in the said S. 92 of the Code. However, it was considered desirable to prevent a public trust from being harassed or put to legal expenses by reckless or frivolous suits being brought against the trustees and hence, a provision was made for leave of the court having to be obtained before the suit is instituted.*

*17. A plain reading of S. 92 of the Code indicates that leave of the court is a pre-condition or a condition precedent for the institution of a suit against a public trust for the reliefs set out in the said section; unless all the beneficiaries join in instituting the suit, if such a suit is instituted without leave, it would not be maintainable at all. Having in mind, the objectives underlying S. 92 and the language thereof, it appears to us that, as a rule caution, the court should normally, unless it is impracticable or inconvenient to do so, give a notice to the proposed defendants before granting leave under S. 92 to institute a suit. The defendants could bring to the notice of the court for instance that the allegations made in the plaint are frivolous or reckless. Apart from this, they could, in a given case, point out that the persons who are applying for leave under S. 92 are doing so merely with a view to harass the trust or have such antecedents that it would be undesirable to grant leave to such persons. The desirability of such notice being given to the defendants, however, cannot be regarded as a statutory requirement to be complied with before leave under S. 92 can be granted as that would lead to unnecessary delay and, in a given case, cause considerable loss to the public trust. Such a construction of the provisions of S. 92 of the Code would render it difficult for the beneficiaries of a public trust to obtain urgent interim orders from the court even though the circumstances might warrant such relief being granted. Keeping in mind these considerations, in our opinion, although, as a rule of caution, court should normally give notice to the defendants before granting leave under the said section to institute a suit, the court' is not bound to do so. If a suit is instituted on the basis of such leave, granted without notice to the defendants, the suit would not thereby be rendered bad in law or non-maintainable. The grant of leave cannot be regarded as defeating or even seriously prejudicing any right of the proposed defendants because it is always open to them to file an application for revocation of the leave which can be considered on merits and according to law.*

*18. We may mention that although clause (ffa) of S. 104(1) of the Code provides that an appeal shall lie against the refusal of grant of leave, that cannot lead to the conclusion that it is*

*obligatory on the part of the court to give notice to the proposed defendants before granting leave because an appeal lies only against the refusal of leave and not against the grant of leave. Before refusing leave the proposed plaintiffs are bound to be heard and it is the plaintiffs and not the defendants who could be prejudiced by refusal to grant such leave."*

21. In the case of **B.S. Adityan and others Versus B. Ramachandran Adityan and others (2004) 9 SCC 720,** the Apex Court in paragraph 5 of the judgment noted as under:-

"5. In the normal course if an appeal is filed against an order granting permission to a party to file a suit as falling under Section 92 CPC, we do not normally interfere with an order made by the High Court nor do we think of entertaining a proceeding of this nature under Article 136 of the Constitution because the order made thereunder will not determine the rights of the parties, but only enable a party to initiate a proceeding."

22. In a recent judgment, in the case of **Ashok Kumar Gupta and another Versus Sitalaxmi Sahuwala Medical Trust and others (2020) 4 SCC 321,** the Apex Court has set aside the order of the High Court refusing to grant leave to the suit. The Apex Court after noticing a long line judgment, in paragraph 12 held the three conditions must exist to invoke jurisdiction under Section 92 of the CPC. Paragraph 12 of the judgment is extracted herein-below:-

*"12. Three conditions are therefore, required to be satisfied in order to invoke Section 92 of the Code and to maintain an action under said Section, namely, that:*

*(i) the Trust in question is created for public purposes of a charitable or religious nature;*

*(ii) there is a breach of trust or a direction of Court is necessary in the administration of such a Trust; and*

*(iii) the relief claimed is one or other of the reliefs as enumerated in said Section.*

*Consequently, if any of these three conditions is not satisfied, the matter would be outside the scope of said Section 92."*

23. In the aforesaid case, the Apex Court after noticing several pronouncements in respect of the scope of Section 92 of C.P.C. found that the suit of appellant meets all the three requirements for invoking Section 92 of CPC, and accordingly, it set aside the order of the High Court and restored the order of the trial court granting leave to sue.

24. Now, in the light of principles enunciated by this Court as well as the Apex Court regarding grant of leave to suit, it can be concluded that three conditions must exist as noted by the Apex Court in paragraph 12 of the judgment in the case of **Ashok Kumar Gupta (supra)** to invoke Section 92 of CPC. If any of the conditions noted in paragraph 12 in the case of **Ashok Kumar Gupta (supra)** is lacking, Section 92 of CPC cannot be invoked.

25. It is also settled in law that non-issuance of notice to the proposed defendant before granting leave to suit under Section 92 CPC will not render the suit invalid since an order granting leave to suit does not prejudice the rights of the proposed defendant in the suit. The proposed defendant has the opportunity to lead evidence and establish by filing

evidence in the trial that the suit is based upon false and vexatious allegations.

26. Now, this Court proceeds to analyze the legality of the order passed by the trial court granting leave to sue in the light of principles laid down by the Apex Court and this court regarding grant of leave under Section 92 of C.P.C.

27. At this point, It is pertinent to mention that the trial court in detail has considered each condition of the trust deed as noticed in the earlier part of the judgment to conclude that the trust is a public trust. Learned counsel for the applicants could not demonstrate that the finding of the trial court in concluding that trust is a public trust is perverse.

28. The suit under Section 92 of CPC is of a special nature that presupposes the existence of public trust of a religious or charitable character. At this juncture, it would be relevant to refer to conditions no. **(1), (3), (5) and (6)** of the Trust Deed to gather the intention of the Founder of the trust, the plain reading of these conditions unequivocally discloses the intention of the Founder of the trust that the trust has been created for the benefit of the public. The trust deed stipulates that the proceeds of property of the trust must be utilized for maintenance of the temple and the expenses to be incurred for *Bhog and Pooja* of the Deity. The income of the trust is to be utilized for discharging Government revenue. The trust deed prohibits the trustees from transferring any property of the trust and further not to use the trust property or its proceeds for their benefit. The trust deed further provides that if any trustee starts any venture not mentioned in the trust deed, the account shall be audited and maintained by the five reputable persons of the Panchayat of the Kasba concerning the said venture.

29. Reading of the trust deed does not indicate that only the family members of the Founder of trust have the right to worship the idol, rather the conditions stipulated in the trust deed in terms of which trust is to be managed discloses that none of the stipulations in the trust deed ascribes any benefit to the members of the family of the Founder of the trust. Hence, it can be inferred from the stipulations in the trust deed that worship of the idol is open to the public at large unless proved otherwise by the applicant by leading evidence during the trial.

30. In this view of the fact, this Court finds that the prima facie opinion of the trial court that trust is a public religious trust is with due application of mind and based upon the appreciation of stipulations in the Trust Deed.

31. The applicants will get an opportunity to disprove the contention of respondents during the trial that trust is not a public or charitable trust by leading evidence. At this stage, the opinion of the trial court on the plain reading of the plaint and stipulations of Trust deed that the Trust is a public trust does not prejudice the rights of the applicants in any manner.

32. Now, coming to the second condition for invoking Section 92 of CPC that there must be a breach of trust or trust is not being managed properly is present in the instant case. The allegations in the plaint extracted above, clearly disclose that the trust property is not being managed properly and by following the conditions of the Trust Deed. The averments in the plaint extracted above clearly disclose that

proceeds of trust are being utilized by the applicants for their personal use which is prohibited in the trust deed; that proceeds of trust property are not utilized for repair of temple and idol and the temple is in a dilapidated condition. In this view of the fact, this Court finds that the second condition for invoking Section 92 of CPC is also present. Relief as claimed in the plaint which has been quoted above also discloses that same falls within the relief provided under Section 92 of CPC. Accordingly, this court believes that all the conditions which must exist to invoke Section 92 of the C.P.C. are present in the present case.

33. Now coming to the judgments relied upon by learned counsel for the applicants, this Court is of the opinion that said judgments do not help the applicant at the stage of grant of leave to suit under Section 92 of CPC. In the case of **Dhirendra Singh and others Vs. Dhanai and others 1983 AIR (All) 2016,** this Court dismissed the first appeal of the plaintiff against the judgment and order passed by District Judge, Faizabad dismissing the suit under Section 92 of CPC on the contest. In this case, the suit was contested by the parties, and issues were framed and after the parties led evidence, the trial court found that the plaintiff has failed to prove that trust is religious trust, and accordingly, it dismissed the suit. The said judgment is not applicable in the facts of the present case, as the suit has been dismissed by the trial court on the contest by the parties which judgment was affirmed by the High Court in Appeal.

34. In the case of ***Sri Satnarayan Ji Maharaj Virajman Mandir Sat Narayan Dharamshala and others Versus Rajendra Prasad Aggarwal and others AIR 1997 ALL 413,*** the trial court refused to grant leave to suit on the ground that trust deed reveals that temple, Dharamshala, and property in question belong to the defendants and the trust properties were partitioned between them. Paragraphs 5, 6, and 7 of the judgment are reproduced herein-below:

*"5. The appellant contended that the nature of the trust, whether it was for public purposes or not, would be determined from the fact as to who would be the beneficiaries of the trust. It was contended that materials were there before the court below to infer that the Hindu public in general were allowed to stay in the dharamshala and to offer puja in the temple and to take part in bhajan and kirtans in the temple and, as such, the public in general were beneficiaries of the trust. The respondents contended that to allow the public in general to offer puja or to stay in a dharamshala may not convert the same into a trust for public purposes when the ownership always remained with Sahu Chhajmal Das and, thereafter, with his sons and these sons had partitioned the property amongst themselves. Had it been the trust, it was argued, no question could have arisen for partition of the property between certain private individuals. In this connection, reference was made to the papers filed with the counter affidavit which were not denied. It was only stated regarding these papers that the properties were not partitioned, only the management thereof was partitioned.*

*6. Case-laws were also cited by the parties in this connection. The Supreme Court made a distinction between a private and public trust, in the case of Devaki Nandan v. Murlidhar, as reported in AIR 1957 SC 133: (1957 All LJ 416). It was*

*observed herein that the distinction between a private and a public trust was that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public or a class thereof. While in the former the beneficiaries are the persons who are ascertained for are capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment. A religious endowment must be held, therefore, to be a private or a public according to the beneficiaries if they are specific person or general public or a section thereof. It was further observed that under the Hindu law an idol is a juristic person capable of holding property and the properties endowed for the institution vest in it. But it does not follow from these that it is to be recorded as the beneficial owner of the endowment. It is only in ideal sense that the idol is the owner of the endowed properties and it cannot have any beneficial interest in the endowment. When once it was not disputed that the true beneficiaries of religious endowment are not the idols but the worshippers and that the purpose of the endowment is the maintenance of that worship for the benefit of worshippers, the question whether an endowment is private or public presents no difficulty. The cardinal point to be decided is whether it was the intention of the founder that specific persons are to have the right of worship of the shrine or the general public or any specific portion thereof.*

*7. In the instant case, however, although an idol was installed a temple raised, a dharamshala was constructed, there is nothing on record to indicate that it was dedicated either to any deity or for any particular segment of the society. The temple, the dharamshala and the property in question always belonged to Sahu Chhajmal Das and subsequently to his heirs by dint of a will and subsequent partition between them."*

35. Reading of aforesaid paragraphs reveals that trust was a private trust as certain properties of trust were partitioned between certain individuals and, therefore, this Court has concluded that had it been a public trust, there would not have been any question of partition of the property of the trust between private individuals. Thus, the judgment of this Court in the case of **Sri Satnarayan Ji Maharaj Virajman Mandir Sat Narayan Dharamshala (supra)** is not applicable in the facts of the present case.

36. The judgment of this Court in the case of **Karunanadhi and others Vs. Gyan Prakash and others 2014 (5) ADJ 467** is also not applicable in the facts of the present case since in the said case it was admitted by the plaintiff in his affidavit that trust is a private trust and because of admission of the plaintiff regarding nature of trust, this Court held that as trust is a private trust, therefore, Section 92 of CPC cannot be invoked. Thus, the said judgment also does not come in aid of the applicants

37. As far the second submission of learned counsel for the applicant that trust deed provides that if there is any dispute in respect to trust, same may be referred to fiver Panchs of Panchayat, the said contention is also misconceived for two reasons; firstly the dispute in the instant case is not concerning dispute among the trustee falling within the ambit of truest deed rather moot question in the instant case is about the management of trust since as per allegation in the plaint, the trust is being mismanaged by the applicant. Secondly, even if for the sake of argument, the contention of learned counsel for the

applicant is accepted, the stipulation in the trust deed that any dispute be referred to the Panch will not override statutory provision since Section 92 has been incorporated in C.P.C. with an object that the trust which is charitable or public religious trust should be managed as per the wish of the Founder of the trust and in accordance with the provisions of the trust deed. Accordingly, this Court is not inclined to accept the aforesaid contention of learned counsel for the applicant.

38. So far as the last contention of learned counsel for the applicant that the respondent has no locus to file a suit, it is relevant to point out that the respondent in the application under Section 92 CPC specifically averred that they belong to the family of Founder of the trust and used to visit the temple for darshan and pooja of the deity. Thus, the last contention of learned counsel for the applicant on the point of locus is also not sustainable keeping in view the fact that the applicant has ample opportunity to lead evidence to disprove the statement of the respondent that they belong to the family of the Founder of the trust.

39. For the reasons given above, this Court finds that no illegality or a jurisdictional error has been committed by the trial court in granting leave to suit to the respondents.

40. Thus, for the reasons given above, the revision lacks merit and is dismissed without any order as to cost.

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**(2021)10ILR A45**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 03.03.2021**

**BEFORE**

**THE HON'BLE DINESH PATHAK, .J.**

Jail Appeal No. 18 of 2019

**Deepak ...Appellant**
**Versus**
**State ...Opposite Party**

**Counsel for the Appellant:**
From Jail, Sri Ashok Kumar Yadav, Sri Rakesh Dube

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

**(A) Criminal Law - Appeal from jail - Indian Penal Code, 1860 - Section 304-B - Dowry death, Section 498-A - Husband or relative of husband of a woman subjecting her to cruelty - The Code of criminal procedure, 1973 - Section 161 , 313 - Dowry Prohibition Act, 1961 - Section 3/4 - circumstantial evidence - "dowry" -"dowry death" - "soon before her death" - There must be existence of a proximate live link between the effect of cruelty based on dowry demand and the death concerned - plea of alibi - minor discrepancies or contradictions.(Para - 45)**

**(B) Indian Evidence Act, 1872 - Section 113-A - Presumption as to abetment of sucide by a married woman , Section 113-B - Presumption as to dowry death , Section 114 - Court may presume existence of certain facts - nexus between the demand of dowry, cruelty or harassment, based upon such demand and the date of death - where a wife is driven to the extreme step of suicide, it would be reasonable to assume active role of her husband rather than leaving it to the discretion of the Court.(Para - 32)**

Dowry death of victim - hanged by her in-laws - victim subjected to cruelty and harassment - continious demand of dowry by her in-laws - conclusion of trial court - demand of dowry was the root cause - drew the victim (wife) to take an extreme step of suicide - convicted the accused/appellant - parents acquited.

**HELD:-**Victim subjected to cruelty and harassment for demand of dowry and the chain of incidents constitute proximate live link with the death of deceased . Prosecution has successfully discharges its duty and it is obligatory on the Court to raise a presumption that accused caused the dowry death. There is no illegality, infirmity or perversity in the impugned judgment and order passed by the Court below . Court below has rightly held the present appellant guilty under Section 304-B and 498-A IPC and under Section 4 of Dowry Prohibition Act. (Para - 62,63,64,65)

**Jail appeal dismissed.** (E-7)

**List of Cases cited:-**

1. Rajendra Singh Vs St. of Pun., (2015) 6 SCC 477

2. Sher Singh @ Partapa Vs St. of Har., (2015) 3 SCC 724

3. St. of Travancore-Cochin Vs Shanmugha Vilas Cashewnut Factory, AIR 1953 SC 333

4. St. of T.N. Vs Arooran Sugars Ltd. ,(1997) 1 SCC 326

5. Mithu Vs St. of Pun., AIR 1983 SC 473

6. P.N. Krishna Lal Vs Govt. of Kerala, 1995 Supp (2) SCC 187

7. Surinder Singh Vs St. of Har., (2014) 4 SCC 129

8. Bharwada Ghoginbhai Hirjibhai Vs St. of Guj., AIR 1983 SC 753

9. Vinod Kumar Vs St. of Har., (2015) 3 SCC 138

10. Baljinder Kaur Vs St. of Pun., (2015) 2 SCC 629

11. Dinesh Vs St. of Har., 2014(12) SC 532

12. Hira Lal & ors. Vs St. of St. (Govt. of NCT) Delhi, (2003) 8 SCC 80

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

1. Heard learned counsel for the appellant and Shri O.P. Mishra, learned A.G.A. for the State.

2. The instant jail appeal has been preferred by the accused-appellant challenging the judgment and order dated 30.11.2018 passed by the Additional District Judge/Fast Track Court (created by XIVth Finance Commission), Kanpur Nagar in Sessions Trial No.529 of 2015 (State vs. Deepak and two others) convicting the present appellant under Section 498-A IPC sentencing him to undergo three years imprisonment along with fine to the tune of Rs.5000/- and, in case of default thereof, he was further to undergo three months additional imprisonment and under Section 304-B IPC sentencing him to undergo eight years imprisonment. He was also convicted under Section 4 of Dowry Prohibition Act, 1961 (hereinafter referred to as "D.P. Act") and sentenced to undergo one year imprisonment along with fine to the tune of Rs.5000/- and in case of default thereof, he was further to undergo three months additional imprisonment. All the sentences were directed to run concurrently.

3. An First Information Report (hereinafter referred to as "FIR") had been lodged by the informant namely Deena Nath (PW-1) with respect to dowry death of his daughter, who was allegedly killed by her in-laws. As per F.I.R. version, marriage of informant's daughter was solemnized with Deepak (accused/appellant herein). At the time of marriage, he had given Rs.1 lakh cash as well as goods worth Rs.1 lakh. That apart, he had given one golden chain and golden ring to the groom, but in-laws of his daughter were not satisfied with the dowry. Husband (Deepak), father-in-law (Dinesh alias Tota

Ram), mother-in-law (Sunita), brother-in-law (Anshu) and sister-in-law (Rekha w/o Anshu) of his daughter used to physically and mentally torture her for want of motorcycle and cash amounting Rs.50,000/-. Due to non-fulfillment of their demand of dowry, they used to beat her up. In-laws of his daughter had attempted several times to kill her, who used to tell her ordeal to her parents. On 22.11.2014, her in-laws kicked her out from their house, later on, when relatives intervened in the matter, they permitted her to enter the house on 20.05.2015, but she was throughout subjected to cruelty. On 12.06.2015 at about 12:30 hours, police informed him about his daughter's death. After reaching there, he came to know the entire facts. The informant believed that five accused, as mentioned above, had hanged his daughter to death due to non-fulfillment of their demand of dowry.

4. In this backdrop, PW-1 had filed a written report dated 12.06.2015 (Exhibit Ka 1) with respect to the death of his daughter. Aforesaid written report was endorsed in General Diary (Exhibit Ka 10) and on the basis thereof, an F.I.R. Dated 12.06.2015 (Exhibit Ka 9) was registered, at about 19:00 hours, as Case Crime No.0449 under Sections 304-B, 498-A IPC and 3/4 of the D.P. Act, accusing five persons namely, Deepak (husband of the deceased/victim), Dinesh alias Tota Ram (father-in-law), Sunita (mother-in-law), Anshu (Jeth) and Rekha (sister-in-law) respectively.

5. As per Inquest Report dated 12.06.2015 (Exhibit Ka 2), there was no sign of injury on the dead body of the deceased except a ligature mark on the right side of the neck. Aforesaid report was prepared and signed by Pramesh Srivastava, Tehsildar (PW-4). Forensic Field Unit, Cantt. Kanpur Nagar had inspected the site of occurrence and submitted a report dated 12.06.2015 (Exhibit Ka 11). Aforesaid report was proved by Vinod Kumar (PW-9), Chief Scientist, Forensic Science Laboratory.

6. Dr. Anil Nigam (PW-5) has proved Post Mortem Report dated 13.06.2015 (Exhibit Ka 7). In the Post Mortem Report, cause of death has been shown asphyxia due to ante mortem injury. Two external injuries had been shown on the body, which are as under :-

(i) Ligature mark 30 cm x 2 cm around the neck, with 7 cm gap right side back of neck. Distance 5 cm below chin, 6.5 cm below left ear, 1 cm below right ear. On dissection of ligature mark-dry and parchment like glistening present under the ligature mark. Ligature mark obliquely placed, high up in the neck between chin and thyroid cartilage.

(ii) Contusion 8 cm x 3 cm on front of forehead, just above both eyebrow.

Hanging and use of hard and blunt object had been shown under the head of manner of causation of injuries.

7. After completion of investigation, the Investigating Officer had submitted a charge-sheet dated 10.08.2015 (Exhibit Ka 10) arraigning only three persons as accused namely Deepak (husband), Dinesh (father-in-law) and Sunita (mother-in-law) under Sections 498-A, 304-B IPC and 3/4 of the D.P. Act.

8. By the order dated 18.09.2015, Chief Metropolitan Magistrate, Kanpur Nagar has committed the case to the Sessions Court for trial. By the order dated 25.02.2016, the case was transferred to the Court concerned. Learned Trial Court, vide

order dated 11.01.2016 had framed charges under Section 498A/34, 304-B/34 IPC and 3/4 of the D. P. Act. Subsequently, vide order dated 25.10.2018, learned Trial Court had framed an alternative charge under Section 302/34 IPC.

9. To prove the accusation, prosecution had produced as many as nine witnesses, out of them three witnesses are of the fact and the remaining are formal witnesses.

10. PW-1 Deena Nath (first informant/father of the victim) had supported the version of FIR qua allegation of dowry death against the accused persons (in-laws of his daughter). He had reiterated that marriage of his daughter was solemnized on 10.12.2012 with Deepak (appellant herein), wherein Rs.1 lakh cash and goods worth Rs.1 lakh were given by him. Apart from that, he had also given one golden ring and one golden chain. After marriage, everything was quite normal for some time, but when his daughter came for the second time to her parental house, she had narrated her ordeal to the informant (PW-1), his wife Chandrmukhi, son Anil Kumar and daughter Pooja. As per informant/PW-1, his daughter had made an allegation against her husband (Deepak), father-in-law (Dinesh alias Tota Ram), mother-in-law (Sunita), Jeth/brother-in-law (Anshul) and Jethani/sister-in-law (Rekha) that they used to torture her physically and mentally for want of one motorcycle and cash Rs.50,000/-. Informant had tried to persuade the in-laws of his daughter and sent her back with them, but they used to torture her for demand of dowry. On 22.11.2014, when his daughter was kicked out from her matrimonial home, she stayed at her parental house for six months under the belief that one day everything would be normal. On 20.05.2015, she had been sent to her in-laws' house due to intervention of the relatives. On 12.06.2015 at about 12-12.30 hours, he had received telephonic information from the police about death of his daughter. Thereafter, he along with his son Sanjay, wife Chandramukhi and elder son-in-law reached at his daughter's matrimonial house on the same day i.e. 12.06.2015 at about 5.00 P.M., where he saw his daughter lying dead on the floor. Thereafter, he went to police station and moved a complaint. He had proved the Written Report as Exhibit Ka 1. On the next date i.e. 13.06.2015, he was called upon by the Circle Officer before whom he had stated all the facts. At that time, his wife and son Sanjay had stayed at the house of his daughter. He had made emphasis that his daughter had been killed by her in-laws due to non fulfillment of dowry demand. In his cross-examination, PW-1 had stated that his son-in-law was educated upto 8th Standard and was serving in Air Force. He has further stated that in-laws of his daughter had never demanded any dowry from him, rather they demanded dowry from his daughter. It is further stated that in his presence in-laws have never demanded any dowry or tortured his daughter. His daughter was intelligent and was a Graduate.

11. PW-2 Anil alias Sanjay, brother of victim, has supported the case of prosecution and stated that victim was his third sister, who was married with present appellant. First time, after 8 days, he brought his sister back to home. Second time, after 1 and ½ months when she returned back to her parental home, she had narrated her ordeal before her mother and sister. PW-2 has stated that his sister(victim) disclosed that her in-laws were not satisfied with the dowry and they

were demanding cash Rs.50,000/- and one motorcycle. His sister had made allegation against all the five accused persons, who are named in the FIR, that they used to torture her mentally and physically. His sister was kicked out from her in-laws' house and after intervention of the relatives, she returned to her matrimonial home. His father received a telephonic information from the police qua death of his sister. After getting information, he, his father, mother and 1-2 persons of the area reached at the house of victim, where he found his sister lying dead on the floor. As per statement of PW-2, he and his family members had bonafide belief that victim had been killed by her in-laws for want of dowry. His father moved a written report to the police and thereafter dead body of the victim was sent for post mortem examination. Funeral was conducted by younger brother of appellant in which PW-2 and his family members had participated. He has verified his signature on the Inquest Report. In his cross-examination, PW-2 has stated that neither any of the accused had demanded dowry from him nor his sister was tortured in his presence. He had given divergent statement with respect to the position of dead body of victim as to what he had seen on the spot and what he had already stated before the I.O. under Section 161 Cr.P.C. In his cross-examination, he has further stated that at the time of inquest there was no Magistrate available on the spot.

12. PW-3 Chandramukhi (mother of the victim) had also supported the prosecution case and made accusation against all the accused persons for dowry death of her daughter. In her examination-in-chief she had stated that when, after four days, his son brought her daughter back to parental home, she had told that her mother-in-law, sister-in-law and husband are demanding cash Rs.50,000/- and one motorcycle. She had sent her daughter back to her in-laws' house after persuading her. Thereafter, several times, she went to her parental house and all times she narrated her ordeal qua dowry demand by the accused persons/her in-laws. Last time, she sent her daughter back to her in-laws' house on their assurance that they will keep her happily. In the meantime, she used to narrate her ordeal on telephonic conversation. After 16-17 days, her husband received telephonic information from the police qua death of her daughter. When she, along with family members, reached at the matrimonial house of her daughter (victim), found dead body of her daughter lying on the floor. At that time, no one was present from the in-laws side. In her cross-examination, she had stated that before the incident, accused persons had demanded cash Rs.50,000/- and one motorcycle from them, which included she herself, her husband and son.

13. PW-4 Pramesh Srivastava (Tehsildar) has stated that he had prepared and signed the Inquest Report (Exhibit Ka 2). Inquest Report was singed by the witnesses and Constable Bachcha Singh, Constable Pushpa Tomar and Inspector. He has made a report for post mortem examination of the dead body and referred to the Chief Medical Officer.

14. PW-5 Dr. Anil Nigam, Senior Consultant, U.H.M. Police Hospital, Kanpur has deposed in his examination-in-chief that on 13.06.2015 he was posted as Senior Consultant at Kanpur Post Mortem Hospital. At the time of post mortem examination rigor mortis had passed from upper extremity and present in lower extremity. Lips, face, nails cyanosed, mark

of saliva and saliva dribbling on left angle of mouth. Eyes closed, mouth half open, tongue protruding out. He has further deposed that there was two marks of injuries on the body, first is a ligature mark on the neck which was sign of hanging, second injury was contusion. Cause of death was asphyxia due to ante mortem injury (hanging). He has proved post mortem examination report as Exhibit Ka 7 and said that injury no.2 was caused due to hard and blunt object.

15. PW-6 Om Prakash Singh, the first Investigating Officer (hereinafter referred to as "I.O."), has reiterated all the facts to which he has investigated and has proved Site Plan as Exhibit Ka 8.

16. PW-7 Manju Yadav (Constable No.904) has deposed that computerized copy was prepared on the basis of written report submitted by first informant Deena Nath. According to him, G.D. entry No.46 at about 19.00 hours on 12.06.2015 was made by then Station House Officer, Rajdev Rai. She has proved FIR as Exhibit Ka 9 and photocopy of G.D. entry as Exhibit Ka 10.

17. PW-8 Vishal Pandey, second I.O., has taken over the charge of investigation from the earlier I.O. and has stated all the facts chronologically with regard to the investigation. He has proved the Charge Sheet as Exhibit Ka 11.

18. PW-9 Vinod Kumar, Senior Scientist, Forensic Science Laboratory, Lucknow, (the then In-charge of Forensic Field Unit, Cantt. Kanpur) deposed that he has investigated the crime scene and submitted a detailed report with respect to the condition of the dead body of the victim and crime scene. He had also taken photographs thereof. He had prepared the report on spot and signed the same which has been proved as Exhibit Ka 11. He has further deposed that after enquiry/investigation of dead body, it was found to be a case of suicidal death, which is not natural.

19. In his reply to the query, as put to the accused-appellant under Section 313 Cr.P.C., he has admitted his marriage with the victim but denied all the allegations made by the prosecution. He has taken plea of alibi that at the time of incident he was at the factory, from where he was sent to jail. Another accused Dinesh alias Tota Ram (father of the appellant) had stated that victim had hanged herself out of anger, as she was annoyed because she wanted to go to her parental home, but his son (i.e. husband of victim/appellant) had refused to let her go to parental home and he had gone at work place after scolding his wife (victim). According to him, this incident of scolding was witnessed by other residents in the vicinity. He has been implicated in false prosecution. Third accused Sunita (mother of the appellant) had stated that on the date of occurrence, victim was adamant to go to her parental home, but appellant refused to let her go there. Thereafter the victim closed the door of the room and hanged herself with the fan and committed suicide. She had also pleaded her innocence and prayed for trial.

20. In defence, accused persons had got examined three witnesses namely Vijay Kumar Dubey (DW-1), Ram Dulari (DW-2) and Poonam Rathore (DW-3). All the defence witnesses have supported the case of the accused persons and deposed that on the date of occurrence, victim (appellant's wife) was adamant to go to her parental home, which was repressed by her husband

and thereafter, he went to his work. That refusal made by her husband resulted into suicidal death of the victim. They further deposed that case of the prosecution qua demand of dowry is false and fictitious. Accused-appellant and the victim were living separately from their other family members. The accused had never demanded Rs.50,000/- cash and a motorcycle, as has been mentioned in the F.I.R.

21. The trial court, after considering the facts and circumstances of the case and the evidence available on the record, had convicted the present appellant under Section 498-A & 304-B IPC and Section 4 of the D.P. Act, but acquitted Dinesh alias Tota Ram (father of the appellant) and Sunita (mother of the appellant) on the ground that they were living separately from their son and daughter-in-law (victim), therefore, no case was made out against them beyond all reasonable doubts.

22. Assailing the impugned judgment, learned counsel for the appellant has submitted as under :-

(a) PW-1 Dina Nath and PW-2 Anil had deposed that neither demand of dowry was made, nor the victim was harassed and tortured in their presence.

(b) Deposition of PW-3 was contrary to the deposition of PW-1 and PW-2 with respect to the demand of dowry, who has stated that accused-appellant has demanded dowry of cash Rs.50,000/- and a motorcycle from the parents and brother of the deceased.

(c) There is a glaring discrepancy/contradiction between the statements of PWs-2 and 3 recorded under Section 161 Cr.P.C. and their deposition before the Court with respect to the condition and position of the dead body at the time when they reached at the crime scene.

(d) There is no evidence of persistent demand of dowry from the victim or her parents. There is no independent witness to corroborate the prosecution's case qua demand of dowry. Disclosure made by the victim before her parents is the only evidence available regarding demand of dowry made by accused persons, which is not sufficient to prove the accusation, that too in light of the fact that PWs-1 and 2 have specifically deposed that no demand of dowry had been made from them.

(e) In the facts and circumstances of the present case, there is no corroborating evidence to prove that soon before the death of the victim she was subjected to cruelty or harassment in connection with demand of dowry, therefore, presumption qua dowry death of the victim cannot be drawn under Section 113-B of the Evidence Act, 1872 (hereinafter referred to as "Evidence Act").

(f) Except one stray incident i.e. dated 22.11.2014 wherein the victim had allegedly been kicked out of her matrimonial home by her in-laws', there is no other corroborating evidence to constitute a proximate live link with death of the deceased.

(g) Learned counsel for the appellant has emphasized that no complaint was made with regard to the alleged incident dated 22.11.2014 and even after 20.05.2015, on which date the victim was accepted/returned in her in-laws family. There is no evidence of demand of dowry from 20.05.2015 till the date of her death i.e. 12.06.2015.

(h) Learned counsel for the appellant has drawn attention of the Court towards deposition of Forensic Expert

(PW-9) and Tehsildar (PW-4), who have treated the death as suicidal death. Even Dr. Anil Nigam (PW-5), who had conducted the post mortem examination, has also pointed out possibility of suicidal death.

(i) Learned counsel has also drawn the attention of the Court towards paragraph 33 of the impugned judgment wherein learned Court below has observed that even assuming that she had committed suicide because of refusal made by her husband, while she was adamant to go to her parental house, it cannot be ruled out that she had committed suicide due to subjecting her to harassment and cruelty for demand of dowry. He further submits that in the aforesaid situation it cannot be said that the present case is a case where crime of dowry death has been commissioned by the accused-appellant.

(j) Learned Court below was not just and fair in relying upon the accusation made by the prosecution only on the basis of conjuncture and surmises.

(k) No corroborating evidence was adduced on behalf of prosecution to prove the accusation against the accused-appellant beyond all reasonable doubts, even after considering all the facts and circumstances, culpability of the present accused-appellant cannot be inferred in commission of crime as alleged in the F.I.R.

(l) The Trial Court has failed to weigh the evidence available on the record in its right perspective and has illegally convicted the appellant without proper consideration of the deposition made by the defence witnesses as well as the statement of accused under Section 313 Cr.P.C.

(m) In the facts and circumstances of the present case, no case is made out against the accused-appellant under Sections 498-A & 304-B of I.P.C. and Section 4 of Dowry Prohibition Act for which he has been convicted.

23. Per contra, learned A.G.A. has submitted as under :-

(a) victim was subjected to harassment and cruelty for want of additional dowry of cash Rs.50,000/- and one motorcycle.

(b) Due to bad behaviour of in-laws, victim came to her parental house on 22.11.2014 and, thereafter, it took six months to negotiate the matter with the in-laws of victim, who had ultimately agreed to accept the victim in their family on 20.05.2015 but unfortunately on 12.06.2015 she had been reported dead.

(c) PWs-1, 2 and 3 are consistent in their statements showing cause of death due to non-fulfillment of demand of dowry. Minor discrepancies, if any, occurred in their statements, will not affect the merits of the case.

(d) Much emphasis cannot be given to the statement of witnesses recorded under Section 161 Cr.P.C. in the light of the fact that all the prosecution witnesses have successfully supported the case of dowry death of the victim as mentioned in the FIR.

(e) It is further submitted that under Section 313-A of Evidence Act, burden lies upon the accused to explain the circumstances wherein victim had allegedly committed suicide.

(f) Learned A.G.A. has drawn the attention of the Court towards injury no.(2) as mentioned in the post mortem report wherein one contusion has been shown on the front of forehead just above both eyebrows and manner of injury has been shown by (i) hanging and (ii) use of hard and blunt object.

(g) In the light of post mortem report, learned A.G.A. has submitted that soon before death, victim was subjected to cruelty and harassment. Accused had failed to explain the ante mortem forehead injury caused to victim.

(h) Even three defence witnesses have admitted that there was some quarrel between the parties on the date of incident due to refusal by husband regarding victim's visit to her parental home.

(i) Injury report and the statements of witnesses supports the case of dowry death and the accused should be convicted for imprisonment for life.

(j) Present jail appeal filed on behalf of accused/appellant is devoid of merits and liable to be dismissed. There is no illegality, perversity or infirmity in the impugned judgment and order passed by the Court below in convicting and sentencing the appellant under Section 304 B/34, 498 A/34 IPC and Section 4 of D.P. Act and case is fully made out in the aforesaid sections against the accused-appellant.

24. I have carefully considered the submission made by learned counsel for the parties and perused the record on board.

25. Matter in hand pertains to dowry death of the lady who had been allegedly hanged by her in-laws. As per FIR version and deposition of prosecution witnesses i.e. PWs-1, 2 and 3, who are witnesses of fact, victim was throughout subjected to cruelty and harassment for want of dowry, inasmuch as, after sometime of marriage while she came to her parental home, she told her ordeal that her in-laws are demanding Rs.50,000/- cash and one motorcycle.

26. It is a case of circumstantial evidence wherein wife of appellant no.1 has been found dead due to hanging (otherwise than under normal circumstances) and her death has been treated as dowry death under Section 304-B IPC. On the basis of statement made by prosecution witnesses, learned Trial Court came to the conclusion that demand of dowry was the root cause and drew the victim to take a drastic step of ending her life. Before examining the facts of the instant case, definition of "dowry" and "dowry death" has to be explained. The word "dowry" is defined under Section 2 of the D.P. Act, which reads as follows :-

***"2. Definition of 'dowry'.*** *--In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly--*

*(a) by one party to a marriage to the other party to the marriage; or*

*(b) by the parent of either party to a marriage or by any other person, to either party to the marriage or to any other person,*

*at or before [or any time after the marriage] [in connection with the marriage of the said parties, but does not include] dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.*

*Explanation II.-- The expression "valuable security" has the same meaning as in section 30 of the Indian Penal Code (45 of 1860)."*

27. Dealing with the definition of dowry as mentioned in Section 2 of the D.P.Act, Hon'ble Supreme Court in **Rajendra Singh vs. State of Punjab, (2015) 6 SCC 477** (Three Judges' Bench) has pointed out six ingredients in paragraph 8 of the judgment, which reads as follows :-

"(1) Dowry must first consist of any property or valuable security - the word

"any" is a word of width and would, therefore, include within it property and valuable security of any kind whatsoever.

(2) Such property or security can be given or even agreed to be given. The actual giving of such property or security is, therefore, not necessary.

(3) Such property or security can be given or agreed to be given either directly or indirectly.

(4) Such giving or agreeing to give can again be not only by one party to a marriage to the other but also by the parents of either party or by any other person to either party to the marriage or to any other person. It will be noticed that this clause again widens the reach of the Act insofar as those guilty of committing the offence of giving or receiving dowry is concerned.

(5) Such giving or agreeing to give can be at any time. It can be at, before, or at any time after the marriage. Thus, it can be many years after a marriage is solemnized.

(6) Such giving or receiving must be in connection with the marriage of the parties. Obviously, the expression "in connection with" would in the context of the social evil sought to be tackled by the Dowry Prohibition Act mean "in relation with" or "relating to".

28. With a view to curb the growing menace of dowry death, Section 304-B has been inserted in the Indian Penal Code and as a supporting deal, presumptive provision in Section 113-B has been inserted in the Evidence Act. Section 304-B of IPC and Section 113-B of Evidence Act, which are decisive provision to ascertain the ununatural death as a dowry death, read as follows :-

*"**304-B. Dowry death.**--(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.*

*Explanation.--For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).*

*(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."*

*"**113-B. Presumption as to dowry death.**--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.*

*Explanation.--For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860)."*

29. Section 304-B IPC clearly enunciates the following ingredients of dowry death :-

(a) the death of woman must have been caused due to burns or bodily injury or due to unnatural circumstances;

(b) such death must have been occurred within seven years of her marriage;

(c) soon before her death, she must have been subjected to cruelty or harassment by her husband or any relative of her husband;

(d) such cruelty or harassment must be in connection with demand of dowry.

30. Aforesaid ingredients have been expounded by the Supreme Court in several judgments and held that Section 304-B IPC is a stringent penal provision which has been implemented for dealing with and punishing offences against married women. Conjoint reading of Section 304-B IPC and presumptive provision of Section 113-B of the Evidence Act, one of the essential ingredients, amongst others, is that the woman must have been soon before her death subjected to cruelty and harassment for or in connection with demand of dowry. On the proof of essentials as mentioned in the aforesaid sections, it becomes obligatory on the Court to raise a presumption that the accused caused the dowry death.

31. Legal presumption qua dowry death has been expounded by the Hon'ble Supreme court in **Sher Singh alias Partapa Vs. State of Haryana, (2015) 3 SCC 724**, in paragraphs 9, 10, 14, 16 and 19, which are quoted below :-

*"9.The legal regime pertaining to the death of a woman within seven years of her marriage thus has numerous features, inter alia:*

*(i) The meaning of "dowry" is as placed in Section 2 of the Dowry Prohibition Act.*

*(ii) Dowry death stands defined for all purposes in Section 304B of the IPC. It does exclude death in normal circumstances.*

*(iii) If death is a result of burns or bodily injury, or otherwise than under normal circumstances, and it occurs within seven years of the marriage and, it is 'shown' in contradistinction to 'proved' that soon before her death she was subjected to cruelty or harassment by her husband or his relatives, and the cruelty or harassment is connected with a demand of dowry, it shall be a dowry death, and the husband or relative shall be deemed to have caused her death.*

*(iv) To borrow from Preventive Detention jurisprudence - there must be a live link between the cruelty emanating from a dowry demand and the death of a young married woman, as is sought to be indicated by the words "soon before her death", to bring Section 304B into operation; the live link will obviously be broken if the said cruelty does not persist in proximity to the untimely and abnormal death. It cannot be confined in terms of time; the query of this Court in the context of condonation of delay in filing an appeal - why not minutes and second - remains apposite.*

*(v) The deceased woman's body has to be forwarded for examination by the nearest Civil Surgeon.*

*(vi) Once the elements itemized in (iii) above are shown to exist the husband or relative shall be deemed to have caused her death.*

*(vii) The consequences and ramifications of this 'deeming' will be that the prosecution does not have to prove anything more, and it is on the husband or his concerned relative that the burden of proof shifts as adumbrated in Section 113B, which finds place in Chapter VII of the Evidence Act. This Chapter first covers 'burden of proof' and then "presumption", both being constant bed-fellows. In the*

*present context the deeming or presumption of responsibility of death are synonymous."*

*"10. Death can be accidental, suicidal or homicidal. The first type is a tragedy and no criminal complexion is conjured up, unless statutorily so devised, as in Section 304A; but even there the culpable act is that of the person actually causing the death. It seems to us that Section 304B of the IPC, inasmuch as it also takes within its contemplation "the death of a woman ..... otherwise than under normal circumstances", endeavours to cover murders masquerading as accidents. Justifiably, the suicidal death of a married woman who was meted out with cruelty by her husband, where her demise occurred within seven years of marriage in connection with a dowry demand should lead to prosecution and punishment under Sections 304B and/or 306 of the IPC. However, if the perfidious harassment and cruelty by the husband is conclusively proved by him to have had no causal connection with his cruel behaviour based on a dowry demand, these provisions are not attracted as held in Bhagwan Das v. Kartar Singh (2007) 11 SCC 205, although some reservation may remain regarding the reach of Section 306."*

*"14. In Section 113-A of the Evidence Act Parliament has, in the case of a wife's suicide, "presumed" the guilt of the husband and the members of his family. Significantly, in Section 113-B which pointedly refers to dowry deaths, Parliament has again employed the word "presume". However, in substantially similar circumstances, in the event of a wife's unnatural death, Parliament has in Section 304-B "deemed" the guilt of the husband and the members of his family. The Concise Oxford Dictionary defines the word "presume" as: supposed to be true, take for granted; whereas "deem" as: regard, consider; and whereas "show" as: point out and prove. The Black's Law Dictionary (5th Edition) defines the word "show" as- to make apparent or clear by the evidence, to prove; "deemed" as- to hold, consider, adjudge, believe, condemn, determine, construed as if true; "presume" as- to believe or accept on probable evidence; and "Presumption", in Black's, "is a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of presumed fact, until presumption is rebutted.""*

*"16. As is already noted above, Section 113-B of the Evidence Act and Section 304-B of the IPC were introduced into their respective statutes simultaneously and, therefore, it must ordinarily be assumed that Parliament intentionally used the word 'deemed' in Section 304-B to distinguish this provision from the others. In actuality, however, it is well nigh impossible to give a sensible and legally acceptable meaning to these provisions, unless the word 'shown' is used as synonymous to 'prove' and the word 'presume' as freely interchangeable with the word 'deemed'. In the realm of civil and fiscal law, it is not difficult to import the ordinary meaning of the word 'deem' to denote a set of circumstances which call to be construed contrary to what they actually are. In criminal legislation, however, it is unpalatable to adopt this approach by rote. We have the high authority of the Constitution Bench of this Court both in* ***State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory AIR 1953 SC 333 and State of Tamil Nadu v. Arooran Sugars Limited (1997) 1 SCC 326,*** *requiring the Court to ascertain the purpose behind the statutory fiction brought about by the use of the word 'deemed' so as to give full effect to the legislation and carry it to its logical*

*conclusion. We may add that it is generally posited that there are rebuttable as well as irrebuttable presumptions, the latter oftentimes assuming an artificiality as actuality by means of a deeming provision. It is abhorrent to criminal jurisprudence to adjudicate a person guilty of an offence even though he had neither intention to commit it nor active participation in its commission. It is after deep cogitation that we consider it imperative to construe the word 'shown' in Section 304-B of the IPC as to, in fact, connote 'prove'. In other words, it is for the prosecution to prove that a 'dowry death' has occurred, namely, (i) that the death of a woman has been caused in abnormal circumstances by her having been burned or having been bodily injured, (ii) within seven years of a marriage, (iii) and that she was subjected to cruelty or harassment by her husband or any relative of her husband, (iv) in connection with any demand for dowry and (v) that the cruelty or harassment meted out to her continued to have a causal connection or a live link with the demand of dowry. We are aware that the word 'soon' finds place in Section 304-B; but we would prefer to interpret its use not in terms of days or months or years, but as necessarily indicating that the demand for dowry should not be stale or an aberration of the past, but should be the continuing cause for the death under Section 304B or the suicide under Section 306 of the IPC. Once the presence of these concomitants are established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt. It seems to us that what Parliament intended by using the word 'deemed' was that only preponderance of evidence would be insufficient to discharge the husband or his family members of their guilt. This interpretation provides the accused a chance of proving their innocence. This is also the postulation of Section 101 of the Evidence Act. The purpose of Section 113-B of the Evidence Act and Section 304B of the IPC, in our opinion, is to counter what is commonly encountered - the lack or the absence of evidence in the case of suicide or death of a woman within seven years of marriage. If the word "shown" has to be given its ordinary meaning then it would only require the prosecution to merely present its evidence in Court, not necessarily through oral deposition, and thereupon make the accused lead detailed evidence to be followed by that of the prosecution. This procedure is unknown to Common Law systems, and beyond the contemplation of the Cr.P.C."*

*"19. Keeping in perspective that Parliament has employed the amorphous pronoun/noun "it" (which we think should be construed as an allusion to the prosecution), followed by the word "shown" in Section 304-B, the proper manner of interpreting the Section is that "shown" has to be read up to mean "prove" and the word "deemed" has to be read down to mean "presumed". Neither life nor liberty can be emasculated without providing the individual an opportunity to disclose extenuating or exonerating circumstances. It was for this reason that this Court struck down the mandatory death sentence in Section 303 IPC in its stellar decision in* ***Mithu vs. State of Punjab, AIR 1983 SC 473.*** *Therefore, the burden of proof weighs on the husband to prove his innocence by dislodging his deemed culpability, and that this has to be preceded only by the prosecution proving*

*the presence of three factors, viz. (i) the death of a woman in abnormal circumstances (ii) within seven years of her marriage, and (iii) and that the death had a live link with cruelty connected with any demand of dowry. The other facet is that the husband has indeed a heavy burden cast on his shoulders in that his deemed culpability would have to be displaced and overturned beyond reasonable doubt. This emerges clearly as the manner in which Parliament sought to combat the scourge and evil of rampant bride burning or dowry deaths, to which manner we unreservedly subscribe. In order to avoid prolixity we shall record that our understanding of the law finds support in an extremely extensive and erudite judgment of this Court in* ***P.N. Krishna Lal v. Government of Kerala, 1995 Supp (2) SCC 187,*** *in which decisions spanning the globe have been mentioned and discussed. It is also important to highlight that Section 304-B does not require the accused to give evidence against himself but casts the onerous burden to dislodge his deemed guilt beyond reasonable doubt. In our opinion, it would not be appropriate to lessen the husband's onus to that of preponderance of probability as that would annihilate the deemed guilt expressed in Section 304-B, and such a curial interpretation would defeat and neutralise the intentions and purposes of Parliament. A scenario which readily comes to mind is where dowry demands have indubitably been made by the accused husband, where in an agitated state of mind, the wife had decided to leave her matrimonial home, and where while travelling by bus to her parents' home she sustained fatal burn injuries in an accident/collision which that bus encountered. Surely, if the husband proved that he played no role whatsoever in the accident, he could not be deemed to have caused his wife's death. It needs to be immediately clarified that if the wife had taken her life by jumping in front of a bus or before a train, the husband would have no defence. Examples can be legion, and hence we shall abjure from going any further. All that needs to be said is that if the husband proves facts which portray, beyond reasonable doubt, that he could not have caused the death of his wife by burns or bodily injury or not involved in any manner in her death in abnormal circumstances, he would not be culpable under Section 304-B."*

32. The phrase **"soon before her death"** has also been clarified by Hon'ble Supreme court in **Rajendra Singh (supra)**. The relevant paragraphs 21, 22, 23, 24 and 25 are quoted below :-

*"21.Coming now to the other important ingredient of Section 304B - what exactly is meant by "soon before her death"?"*

*"22. This Court in* ***Surinder Singh v. State of Haryana (2014) 4 SCC 129,*** *had this to say (SCC pp.137-39, paras 17-18):*

*"17. Thus, the words "soon before" appear in Section 113-B of the Evidence Act, 1872 and also in Section 304-B IPC. For the presumptions contemplated under these sections to spring into action, it is necessary to show that the cruelty or harassment was caused soon before the death. The interpretation of the words "soon before" is, therefore, important. The question is how "soon before"? This would obviously depend on the facts and circumstances of each case. The cruelty or harassment differs from case to case. It relates to the mindset of people which varies from person to person. Cruelty can be mental or it can be physical.*

*Mental cruelty is also of different shades. It can be verbal or emotional like insulting or ridiculing or humiliating a woman. It can be giving threats of injury to her or her near and dear ones. It can be depriving her of economic resources or essential amenities of life. It can be putting restraints on her movements. It can be not allowing her to talk to the outside world. The list is illustrative and not exhaustive. Physical cruelty could be actual beating or causing pain and harm to the person of a woman. Every such instance of cruelty and related harassment has a different impact on the mind of a woman. Some instances may be so grave as to have a lasting impact on a woman. Some instances which degrade her dignity may remain etched in her memory for a long time. Therefore, "soon before" is a relative term. In matters of emotions we cannot have fixed formulae. The time-lag may differ from case to case. This must be kept in mind while examining each case of dowry death.*

*18. In this connection we may refer to the judgment of this Court in Kans Raj v. State of Punjab [(2000) 5 SCC 207 : 2000 SCC (Cri) 935] where this Court considered the term "soon before". The relevant observations are as under: (SCC pp. 222- 23, para 15)*

*'15. ... 'Soon before' is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the idea of proximity test. The term 'soon before' is not synonymous with the term 'immediately before' and is opposite of the expression 'soon after' as used and understood in Section 114, Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be 'soon before death' if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before such alleged treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the circumstances, be treated as having become stale enough.'*

*Thus, there must be a nexus between the demand of dowry, cruelty or harassment, based upon such demand and the date of death. The test of proximity will have to be applied. But, it is not a rigid test. It depends on the facts and circumstances of each case and calls for a pragmatic and sensitive approach of the court within the confines of law."*

*"23. In another recent judgment in* ***Sher Singh v. State of Haryana, 2015 (1) SCALE 250,*** *this Court said:*

*"We are aware that the word 'soon' finds place in Section 304B; but we would prefer to interpret its use not in terms of days or months or years, but as necessarily indicating that the demand for dowry should not be stale or an aberration*

*of the past, but should be the continuing cause for the death under Section 304B or the suicide under Section 306 of the IPC. Once the presence of these concomitants are established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt." (at page 262)"*

*"24. We endorse what has been said by these two decisions. Days or months are not what is to be seen. What must be borne in mind is that the word "soon" does not mean "immediate". A fair and pragmatic construction keeping in mind the great social evil that has led to the enactment of Section 304B would make it clear that the expression is a relative expression. Time lags may differ from case to case. All that is necessary is that the demand for dowry should not be stale but should be the continuing cause for the death of the married woman under Section 304B."*

*"25. At this stage, it is important to notice a recent judgment of this Court in Dinesh v. State of Haryana, 2014 (5) SCALE 641 in which the law was stated thus:*

*"15.The expression "soon before" is a relative term as held by this Court, which is required to be considered under the specific circumstances of each case and no straight jacket formula can be laid down by fixing any time of allotment. It can be said that the term "soon before" is synonyms with the term "immediately before". The determination of the period which can come within term "soon before" is left to be determined by courts depending upon the facts and circumstances of each case." (at page 646)*

*We hasten to add that this is not a correct reflection of the law. "Soon before" is not synonymous with "immediately before"."*

33. In the aforesaid judgments Hon'ble Supreme Court succinct the scope of Section 304-B IPC and Section 113-B of the Evidence Act. It is clear that in case of dowry death initial burden lies upon the prosecution to prove the ingredients of Section 304-B IPC by preponderance of probability. Prosecution is not required to prove the ingredients beyond reasonable doubt, otherwise it will defeat the purpose of Section 304-B IPC and once prosecution has discharged its initial burden, presumption of innocence of an accused would get replaced by deemed presumption of guilt of accused. In the condition, burden would then be shifted on accused to rebut that deemed presumption of guilt by proving his innocence beyond reasonable doubt. In the matter in hand, prosecution witnesses of fact i.e. PWs-1, 2 and 3 were consistent in their depositions qua cruelly attitude of husband and his family member in connection with demand of dowry.

34. In light of the law as discussed above, the main ingredients of dowry death is harassment and cruelty for demand of dowry, which should be examined first. As per prosecution case, marriage of the victim and appellant herein was solemnized on 10.12.2012. Factum of marriage was admitted by the accused in his statement under Section 313 Cr.P.C. Even defence witnesses have admitted marriage of the accused-appellant with the victim in the year 2012. There is also no dispute that victim was found dead within seven years of her marriage. As per F.I.R. version, on 12.06.2015 father of the victim had received telephonic information from the police with respect of his daughter's death. Factum of death had not been disputed by

the accused in his defence, which occurred within two and half years of the marriage. Factum of demand of dowry has been asserted by the prosecution witnesses, though the same has been denied by the accused in his statement under Section 313 Cr.P.C. and the deposition of the defence witnesses.

35. PW-1, first informant (i.e. father of the victim) has clearly stated in his examination-in-chief that while his daughter came from her in-law's house, she narrated her ordeal to her family members (i.e. parents, brother and sisters). He has categorically stated that his daughter was throughout subjected to cruelty and harassment for demand of dowry. On 22.11.2014, she was kicked out from her in-law's house. After intervention of the relatives, anyhow she again went to her in-law's house on 20.05.2015 and ultimately on 12.06.2015, he had received information about death of his daughter. In his cross-examination, he stated that after 2-3 months of his daughter's marriage, parents of the accused-appellant and even accused himself had started demanding dowry.

36. PW-2 (Anil-brother of the victim) had also corroborated the allegation of demand of dowry as mentioned in the F.I.R. Second time, after one and half months, when she came to her parental home, she was weeping while narrating her ordeal to her family members about the demand of Rs.50,000/- cash and one motorcycle. She had also clearly narrated that her husband, father-in-law, mother-in-law, brother-in-law and sister-in-law used to treat her with cruelty and thrashed her for demand of Rs,50,000/- cash and one motorcycle. He also supported the version of his father that his sister (victim) was thrown out from her matrimonial house due to non-fulfillment of demand of dowry made by her husband and in-laws and subsequently on persuasion and intervention of the relatives, she was returned to her in-law's house. After said induction i.e. on 20.05.2015, she had been hanged to death on 12.06.2015.

37. PW-3 Smt. Chandra Mukhi (mother of the victim) had also supported the FIR version and categorically stated that when her daughter came from her in-laws' house, she narrated her ordeal that her husband, father-in-law and mother-in-law were demanding Rs.50,000/- cash and one motorcycle. PW-3 has articulated the ordeal of her daughter that she had been through out subjected to harassment and cruelty for the demand of dowry made by her in-laws, who used to beat up her daughter. Her daughter had been kicked out from her in-laws' house for demand of dowry and after intervention of the relatives, she had been permitted to enter into her matrimonial home. After great persuasion, she had anyhow agreed to go to her in-laws house but unfortunately, she had been hanged to death due to non-fulfillment of dowry. In her cross-examination, she had affirmly stated that in-laws of her daughter were demanding Rs.50,000/- cash and a motorcycle.

38. Defence has failed to point out any diversity or weakness in the cross-examination of PWs-1, 2 and 3, suggesting any doubt in their depositions. Prosecution witnesses, in their depositions, had successfully made out a case of persistent demand of dowry and cruelty against the in-laws of the victim and corroborated the prosecution case as mentioned in the FIR, though the accused persons had denied these allegations in their statements under Section 313 Cr.P.C. Even the defence

witnesses had denied the factum of demand of dowry in their depositions, though they failed to create any doubt in the accusation made by the prosecution.

39. Learned counsel for the appellant has tried to point out some discrepancies in the statement of the prosecution witnesses with respect to the demand of dowry and before whom it was made. It is submitted that no independent witness had been adduced to corroborate the factum of demand of dowry.

40. Minor discrepancies, which have been tried to be pointed out by learned counsel for the appellant, are not much relevant in the present matter. Though the minor discrepancies or contradictions are not of much relevance in examining the facts and circumstances responsible for the commission of the crime, inasmuch as, with the passage of time when witnesses are called in the witness box, they may have some problem, for many reasons, in recollecting the exact happening which took place on the date of occurrence. In this respect, Hon'ble Supreme Court in **Bharwada Ghoginbhai Hirjibhai v. State of Gujrat, AIR 1983 SC 753,** has expounded the law showing several conditions wherein minor discrepancies could be occurred and same should be ignored. The relevant portion of paragraph 5 and paragraph 6 are being quoted below :

*"5. .....Over much importance cannot be attached to minor discrepancies. The reasons are obvious:*

*(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*

*(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*

*(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.*

*(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.*

*(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.*

*(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.*

*(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account*

*of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him-Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.*

*6. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses."*

41. Learned A.G.A. submitted that there was no glaring discrepancy in the matter which could affect the merit of the case and minor discrepancies cannot be counted for the purpose of acquitting the accused whereas holistic perusal of the statement made by prosecution witnesses clearly corroborated the accusation made by the prosecution. In support of his contention, he has relied upon paragraph 24 of the judgement rendered in **Vinod Kumar vs. State of Haryana, (2015) 3 SCC 138,** which is quoted below :

*"24. The next facet relates to the discrepancies in the evidence of the witnesses. The learned trial Judge has found discrepancies with regard to the handing of letter by Santosh to Manphul; the discrepancies relating to the place and time pertaining to various aspects stated by witnesses and the identity of the accused at the time of arrest. The discrepancies which have been noted are absolutely minor. The High Court has correctly observed that the minor discrepancies like who met whom, at what time and who was dropped and at whose place and at what time, etc. have been given unnecessary emphasis. It is well settled in law that minor discrepancies on trivial matters not touching the core of the case or not going to the root of the matter could not result in rejection of the evidence as a whole. It is also well accepted principle that no true witness can possibly escape from making some discrepant details, but the Court should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that it would be justified in jettisoning his evidence. It is expected of the Courts to ignore the discrepancies which do not shed the basic version of the prosecution, for the Court has to call into aid its vast experience of men and matters in different cases to evaluate the entire material on record."*

42. Now the vexed question for consideration is as to whether the victim had died otherwise than under normal circumstances and it was shown that soon before her death, she was subjected to cruelty and harassment by her husband or his relatives for, or in connection with, any demand of dowry.

43. As discussed in preceding paragraph, prosecution has succeeded in making out a case of persistent demand of dowry and defence has failed to create any doubt in all the probabilities of persistent demand of dowry. It has been submitted by learned counsel for the appellant that there was no evidence on record to prove that soon before her death the victim was subjected to cruelty or harassment in relation to demand of dowry. After the incident dated 22.11.2014 when she was allegedly thrown out from her in-laws' house, there was no incident taken place to support the case of the prosecution. There was no other incident of cruelty or harassment with the victim, which can

constitute a proximate live link with death of deceased. In support of his contention, learned counsel for the appellant has relied upon paragraph 18 of the judgment rendered in **Baljinder Kaur vs. State of Punjab, (2015) 2 SCC 629,** which is being quoted below :

*"18. The above decisions of this Court laid down the proximity test i.e. there must be material to show that "soon before her death" the woman was subjected to cruelty or harassment "for or in connection with dowry". The facts must show the existence of a proximate live link between the effect of cruelty based on dowry demand and the death of the victim. "Soon before death" is a relative term and no strait-jacket formula can be laid down fixing any time-limit. The determination of the period which can come within the term "soon before death" is left to be determined by the Courts depending upon the facts and circumstances of each case."*

44. In the preceding paragraphs, I have already given much deliberations to define phrase 'soon before her death'. Though in the case of **Dinesh vs. State of Haryana, reported in 2014(12) SC 532,** 'soon before' has been defined as it is synonymous with the term (immediately before) but showing disagreement with the aforesaid observations, a three Judges Bench of the Hon'ble Supreme Court in the case of **Rajinder Singh (Supra)**, it is stated that 'soon before' is not synonymous with 'immediately before'.

45. In the matter of **Hira Lal and Others vs. State of State (Govt. of NCT) Delhi, (2003) 8 SCC 80,** the Hon'ble Supreme Court has expounded, after comparing study of 'soon after theft' as mentioned in Section 114 - Illustration (a) of the Evidence Act, that determination of period which come within the term 'soon before' is left to be determined by the court, depending upon facts and circumstances of each case. Hon'ble Supreme Court held that there is no straight jacket formula to determine the aforesaid phrase . There must be existence of a proximate live link between the effect of cruelty based on dowry demand and the death concerned.

46. Matter in hand relates to dowry death of victim, which is obviously a case of death other than under normal circumstances. It is quite possible that continuous demand of dowry, as deposed by prosecution witnesses of fact, had driven the wife (victim) to take such an extreme step of suicide and in that condition, it would be reasonably assumed active role of her husband. Inquest report (Exhibit Ka 2) and the statement of Ramesh Chandra Srivastava (PW-4) who had prepared and signed the inquest report clearly evinced death of victim other than under normal circumstances. Even the postmortem report and the statement of Dr. Anil Nigam (PW-5) has also corroborated the aforesaid fact. It may be a matter of dispute as to whether she had been forcibly hanged to death or hanged herself to death but there is no doubt that she had ended her life under extreme pressure created by her in laws.

47. Dealing with the matter of cruelty and harassment soon before the death, injury no.(2) as shown in the postmortem report and the statement of Dr. Anil Nigam (PW-5), explaining the injuries, cannot be ignored which indicates some sort of cruelty committed with the victim. Injury no.(2) clearly shows that there was a mark of contusion 8" x 3" on the front of forehead just above both eyebrows. In the Post Mortem report (Exhibit Ka 7), hard

and blunt object has been shown as a manner of causing the injuries. Therefore, injury no.(2) showing mark of contusion, other than the injury no.(1) which is with respect to hanging, creates suspicion about the circumstances wherein the victim was hanged to death.

48. Dr. Anil Nigam (PW-5), who had conducted the post mortem, has proved the post mortem report as Exhibit Ka 7 and stated that at the time of post mortem examination, rigor mortis had passed from upper extremity and present in lower extremity. Lips, face, nails are cyanosed and there was mark of saliva dribbling on left angle of mouth. He has deposed that first injury pertains to a ligature mark on the neck which was sign of hanging but the second injury was contusion, which was caused due to hard and blunt object. In his cross-examination he has stated that though possibility of suicidal death cannot be ruled out, the presence of injury no.(2) indicates the ante mortem wound which cannot be caused while taking the body down from the hanging position. It is further suggested that immediately after hanging while his body is taken down, aforesaid injury no.(2) could be inflicted due to hit by any hard object like chair, wall, stick and any injury inflicted within 2 or 4 minutes of death could suggest to an ante mortem injury. After considering the facts and circumstances of the case and evidence available on the record it cannot be inferred that dead body of victim was taken down within 2 to 4 minutes of the death.

49. There is no evidence on the record that who has informed the police qua death of victim. It has also not been made clear by the defence that as to how and when dead body was taken down from the hanging position. In the light of such suspicious and doubtful circumstances, appellant/accused cannot be permitted to take benefit of deposition made by PW-5. In cross-examination of PW-5, defence has failed to get any suggestion qua explanation about injury no.(2). Accused persons in their statements under Section 313 Cr.P.C. have not explained injury no.(2) which is vital in determining cruelty and harassment soon before death. In replying to question no.(9) qua post mortem report (Exhibit Ka 7) and statement of PW-5 Dr. Anil Nigam, accused has failed to offer any explanation in their statements under Section 313 Cr.P.C. They have simply stated that statement of PW-5 is a formal statement.

50. Learned counsel for the appellant has submitted that dribbling of saliva is surest sign of hanging having taken place during life, as the secretion of saliva being a vital function cannot occur after death. Learned counsel for the appellant has made emphasis that she hanged herself to death because of annoyance of refusal made by her husband, who had turned down her request by scolding not letting her go to parental home.

51. In the facts and circumstances of the present case wherein mark of injury no.(2) is not explained, I am not in agreement with the suggestion made by learned counsel for the appellant as mentioned above. To make an opinion that death was caused by hanging, one can easily say that death was due to hanging, in case, in addition of cord mark, there was mark of dribblling of saliva, ecchymosis present around ligature mark, post mortem signs of asphyxia, besides if there are no evidence of a struggle, fatal injury or poisoning. The seat of injury no.(2) at forehead of deceased, prima facie, reflects

the inflicting of wound, which cannot be ignored in deciding cruelty soon before death.

52. Learned counsel for the appellant has emphasized on the endorsement made on the Inquest Report (Exhibit Ka 2) wherein no injury has been shown on the dead body of the victim except a mark of ligature on right side of neck, which was caused due to noose. Report dated 12.06.2015 (Exhibit Ka 11) submitted by Forensic Expert (PW-9) shows that body of deceased was hanging with a noose of cloth attached to the fan. Though, in the Inquest Report (Exhibit Ka 2) and the pictures taken by forensic team, no mark of injury has been shown on the forehead of the deceased, as mentioned in the Post Mortem Report, but it would be relevant to consider that the persons who have prepared the Inquest Report (Exhibit Ka 2) and the report dated 12.06.2015 (Exhibit Ka 11) were not expert in examining dead bodies, which is subject matter of expertise of the doctor, who is authorized to conduct the post mortem and, in turn, Dr. Anil Nigam (PW-5) who had conducted, prepared and signed the Post Mortem Report has clearly mentioned the injury no.(2) to be caused by hard and blunt object and had proved the Post Mortem Report (Exhibit Ka 7).

53. Learned counsel for the appellant has submitted that the appellant (husband of the deceased) was made accused along with his parents, but his parents have been acquitted by the Trial Court, therefore, present appellant should also be acquitted, inasmuch as, after acquittal of his parents, genesis of crime as made by prosecution is totally collapsed.

54. I find no force in the aforesaid submission of learned counsel for the appellant, because acquittal of parents of appellant (husband) has been made on a different footing, inasmuch as, even on the preponderance of probability their involvement could not be made out on the ground that they were living separately from the appellant and his wife (victim). After careful consideration of evidences of prosecution witnesses and defence witnesses, Trial Court has taken a pragmatic view that involvement of parents of husband (i.e. appellant herein) is not made out on the facts and circumstances of the present case, who were living separately from their son but involvement of husband cannot be ruled out.

55. From the evidence on record it is proved that appellant was living with his wife, therefore, his claim for acquittal on the ground of acquittal of his relatives (i.e. parents) is not sustainable and being cohabitant with his wife, his complicity in the commission of crime could easily be inferred. On the other hand, in the matter of his parents, who were living separately, strong proof is required to implicate them.

56. Learned A.G.A. has submitted that complicity of present appellant in the commission of crime can easily be presumed under Section 113-A of the Evidence Act.

57. Aforesaid submission made by learned A.G.A. has got no legal force, inasmuch as, intention of legislation in enforcing the provision as embodied under Section 113-A and 113-B of the Evidence Act is clear on different parameters. In the matter of **Sher Singh (supra)**, Hon'ble Supreme Court has given a comparative study on aforesaid sections and expounded that the provisions as embodied under Section 113-A of Evidence Act confers a

discretion on Court to draw presumption in case of suicide, whereas Section 113-B of the Evidence Act provides mandatory requirement to the Court to draw an adverse inference about guilt of accused in case of dowry death as defined under Section 304-B IPC. Hon'ble Supreme Court presumed that where a wife is driven to the extreme step of suicide, it would be reasonable to assume active role of her husband rather than leaving it to the discretion of the Court.

58. Learned counsel for the appellant has made emphasis on the statement of accused under Section 313 Cr.P.C. wherein he has shown his absence at the time of incident, as he had gone to his work place. Statement of accused qua his absence at the place of occurrence was supported by statements of defence witnesses i.e. DWs-1, 2 and 3, but they have miserably failed to adduce any concrete evidence beyond doubt and prove his presence at the work place at the time of occurrence. Neither any certificate has been adduced from the employer nor the employer has been got examined on behalf of accused to prove his presence at the work place at the time of occurrence.

59. After considering the facts and circumstances of the present case and the appreciation of evidence available on record, I am of the considered view that there was persistent demand of dowry made by accused from the victim who was used to subjected to cruelty and harassment for such demand and ultimately she had ended her life in suspicious circumstances wherein injury no.(2) inflicted on her forehead suggesting some violence soon before her death. PWs-1, 2 and 3 are consistent in their statements with regard to demand of dowry and cruelly attitude made by her in-laws. Just after marriage victime has been subjected to cruelty and harassment for demand of Rs.50,000/- cash and one motorcycle and she narrated her ordeal to her parents and other family members, whenever she got opportunity to talk with them. After great persuasion and intervention of relatives, she had been sent to her matrimonial home, but unfortunately within 15 days thereafter she had been driven to take a drastic step in which ended her life.

60. I do not find any force in the submission that refusal made by husband not giving her permission to go to her parental home caused serious depression to the deceased, inasmuch as, she had strong affection towards her parent and her inability to cope up with the situation, immediate temptation had driven her to fall into the incident of committing suicide.

61. Prosecution has successfully proved the accusation by preponderance of probability, but defence has failed to discharge his burden qua deemed presumption of his guilt, beyond reasonable doubt.

62. Perusal of evidence of prosecution in totality of surrounding circumstances along with other evidence available on record, in which crime is alleged to have commissioned, it can easily be inferred that the victim was subjected to cruelty and harassment for demand of dowry and the chain of incidents constitute proximate live link with the death of deceased.

63. In the facts and circumstances of present case, it cannot be said that there was stray incident of demand of dowry. Death of victim within two and half years of marriage in suspicious circumstance

wherein seat of injury no.(2) at forehead of deceased and persistent demand of dowry shows that soon before her death, she was subjected to cruelty and harassment by her husband for, or in connecting with, demand of dowry. Prosecution has successfully discharges its duty and it is obligatory on the Court to raise a presumption that accused caused the dowry death. No unimpeachable evidence has been adduced by the accused to prove his innocence and rebut his complicity in commission of crime of dowry death. There is no illegality, infirmity or perversity in the impugned judgment and order passed by the Court below warranting interference by this Court in exercise of its appellate jurisdiction. Learned Court below has rightly held the present appellant guilty under Section 304-B and 498-A IPC and under Section 4 of Dowry Prohibition Act.

64. In view of aforesaid discussions and observations, I do not find any good ground to alter or modify the impugned judgment and order dated 30.11.2018 passed in Sessions Trial No.529 of 2015.

65. In the result, the present appeal lacks merit and is, accordingly, dismissed. The conviction and sentence of appellant under Sections 304-B and 498-A IPC and under Section 4 of D.P. Act as awarded by Court below is hereby upheld and impugned judgment and order dated 30.11.2018 passed by the Additional District Judge/Fast Track Court (created by XIVth Finance Commission), Kanpur Nagar in Sessions Trial No.529 of 2015, is hereby affirmed and maintained.

66. Let a copy of this judgment along with lower Court's record be sent to concerned Court below, for compliance. A compliance report be sent to this Court. Copy of this judgment be also supplied to accused-appellant through concerned Superintendent of Jail

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**(2021)10ILR A68**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 08.10.2021**

**BEFORE**

**THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J**
**THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.**

Criminal Appeal No. 221 of 2015

**Balram ...Appellant**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Alok Srivastava, Ninnie Shrivastava, Pankaj Kumar Singh, Ravi Kant Pandey

**Counsel for the Respondent:**
Govt. Advocate

**(A) Criminal Law - Appeal against conviction - The Indian Penal Code, 1860 - Section 302 - murder - Section 304 - culpable homicide not amounting to murder - dying declaration - in order to form the sole basis for conviction of the accused-appellant, the dying declaration has to be truthful and voluntary - duty of prosecution to prove its case against the accused-appellant beyond reasonable doubt - benefit of doubt belonged to the accused - Suspicion, howsoever grave cannot take place of a proof .(Para - 26,40)**

Accused/appellant, elder brother of husband of the deceased - beaten deceased - some altercation between the ladies - deceased returned after attending nature's call - accused/appellant and one - poured kerosene oil on the deceased - set her ablaze by igniting match stick - deceased sustained burn injuries -

dying declaration recorded by the Naib Tehsildar - different version of occurrence narrated by deceased in her dying declaration - FIR registered under section 304 - Trial court convicted under section 302 - hence instant appeal.

**HELD:-**Prosecution projected two versions of the same incident which are mutually irreconcilable and failed to prove its case beyond reasonable doubt. Trial court failed to consider and appreciate the material contradictions appearing in the prosecution case and evidence led by the prosecution and defence in its right perspective and , thus, has erred in convicting and sentencing the appellant, who is entitled to the benefit of doubt. (Para - 41)

**Criminal Appeal allowed.** (E-7)

**List of Cases cited:-**

1. Panneerselvam Vs St. of T.N. , (2008) 17 SCC 190

2. Jayamma Vs St. of Karn. , AIRONLINE 2021 SC 241

3. P. Ramesh Vs St. Represented by Inspector of Police , (2019) 20 SCC 593

4. Laxman Vs St. of Mah., 2003 (1) JIC 30 (SC)

5. Chandra Narain Yadav Vs Shibjee Yadav & ors. , 2000 (2) JIC 801 (SC)

6. Sham Shankar Kankaria Vs St. of Mah., (2006) 13 SCC 165

7. St. of Guj. Vs Ayrajbhai Punjabhai Varu , (2016) 14 SCC 151

8. Vallabhaneni Venkateshwara Rao Vs St. of A.P. , (2009) 6 SCC 484

9. Upendra Pradhan Vs St. of Orissa , (2015) 11 SCC 124

(Delivered by Hon'ble Ajai Kumar Srivastava-I, J.)

1. Heard Ms. Ninnie Shrivastava, learned *amicus curiae* for the appellant, Sri Vishwash Shukla, learned A.G.A. for the State and have perused the entire record available before us.

2. After being convicted and sentenced in Sessions Trial No.183/2012 arising out of Crime No.61/2012, under Section 302 Indian Penal Code (hereinafter referred to as "I.P.C."), Police Station Tarabganj, District Gonda by the learned Additional District & Sessions Judge, Court No.2, Gonda vide judgment and order dated 22.01.2015, the sole accused/appellant has filed the instant criminal appeal.

3. By the impugned judgment and order, the learned trial court convicted and sentenced the appellant to undergo imprisonment for life and a fine of Rs.10,000/- for the offence under Section 302 I.P.C. and in default of payment thereof, the appellant was directed to undergo three months' additional imprisonment.

4. The facts as unfolded by the prosecution, in short conspectus, are that a written report was handed over at Police Station Tarabganj by the first informant, Smt. Reshma Devi on 21.03.2012 stating therein that her daughter, deceased-Smt. Bindoo was married to Indrajeet resident of Pathar Begwa, Police Station Tarabganj, District Gonda ten years ago. Indrajeet works at Mumbai. The deceased-Bindoo lived in Gonda with her children, namely, Deepak and Rohit aged about nine and four years respectively. The accused-Balram, elder brother of Indrajeet, had beaten Bindoo, the deceased on 14.02.2012 at about 05:00 PM in the evening due to brawl between the ladies. On 15.02.2012 in

the morning at about 04:00 AM, when the deceased-Bindoo returned after attending nature's call, accused/appellant, Balram and one Aafta Devi poured kerosene oil on the deceased and thereafter, set her ablaze by igniting match stick. The deceased-Bindoo sustained burn injuries, who was taken to hospital by younger daughter of the first informant, namely, Smt. Renu and her husband Manoj. The deceased-Bindoo was admitted in Government Hospital, Gonda. Her husband, Indrajeet used to take care of deceased by visiting Gonda from Mumbai. However, the deceased-Bindoo succumbed to her injuries on 08.03.2012 during her treatment.

5. The Naib Tehsildar, Ratnesh Tiwari, PW-3 recorded dying declaration of deceased on 15.02.2012 after obtaining certificate regarding fitness of deceased from the Emergency Medical Officer, District Hospital Gonda.

6. The autopsy on the cadaver of the deceased was conducted on 09.03.2012 which is Ex. Ka-12, according to which, the cause of death is septicemic shock as a result of ante-mortem burn injuries.

7. On the basis of aforesaid information by the first informant, an F.I.R. was registered under Section 304 I.P.C. at Police Station Tarabganj, District Gonda against accused-Balram and Smt. Aafta Devi.

8. After registration of the case, the Investigating Officer, Incharge Inspector, Shashikant Mishra, PW-5 prepared site plan, Ex. Ka-9, recorded the statements of witnesses under Section 161 Cr.P.C. and after completion of investigation, chargesheet, Ex. Ka-10 was submitted against accused-Balram only under Section 302 I.P.C.

9. As the case was exclusively triabled by the court of Sessions, the learned Magistrate committed the case to the court of Sessions, which came to be registered as Sessions Trial No.183/2012. The learned Sessions Judge framed charge under Section 302 I.P.C. against accused-Balram, which was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.

10. To bring home the guilt of the appellant to the hilt, the prosecution has examined as many as eight witnesses. Smt. Reshma Devi, PW-1 is the first informant and mother of the deceased. Smt. Renu, PW-2 is real sister of the deceased who is said to have accompanied the deceased while she was being taken to the hospital after sustaining burn injuries. Ratnesh Tiwari, PW-3 is the Naib Tehsildar who has recorded dying declaration of the deceased on 15.02.2012. Mohd. Jaseem, PW-4 is the Naib Tehsildar who has proved *panchayatnama*, Ex. Ka-3. Shashikant Misra, PW-5 is the Incharge Inspector, who has prepared site plan, Ex. Ka-9. Sanjay Kumar Pandey, PW-6 is the S.H.O. who has filed charge sheet and a report, which are Ex. Ka-10 and Ex. Ka-11 respectively. Dr. Anil Kumar, PW-7 is the doctor who has conducted the autopsy on the cadaver of the deceased. S.I. Ram Lakhan Tiwari, PW-8 is also an Investigating Officer of the case.

11. After the conclusion of prosecution evidence, statement of accused was recorded under Section 313 Cr.P.C. The accused stated that the deceased burnt herself to commit suicide, thus, he has stated the prosecution case to be false. He claimed himself to be innocent and also stated to have been falsely implicated.

12. Defence witnesses, namely, Smt. Nandini Devi, Smt. Durgawati and Deepak Vishwakarma were also examined as DW-1, DW-2, DW-3 respectively from the side of the accused.

13. The learned trial court vide impugned judgment and order dated 22.01.2015 convicted the accused/appellant as aforesaid. Hence the instant appeal.

14. Learned *amicus curiae* appearing for the appellant has vehemently argued that the first information report regarding the occurrence was lodged on 21.03.2012 i.e., after a delay of about 34 days from the date of incident and atleast after a delay of about thirteen days from the date of death of the deceased, Smt. Bindoo. The prosecution has failed to explain the cause of such delay. The first information report was, thus, lodged after consultation with relatives and others to falsely implicate the accused/appellant.

15. She has further submitted that the prosecution story as contained in the first information report, Ex. Ka-13 is entirely different from the version of occurrence as narrated by the deceased in her dying declaration, Ex. Ka-2, which itself casts doubt on the veracity of the prosecution story. According to her, the learned trial court has returned finding of guilt against the weight of evidence available on record by ignoring the testimonies of defence witnesses, particularly, Deepak Vishwakarma, DW-3, son of the deceased who is a competent witness, therefore, the same is perverse and liable to be set aside.

16. She has also argued that having sustained serious burn injuries, the victim was physically and mentally unable to make any voluntary declaration in the form of dying declaration, Ex. Ka-2. Therefore, no reliance, whatsoever, on such dying declaration can be placed in order to hold the accused/appellant guilty.

17. Her further submission is that the prosecution itself has projected two versions of the same occurrence, which are irreconcilable, therefore, the prosecution has failed to prove its case against the accused-appellant beyond reasonable doubt. The accused/appellant deserves benefit of doubt and the impugned judgment and order being unsustainable deserves to be set aside.

18. To lend support to her aforesaid arguments, she has placed reliance upon the judgments of the Hon'ble Supreme Court in **Panneerselvam vs. State of Tamil Nadu reported in (2008) 17 SCC 190, Jayamma vs. State of Karnataka** reported in **AIRONLINE 2021 SC 241** and **P. Ramesh vs. State Represented by Inspector of Police** reported in **(2019) 20 SCC 593.**

19. Per contra, Sri Vishwash Shukla, learned A.G.A. has submitted that a hapless lady has been done to death by the accused/appellant in a brutal manner by setting her ablaze after pouring kerosene oil on the person of the deceased. He has further stated that the dying declaration, Ex. Ka-2 has been duly recorded by the Naib Tehsildar, Ratnesh Tiwari, PW-3 after obtaining a report regarding mental and physical fitness of the deceased being capable of making voluntary dying declaration. Therefore, reliance upon such dying declaration, Ex. Ka-2 has rightly been placed by the learned trial court.

20. Learned A.G.A. would, then, contend that the finding of guilt has rightly

been returned by the learned trial court on the basis of evidence available before it, which is duly supported by the law laid down by the Hon'ble Supreme Court in **Laxman vs. State of Maharashtra, 2003 (1) JIC 30 (SC), Chandra Narain Yadav vs. Shibjee Yadav and others, 2000 (2) JIC 801 (SC)** and **Sham Shankar Kankaria vs. State of Maharashtra, (2006) 13 SCC 165** wherein it has been held by the Hon'ble Supreme Court that dying declaration can be the sole basis of conviction if found to be voluntary and truthful and that it is not required to be recorded in any particular form.

21. A Constitution Bench of the Hon'ble Supreme Court in **Laxman's case (supra)** in para-3 has held as under:-

*"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 death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the Court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and corrects. The Court, however, has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The Court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up the medical opinion. But where the eye-witnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate is absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording.* ***Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the***

***Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the Court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore, the voluntary and truthful nature of the declaration can be established otherwise."***(emphasized by us)

22. The Hon'ble Supreme Court in **Sham Shankar Kankaria's case (supra)** in para-11 has held as under:-

***"11. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. 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 either tutoring or 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 assailant. 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....."***

(emphasized by us)

23. The approach to be adopted by the courts while evaluating dying declaration has also been summarized by the Hon'ble Supreme Court in paras-15 and 18 in **State of Gujarat vs. Jayrajbhai Punjabhai Varu** reported in **(2016) 14 SCC 151** 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.*

*18. The court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect and, therefore, a mechanical approach to the law of dying declaration has to be shunned."*

24. Even in **Chandra Narain Yadav's case (supra)**, relied upon by the prosecution, the Hon'ble Supreme Court has held that it is settled that a dying declaration, if found to be truthful and

voluntary, can form the sole basis of conviction even without corroboration.

25. Thus, so far as the capacity of the maker of dying declaration in this case is concerned, Ratnesh Tiwari, PW-3 has testified in unequivocal terms that he had recorded the dying declaration on 15.02.2012 after ascertaining the fact that the victim was conscious and was in a fit state of mind to make a dying declaration. According to him, before and after recording of dying declaration, Ex. Ka-2, he had obtained certificate from Emergency Medical Officer, Gonda regarding medical and physical fitness of the declarant, Smt. Bindoo. Therefore, the argument of learned *amicus curiae* to the effect that after having burn injuries, the victim was not in a fit state of mind to make a dying declaration worth acceptance is not acceptable.

26. However, in order to form the sole basis for conviction of the accused-appellant, the dying declaration, Ex. Ka-2 has to be truthful and voluntary as held by the Hon'ble Supreme Court in **Sham Shankar Kankaria's case (surpa), Jayrajbhai Punjabhai Varu's case (supra) and Chandra Narain Yadav's case (surpa).**

27. The prosecution story as culled out from the first information report, Ex. Ka-13 is that the accused/appellant, Balram, elder brother of husband of the deceased, had beaten Bindoo, the deceased on 14.02.2012 at about 05:00 PM in the evening due to some altercation between the ladies. On 15.02.2012 in the morning at about 04:00 AM, when the deceased-Bindoo returned after attending nature's call, the accused/appellant, Balram and one Aafta Devi poured kerosene oil on the deceased and thereafter, set her ablaze by igniting match stick. The deceased-Bindoo sustained burn injuries who was taken to hospital by younger daughter of the first informant, namely, Smt. Renu, PW-2 and her husband Manoj. Thus, according to the first information report, Ex. Ka-13, the specific time of occurrence is about 04:00 AM on 15.02.2012, which was witnessed by Smt. Renu, PW-2 the real sister of the deceased. The first informant, Smt. Reshma Devi is not an eye witness of the said incident.

28. However, what we notice is that an altogether different version of the occurrence has been narrated by the deceased, Smt. Bindoo in her dying declaration, Ex. Ka-2. In the dying declaration, Ex. Ka-2, she has stated to have been set ablaze by the accused-appellant in the intervening night of 14/15.02.2012 at about 11-12 PM. The deceased, in her dying declaration, Ex. Ka-2, has also stated that Smt. Kismalti W/o Kaushal, her younger mother-in-law tried to put off fire by throwing a blanket upon her. Thus, according to the dying declaration, Ex. Ka-2, at the time of alleged occurrence, Smt. Renu, PW-2, the real sister of deceased, was not present and Smt. Kismalti W/o Kaushal who is said to have been present and who is said to have attempted to put off fire by throwing blanket upon the deceased, has not been examined from the side of prosecution without assigning any reason therefor. She was an important witness for ascertaining the true manner and time of the occurrence, however, the prosecution has chosen not to produce Smt. Kismalti without assigning any reason therefor, despite the fact that she has been shown to be a witness in the charge sheet, Ex. Ka-10.

29. We also notice the fact that according to the first information report, Ex. Ka-13, apart from the appellant-Balram, one Smt. Aafta Devi is also said to have participated in the commission of

crime, however, in dying declaration, Ex. Ka-2, the declarant has not named Smt. Aafta Devi. No evidence against Smt. Aafta Devi could be gathered during the investigation. Therefore, charge sheet was not submitted against Smt. Aafta Devi after conclusion of investigation.

30. The real sister of the deceased, Smt. Renu, PW-2 in her testimony has stated that the incident took place on 15.02.2012 in the morning at about 04:00 AM. Therefore, the time of occurrence as disclosed in the first information report, Ex. Ka-13 is quite different from the time of occurrence mentioned in dying declaration, Ex. Ka-2. The deceased, Bindoo in her dying declaration, Ex. Ka-2 has stated that at the time of occurrence, Smt. Kismalti W/o Kaushal tried to put off fire. Therefore, the fact that the prosecution did not produce Smt. Kismalti without assigning any reason assumes significance. It also raises doubt on the presence of Smt. Renu on the spot because Deepak Vishwakarma, DW-3, who is son of the deceased, has stated that on the date of occurrence, he was sleeping beside his mother. He saw his mother, who herself poured kerosene oil upon her and got it ignited by herself. He has also stated that Smt. Kismalti threw a blanket upon his mother and fled away from the spot due to fear. This witness being son of the deceased, appears to be reliable witness whose presence on the fateful night with her mother is quite natural. He appears to be more reliable than any other prosecution witnesses in respect of time and manner of occurrence.

31. We may also notice that the investigating officer, Sashikant Mishra, PW-5 has, in his testimony, stated that the place of occurrence was an open place as shown in the site plan, Ex. Ka-9. During the inspection of the site of occurrence, he did not notice any burnt up bed sheet, mattress or cot etc. nor did he collect any such article from the site of occurrence. This fact again lends support to the statement of Deepak Vishwakarma, DW-3 who has stated that her mother after pouring kerosene oil on herself went out and once she returned from there, this witness saw her burning. That is why, no burnt up bed sheet, mattress or cot etc. were perhaps found or recovered from the spot.

32. It is also a significant fact that the prosecution has clearly projected two different versions of the same incident. One, as narrated by the declarant/deceased, Smt. Bindoo in her dying declaration, Ex. Ka-2, according to which, the accused-appellant, Balram is said to have set her ablaze in the intervening night of 14/15.02.2012 at about 11:00-12:00 PM due to some brawl. Despite dying declaration, Ex. Ka-2 dated 15.02.2012 to the aforesaid effect being in existence, an altogether different version of this very occurrence is also projected by the prosecution as culled out from the first information report, Ex. Ka-13 which was lodged on 21.03.2012, according to which, apart from the appellant-Balram, one Aafta Devi is also said to have participated in setting the deceased ablaze, which is said to have been witnessed by Smt. Renu, PW-2 real sister of the deceased. The deceased died on 08.03.2012. The first information report, Ex. Ka-13, however, was lodged on 21.03.2012 after a delay of about thirteen days from the date of death of the deceased, Smt. Bindoo. The two different versions of the same occurrence, which the prosecution has projected, have material differences with regard to time of occurrence, manner

of occurrence and the persons who allegedly committed the crime in question.

33. According to dying declaration, Ex. Ka-2, Smt. Kismalti attempted to put off fire by throwing a blanket upon the deceased. She was shown as a witness in the charge sheet, Ex. Ka-10. She was, thus, an important witness for ascertaining the true manner and time of the occurrence, however, she has not been examined by the prosecution without assigning any reason, whatsoever, for the same. Therefore, it would be fair to draw an inference that perhaps she was not prepared to support false prosecution case.

34. The Hon'ble Supreme Court in **Vallabhaneni Venkateshwara Rao vs. State of Andhra Pradesh** reported in **(2009) 6 SCC 484** in paras-21 and 23 has held as under:-

*"21. It is seen from the records, three different stories have been projected by the prosecution. As per Ext. P-12 recorded at 12.45 p.m., three persons attacked with sticks in the presence of one eyewitness Jagan. As per Ext. C-2 recorded at 2.30 p.m. ten persons attacked with crowbar. As per Ext. P-14 recorded by PW 8 before the death of the deceased at 2.50 p.m. seven persons attacked with sticks in the presence of two new eyewitnesses. No clear answer comes from the prosecution as to which of the three versions is believable. Ext. P-12 suffers from two infirmities. Firstly, medical evidence is contradictory. Secondly, only eyewitness Jagan mentioned in Ext. P-12 was not examined. The non-examination of the said eyewitness would result in the lack of corroboration to Ext. P-12.*

*23. Above being the position, it would be unsafe to convict the appellant-accused. Their convictions are accordingly set aside. They be set at liberty forthwith if not required to be in custody in any other case."*

35. The learned trial court has found the witness Deepak Vishwakarma, DW-3, son of the deceased as a competent witness to understand and depose, however, it has failed to appreciate the fact that DW-3 being son of the deceased was a natural witness whose presence beside his mother on the date of occurrence was more natural than the presence of Smt. Renu, PW-2, the married real sister of the deceased.

36. Deepak Vishwakarma, DW-3, who is son of the deceased, has stated that his mother, deceased-Smt. Bindu gave him mobile phone to watch picture and she went out of the house and once she returned, she was engulfed in fire. He has also stated that his mother did not complain about appellant/accused.

37. The Hon'ble Supreme Court in **Jayamma's case (supra)** while setting aside the judgment and order of conviction passed by the High Court and upholding the judgment of acquittal passed by the learned trial court in a case where the prosecution has projected two different versions of the same incident and where the first information report was found to be lodged after some delay has, inter alia, relied upon following circumstances:-

"22.
xxxx xxxx
xxxx xxxx
xxxx xxxx
xxxx xxxx
xxxx xxxx
xxxx xxxx

***Sixthly, the alleged motive for the homicidal death is highly doubtful.***

***There is not an iota of evidence, and the prosecution has made no effort to verify the truth in the statement that the appellants poured kerosene and lit the victim on fire only because her son had assaulted the husband of Appellant No.1 and the accused were insisting on payment of Rs.4,000/ which was spent on the treatment of the said assault-victim. Not much can be said when the deceased's own son and daughterinlaw have denied this incident and rather claimed that their mother/motherinlaw committed suicide.***

***The Seventh reason to dissuade us from harping upon Ex.P5 is the conduct of the parties, i.e., a natural recourse expected to happen. Had it been a case of homicidal death, and the victim's son (PW2) and her daughter-in-law (PW5) had witnessed the occurrence, then in all probabilities, they would have, while making arrangement to take the injured to hospital, definitely attempted to lodge a complaint to the police. Contrarily, the evidence of the doctor and the police officer suggest that while the son, daughterinlaw and neighbour of the deceased were present in the hospital, none approached the police to report such a ghastly crime. It is difficult to accept that the son and daughter-in-law of the deceased were won over by the accused persons within hours of the occurrence. This unusual conduct and behaviour lends support to the parallel version that the victim might have committed suicide.***

xxxx xxxx xxxx xxxx
xxxx xxxx xxxx xxxx
xxxx xxxx xxxx xxxx"

(emphasized by us)

38. In the present case too, the incident occurred on 14/15.02.2012, the deceased, Smt. Bindoo admittedly died on 08.03.2012, her dying declaration, Ex. Ka-2 stood recorded on 15.02.2012, however the first information report came to be lodged on 21.03.2012 i.e., after a delay of about 34 days from the date of incident and atleast after a delay of about thirteen days from the date of death of the deceased, Smt. Bindoo. Deepak Vishwakarma, DW-3 has stated that his mother, deceased-Smt. Bindoo burnt herself. The learned trial court, thus, lost sight of aforesaid significant facts while returning the finding of guilt of the accused/appellant.

39. The learned trial court also failed to appreciate the fact that according to Shashikant Mishra, PW-5, the investigating officer, no burnt up residue of the bed sheet, mattress or cot etc. were recovered from the site of occurrence, which clearly indicates that the site of occurrence was different from the room or thatch of the deceased.

40. We are conscious of the fact that in the present case, a young lady has died but the fact remains that it is the duty of prosecution to prove its case against the accused-appellant beyond reasonable doubt. Suspicion, howsoever grave cannot take place of a proof. In this regard, the Hon'ble Supreme Court in **Upendra Pradhan vs. State of Orissa** reported in **(2015) 11 SCC 124** in para-14 has held as under:-

*"14. Taking the first question for consideration, we are of the view that in case there are two views which can be culled out from the perusal of evidence and application of law, the view which favours the accused should be taken. It has been recognised as a human right by this Court. In Narendra Singh v. State of M.P., [(2004) 10 SCC 699 : 2004 SCC (Cri) 1893], this Court has recognised presumption of*

*innocence as a human right and has gone on to say that: (SCC pp. 708 & 709, paras 30-31 & 33)*

***"30. It is now well settled that benefit of doubt belonged to the accused. It is further trite that suspicion, however grave may be, cannot take place of a proof. It is equally well settled that there is a long distance between ''may be' and ''must be'.***

*xxxx xxxx xxxx xxxx*
*xxxx xxxx xxxx xxxx*
*xxxx xxxx xxxx xxxx"* (emphasized by us)

41. Thus, it can be safely concluded that the prosecution has projected two versions of the same incident which are mutually irreconcilable. Therefore, on the basis of aforementioned discussions, we are of the considered view that the prosecution, in the instant case, has been unable to answer as to which of the two prosecution stories is believable. The prosecution has, thus, failed to prove its case beyond reasonable doubt. The learned trial court has failed to consider and appreciate the material contradictions appearing in the prosecution case. The learned trial court has also failed to appreciate and consider the evidence led by the prosecution and defence in its right perspective and, thus, has erred in convicting and sentencing the appellant, who is entitled to the benefit of doubt. Therefore, the impugned judgment and order passed by the learned trial court is not sustainable in the eyes of law and the same is liable to be set aside. The accused-appellant is entitled to be acquitted of charge levelled against him.

42. In view of the aforesaid, the present criminal appeal is **allowed** and consequently impugned judgment and order dated 22.01.2015 passed by the learned Additional District & Sessions Judge, Court No.2, Gonda in Sessions Trial No.183/2012 arising out of Crime No.61/2012, under Section 302 of I.P.C., Police Station Tarabganj, District Gonda is hereby set aside.

43. The accused-appellant, Balram is in jail. Let the accused-appellant, Balram be released from jail forthwith, if he is not wanted in any other case.

44. In compliance of provisions of Section 437A Cr.P.C., it is directed that the accused-appellant, Balram shall furnish a personal bond and two sureties each in the like amount to the satisfaction of the court concerned within two weeks of his release from the jail.

45. Before we part with the case, we express our appreciation for the distinguished assistance rendered by Ms. Ninnie Shrivastava, the learned *amicus curiae* in the instant appeal. The learned *amicus curiae* shall be paid a sum of Rs.10,000/-.

46. Let the record of lower court along with a copy of this order be transmitted forthwith to the learned trial court concerned for necessary information and compliance.

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**(2021)10ILR A78**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 23.10.2021**

**BEFORE**

**THE HON'BLE RAJEEV SINGH, J**

Criminal Appeal No. 276 of 2011

and
Criminal Appeal No. 583 of 2012

**Umesh Kumar Mishra ...Appellant**
**Versus**
**The State ...Respondent**

**Counsel for the Appellant:**
Arun Sinha, Anil Kumar, Rajendra Prasad Mishra, Siddhartha Sinha

**Counsel for the Respondent:**
G.A.

**(A) Criminal Law - appeal against conviction - The Indian Penal Code, 1860 - Sections 394, 411, 302/34 and 307/34 - The Code of criminal procedure, 1973 - Section 161,313 - interested witness - considering the critical condition of the injured persons, delay in lodging the F.I.R. is not fatal to the case of prosecution - testimony of the injured witness would be on higher pedestal and it could not be doubted except the extreme contradictions - if the accused persons is well known by sight, then it would be waste of time to put him up for identification and trial will not be vitiated as the testimony of the injured witness cannot be discredited.(Para - 12,13)**

Appellants followed P.W.1(injured eye witness) and his friend - at an isolated place took advantage - fuel in their motorcycle finished and asked for some petrol - deceased/friend of P.W.1 came down - started taking out petrol from his motorcycle - appellants shot fire on the P.W.1 and thereafter, looted the ornaments - P.W.1 and his friend received grievous injuries - friend of P.W.1 died - conviction - hence appeal.

**HELD:-**Motive and the conduct of the appellants reveals that they were in premeditated mind with the common intention to kill the injured and loot the ornaments. Appellants failed to establish their case, and there is no illegality in the judgment and order passed by Additional Sessions Judge.(Para – 13).

**Criminal Appeals dismissed.** (E-7)

**List of Cases cited:-**

1. Sonu @ Sunil Vs St. of M.P. , (2020) SCC OnLine SC 473

2. Mohanlal Gangaram Gehani Vs St. of Mah., (1982) 1 SCC 700

3. Dana Yadav @ Dahu & ors. Vs St. of Bihar, (2002) 7 SCC 295.

4. Rabindra Mahto & anr. Vs St. of Jharkhand , (2006) 10 SCC 432

5. Thaman Kumar Vs St. of Union Territory of Chandigarh, (2003) 6 SCC 380

6. Rakesh & anr. Vs St. of U.P. & anr., (2021) 7 SCC 188

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

1. Both the appeals are being decided by way of a common order.

2. Both the appeals are filed against the judgment and order dated 16.12.2010 passed by Additional Sessions Judge/F.T.C., Court No.9, Pratapgarh in S.T. No.179 of 2009 (The State vs. Manoj Kumar Soni @ Manu Verma and others) arising out of Case Crime No.09 of 2008, under Sections 394, 411, 302/34 and 307/34 I.P.C., Police Station Hathigawan, District Pratapgarh, thereby, convicting and sentencing the appellants under Section 394/34 I.P.C. for 7 years' R.I. and a fine of Rs.2,000/-, in default of payment of fine, 3 months of further imprisonment; under Section 411 I.P.C. for 2 years' R.I.; under Section 307/34 I.P.C. for 7 years's R.I. and a fine of Rs.3,000/-, in default of payment of fine, 3 months of further imprisonment; and Section 302/34 I.P.C. for life imprisonment and a fine of Rs.5,000/-, in

default of payment of fine, 6 months of further imprisonment.

3. In compliance of the order dated 04.08.2021, on 05.08.2021, the accused/appellant Manoj Kumar Soni @ Manu Verma appeared through video conferencing from Central Jail, Naini, Prayagraj, who was identified by Shri Kunj Bihari Singh, Deputy Jailor, Central Jail, Naini, Prayagraj, who was also present along with him. On the said date, the accused/appellant Manoj Kumar Soni @ Manu Verma was asked to engage a counsel of his own choice or Shri Rajendra Prasad Mishra, Advocate as Amicus Curiae, who was appearing in the connected Criminal Appeal No.276 of 2011 for the appellant Umesh Kumar Mishra, will argue the appeal on his behalf. As the criminal appeal is expedited by the Hon'ble Supreme Court, therefore, this Court has no option except to hear the instant appeal finally and vide order dated 05.08.2021, time was also granted to appellant Manoj Kumar Soni @ Manu Verma for engaging the counsel of his own choice by the next date of listing i.e. 11.08.2021, failing which, Shri Rajendra Prasad Mishra, Advocate had been appointed as Amicus Curiae vide order dated 28.07.2021 will argue the matter on his behalf. On 11.08.2021, Senior Superintendent, Central Jail, Naini, Prayagraj had reported that the order dated 05.08.2021 was communicated to the appellant Manoj Kumar Soni @ Manu Verma, therefore, the appeal was proceeded.

4. Heard Mr. Rajendra Prasad Mishra, Advocate as learned Amicus Curiae for the appellant Manoj Kumar Soni @ Manu Verma (Criminal Appeal No. 583 of 2012) and learned counsel for the appellant Umesh Kumar Mishra (Criminal Appeal No.276 of 2011), and Mrs. Smiti Sahay, learned A.G.A. for the State, and perused the record.

5. As per the prosecution case, on 05.02.2008, Rajesh Kumar and Vikas Kumar Soni, running a jewelry business, went to Allahabad in relation to their business and after completing their work, they were coming back with the purchased ornaments of gold and silver on one motorcycle to Kunda. At about 09:30 p.m. when they reached Yadav Dhaba near Allahabad-Unnao road, Village Mahrupur, then Manoj @ Manu Soni S/o Ravi Soni R/o Manzhanpur (Netanagar), P.S. Manzhanpur, District Kaushambi (who was residing near Main Chauraha Kunda four years ago) along with one unknown person, coming on another motorcycle, overtook their bike and asked them for petrol saying that petrol in his motorcycle is finished, as Manoj was known to them, therefore, they stopped their bike for giving petrol, then Manoj @ Manu shot Rajesh Kumar and the other accused shot Vikas Kumar with the intention to kill them, then both of them fell down. Thereafter, both the accused persons looted their ornaments amounting of Rs.60,000/- and Mobile of Rajesh Kumar, and fled away. Thereafter, both the injured were admitted to the hospital. Information of the aforesaid incident was given in writing by P.W.2 Rambabu (uncle of P.W.1 Vikas Kumar Soni (injured)) to the police station on 07.02.2008 and the F.I.R. was lodged on the same day (07.02.2008) at 17:30 hours as Case Crime No.9 of 2008, under Section 394 I.P.C., P.S. Hathigawan, District Pratapgarh against the appellant Manoj @ Manu Soni (named in the F.I.R.) and one unknown.

6. After the said incident, both the injured persons were brought to hospital at

Kunda, but due to their serious condition, they were referred to Allahabad and were admitted at Jeevan Jyoti Hospital, Allahabad and during the course of investigation, Rajesh Kumar Kesharwani died on 19.02.2008. The appellant Manoj Kumar Soni @ Manu Verma was arrested on 12.02.2008 and the appellant Umesh was arrested on 16.02.2008. On their pointing out, weapon was recovered and during the course of investigation, site plan was prepared by the Investigating Officer as well as the inquest report of the deceased Rajesh Kumar Kesharwani was prepared and thereafter, postmortem of the body was also conducted. The recovered weapon and other articles were also sent for forensic examination to F.S.L.

7. During the course of investigation, statements of Ram Babu Soni, Ram Bahadur, Nanke @ Pushpendra Kumar, Harsihchandra Kesarwani, Shrinath Soni, Vikas Soni (injured), Vinod Kumar Vaish, Sanjay Kumar, Shiv Lal Kesharwani, Gulabchand Kesarwani, Constable Habib Siddiqui, Constable Narsingh Sharan Yadav, Constable Vinod Kumar Kushwaha, Constable Vinod Dubey, Constable Murli Singh, Constable Ashok Kumar Shukla, S.I. Shiromani Bhaskar, S.H.O. Vikas Yadav, P.S. Hathigawan, Investigating Officer were recorded under Section 161 Cr.P.C. and thereafter, Investigating Officer prepared charge sheet against the appellants under Sections 394, 411, 302 I.P.C. and submitted to the court below and after taking cognizance, the case was committed to the court of Sessions and after framing of charges, the prosecution relied on the oral testimony of 10 witnesses i.e. P.W.1 Vikas Soni (injured), P.W.2 Rambabu Soni (informant), P.W.3 Harishchandra, P.W.4 Dr. Shivcharan Lal, P.W.5 Ashok Kumar Shukla, P.W.6 Dr. C.K. Gupta (Emergency Medical Officer of Jeevan Jyoti Hospital, Allahabad), P.W.7 S.I. Ram Ashrey Yadav, P.W.8 S.I. Shiromani Bhaskar, P.W.9 S.I. Shri Nivas Yadav, P.W.10 Dr. Raksha Gupta (Vijay Diagnostic Center, Allahabad).

8. The prosecution also relied on 30 documentary evidences i.e. Ext. Ka- 1 memo of identification of recovery of articles, Ext. Ka-1A G.D. Entry in relation to lodging of the F.I.R., Ext. Ka-2 postmortem report of Rajesh Kumar Kesharwani, Ext. Ka-3 Chick F.I.R., Ext. Ka-4 G.D. Entry in relation to F.I.R., Exts. Ka-5 & 6 injury reports of Vikas and Rajesh Kumar Kesharwani, Ext. Ka-7 death report of Rajesh Kumar Kesharwani, Ext. Ka-8 Photo Naash, Ext. Ka-9 Namoona seal, Ext. Ka-10 Jeevan Jyoti Hospital, Police form No.13, Ext. Ka-12 report of P.S. Kotwali, District Allahabad in relation of letter to C.M.O. for conducting the postmortem of the body of the deceased, Ext. Ka-13 arrest of accused and recovered ornaments and mobile, Ext. Ka-14 site plan, Ext. Ka-15 recovery memo of taking of plain and blood stained mud, Ext. Ka-16 recovery memo of taking two mufflers, Ext. Ka-17 memo of recovery of one blank cartridge, Ext. Ka-18 arrest memo of appellant Manoj Kumar Soni, Ext. Ka-19 arrest memo of appellant Umesh Kumar Soni, Ext. Ka-20 site plan, Ext. Ka-21 memo of recovery of weapon and other articles on the pointing out of the appellant Umesh Kumar Mishra, Ext. Ka-22 site plan in relation to the arrest of the accused, Ext. Ka-23 ballistic experts report of country made pistol of two cartridges of 315 bore, Ext. Ka-24 report of F.S.L. in relation to blood stained mud, Ext. Ka-25 recovery memo in relation to mufflers, spectacles and blood stained mud, Ext. Ka-26 report of F.S.L. in relation to the blood stained

mud and ballistic report of country made pistol and other articles, Ext. Ka-26A C.T. Scan report of neck and cervical spine plain of injured Vikas, Ext. Ka-27 CT Scan report of Brain Plain of Vikas, Ext. Ka-28 CT Scan report of neck and cervical spine plain of Rajesh Kumar, Ext. Ka-29 CT Scan report of Brain Plain of Rajesh Kumar, Ext. Ka-30 charge sheet submitted against the accused persons, under Sections 394, 411, 302 I.P.C.

9. After the prosecution evidence, the statement of the appellants under Section 313 Cr.P.C. were recorded and appellants denied the prosecution case and submitted their statements.

10. After hearing the arguments of parties, the judgment and order of conviction dated 16.12.2020 was passed by the trial court and the same is under challenge before this Court by way of the present appeals.

11. Learned counsel for the appellants has submitted that the judgment of trial court is not sustainable on the grounds that:-

A. Only one eye witness namely Vikas Soni (P.W.1) was produced by the prosecution, who is the interested witness, therefore, his statement is not reliable.

B. It is undisputed that the incident was taken place on 05.02.2008 at about 09:30 p.m., but the F.I.R. in question was lodged on 07.02.2008 at 17:30 hours by uncle of Vikas Soni (injured), therefore, prosecution sotry is not reliable.

C. As per the prosecution case, both the persons namely Vikas Soni and Rajesh had received injury on their neck, therefore, it was not possible to speak and narrate the incident.

D. The identification of the alleged recovered ornaments was not done in accordance with law, therefore, the same is not reliable.

E. As per the prosecution case, both the appellants shot fire, but only one weapon was recovered and the recovery of one weapon shown by the police is also not reliable.

F. No identification parade of accused-appellant Umesh Kumar Mishra was conducted as per the law.

11.1 Learned counsel for the appellants has further submitted that P.W.-1 Vikas Soni (injured) has deposed in his cross-examination that after the said incident, injured persons were lying on the place of incident and within 10 minutes, his father Srinath Soni and his friend Sahjade reached on the spot and his uncle (Tau) Rambabu Soni (PW-2) informant do not reached there, thereafter, both the injured were brought to the hospital at Kunda and after treating them, they were sent to Allahabad, and father of Rajesh namely Harish Chand P.W.3 was with them when they were sent to Allahabad. He also stated in his cross-examination that he narrated the story to the informant Rambabu Soni (P.W.2) when he regain the consciousness after 2-3 days from the date of incident. He also submitted that as per the prosecution case deposed by P.W.1 that both the appellants opened fire with their respective pistols and caused injury to P.W.1 as well as to his friend Rajesh Kesharwani, but recovery of one country made pistol of 315 bore is shown, which is not reliable, but this fact was not considered by the court below. He further submitted that as the appellant Umesh Kumar Mishra was not known to the P.W.1 Vikas Soni, but no identification parade was conducted and during the course of trial in court, P.W.1 identified the appellant Umesh Mishra as

one of the assailant, therefore, prosecution story is not reliable and court below committed error in considering the evidences deposed by the witnesses.

11.2. Learned counsel for the appellants has further submitted that only P.W.1 Vikas Soni is placed by the prosecution as an eye witness and no any other eye witness was placed by the prosecution before the trial court. As other witnesses namely P.W.2 Ram Babu Soni and P.W.3 Harishchandra were examined as witnesses of the fact, but they were not an eye witnesses, therefore, the prosecution story is not reliable and the learned court below committed error in considering the fact that no any independent eye witness was placed by the prosecution, therefore, the prosecution story is not reliable.

11.3. Learned counsel for the appellants has further submitted that incident was taken place on 05.02.2008 at about 09:30 p.m. and the F.I.R. was lodged by P.W.2 Ram Babu Soni (uncle of P.W.1 Vikas Soni) on 07.02.2008. He further submitted that P.W.2 deposed before the trial court in his examination-in-chief that the injured persons were in serious condition and they were unconscious, and after gaining consciousness, P.W.1 Vikas Soni narrated the incident to him, then the written complaint was given at the police station concerned and later on, the F.I.R. in question was lodged, but he failed to give reply that why the F.I.R. in question was not lodged on the same day and he also stated that Vikas Soni and Rajesh were seriously injured, therefore, they were focusing for their medical treatment. In his deposition, P.W.2 has also stated that on the date of incident at 10:30 p.m., Sahjade had informed him about the incident that his nephew Vikas and Rajesh were shot, then he reached on the spot, but he found that injured were brought to hospital at Kunda and thereafter, he again received phone call of Sahjade that due to serious condition of injured, they were referred to Allahabad. Thereafter, he reached at Jeevan Jyoti Hospital, Allahabad on the same day and he found that Rajesh was in his senses and he was talking, but Vikas Soni (P.W.1) was critical and Rajesh informed him about the incident. He further submitted that though, P.W.2 was informed by Rajest about the incident on the same day, even then, the F.I.R. was not lodged on the same day, therefore, the prosecution story is not reliable.

11.4. Learned counsel for the appellants has submitted that as per the prosecution case, the F.I.R. in question was lodged by P.W.2 (informant) on the narration of P.W.1 Vikas Soni after regaining his consciousness and informed him about the incident. He further submitted that the alleged injury is found on the neck of P.W.1, therefore, it is not possible to speak, and Dr. C.K. Gupta (P.W.6) categorically deposed before the court below in his cross-examination that both the injured persons were not in position to speak. In such circumstances, there is contradiction that the F.I.R. lodged by the P.W.2 on the narration of P.W.1 (injured eye witness). The injuries found on the body of the injured Vikas Soni (P.W.1) and the deceased Rajesh Kesharwani are as under :-

**Injuries of P.W.1 Vikas Soni (injured witness)**

1. Gunshot wound of entry 2 cm x 2 cm on back of Rt. side of the neck below Hairline. Blackening & tattooing present around the wound.

2. Gunshot wound of exit 3 cm x 2 cm on Rt. side of face. Just anterior to angle of Mandible, Pieces of fracture mandible seen through the wound. No Blackening & tattooing present. Margin Everted.

**Injuries of Rajesh Kumar Kesarwani (deceased)**

1. Gunshot wound of entry 2 cm x 2 cm on back of Rt. side of the neck. Blackening & tattooing present around the wound. Margin Inverted.

2. Gunshot wound of exit 2 cm x 1 cm part of Rt. side of neck 4 cm below angle of Mandible. Margin Everted. No Blackening & Tattooing present.

11.5. Learned counsel for the appellants has further submitted that the identification of the recovered ornaments was not done in accordance with law. He also submitted that all the recovered articles were taken from the shop of father of appellant Manoj Kumar Soni and planted. He also submitted that recovery of one piece of silver was shown from the appellant Umesh and the identification was also not conducted in accordance with law. He also submitted that during the course of investigation not even a single receipt or evidence in relation to the purchase of ornaments was procured by the Investigating Officer and this fact was also not investigated that whether any article was purchased by the Rajesh Kesharwani and Vikas Soni or not, and even the shop were also not disclosed from which the alleged ornaments were purchased, therefore, the prosecution story is not reliable. He also submitted that alleged recovered ornaments were not weighed and it is admitted by P.W.8 in his deposition before the trial court and only on assumption, weight of ornaments were mentioned about 600 grams in the recovery memo, this shows that all the exercise of recovery was done in the most mechanical manner.

11.6. Learned counsel for the appellants also relied on the following judgments of Hon'ble Supreme Court in support of his submissions :-

***A. Sonu @ Sunil vs. State of Madhya Pradesh (2020) SCC OnLine SC 473.***

***B. Mohanlal Gangaram Gehani vs. State of Maharashtra (1982) 1 SCC 700.***

***C. Dana Yadav @ Dahu & Others vs. State of Bihar (2002) 7 SCC 295.***

11.7. Learned counsel for the appellants has further submitted that as per the prosecution case, it is a case of single fire which is alleged to be fired by each appellants, therefore, conviction u/s 302 I.P.C. may be converted into Section 304 Part II I.P.C. and sentence of the appellants be reduced in the interest of justice.

12. Learned A.G.A. has submitted that there is no illegality in the judgment of learned court below and made following submissions :-

12.1. P.W.1 Vikas Soni is the injured witness and he was examined before the trial court and identified the accused persons and he also deposed that on 05.02.2008, Manoj Soni shot Rajesh Kesarwani and Umesh shot him, as a result, they fell down and the appellants looted the ornaments. P.W.1 also identified the recovered ornaments and submitted that ornaments were purchased from the shop of Chotelal Agarwal and purchase slip was given by him which was with Rajesh Kesarwani who died due to fire arm injury caused by the accused persons. She also submitted that P.W.1 was cross-examined by the counsels of the appellants on 24.09.2009, 31.10.2009, 07.11.2009, 09.02.2010 and 16.02.2010 in detail, who deposed the manner of assault by the appellants with their respective weapons. She also submitted that the injury report of the P.W.1 and Rajesh Kesarwani (deceased) are corroborating with the deposition of P.W.1 Vikas Soni and learned court below has rightly appreciated the evidence of prosecution as well as the statement of appellants under Section 313

Cr.P.C. She also submitted that the statement of witnesses cannot be considered in part and complete statement of the witnesses is to be considered, therefore, there is no illegality in the judgment which is under challenge.

12.2. In reply to the argument of the learned counsel for the appellants that the incident was taken place on 05.02.2008 at about 04:30 p.m., but the F.I.R. was lodged on 07.02.2008 at 17:30 hours, learned A.G.A. submitted that the P.W.1, P.W.2 and P.W.3 have categorically deposed before the trial court that P.W.1 and Rajesh Kesharwani were seriously injured and therefore, there first obligation was to facilitate them proper treatment and they were hoping for their recovery. In such circumstance, delay in lodging the F.I.R. is not fatal to the case of prosecution. She also submitted that P.W.1 is the injured witness and he categorically supported the prosecution version and narrated the manner of assault by the appellants, therefore, trial court has rightly considered the aforesaid fact, and on this point, the learned court below has rightly appreciated the law laid down by the Supreme Court in the case of ***Rabindra Mahto and Another vs. State of Jharkhand reported in (2006) 10 SCC 432*** and submitted that considering the critical condition of the injured persons, delay in lodging the F.I.R. is not fatal to the case of prosecution.

12.3. P.W.1 as well as P.W.2 were examined before the trial court and they categorically deposed that when P.W.1 regained his consciousness after two days from the date of incident, then he narrated the incident to P.W.2 and thereafter, the F.I.R. in question was lodged by P.W.2 Ram Babu Soni and he was also cross-examined by the counsels for the appellants but nothing was gained, and trial court came to the conclusion that due to critical condition of the injured persons, priority was given for their treatment and after their recovery, the F.I.R. in question was lodged and this fact was rightly dealt by the learned court below.

12.4. In reply to the submission of learned counsel for the appellants that the injured persons were not in position to speak as seat as deposed by P.W.6. Learned A.G.A. submitted that in his cross-examination, P.W.6 deposed before the trial court that the injured persons were not in position to speak and their admission timings 12:05 a.m. and 12:10 a.m. respectively, then they were medically examined, but he did not refute that the injured persons were also not in position to speak later on; as in his cross-examination, P.W.1 categorically deposed before the trial court that after he regained his consciousness, he narrated the whole incident to Rambabu Soni (P.W.2). She further submitted that in his cross-examination, P.W.2 also deposed before the trial court that when he reached to the Jeevan Jyoti Hospital, Allahabad, then he found that injured Rajesh was conscious and he was speaking, but Vikas was unconscious. She further submitted that P.W.3 Harishchandra also deposed before the trial court that when he reached on the spot, then Rajesh was conscious and he told him that Manoj Soni had shot him and friend of Manoj Soni had shot Vikas and they looted all the ornaments and his (Rajesh) mobile phone was also snatched. Therefore, the argument of learned counsel for the appellants is not sustainable and the aforesaid point was also rightly dealt by the court below. She also submitted that due to excessive bleeding, condition of Rajesh deteriorated and he died, and also deposed by P.W.4 Dr. Shivcharan Lal before the trial court that after such type of injuries, the injured would not be able to speak

clearly and in absence of medical facilities, he will be conscious for about one hours. She further submitted that in the present case, Harishchandra (P.W.3) reached on the spot within 10-15 minutes and both the injured were in condition to speak, therefore, the court below has rightly dealt the issue on the strength of law laid down by the ***Hon'ble Supreme Court in the case of Thaman Kumar vs. State of Union Territory of Chandigarh (2003) 6 SCC 380*** in which it was held that the testimony of the injured witness would be on higher pedestal and it could not be doubted except the extreme contradictions.

12.5. In reply to the submission of the learned counsel for the appellants that the manner of identification of the alleged recovered ornaments was not done in accordance with law, learned A.G.A. submitted that the identification of the recovered articles was done before the Magistrate complying the established procedure and P.W.1 Vikas Soni (Injured eye witness), in his cross-examination, has deposed before the trial court that ornaments i.e. One pairs of Chhagal, Six pairs of Anklet, One silver plate as well as Silver coconut and Silver areca nut were purchased from the shop of Chotelal Agarwal, and on all the Anklets, monogram of ML was stamped. The identification memo for recovery of articles was prepared as Ext. Ka-1 and it was duly signed & proved by the P.W.1 (injured eye witness). She further submitted that receipt of the aforesaid articles was with the Rajesh Kesharwani who died in the incident. She also submitted that P.W.9 Shri Nivas Yadav also proved the identification memo of the recovered articles and opportunity to cross-examine him was also given to the counsels for the appellants, but they did not got any material in his cross-examination and they could not refute his argument. Therefore, the learned trial court has rightly dealt the aforesaid issue.

12.6. In reply to the submission of learned counsel for the appellants that recovery of only one weapon was shown, but it was alleged in the F.I.R. that both the appellants shot fire, therefore, the prosecution case is not reliable, learned A.G.A. submitted that after the arrest of appellant Umesh Kumar Mishra, on his pointing out, one country made Pistol of 315 bore along with looted piece of silver was recovered from the bush adjoining to the house of Devendra Shukla and recovery memo was prepared as Ext. Ka-26 which has been duly proved. One cartridge of 315 bore was also recovered from the place of incident. She further submitted that the recovered cartridge as well as country made pistol were sent for the ballistic analysis to F.S.L. and the ballistic report reveals that the cartridge was fired with the recovered pistol, and it is also deposed by P.W.1 that Umesh Mishra shot fire on him. Therefore, merely on the ground that second weapon was not recovered, therefore, recovery from appellant Umesh Mishra is not reliable, is not acceptable. She also submitted that report of F.S.L. as well as the statement of injured witness P.W.1 and the injury report of the injured corroborates with the prosecution case, therefore, the arguments of the learned counsel for the appellants is not sustainable.

12.7. In reply to the point argued by learned counsel for the appellants that identification parade of the appellant Umesh Mishra was not conducted in accordance with law and the learned court below has not rightly dealt the aforesaid point, learned A.G.A. submitted that the aforesaid point is not correct as in the written complaint, appellant Manoj Soni was named and the P.W.1, in his deposition

before the court below, stated that he was known to the appellant Umesh Mishra by face, but he could not recollect his name earlier and later on, the name of Umesh Mishra came into his knowledge. Therefore, the testimony of injured witness cannot be discredited and the benefit of doubt cannot be given to the appellant Umesh Mishra who shot fire on the injured and looted the ornaments. She further submitted that appellant Umesh Mishra was rightly identified by P.W.1 (injured eye witness) and this point was also rightly dealt by the learned trial court.

13. Considering the arguments of learned counsel for the appellants as well as learned A.G.A. and going through the record, it is evident that :

13.1. Submission made by learned counsel for the appellants is that testimony of P.W.1 Vikas Soni (injured witness) is not reliable on the ground that in his cross-examination, he deposed that within 10 minutes of the incident, his father Shrinath Soni along with his friend Sahjade reached on the spot and thereafter, both the injured were brought to the hospital at Kunda and from there, they were shifted to Allahabad and P.W.3 Harishchandra (father of the deceased Rajesh) was also with them, and the incident was narrated to Rambabu Soni (P.W.2) when he regained his consciousness after 2-3 days from the date of incident; and P.W.1 is an interested witness as there was business rivalry in between him and appellant Manoj Soni, but it is evident from the deposition of P.W.1 that he was cross-examined by the counsels for the appellants before the trial court and he categorically deposed the incident and the manner of assault and medico-legal report of the injured and the deceased Rajesh corroborates with the deposition of P.W.1 and in his cross-examination he also deposed that he was known to the appellant Manoj Soni and also known to the co-accused by face, who was the pillion rider of Manoj Soni. He narrated the incident before the trial court that at Chowk, Meerganj Main Market, Allahabad, he and his friend Rajesh (deceased) went to Jewelry shop for purchasing the ornaments. He purchased ornaments amounting to Rs.60,000/- but he was not aware about the amount of purchased ornaments by Rajesh. In the market, appellant Manoj Soni @ Manu Verma, who was familiar to P.W.1 and his friend Rajesh, along with appellant Umesh (whose face was familiar to P.W.1 but not well known) met them. At about 07:00 p.m., after purchasing the ornaments, when they started moving for home at Kunda, then the appellant Manoj Soni & his friend Umesh Mishra also moved for their home at Kunda, and P.W.1 & his friend Rajesh were riding on one motorcycle and Manoj Soni & his friend Umesh Mishra were on the other motorcycle. When they reached near 20 meter away from Madri Intersection, then the appellant Manoj Soni stopped his motorclyce after overtaking them and asked for fuel as petrol in his motorcycle was finished, P.W.1 was driving the motorcycle and Rajesh was the pillion rider, and when Rajesh was getting off from the motorcycle for taking out petrol, then he was advised by him (P.W.1) that in few distance Yadav Dhaba is situated where there is appropriate light and he can takeout the petrol there, then Manoj Soni told him that who will carry the motorcycle there give it here. Then Rajesh (deceased) started taking out the fuel. Manoj Soni first shot Rajesh with the intention to kill and Umesh shot him (P.W.1). Learned A.G.A. submitted that P.W.1 was confronted by the counsel for the appellants but the testimony of the witness was intact and the manner of assault and

respective injuries with the respective weapon are corroborating. In the statement of appellants under Section 313 Cr.P.C., questions were framed on the basis of prosecution evidence relied during the course of trial, but both the appellants had given answers to the questions as incorrect, wrong and implicated with the intention to harass them. It is also evident from the aforesaid statement of the appellant Umesh Kumar Mishra that he denied to place any defence witness and in his additional statement, he stated that he was having inimical relations with Bachha Yadav, and Constable Santosh Yadav is his relative, therefore, he was falsely implicated in the present case. Appellant Manoj Kumar Soni also stated in his additional statement, in writing, with the narration that he is the goldsmith and was working with the P.W.2 (informant) prior to the date of incident, and Rs.20,000/- as labour charges was due to him, and earlier dispute was taken place between them, as a result, merely on the basis of suspicion, he was implicated in the present case. He also narrated that the ornaments those were shown by the police as recovered articles were taken from the shop of his father; but he failed to produce any witness in support of his additional statement and neither any detail that when the ornaments were taken away from the shop of his father nor the detail of ornaments which were taken away are mentioned, therefore, such statement is a vague one and the trial court has rightly considered the evidence of the P.W.1 (injured eye witnesses) as the testimony of injured witnesses cannot be discredited when the manner of assault was properly deposed and an opportunity was also given to the counsels of accused-appellant to cross examine, but they failed to refute, therefore, the arguments of learned counsel for the appellants has no force.

13.2. Second submission of learned counsel for the appellants is that the incident was taken place on 05.02.2008 at about 09:30 p.m., but the F.I.R. in question was lodged on 07.02.2008 at 17:30 hours by P.W.2 (uncle of injured Vikas Soni) after well thought, therefore, prosecution story is not reliable; but in the present case, it is evident that the injury was caused by the appellants to P.W.1 and his friend Rajesh with intention to kill & loot them and in their depositions, P.W.2 and P.W.3 have categorically stated that the injured were in critical condition and they were focusing for their treatment first, therefore, delay has been caused in lodging the F.I.R. In the present case, merely delay in lodging the F.I.R. does not vitiate the trial, as the injured eye witness has categorically defined the role of informant, and the learned court below has rightly dealt the issue by relying on the decision of Hon'ble Supreme Court in the case of ***Rabindra Mahto and Another vs. State of Jharkhand (supra),*** therefore, the submission of learned counsel for the appellants is not sustainable.

13.3. Third submission of learned counsel for the appellants is that as per the injury report of the injured and his friend Rajesh who later on died and as per deposition of Dr. C.K. Gupta (P.W.6), injured persons were not in position to speak, therefore, it is highly improbable that P.W.1 narrated the whole incident to P.W.2 and then the F.I.R. was lodged; but as per the record, P.W.6 Dr. C.K. Gupta was examined and cross-examined and he categorically deposed that that the injured persons were not in position to speak, but he did not depose that the injured persons were not in position to speak later on also and P.W.1 has categorically deposed before the trial court in his cross-examination that when he regained his consciousness, he

narrated the incident to P.W.2. The testimony of P.W.2 also corroborates and he also deposed in his cross-examination that Rajesh was not in sense when he reached to the hospital, and P.W.3 also deposed before the trial court and supported the prosecution version. Therefore, the submissions of learned counsel for the appellants has no force and the trial court has rightly considered the deposition in accordance with the law laid down by Hon'ble Supreme Court in the case of ***Thaman Kumar vs. State of Union Territory of Chandigarh (supra).***

13.4. Fourth submission of learned counsel for the appellants is that in relation to recovery of alleged ornaments, established procedure was not adopted and without mixing sample of ornaments of identical nature, identification of ornaments was conducted, therefore, the recovery memo is not reliable and he also relied on the decision of Hon'ble Supreme Court in the case Sonu @ Sunil vs. State of Madhya Pradesh (supra) and submitted that in case, identification procedure was conducted without mixing the recovered jewelry or identical ornaments, the identification is not admissible, and the learned court below has committed error in accepting the identification of the ornaments; but the aforesaid case relied by the learned counsel for the appellants is of circumstantial evidence and in the present case, P.W.1 is the injured eye witness and he also narrated the manner of assault by the appellants, therefore, the application of the law laid down in the aforesaid case law does not apply in the present case, hence, the submission of learned counsel for the appellants has no force and the learned court below has rightly appreciated the recovery memo in relation to recovered articles and the deposition of P.W.1 (injured eye witness).

13.5. Fifth submission of learned counsel for the appellants is that as per the prosecution case, both the appellants shot fire, but only one weapon was recovered, therefore, prosecution story is not reliable; but as per record, after arrest of the appellant Umesh Mishra, weapon was recovered on his pointing out. The recovery memo was prepared by P.W.9. and it was duly proved before the trial court and opportunity to cross-examine was also given to the counsels for the appellants, but the same could not be refuted. It is also evident that recovered weapon and cartridge were sent to F.S.L. and F.S.L. report (Ext. Ka.- 23) reveals that the cartridge was fired with the recovered weapon. In case, the second weapon was not recovered, then the testimony of injured witness cannot be discredited in view of the law laid down by ***Hon'ble Supreme Court*** in the case of ***Rakesh and another vs. State of Uttar Pradesh and another (2021) 7 SCC 188*** and the learned court below has rightly dealt the issue and the submission of learned counsel for the appellants has no force.

13.6. Learned counsel for the appellants also relied on the decision of Hon'ble Supreme Court in the case of Mohanlal Gangaram Gehani vs. State of Maharashtra (supra) and submitted that testimony of a witness who identified the accused for the first time in the court in absence of any T.I. parade would not be reliable; but the P.W.1 (injured eye witness) categorically deposed before the court below that appellant Umesh Mishra was familiar to the witness by face but not by name, and in his cross-examination, the counsel for Umesh Mishra confronted him but failed to disbelieve him; and it is well settled in the case of Dana Yadav @ Dahu & Others vs. State of Bihar (supra) that if the accused persons is well known by sight,

then it would be waste of time to put him up for identification and trial will not be vitiated as the testimony of the injured witness cannot be discredited.

13.7. Final submission of the learned counsel for the appellants is that it is a case of single shot which is alleged to be done by each appellant, therefore, conviction under Section 302 I.P.C. may be altered in Section 304 Part II I.P.C. and sentence of the appellants be reduced in the interest of justice; but as per the deposition of P.W.1, who is the injured eye witness, appellants followed him and his friend Rajesh from Allahabad and at an isolated place took advantage by saying that fuel in their motorcycle is finished and asked for some petrol, and when Rajesh (deceased/friend of P.W.1) came down and started taking out petrol from his motorcycle, then a shot was fired by Manoj Soni at him and at the same time, appellant Umesh Mishra also shot fire on the P.W.1 and thereafter, looted them. In the said incident, P.W.1 and his friend received grievous injuries and later on, because of the said injury, Rajesh (friend of P.W.1) died. As the motive and the conduct of the appellants reveals that they were in premeditated mind with the common intention to kill the injured and loot the ornaments, therefore, the submission of learned counsel for the appellants has no force.

14. In view of the above discussion, the appellants failed to establish their case, and there is no illegality in the judgment and order dated 16.12.2010 passed by Additional Sessions Judge/F.T.C., Court No.9, Pratapgarh.

15. Accordingly, both the appeals are hereby ***dismissed.***

16. From perusal of the record, it appears that the appellant namely, **Umesh Kumar Mishra** is on bail. His bail bonds is cancelled and sureties are discharged. He is directed to surrender in the court below forthwith to serve out the sentence awarded by the learned trial court, failing which, trial court is directed to take all coercive steps for taking him in custody and sent to jail.

17. In the connected appeal, appellant-Manoj Kumar Soni @ Manu Verma is in jail. He shall serve out the sentence awarded by the trial court.

18. Let the lower court record along with the present order be transmitted to the trial court concerned for necessary information and compliance forthwith.

19. District & Sessions Judge, Pratapgarh is directed to ensure the communication of this order to the appellant-Manoj Kumar Soni @ Manu Verma at his confinement place.

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**(2021)10ILR A90**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 07.10.2021**

**BEFORE**

**THE HON'BLE ARVIND KUMAR MISHRA-I, J.**
**THE HON'BLE NAVEEN SRIVASTAVA, J.**

Criminal Appeal No. 291 of 1983

**Mangali & Ors. ...Appellants(In Jail)**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellants:**
Sri G.S. Chaturvedi, Sri Rajarshi Gupta

**Counsel for the Respondent:**
Govt. Advocate

**(A) Criminal Law - appeal against conviction - The Indian Penal Code, 1860 - Section - 302/34, 201 - motive - ante-**

**mortem injuries cannot be ascertained because of the charred parts of the body - no corroboration of the incident from any independent source - relevancy of the motive assumes wider dimension insofar as the present appellant is concerned and in that regard, the position of other co-accused, *vis-a-vis*- the appellant becomes entirely different - Only a casual reference of relationship that appellant is a distant relative of co-accused would not be suffice to prove the fact of appellant being relative. Para -8,15 ,27,28)**

Informant and his nephew - going for sowing field - enmity, on account of litigation for the landed property - some altercation taken place between informant's nephew - motive - accused killed informant's nephew bullock-cart by throwing him into the burning thatch - conviction against the accused-appellant - hence appeal.

**HELD:-**Prosecution has not been able to prove its case beyond reasonable doubt against the surviving appellant. He is entitled to the benefit of doubt. Finding of conviction recorded against the appellant by the trial court is perverse and illegal on its face, which is not sustainable, for simple reason that there was no worthy cause for the appellant to commit crime along with the other three co-accused. Judgment and order of conviction and sentence set aside. (Para - 31,32)

**Criminal Appeal allowed.** (E-7)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Sri Rajarshi Gupta, learned Amicus Curiae for the appellants, Sri Bhanu Prakash Singh and Sri Rajeev Kumar Rai, learned Brief Holders for the State and perused the material available on record.

2. By way of instant criminal appeal, challenge has been made to the authenticity, veracity and sustainability of the judgment and order of conviction dated 31.1.1983, passed by the Sessions Judge, Budaun in Sessions Trial No. 176 of 1982 *(State vs. Mangli and others)*, arising out of Case Crime No. 194 of 1981, Police Station - Rajpura, District - Budaun, whereby the appellants have been sentenced to undergo imprisonment for life under Section - 302/34 I.P.C. and two years rigorous imprisonment under Section - 201 I.P.C.

3. Record reflects that out of the four accused-appellants, accused-appellant no.1- Mangli, accused-appellant no.2- Rajendra and accused-appellant no.3- Toofan expired during the pendency of this appeal. This appeal against them stood abated previously.

4. Now, in this appeal, Pannoo is appellant no.4, the only surviving accused-appellant, whose case has been argued by Sri Rajarshi Gupta, the learned Amicus Curiae.

5. Brief facts of the prosecution case, as discernible from record appear to be that an oral report was lodged at Police Station - Rajpura in Sub-District - Gunnaur, District - Budaun on 29.10.1981 at about 10:00 A.M., regarding some incident that took place in Village - Pavsara within the aforesaid police station with the averments that the informant - Latoori son of Natthu Ahar, resident of Village - Pavsara within police station - Rajpura narrated about the incident that the morning, when the informant and his nephew- Aaram Singh, Shyam Lal and Tilak Singh were going for sowing the field of Aaram Singh who was moving ten steps ahead of him on bullock-cart and as soon as the informant along with others reached near the field of Pannoo and Shyam Lal, then Mangli and Pannoo possessing *'lathi'*, Rajendra

possessing gun in their hands and Toofan possessing spear in his hands appeared from behind the bushes. Mangli, Toofan and Pannoo assaulted Aaram Singh with *'lathi'* and spear, due to which, Aaram Singh sustained injuries and rendered unconscious. On alarm being raised, Sardar and Ram Swaroop arrived on the spot. The informant tried to intervene but was threatened on gun point by Rajendra. Thereafter, the accused put Aaram Singh in his bullock-cart and took him to their (House of Mangli) home. The informant along with villagers followed them and arrived at the house of the accused, where they saw the thatched roof of the house of the accused (Mangli) under fire and Rajendra was standing on the roof of the house with gun and threatening that in case, anyone comes forward, he will be killed. The accused burnt Aaram Singh and bullock-cart in the burning thatched covering. It was also stated by the informant that enmity, on account of litigation, is going on and in that connection some altercation had taken place between the informant's nephew-Aaram Singh and the accused and on account of that (enmity), accused killed Aaram Singh by throwing him into the burning thatch. The informant rushed to the police station and oral report was lodged around 10:00 a.m., which was noted in the Check F.I.R. at Case Crime No. 194 of 1981, under Sections - 302, 201 I.P.C. on 29.10.1981 (at 10:00 a.m.) at Police Station - Rajpura, District - Budaun, the report was read over to the informant when he appended his signature on it, which is Ext. Ka.1. On the basis of entries so made, a case was registered in the concerned general diary under at case crime number under the aforesaid sections of I.P.C. on the aforesaid date and time at Police Station - Rajpura, which is Ext. Ka.3.

6. Inquest report in that regard of the burnt piece of human flesh was prepared on the spot on 29.10.1981, which is Ext. Ka.8. The relevant papers prepared on the spot pertaining to the dead body are Ext. Ka.9 and Ext. Ka.10. Similarly, letter to C.M.O. for postmortem is Ext. Ka.11, specimen signature is Ext. Ka.12.

7. The witnesses and the Investigating Officer concurred that in order to ascertain the real cause of death, the piece of burnt flesh be sent for postmortem examination. Consequently, postmortem examination on the dead body (burnt piece of flesh) of Aaram Singh was conducted on 30.10.1981 at 5:00 p.m. at mortuary Budaun. It was stated that cause of death could not be ascertained as only charred parts of body were available which appeared to be of adult human but the same was preserved for further confirmation by anatomist. Even, sex could not be determined, exact age could not be ascertained. The postmortem examination report is Ext. Ka.2.

8. The body was not identifiable because it was reduced to the burnt skeleton without specification of age and sex. Relevant to mention that ante-mortem injuries cannot be ascertained because of the charred parts of the body.

9. The investigation was entrusted to Hari Maya Sharma, the Station Incharge, Police Station - Rajpura. The oral report was lodged by the informant - Latoori, when this witness (I.O.) was present at the police station. The I.O. recorded statement of informant- Latoori at the police station itself and proceeded to the place of occurrence by government jeep at Village - Madhaiya Pavsara at the house of Mangli, where he found the thatch of Mangli under

flames which has been depicted in the site-plan by word (B). He got the fire got extinguished by pouring water on it and upon search being made, a part of flesh of human being was discovered. A memo of the same was prepared, which is Ext. Ka.4. A part of the underwear was also found stuck to this human flesh. At the point of recovery, Kalyan Singh son of Ram Ji Lal was also present. He also gave one similar underwear to the I.O.. A similar underwear reassembling the same clothe as the stuck one was also shown to the Investigating Officer, who prepared a memo of the same as Ext. Ka.5, the I.O. also prepared site-plan on the spot, which is Ext. Ka.6, collected ashes of the burnt thatch in one container, bone pieces were kept in another container and the burnt portion of the bullock-cart was kept in a gunny bag under seal. A memo of all the above was prepared on the spot, which memo is Ext. Ka.7. Blood marks were found on the main door of the house of Mangli. Some pieces of the door were taken into possession and a memo of the same was prepared on the spot, which is Ext. Ka.13. Besides this, statement of various prosecution witnesses were also recorded. At the time, when he reached at the house of Mangli, no family member of Mangli was present over there. Entry in that regard has been made in the concerned Case Diary and copy of the same is Ext. Ka.14. Mangli was arrested on 1.11.1981. Recovery of *'lathi'* was effectuated from him, the very same day. The *'lathi'* was kept in four pieces and a memo of the same was prepared as Ext. Ka.15. Besides this, material exhibits were also prepared. *'lathi'* (Material Ext.1), ashes (Material Ext.2), pieces of door (Material Ext.3), burnt pieces of bones (Material Ext.4), underwear (Material Ext.5) and the piece of clothes stuck to the human flesh (Material Ext.6). After completing the investigation, the Investigating Officer filed charge-sheet (Ext. Ka.16) against the accused-appellant.

10. Consequent upon this, the trial commenced and it was numbered as Sessions Trial No. 176 of 1982 *(State versus Mangli & Others)*. The Sessions Judge, Budaun, vide his order dated 6.5.1982 heard both the sides on point of charge and found *prima-facie* ground existing for framing charges under Sections - 302/34 and 201 I.P.C. against the accused-appellant. Charge was read over and explained to the accused-appellant, who denied the charges and opted for trial.

11. The prosecution produced in all seven witnesses. P.W.1 Latoori is the informant, who lodged an oral report at the Police Station - Rajpura regarding the incident. P.W.2 Dr. M.V. Juyal conducted postmortem examination on four pieces of burnt flesh of human being and it was observed in the postmortem examination report (Ext. Ka.2) that it was not possible to know about any ante mortem injuries on account of severe burn. Constable Kunwar Pal Singh P.W.3 has prepared the Check F.I.R. and made relevant G.D. Entry. Constable Rajpal Singh P.W.4 and Constable Saran Singh P.W.5 have testified about safe custody of the pieces of human flesh and its safe conveyance to the Mortuary, Budaun. Tilak Singh P.W.6 is the eye witness of the occurrence and Hari Maya Sharma P.W.7 is the Investigating Officer.

12. The evidence for the prosecution was closed and the statement of the accused-appellant was recorded under Section - 313 Cr.P.C., wherein, appellant denied the prosecution version and submitted that he was on inimical terms

with his brother- Chaturi, who in collusion with Latoori (the informant) has falsely involved him in this case. He was asked to adduce his defence, whereupon he initially wished to give testimony, but he did not adduce testimony.

13. After considering the merit of the case, the Sessions Judge, Budaun returned finding of conviction against the accused-appellant. Thus, sentencing him under the aforesaid charges and sentenced him as above, vide his judgment and order dated 31.1.1983.

14. Consequently, this appeal.

15. Sri Rajarshi Gupta, learned Amicus Curiae for the appellant submits that so far as the involvement of the appellant is concerned, it can be seen from the entire record that the appellant has not played any particular role in this case and the only point for his false implication is that the relationship of the appellant with his brother was not good, but in severely battered position and his brother in collusion with Latoori has got the appellant involved in this case. Otherwise, there was no motive whatsoever for the appellant to indulge in committing in any such offence. The other three co-accused Mangli and his two sons (Rajendra and Toofan) might have a cause of action against the deceased-Aaram Singh, but a cooked up story was set up that the appellant happens to be a relative of co-accused- Mangli, which story when specifically put to the appellant in the statement under Section - 313 Cr.P.C. was flatly denied and it was claimed that the appellant is not related to Mangli. Learned Amicus Curiae further added that there is no corroboration of the incident from any independent source. Both the witnesses are partisan witnesses, relatives and highly interested witnesses. Their testimony is tutored and improved one and it varies from each other, full of embellishments. The case against the appellant- Pannoo is highly different from that of the other co-accused. The accused- Pannoo has been made a scapegoat, for no worthy reason. Except, participation in the occurrence, nothing more has emerged against the appellant. The facts and circumstances also foretell about false implication of the appellant, because the motive assigned for committing the offence on account of landed property and the incident was claimed to have been caused by the other accused Mangli, Rajendra and Toofan, but that motive had got no nexus with the case of the present accused- appellant nor the present accused-appellant had any such motive as he neither is nor was any relative of co-accused Mangli. Consequently, the judgment of conviction is perverse and illegal.

16. While retorting to the aforesaid argument, learned A.G.A. has supported the judgment of conviction and sentence and claimed that the finding of conviction is just and consistent and the same is based on material on record.

17. We have also considered above rival submissions.

18. The moot point that arises for our consideration is primarily confined to fact whether the prosecution has been able to establish its case against the appellant beyond reasonable doubt?

19. Bare perusal of the F.I.R. indicates that it was orally lodged at Police Station - Rajpura, District - Budaun on 29.10.1981 around 10:00 a.m. after the occurrence took place at 8:00 a.m. at

Village - Pavsara. The distance of the place of the occurrence from the police station is shown to be three kilometers. As per the description contained in the F.I.R., the informant- Latoori accompanied his nephew, Aaram Singh along with others, Shyam Lal and Tilak Singh were going to plough the field of Aaram Singh. Aaram Singh was moving ten steps ahead of them on his bullock-cart. It was around 8:00 a.m. when they reached near field of Shyam Lal, when Mangli and Pannoo possessing *'lathi'*, Rajendra possessiong gun and Toofan possessing spear all of a sudden appeared from behind the bushes. Mangli, Toofan and Pannoo gave assault with *'lathi'* and spear to Aaram Singh. Aaram Singh fell unconscious by the assault. Alarm was raised, whereupon Sardar and Ram Swaroop arrived on the spot. The informant tried to save the victim, but Rajendra threatened at gun point. Thereafter, the accused took the victim on his bullock-cart to their home. The informant along with several villagers reached at the house of the accused (Mangli), whereupon he found the thatch under flames and Rajendra was threatening from the roof top that in case anyone tried to intervene, he shall be severely dealt with.

20. It is alleged that the accused threw Aaram Singh with the bullock-cart in the flames of the thatch and burnt him to death. Thereafter, this report was lodged at 10:00 a.m., the very same day. This report Check F.I.R. is Ext. Ka.1. There is nothing adverse either in the testimony of the prosecution witnesses or prevailing facts and circumstances of this case, which may indicate that the F.I.R. is ante timed because the events allegedly took place around 8:00 a.m., distance of three kilometers was covered by the informant himself and he orally lodged the report at police station - Rajpura. Therefore, the point raised to the extent that F.I.R. is ante timed is not sustainable.

21. However, insofar as the incident is concerned, obviously it has been disclosed in the F.I.R. that accused are on inimical terms with the informant on account of enmity, due to litigation for the landed property and because of that some altercation also had taken place three days prior to the occurrence. This is the strong motive for committing the crime.

22. So far as all the accused are concerned, then the three co-accused, say, Mangli, Rajendra and Toofan are related to each other as the father and the two sons. Mangli is father of Rajendra and Toofan. So far as the role of the appellant- Pannoo is concerned, claim is that Pannoo has got nothing to do with the offence in question, for the specific reason that Pannoo has got no connection with the aforesaid three accused, Mangli, Rajendra and Toofan and he is not connected with them in any manner either friendship or he being relative.

23. However, it has emerged in the testimony of the prosecution witnesses of fact that Pannoo is distant relative of Mangli, but we upon consideration of the entire record fail to come across any such specific relationship having been established by the prosecution in relation to the present appellant- Pannoo qua the other co-accused. The appellant has given statement under Section - 313 Cr.P.C., and in reply to Question No.17, he has stated that his brother- Chaturi has got himself falsely implicated in this case because enmity exists between the appellant and his brother- Chaturi and this has been done by the Chaturi by colluding with the

informant- Latoori. Neither in the argument extended by the learned counsel for the State/prosecution nor from record anything in the shape of confirmation to the fact of the appellant being relative of the Mangli is proved. This stray testimony that the appellant- Pannoo is relative of Mangli finds place in the examination-in-chief of Latoori (P.W.1). However, in the examination-in-chief, nothing particular has been stated so as to specifying what relationship the appellant had with the accused. The fact of actual relationship between the appellant Pannoo and co-accused- Mangli being a fact has not been duly proved.

24. In view of denial of the appellant that he has been falsely implicated on account of enmity with his brother-Chaturi, who colluded with informant-Latoori, we as a measure of caution find it appropriate to determine what purpose was working there in between co-accused Mangli, Rajendra Toofan on the one side and the appellant-Pannoo on the other side because unless and until Pannoo has got any interest in the killing of Aaram Singh either on ground of he being friend of the aforesaid three co-accused or he being relative of them, it becomes out of comprehension that the appellant will participate in such ghastly crime. On both count, a vague statement finds place in the examination-in-chief of Latoori (P.W.1) that accused Pannoo is his relative. Except that no other description.

25. Nothing specific appears on this particular aspect and this testimony should be treated to be vague and tutored one and it gives vent to the claim of the appellant that some collusion took place between the informant- Latoori (P.W.1) and the brother of the appellant- Chaturi and it has not been proved reasonably that nexus between the co-accused Mangli and the appellant was in fact based on any relationship. Otherwise for what cause or reason, Pannoo, the appellant had any cause for committing any offence of the like nature. If the appellant was standing in any relationship to Mangli, then particular relationship ought to have been specified as was required to be done so as to gather the intention and objective in which Pannoo was interested (in committing the offence). Except, one vague sentence, there is nothing in the entire examination-in-chief of Latoori (P.W.1) that appellant is his relative.

26. Similarly in the testimony of Tilak Singh (P.W.6), nothing positive has been said about particular relationship between co-accused Mangli and his two sons-the two co-accused, Rajendra and Toofan and the accused- Pannoo, which may indicate that both Mangli along with his sons were related to Pannoo. Once the relationship between Pannoo and Mangli is not established, then the argument advanced to the extent that for what reason appellant-Pannoo would involve himself in the commission of the offence becomes worth consideration. Admittedly, both the witnesses of fact are related to deceased- Aaram Singh.

27. Thus, here in this case, relevancy of the motive assumes wider dimension insofar as the present appellant is concerned and in that regard, the position of other co-accused, *vis-a-vis*- the appellant becomes entirely different. The reason is specific, if the appellant is not a relative of Mangli, then how can it be said that he has any cause against the deceased and he would indulge in such crime to settle any score with deceased-Aaram Singh, as such.

28. We come across fact that whatever dispute was there with deceased Aaram

Singh was with Mangli. In the testimony of Latoori (P.W.1), it has emerged in his cross examination on Page No. 26 of the paper book that two-three days prior to the incident, there was some dispute between Aaram Singh- the deceased and Mangli- the another co-accused and the dispute had in its background fact that both Aaram Singh and Mangli were driving their respective bullock-carts coming from opposite direction intercepted each other on the way and on point of giving safe passage, altercation took place between Mangli and Aaram Singh. Therefore, Mangli and his two sons may be interested persons, who had a cause against Aaram Singh. But once it is not satisfactorily that the present appellant is really relative of Mangli, it would not be safe, in the absence of such satisfaction, to impute any motive to the present appellant to commit the crime. Only a casual reference of relationship that appellant is a distant relative of Mangli would not be suffice to prove the fact of appellant being relative.

29. So far as the testimony of prosecution witnesses of fact against the appellant is concerned, then the same appears to be tutored one, full of improvement and embellishments insofar as it implicates and involves the appellant along with the other three co-accused, who had specific cause against the deceased. Statement of the appellant-Pannoo under Section - 313 Cr.P.C. is self speaking and carries weight and cannot be brushed aside under facts and circumstances of this particular case.

30. No leading role that the appellant took lead in the commission of the offence has been attributed to the present appellant by the prosecution nor is it reflected in the testimony of the prosecution witnesses of fact in particular Latoori (P.W.1) and Tilak Singh (P.W.6). On this point, the lower court failed to appreciate the evidence and has totally misread the import and the meaning of the statement of the appellant given in reply to question made under Section - 313 Cr.P.C. and for this specific reason, the finding of conviction recorded against the appellant by the trial court becomes perverse and illegal on its face, which is not sustainable, for simple reason that there was no worthy cause for the appellant to commit crime along with the other three co-accused.

31. We may record our satisfaction that arguments extended on behalf of the present appellant carry force and the same are approved and sustained by us. Consequently we hold in unambiguous terms that the prosecution has not been able to prove its case beyond reasonable doubt against the surviving appellant, namely, Pannoo. Thus, he is entitled to the benefit of doubt.

32. In the wake of above discussion, we may sum up that the finding of conviction and the sentenced awarded by the trial court is on the face erroneous and perverse insofar it relates to present appellant-Pannoo and the same cannot be sustained in the eye of law. Therefore, the judgment and order of conviction and sentence dated 31.1.1983 passed by the Sessions Judge, Budaun, in Sessions Trial No.176 of 1982, *(State Vs. Mangli and others)*, arising out of Case Crime No.194 of 1981, under Sections 302/34 and 201 I.P.C., Police Station-Rajpura, District- Budaun, is hereby set aside. Accused-appellant no.4- Pannoo is acquitted of all the charges as above.

33. Accordingly, the instant appeal succeeds and the same is ***allowed.***

34. In this case, the accused-appellant no.4- Pannoo is in jail. He shall be released

forthwith unless and until he is wanted in connection with any other case. The appellant shall ensure compliance of Section - 437A Cr.P.C.

35. Let a copy of this judgment/order be certified to the court concerned for necessary information and follow up action.

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**(2021)10ILR A98**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 12.08.2021**

**BEFORE**

**THE HON'BLE ANIL KUMAR OJHA, J.**

Jail Appeal No. 377 of 2018

**Sunil Prajapati ...Appellant**
**Versus**
**State ...Opposite Party**

**Counsel for the Appellant:**
From Jail, Sri Prashant Vyas, Sri Rajesh Kumar Dubey

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

**(A) Criminal Law - Appeal from jail - Indian Penal Code, 1860 - Sections 326Ka, 324, 323, 353, 332 & 308 - The Code of Criminal Procedure, 1973 - Section 161,313 - to establish an offence by an accused motive is not required to be proved when case is based on eye witness account - prosecution case cannot be doubted on the ground of non examination of independent witnesses. (Para - 18,19)**

Appellant came to the office of injured - poured inflammable substance over his body, beaten him by brick and iron rod several times - injured sustained grievous injuries - head was lacerated at several places - Appellant committed marpit with other employees of the office - acid injury in the eyes and body of the injured - appellant obstructed the government work. (Para - 3, 17)

**HELD:-**Appellant forcibly entered into the office of complainant and beaten injured and poured acid over his body without any reason, the appellant committed marpit with other employees of the office. It was a government office where the alleged incident took place, therefore, the appellant also created obstruction in discharging the duties by the government employees. Prosecution has established charges under Sections Section 326Ka, 324, 323, 353, 332 & 308 of I.P.C., against the appellant beyond reasonable doubt.(Para - 22,23)

**Jail appeal dismissed.** (E-7)

**List of Cases cited:-**

1. Thaman Kumar Vs St. of Union Territory of Chandigarh, 2003 (3) SCR 1190

2. Saddik Vs St. of Guj., (2016) 10 SCC 663

3. Nagaraj Vs St. , (2015) 4 SCC 739

4. Sanaullah Khan Vs St. of Bihar, 2013 (81) ACC 302 (SC)

5. Subal Ghorai Vs St. of W.B., (2013) 4 SCC 607

6. Deepak Verma Vs St. of H.P., 2012 (76) ACC 794(SC)

7. Sadhu Saran Singh Vs St. of U.P. & ors., (2016) 4 SCC 357

8. Mukesh Vs St. for NCT of Delhi & ors., AIR 2017 SC 2161

9. Bhagwan Jagannath Markad Vs St. of Mah., (2016) 10 SCC 537

10. Babu Ram Vs St. of U.P., 2002 (2) JIC 649 (SC)

11. Maqbool Vs St. of U.P. & anr., AIR 2018 SC 5101

(Delivered by Hon'ble Anil Kumar Ojha, J.)

Heard Sri Rajesh Kumar Dubey, learned counsel for the appellant, learned A.G.A. for the State and perused the records.

2. Challenge in this Jail Appeal is the judgment and order dated 13.02.2018 passed by Additional Sessions Judge/Special Judge, S.C./S.T. Act, Gautam Budh Nagar in S.T. No. 750 of 2014 (State v. Sunil Prajapati) arising out of Case Crime No. 992 of 2014, under Section 326Ka, 324, 323, 353, 332 & 308 of I.P.C., P.S. Sector 39 Noida, District Gautam Budh Nagar whereby the Learned Additional Sessions Judge/Special Judge, S.C./S.T. Act has convicted and sentenced the appellant under Section 308 I.P.C. four years rigorous imprisonment and Rs. 2000/- fine in default of payment three months additional simple imprisonment; under Section 324 I.P.C. two years of rigorous imprisonment and Rs. 1000/- fine and in default of fine one month simple imprisonment; under Section 326A I.P.C. 10 years rigorous imprisonment and Rs. 10,000/- fine and in default six months additional simple imprisonment; under Section 332 I.P.C. two years rigorous imprisonment and fine of Rs. 2000/- and in default of payment of fine of Rs. 2000/- one month simple imprisonment; under Section 353 I.P.C. one year rigorous imprisonment and Rs. 1000 fine and in default of payment of fine of Rs. 1000/- one month additional simple imprisonment. All the sentences have been ordered to run concurrently.

3. Shorn of unnecessary details, the prosecution case is that the complainant Anil Kumar Sharma lodged an F.I.R. on 20.09.2014 at 16:30 hours against appellant Sunil Prajapati at P.S. Sector 39 Noida, District Gautam Budh Nagar, stating therein that on 20.09.2014 at 11:00 hours, appellant Sunil Prajapati came to the office of the complainant having one plastic jug filled with inflammable substance and poured the same on the injured Jitendra Shandilya and took him out of the office and assaulted on his head several times by brick and iron rod. In the incident, injured Jitendra Shandilya sustained grievous injuries on his head. After beating the Anil Kumar, J.E. and Mithun Operator, appellant fled from there. The appellant has obstructed the government work. Jitendra Shandilya was taken to the Kailash hospital, Sec-27 where he could not be treated properly and then he was brought to Fortis hospital, Sec-62 and was admitted in I.C.U. ward. He received 22 stitches in his head and both eyes were injured and burnt also.

4. On the written report submitted by Anil Kumar Sharma, S.D.O. Electricity Office, a case was registered against the appellant Sunil Prajapati at P.S. Sector 39 Noida, District Gautam Budh Nagar in Case Crime no. 992 of 2014, under Section 326Ka, 324, 323, 353, 332, 308 of I.P.C., P.S. Sector 39 Noida, District Gautam Budh Nagar.

5. Police started investigation, prepared recovery memo of plastic jug and inflammable substance lying on the floor and collected the evidence. Statement of witnesses under Section 161 Cr.P.C. was recorded. After completion of investigation, charge sheet was submitted against the appellant Sunil Prajapati in Case Crime No. 992 of 2014, under Section 326Ka, 324, 323, 353, 332 of I.P.C., P.S. Sector 39 Noida, District Gautam Budh Nagar.

6. The then Chief Judicial Magistrate, Gautam Budh Nagar, on 26.11.2014 committed the case of appellant to the Sessions Court for trial. The Additional Sessions Judge/Special Judge, S.C./S.T. Act on 14.05.2015 charged the appellant under Sections 323, 324, 326Ka, 308, 353 & 332 of I.P.C. Appellant Sunil Prajapati denied the charges and claimed trial.

7. Prosecution was called upon to adduce evidence. Evidence of PW1 Anil Kumar Sharma complainant/informant, PW2 injured Jitendra Shandilya, PW3 J.E. Anil Kumar, PW4 Dr. Amit Saxena, PW5 Dr. Surjeet Singh , PW6 S.O. Shiv Prakash Singh, PW7 Avadhesh Kumar Awasthi, PW8 Naresh Kumar were recorded.

8. Statement of appellant Sunil Prajapati was recorded under Section 313 Cr.P.C., appellant denied the evidence and said he has been prosecuted due to enmity.

9. After hearing learned counsel for the prosecution and defence, the then Additional Sessions Judge/Special Judge, S.C./S.T. Act, Gautam Budh Nagar convicted and sentenced the appellant as above.

10. Learned counsel for the appellant submitted that there is no motive to commit the aforesaid crime, prosecution has not adduced any independent witness to substantiate prosecution version, there is no enmity between the appellant and the injured Jitendra Shandilya. Evidence of the prosecution witnesses is unworthy of credence. It is a case of simple injury. Further submitted that offence under Section 326Ka I.P.C. is not made out against the appellant. There are no criminal antecedents of the appellant, therefore, appellant should be acquitted of the charges leveled against him.

11. Per contra, learned A.G.A. opposed the above submissions put forward by learned counsel for the appellant and contended that the evidence of witnesses of fact is reliable and trustworthy. There is no contradiction between ocular testimony and medical evidence. There is no motive of false implication. The prosecution has proved its case beyond reasonable doubt against the appellant. There is no merit in the appeal and hence, it should be dismissed.

12. PW1 Anil Kumar Sharma is S.D.O. of the Electricity Office situated at 33/11KV, Vidyut Upkhand, Sector-39 Noida, Gautam Budh Nagar. He has supported the prosecution case and has proved the First Information Report Ex. Ka-1. In the cross-examination at page no. 21 of the paper book, this witness has specifically stated that the appellant Sunil Prajapati committed *marpit* with injured Jitendra Shandilya before him in his office. He saved the injured Jitendra Shandilya from the clutches of the appellant Sunil Prajapati, and he did not sustain injury in the alleged incident. The appellant Sunil Prajapati committed *marpit* in the cabin and on the ground also. At page no. 19 of the paper book, this witness has deposed that the appellant Sunil Prajapati beaten the injured Jitendra by brick and iron rod.

Learned counsel for the appellant drew the attention of this Court of some inconsistencies in the statement of PW1 Anil Kumar Sharma, which are of trivial nature. The alleged incident is said to have taken place in the office of this witness at 11:00AM in broad day light, during office

hours. Remaining present in the office during office hours is quite natural.

In view of the above, it is held that this witness was present in the office at the time of alleged incident, he witnessed the incident through his own eyes. The evidence of PW1 is probable and reliable.

13. PW2 Injured Jitendra Shandilya is the injured witness. He sustained injuries in this case. He has stated in his examination-in-chief at page no. 26 of the paper book that the appellant poured acid over his body and thereafter beaten him by bricks and iron rod. In the alleged incident, he sustained injuries over his head and in his eyes. Thereafter, threatening to kill this witness, appellant ran away from there. At page no. 28 of the paper book in his cross-examination this witness has stated that it is true that there was no enmity between him and appellant. On the day of alleged incident also no altercation took place between him and appellant. This witness is the Government servant. He was present in his office at the time of this incident, appellant came there, quarreled with him and beaten him and poured acid over his body. Remaining present in the office during office hours is quite natural. The evidence of PW2 credible and trustworthy.

14. PW3 J.E. Anil Kumar is an employee of the office where the incident took place. In the examination-in-chief at page no. 29 of the paper book, this witness supporting the prosecution case has stated that appellant poured acid over Jitendra Shandilya due to which he started crying, thereafter the appellant beaten him by bricks and iron rod. In the incident, the injured Jitendra Shandilya sustained injuries over his head and in his eyes. This witness has further deposed that when he endeavored to save the injured, appellant Sunil Prajapati beaten him also by kicks and fists. In the cross-examination at page no. 30 of the paper book, this witness has stated that incident took place in the office at 11:00 hours. In cross-examination also nothing prejudicial to prosecution case could be extracted by the defence. Like other two witnesses, remaining present during office hours in the office is natural conduct of this witness. The evidence of PW3 is reliable and worthy of credence.

15. PW4 Dr. Amit Saxena has proved the medical report Ex. Ka-2 of the injured Jitendra Shandilya. This witness found following injuries on the person of the injured:

(1) Lacerated wound on occipital region of approx 7cm X 0.5cm X 0.5cm;

(2) complaint of burn sensation in eyes and upper part of body;

(3) Lacerated wound on head of approx 1cm X 0.5cm X 0.05cm.

This witness has deposed that he kept the injured under observation. Learned counsel for the defence cross-examined this witness extensively, but there is no major contradiction in the evidence of this witness.

16. PW5 Dr. Sarjeet Singh Guglani prepared the discharge card and proved the same as Ex. K-3. He has also prepared supplementary report Ex. Ka-9. He has specifically stated in his evidence at page no. 36 of the paper book that due to acid both eyes were injured and there was injury on his head also. Due to acid there was burn over face, stomach and legs. There were sufficient burn in the red side of the cornea. All the injuries were of grievous nature. The eyes of the injured can be saved owing to timely treatment but injuries of the eyes were grievous in nature.

17. Prosecution case is that appellant Sunil Prajapati came to the office of injured at 11:00AM on 20.09.2014 and poured inflammable substance over his body, beaten him by brick and iron rod several times. In the alleged incident injured Jitendra Shandilya sustained grievous injuries. His head was lacerated at several places. Appellant committed *marpit* with other employees of the office. Injured was taken to hospital for treatment. PW4 Dr. Amit Saxena & PW5 Dr. Sarjeet Singh Guglani corroborated the evidence of injured and eye witnesses. There was acid injury in the eyes and body of the injured. There was lacerated wound over the head of the injured which can be caused by hard and blunt object like iron rod and bricks. Thus, there is no contradiction between the medical and oral evidence. Evidence of injured is corroborated by the evidence of eye witnesses and medical evidence.

18. Learned counsel for the appellant submitted that the appellant has no motive to cause injuries to the injured Jitendra Shandilya so case of the prosecution is doubtful.

I do not agree with the above contention of the learned counsel for the appellant because it is settled principal of law that to establish an offence by an accused motive is not required to be proved when case is based on eye witness account.

In ***Thaman Kumar v. State of Union Territory of Chandigarh 2003 (3) SCR 1190,*** the Hon'ble Apex Court has held as follows:

*"There is no such principle or rule of law that where the prosecution fails to prove the motive for commission of the crime, it must necessarily result in acquittal of the accused. Where the ocular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence, a finding of guilt can safely be recorded even if the motive for the commission of the crime has not been proved. In State of Himachal Pradesh v. Jeet Singh, [1999] 4 SCC 370 it was held that no doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no offence was committed if the prosecution failed to prove the precise motive of the accused to commit it, as it is almost an impossibility for the prosecution to unreveal the full dimension of the mental disposition of an offender towards the person whom he offended. In Nathuni Yadav and Ors. v. State of Bihar and Anr:, [1998] 9 SCC 238 it was held that motive for doing a criminal act is generally a difficult area of prosecution as one cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act and such impelling cause need not necessarily be proportionately grave to do grave crimes. It was further held that many a murders have been committed without any known or prominent motive and it is quite possible that the aforesaid impelling factor would remain undiscoverable. In our opinion, in the facts and circumstances of the case, the absence of any evidence on the point of motive cannot have any such impact so as to discard the other reliable evidence available on record which unerringly establishes the guilt of the accused."*

Following other authorities of the Hon'ble Apex Court may be also be referred on the above point.

***Saddik v. State of Gujarat, (2016) 10 SCC 663; Nagaraj v. State, (2015) 4 SCC 739; Sanaullah Khan v. State of Bihar, 2013 (81) ACC 302 (SC); Subal Ghorai v. State of W.B., (2013) 4***

***SCC 607; Deepak Verma v. State of HP, 2012 (76) ACC 794(SC).***

The argument of learned counsel for the appellant that prosecution has not proved the motive, hence, prosecution case is doubtful, is accordingly rejected.

19. Learned counsel for the appellant submitted that prosecution has not produced any independent witness in support of its case, hence, prosecution case is doubtful, I am unable to agree with the above contention of the learned counsel for the appellant. Non examination of the independent witness is not a ground to doubt the prosecution case.

The Hon'ble Apex Court has held that the prosecution case cannot be doubted on the ground of non examination of independent witnesses.

In **Sadhu Saran Singh v. State of U.P. & Ors. (2016) 4 SCC 357**, the Hon'ble Apex Court has held as follows:

*"As far as the non-examination of any other independent witness is concerned, there is no doubt that the prosecution has not been able to produce any independent witness. But, the prosecution case cannot be doubted on this ground alone. In these days, civilized people are generally insensitive to come forward to give any statement in respect of any criminal offence. Unless it is inevitable, people normally keep away from the Court as they feel it distressing and stressful. Though this kind of human behaviour is indeed unfortunate, but it is a normal phenomena. We cannot ignore this handicap of the investigating agency in discharging their duty. We cannot derail the entire case on the mere ground of absence of independent witness as long as the evidence of the eyewitness, though interested, is trustworthy".*

Following authorities of the Hon'ble Apex Court may be also be referred on the above point: ***Mukesh v. State for NCT of Delhi & Ors. AIR 2017 SC 2161, Bhagwan Jagannath Markad v. State of Maharashtra, (2016) 10 SCC 537, Babu Ram v. State of U.P. 2002 (2) JIC 649 (SC).***

20. Learned counsel for the appellant further submitted that learned trial court has wrongly convicted the appellant under Section 326 A IPC. He submitted that in this case, there is no grievous injury so appellant could not have been convicted under Section 326A I.P.C. He placed reliance on the judgment and order passed by Hon'ble Apex Court in ***Maqbool v. State of U.P. and another AIR 2018 SC 5101,*** relevant para of which is quoted hereinbelow:

*16. As we have already discussed above, it is not the percentage or gravity of injury, which makes the difference. Be it simple or grievous, if the injury falls under the specified types under Section 326A on account of use of acid, the offence under Section 326A is attracted. Section 326B could be attracted in case the requirements specified are met on an attempted acid attack. Therefore, both the High Court of Rajasthan in Laddu Ram (supra) and High Court of Madras in M. Siluvai Murugan @ Murugan (supra)do not lay down the correct position of law and they are overruled.*

I have gone through the above paragraph. From the judgment cited by learned counsel for the appellant, it is clear that it is not the percentage or gravity of injury which makes the difference, be it simple or grievous, if the injury falls under the specified types under Section 326A on account of use of acid, the offence 326A

I.P.C. is attracted. Section 326B I.P.C. can be attracted in a case the requirements specified are met on an attempted acid attack. Now it would be useful to refer the provisions of Section 326A of I.P.C. which is quoted hereinbelow:

*"326. Voluntarily causing grievous hurt by use of acid, etc.--Whoever causes permanent or partial damage or deformity to, or bums or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid1 on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine;*

*Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim;*

*Provided further that any fine imposed under this section shall be paid to the victim."*

From the perusal of the aforesaid provision of Section 326A I.P.C., it is clear that if a person causes burns by throwing acid, the offence is covered under Section 326A I.P.C. So far as the facts of the present case are concerned, PW2 injured Jitendra Shandilya has specifically stated in his examination-in-chief at page no. 26 of the paper book that appellant poured acid over the body of injured Jitendra Shandilya and beaten him by bricks and iron rod. In the incident, he sutained injuries over his head, due to acid right eye of this witness was injured. PW5 Dr. Sarjeet Singh Guglani has stated in his examination in chief at page no. 36 of the paper book that there was acid burn over the face, stomach and legs of the injured. The right eye cornea was also burnt. As per the supplementary report, the injury of the injured was grievous in nature. Thus, from the evidence of PW2 Jitendra Shandilya, PW5 Dr. Sarjeet Singh Guglani offence under Section 326A I.P.C. is clearly established.

21. Learned counsel for the appellant further submitted that there was no enmity between the appellant and the injured. As there was no enmity between the appellant and injured, so possibility of false implication is also ruled out.

22. Learned counsel for the appellant lastly submitted that appellant is in jail since 21.09.2014 so lenient view should be taken in the matter.

I am unable to agree with the above contention of the learned counsel for the appellant because from the evidence, it is established that the appellant forcibly entered into the office of complainant and beaten Jitendra Shandilya and poured acid over his body without any reason, the appellant committed *marpit* with other employees of the office. It was a government office where the alleged incident took place, therefore, the appellant also created obstruction in discharging the duties by the government employees.

23. Upshot of the above discussion is that prosecution has established charges under Sections Section 326Ka, 324, 323, 353, 332 & 308 of I.P.C., against the appellant beyond reasonable doubt. Appeal lacks merit and deserves to be dismissed.

24. Accordingly, this appeal is **dismissed.**

25. Copy of this judgment be certified to the court below for compliance. Lower court record be transmitted to the District Court, concerned.

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**(2021)10ILR A105**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 30.07.2021**

**BEFORE**

**THE HON'BLE AJAI TYAGI, J.**

Criminal Appeal No. 901 of 2017

**Manoj Kumar Seth ...Appellant(In Jail)**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellants:**
Sri Dinesh Mishra, Sri Satish Sharma, Sri Ravish Kumar Mal

**Counsel for the Respondent:**
A.G.A.

**(A) Criminal law - appeal against conviction - The Indian Penal Code, 1860 - Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 8/21, section 42 - power of entry , search , seizure and arrest without warrant or authorisation , Section 50 - conditions under which search of persons shall be conducted - provision of Section 50 of the Act stands attracted in case of personal search and not in the case where the search was given effect otherwise than from the personal search of the accused. (Para - 7,8)**

Contraband (Heroin) recovered from a bag - in day time at 2:50 p.m. - at a crowded place - attached to the motor-cycle - on which the accused - appellant was riding - trial court held - compliance of section 50 not mandatory - conviction - hence appeal.

**HELD:-** Section 50 of the Act patently has no application in this case because the recovery of Heroin was not from the person of the appellant, but from the bag attached to the motor-cycle. Trial Court rightly held in the impugned judgment that Section 50 of the Act, is not at all applicable in the present case. Appellant has been rightly convicted and sentenced by learned trial court.(Para - 8,9,15 )

**Criminal Appeal dismissed.** (E-7)

**List of Cases cited:-**

1. St. of Punjab Vs Baldev Singh, (1999) 6 SCC 1721

2. Madan Lal & anr. Vs St. of H.P,, 2003 (47) ACC 763

3. Megh Singh Vs St. of Punj., 2003 Cr.LJ 4329

4. St. of H.P. Vs Pawan Kumar, 2005 (52) ACC 710

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred by the appellant against the judgment and order dated 4.11.2016, passed by learned Additional Sessions Judge, Allahabad, in Special Trial No.121 of 2009 (*State vs. Manoj Kumar*) arose out of Case Crime No.23 of 2009, under Section 8/21 Narcotic Drugs and Psychotropic Substances Act, 1985 (herein after referred to as 'the Act, 1985'), Police *Station-Mutthiganj, District-Prayagraj*, by which appellant was convicted for 15 years rigorous imprisonment and fine of Rs.1,00,000/- *(one lakh).*

2. The relevant facts necessary for disposal of this appeal are as under:

(i) On 30.01.2009, *Dhananjay Mishra*, Sub-Inspector, In-charge-SOG along with other police-personnel reached at *Kotha-Parcha near Dot-ka-pul* within area of P.S.-*Mutthiganj*, where SHO, *P.S.*-

*Muthiganj* was already present with other police-personnel. At that time, informer told police-party that a person is coming from the side of *Arya Kanya Degree College Crossing, Naini* on stolen motor-cycle bearing No.UP-70-Y-8695. On receiving this information, police-party led by Incharge-SOG and SHO, *Mutthiganj* went to *Arya Kanya Degree College*. Near the above college, informer pointed out the said motor-cycle. On trying to stop him by police, the person on motor-cycle tried to escape by turning the motor-cycle back, but he was caught by the police at 2:50 p.m. On inquiry, he told his name as *Manoj Kumar Seth s/o Late Bechan Lal Seth*. A fake registration certificate was recovered from his pocket. While searching the accused and motor-cycle, Heroin was recovered in a packet from the bag attached with the motor-cycle. Police gave option to the accused for his search before a Gazetted Officer or a Magistrate, but accused declined the offer.

(ii) The recovered contraband (Heroin) was weighted by the police and its weight was found 1.110 kg. Police asked the public to become witness on the recovery memo, but no one was ready to become witness. Out of recovered Heroin, 5 gm. was separated and it was sealed on the spot as sample. This sample was sent to Forensic Science Laboratory for chemical examination. Chemical Examination Report was received from the lab (Ex.ka-3) and it was reported in aforesaid report that the sample was Heroin. The accused-appellant was charged with the contravention of Section 8 read with section 21 of the Act and was put for trial. The Additional Sessions Judge, Allahabad, convicted him of the charges levelled against him. The accused appellant carried an appeal to this Court against his conviction.

3. Heard learned counsel for the accused-appellant, learned AGA for the State and perused the record.

4. The very first question argued by learned counsel for the appellant was that there was contravention of Section 50 of the Act inasmuch as the offer made to the accused for searching in presence of a Gazetted Officer or a Magistrate and he declined the offer and the same was not corroborated by any independent witness. It was vehemently submitted by learned counsel for the appellant that the place of occurrence was a crowded place and occurrence is said to have taken place in the day-light at 2:50 p.m., but there was no public witness of the occurrence.

5. As far as the compliance of Section 50 of the Act is concerned, it would relevant to quote Section 50 of the Act for ready reference:

*50. Conditions under which search of persons shall be conducted.--*

*(1) When any officer duly authorized 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. 1[(5) When an officer duly authorized 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.]*

6. The Hon'ble Apex Court in **State of Punjab vs. Baldev Singh** (1999) 6 SCC 172, held as under:

*"12. On its plain reading, Section 50 of the Act, would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search contraband under the NDPS Act, is also recovered, the requirements of Section 50 of the Act are not attracted."*

7. Apart from this, it has also been held by Hon'ble Apex Court that the provision of Section 50 of the Act stands attracted in case of personal search and not in the case where the search was given effect otherwise than from the personal search of the accused. Following cases were relied:

***1. Madan Lal and another vs. State of Himachal Pradesh,*** 2003 (47) ACC 763;

***2. Megh Singh vs. State of Punjab,*** 2003 Cr.LJ 4329; and

***3. State of Himachal Pradesh vs. Pawan Kumar,*** 2005 (52) ACC 710.

8. In the aforesaid judgments, it has been held by the Hon'ble Apex Court that Section 50 of the Act, applies only in case of personal search of a person. It does not extend to search of a vehicle or container or a bag or premises. In the present case, the contraband (Heroin) was recovered from a bag attached to the motor-cycle on which the appellant was riding. Hence, it was not a case of personal search.

9. Moreover, in the case of *Pawan Kumar* (supra) wherein meaning of the word 'person' has been discussed, the word 'person' would mean a human-being with appropriate covering and clothing and also footwear. A bag, briefcase or any such article or container etc., can, under no circumstances, be treated as a body of human-being. Hence, Section 50 of the Act patently has no application in this case because the recovery of Heroin was not from the person of the appellant, but from the bag attached to the motor-cycle. Hence, the compliance of Section 50 of the Act, was not mandatory. Learned Trial Court rightly held in the impugned judgment that Section 50 of the Act, is not at all applicable in the present case.

10. It is true that the recovery of Heroin was made from the possession of

accused-appellant in day time at 2:50 p.m. at a crowded place, but there are no public witnesses. It is an admitted fact that no independent witness joined in this case. Witnesses of fact examined in this case PW1 to PW5 categorically stated in their statements that they tried their best to join independent witness from the public on the spot, but all the persons refused to become witnesses. Learned Trial Court opined in this regard that accused appellant was caught by the combined team of SOG, *Prayagraj* and Police-personnel of P.S.-*Mutthiganj*. Accused was arrested as per rules. In his statement before trial court under Section 313 Cr.P.C. Accused-appellant has stated that members of police party used to make illegal demand of money from him and due to not giving the money, he was falsely implicated in the case. It was a burden on accused-appellant to prove the above statement, but there is not even an iota of evidence in this regard. Accused-appellant has not put forward any sort of evidence, which could show that police party was on enmity or he was having hostile relations with the police-personnel. Five witnesses of fact were produced by the prosecution, but on their cross-examination also, defence could not extract any sort of evidence indicating any hostility of police-party with the appellant. Hence, there was no material on record to show that the public witnesses were withheld or suppressed by the prosecution with an ulterior motive and it alone could not extend any benefit in favour of accused-appellant.

11. Learned counsel for the appellant advanced argument on the point of Section 42 of the Act also. He has submitted that there is no compliance of Section 42 of the Act by the police at the time of alleged search and arrest in the case. Before making arrest of the accused, police did not take down the information of informer in writing and did not send a copy thereof to his immediate superior officer within 72 hours of the arrest. But, in my opinion, Section 42 of the Act has no applicability in this case because the police party did not get any information from the informer regarding the accused having possession of some contraband. But the police-party only got information from the informer that accused is coming from Naini towards *Arya Kanya Degree College* crossing on a stolen motor-cycle. Contraband Heroin was recovered by the police at the time of searching of motor-cycle from the bag attached to it for which the police did not get any prior information, therefore, in this case, Section 42 of the Act has no applicability and accused cannot be given any benefit of that.

12. It is also argued by learned counsel for the appellant that there was delay in filing first information report in this case. This Court is unable to agree with this argument as the record shows that occurrence took place at 2:50 p.m. and chick FIR (Ex.ka5) shows that case was registered against the appellant on the same day at 4:30 p.m., i.e., after 1:40 hours after the occurrence while the distance from the place of occurrence to the police station is shown one and a half km. It is quite natural that police had taken some time on the place of occurrence for preparing recovery memo etc. Hence, there cannot be said any delay in lodging the FIR by police after arrest of the accused-appellant.

13. Lastly, it was argued by learned counsel for the appellant that there was no criminal history of accused, but I am unable to agree with this argument as the learned trial court has convicted the

accused-appellant after analyzing all the evidence available on record. Hence, if accused has no criminal history, it does not make any difference on the merit of the case.

14. No other argument was advanced from the side of appellant.

15. In view of above, I reach on definite conclusion that the appellant has been rightly convicted and sentenced by learned trial court.

16. The present appeal lacks merit and is, accordingly, **dismissed.**

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**(2021)10ILR A109**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 26.10.2021**

**BEFORE**

**THE HON'BLE PANKAJ BHATIA, J**

Criminal Appeal No. 1822 of 2016

**Ram Shankar ...Appellant**

**Versus**

**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Ram Bux Rawat, Amrendra Singh, Anjali Dubey, Arif Khan, Awadhesh Kumar Tiwari, Azmi Yousuf, Kuldeep Kumar Awasthi, Rajiv Mishra, Soniya Mishra

**Counsel for the Respondent:**
G.A.

**(A) Criminal Law - Appeal against conviction - The Indian Penal Code, 1860 - Section 272 - Adulteration of food or drink intended for sale - U.P. Excise Act ,1910 - Section 3(9) , 60(2) - Denatured - rendered unfit for human consumption , noxious - adding of a substance with an intent to make it poisonous or harmful .**

500 gms of urea and 105 liter of country liquor - recovered from the possession of the appellant - sample send for forensic examination - based upon the evidence - impugned judgement passed - holding appellant guilty - under section 272 I.P.C. as well as under section 60(2) of the Excise Act - conviction - hence appeal.

**HELD:-**No material on record either before this Court or before the Trial Court to come to a conclusion that the liquor recovered was 'denatured'. In the absence of any material to demonstrate that the country liquor so recovered was rendered 'noxious'/'denatured' and was intended for sale, the conviction of the appellant under section 272 I.P.C. cannot be justified. Conviction of the appellant under section 60(2) of the U.P. Excise Act cannot be faulted with.(Para - 11)

**Criminal Appeal disposed off.** (E-7)

**List of Cases cited:-**

1. Ashok Vs St. of U.P., Criminal Appeal No.5815 of 2019

2. St. Vs Asgar & anr. , Government Appeal No.156 of 2019

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Ms. Soniya Mishra learned counsel for the appellant and Sri Vivek Gupta, learned AGA for the State.

2. The present criminal appeal has been filed against the judgment and order dated 16.11.2016 passed by the learned Additional Sessions Judge, Court no.6 SC/ST Act, Lakhimpur Kheri in Sessions Trial No.527 of 2013 whereby the appellant has been convicted under section 60(2) of the Excise Act and sentenced for a period of one year along with fine of Rs.1000/-

and further the appellant has been convicted under section 272 I.P.C. with sentence of ten years and a fine of Rs.10,000/-.

3. The facts, in brief, leading to the passing of the impugned judgment is that on 26.09.2010, an information was received by the S.I. Uttam Singh Rathaur and Vinod Kumar to the effect that one Rama Shanker was manufacturing illegal country liquor at his house. Based upon the said information, the said two persons left towards the house of Rama Shanker, on the way they convinced the strangers to become panch, which was refused by them. However, the said two persons went to the house of Rama Shanker wherein they saw that from the house smoke was coming out. On going into the house, they saw that one person sitting besides the stove (Chullha) which was on fire. On the said stove, two utensils made of mud were kept. On questioning, the said person disclosed his name as Rama Shanker aged about 45 years and from the spot 500 gms of Urea was recovered as well as country liquor which was being prepared was also recovered. It was recorded that in the statement given by Rama Shanker, he admitted that he used Urea for manufacture of the country liquor. A sample of the said liquor was drawn and was sent for forensic examination and the case was registered against the appellant.

4. During the trial, four witnesses were produced by the prosecution, two of whom were the part of the raiding party. In defense the appellant also produced two witnesses. PW-1 in his statement reiterated the version to the effect that on raiding the house of Rama Shanker, country liquor was recovered and he had admitted to adding Urea to the said country liquor. PW-2 also supported the raid. The report of the Forensic Science Laboratory was also cited before the the trial court, which was to the effect that from the sample sent and analyzed 3.4% alcohol was found and urea was also present in the said sample. Based upon the said evidence, the impugned judgment was passed holding the appellant guilty under section 272 I.P.C. as well as under section 60(2) of the Excise Act.

5. The counsel for the appellant argues that the judgment in question is bad in law for more than one reason. He argues from the entire evidence on record, even if admitted to be true, there was no averment or evidence to the effect that the manufactured liquor was intended for sale. He further argues that there is no material on record to suggest that adding of Urea makes the drink (in the present case country liquor) 'noxious'. He has placed the reliance of the provisions of section 272 I.P.C., which is as under:

***272. Adulteration of food or drink intended for sale.?****Whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.*

The U.P. amendment to the said section is also as under :

*Uttar Pradesh - In section 272 for the words 'shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both" the following shall be substituted, namely:-*

*"shall be punished with imprisonment for life and shall also be liable to fine:*

*Provided that the court may, for adequate reason to be mentioned in the judgment, impose a sentence of imprisonment which is less than imprisonment to life."*

6. In the light of the statutory provision, as quoted above, counsel for the appellant argues that there was no evidence whatsoever to the effect that the drink (in the present case country liquor), was rendered noxious by the use of Urea and further there was no material whatsoever to establish that there was any intent of selling the said manufactured liquor by the appellant so as to attract the rigour of section 272 IPC. He further argues that the appellant is in custody since 16.11.2016 after the judgment was given against him and had also suffered the custody during the trial of approximately one year. Thus, he argues that the appellant has already undergone six years of imprisonment and the appeal should be allowed on the sentence undergone.

7. Counsel for the appellant places reliance on the two judgments of this Court in the case of Ashok vs. State of U.P. passed in Criminal Appeal No.5815 of 2019 decided on 05.01.2021 as well as in the case of the State vs Asgar and another passed in Government Appeal No.156 of 2019 decided on 19.08.2019.

8. Learned AGA Sri Vivek Gupta argues that 105 liter of country liquor was recovered from the possession of the appellant and thus, the punishment awarded is justified. He argues that the nature of the offence against the appellant is very serious and the acts done by the appellant is a crime against the whole society and no leniency needs to be shown towards the appellant and the appeal deserves to be dismissed.

9. After hearing the counsel for the parties this court raised a query to the learned AGA with regard to what was the material available before the trial court in the form of evidence to allege and establish that the country liquor seized from the possession of the appellant was intended for sale. After going through the entire judgment and the evidence referred, to leading to the conviction of the appellant by means of the impugned judgment, there is no whisper with regard to the intention of the appellant to sell the alleged country liquor. Even the recovery so made from the appellant do not point out to recovery of any packaging material in the form of bottles, labels etc. to demonstrate that the alleged country liquor was intended for sale. There is no evidence on record to establish that adding of Urea to the liquor would render the same noxious for human consumption. Although the word 'noxious' is not defined in the U.P. Excise Act or even in the I.P.C., the word 'noxious' on its plain reading means adding of a substance with an intent to make it poisonous or harmful.

10. Section 3(9) of the U.P. Excise Act defines 'denatured' to mean anything which is rendered unfit for human consumption in such manner as may be prescribed by the State Government by a notification on that behalf. The definition of word 'denatured' is as under :

***"Denatured"-*** *"Denatured" means rendered unfit for human consumption in such manner as may be prescribed by the State Government by notification in this behalf. When it is proved that any spirit contains any quantity of any substance prescribed by the State Government for the purpose of denaturation the court may presume that such spirit is or contains or has been derived from denatured spirit.*

11. To come to a conclusion that the liquor recovered from the possession of the appellant would fall within the definition of section 3(9) of the U.P. Excise Act, it had to be alleged and established that adding of Urea was contrary to the notification or that the said Urea was in excess of what was prescribed by any notification so as to render the country liquor as 'denatured'. There is no such material on record either before this Court or before the Trial Court to come to a conclusion that the liquor recovered was 'denatured'. In the absence thereof, it could not be said that the liquor so recovered was rendered 'noxious' for human consumption and further there is no material to implicate the appellant under section 272 of I.P.C. as there was no material to come to the conclusion that the said country liquor was intended for sale. In the absence of any material to demonstrate that the country liquor so recovered was rendered 'noxious'/'denatured' and was intended for sale, the conviction of the appellant under section 272 I.P.C. cannot be justified. However, the conviction of the appellant under section 60(2) of the U.P. Excise Act cannot be faulted with. In view of the evidence on record as the appellant has already undergone more than six years in imprisonment, the appeal is **disposed off** with direction that the appellant shall be released forthwith on the sentence already undergone.

12. Office is directed to send a copy of this judgment along with the lower court record to the court concerned forthwith for necessary information and compliance.

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**(2021)10ILR A112**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 23.09.2021**

**BEFORE**

**THE HON'BLE AJIT SINGH, J.**

Criminal Appeal No. 1937 of 1992

**Chandru & Anr. ...Appellants(In Jail)**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellants:**
Sri S.K.S. Chauhan

**Counsel for the Respondent:**
A.G.A., Sri Sharad Kumar Srivastava

**(A) Criminal Law - appeal against conviction - The Indian Penal Code, 1860 - Sections 307/34 and 323/34 - *Principle of proportionality* between the crime committed and the penalty imposed are to be kept in mind - operating the sentencing system - law should adopt corrective machinery or deterrence based on factual matrix - It is the duty of every court to award *proper sentence* having regard to nature of offence and manner of its commission - courts must not only keep in view the right of victim of crime but also society at large - criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. (Para -13,15 )**

Complainant and her husband - assaulted by accused/appellants - having pharsa and lathi in their hand - husband of complainant received injury - caused by pharsa - both accused persons assaulted injured - trial court convicted accused persons - appellants does not propose to challenge the impugned judgement - prayed for modification of order of sentence - period already undergone by appellant - hence appeal.

**HELD:-**Appellants have realized the mistake committed by them and are remorseful to their conduct and feel it necessary to serve with their polite and cooperative behaviour to the society which they belong to and now they want to transform themselves into a law abiding citizen, they should be given a chance to reform themselves and extend their better contribution

to the society to which they belong to. Court deems it fit to alter the conviction from section 307/34 I.P.C. to section 324 I.P.C.(Para - 16,17)

**Criminal Appeal partly allowed.** (E-7)

**List of Cases cited:-**

1. Mohd. Giasuddin Vs St. of A.P., AIR 1977 SC 1926

2. Sham Sunder Vs Puran, (1990) 4 SCC 731

3. St. of M.P. Vs Najab Khan, (2013) 9 SCC 509

4. Jameel Vs St. of U.P., (2010) 12 SCC 532

5. Guru Basavraj Vs St. of Karnatak, (2012) 8 SCC 734

6. Deo Narain Mandal Vs St. of U.P., (2004) 7 SCC 257
7. Shyam Narain Vs St. (NCT of delhi), (2013) 7 SCC 77

8. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

9. St. of Punjab Vs Bawa Singh, (2015) 3 SCC 441

10. Raj Bala Vs St. of Har., (2016) 1 SCC 463

11. Kokaiyabai Yadav Vs St. of Chhattisgarh, (2017) 13 SCC 449

12. Jameel Vs St. of U.P. ,(2010) 12 SCC 532

13. Guru Basavraj Vs St. of Kar., (2012) 8 SCC 734

14. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

15. St. of Pun. Vs Bawa Singh, (2015) 3 SCC 441

16. Raj Bala Vs St. of Har., (2016) 1 SCC 463

17. Ravada Sasikala Vs St. of A.P., AIR 2017 SC 1166

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

1. This criminal appeal has been filed against the judgement and order dated 28.10.1992 passed by Special Judge, Fatehpur in S.T. No. 70 of 1989, under Sections 307/34 and 323/34 I.P.C., P.S. Bindki, district-Fatehpur, whereby learned Judge convicted and sentenced the appellant to 4 years rigorous imprisonment under Section 307 and 307/34 I.P.C. with a fine of Rs. 500/- each, six months imprisonment under Section 323/34 and 323 I.P.C.

2. Both the sentences shall run concurrently.

3. The prosecution story in brief is that on 5.1.1988 the complainant and her husband Kali were returning back from Bindi Bazar to their village and when they reached near village-Darveshabad both the accused had assaulted them. Chandu was having a pharsa in his hand and other accused-appellant Jokhu was having lathi in his hand. Upon hearing the hue and cry Cheda Lal, Chunbad, Uma Shankar and Kallu, who were residents of the village, reached at the spot. On their exhortation, both the accused-appellants ran away from the place of occurrence. The husband of the complainant Kalideen had received injury, which was caused by 'pharsa'. The injured was taken to the hospital and during medical examination a fracture was found in his head.

4. As the case was exclusively triable by the Court of Sessions, learned Magistrate committed the case to the Court of Sessions and learned Additional Sessions Judge, Fatehpur framed the charge against the appellants under Sections 307/34 and 323/34 I.P.C. to which the appellants pleaded not guilty and claimed to be tried.

5. To bring home guilt of the appellants, the prosecution examined four witnesses. PW1 Kalideen, PW2 Shivliya, PW3 Cheda Lal and PW4 Dr. Prem Singh. All the witnesses have specifically stated that both the accused persons had assaulted the injured and the trial court after anylising the evidence on record convicted the accused persons as aforesaid.

6. At the very outset, learned counsel for the appellants, on instructions, stated that he does not propose to challenge the impugned judgement and order on its merits. He, however, prayed for modification of the order of the sentence for the period already undergone by the appellant.

7. In furtherance to his submission, the learned counsel for the accused-appellants submits that the incident had taken place in the year 1988 and the accused-appellants were convicted in the year 1992. Accused-appellant no. 1, Chandu was 40 years of age and other accused Jokhu was 25 years of age respectively at the time of incident and at present the appellant no. 1 Chandu is more than 70 years of age and other accused Jokhu is more than 55 years of age at present. He also submits that both the accused-appellants are absolutely innocent and they had not intended to assault but it happened at the spur of moment without any premeditation due to an altercation that took place between the injured and the accused-appellants. In this incident the accused persons also suffered injuries. It is also argued that although the doctor had opined that frontal bone of the injured was fractured, yet before Court in his statement he did not depose that the injury sustained by the injured was fatal to life. He also submits that the medical evidence was not such which could make it out an offence against the accused appellants to be punishable under Section 307 I.P.C., still the accused appellants were convicted under Section 307/34, 323/34 IPC and they were subjected to serve out the sentence so awarded by the impugned judgment. It is also relevant to bring on record that ten days imprisonment has already been undergone by them during trial and after conviction. No case was to be made out under Section 307 IPC, but at the most it was squarely covered under Section 324 I.P.C. as the ingredients of an offence punishable under Sections 307/34 IPC were not present in this matter nor it was proved by the prosection to be a case made out under Section 307/34 IPC beyond reasonable doubt and the offence under Section 307 or 307/34 IPC is made out only if the injuries sustained by the injured were likely to cause death. Since this was not the case made out here from the medical evidence, therefore, the offence, if any, will be covered under Section 324 I.P.C. Further submission is that it was the first offence of the accused and after conviction the accused had not indulged in any other criminal activity. He next submits that although the trial court has convicted the present accused on the basis of mere conjuncture while the appellants are absolutely innocent and has been falsely implicated in this case with the ulterior intention of harassing him. Further submission is that there is no bread earner in the family of the appellant. He also submits that on the question of legality of sentence he is not pressing this appeal and only pressing on the quantum of sentence and he has prayed for taking a lenient view considering the age of the accused and their age related ailments.

8. Learned A.G.A. has vehemently opposed the submission made by learned counsel for the appellant. He has however, submits that if slight reduction in sentence is made, he has no objection.

9. I have perused the entire material available on record and the evidence as well as judgment of the trial court. The learned counsel for the accused-appellants does not want to press the appeal on its merit and requests to take a lenient view of the matter.

10. In ***Mohd. Giasuddin Vs. State of AP, AIR 1977 SC 1926***, explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization.Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

11. In ***Sham Sunder vs Puran, (1990) 4 SCC 731***, where the high court reduced the sentence for the offence under section 304 part I into undergone, the supreme court opined that the sentence needs to be enhanced being inadequate. It was held:

"The court in fixing the punishment for any particular crime should take into consideration the nature of offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of offence."

12. In ***State of MP vs Najab Khan, (2013) 9 SCC 509,*** the high court, while upholding conviction, reduced the sentence of 3 years by already undergone which was only 15 days. The supreme court restored the sentence awarded by the trial court. Referring the judgments in ***Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734,*** the court observed as follows:-

"In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of court to award proper sentence having regard to the nature of offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of victim of the crime but also the society at large while considering the imposition of appropriate punishment."

13. Earlier, "Proper Sentence" was explained in ***Deo Narain Mandal Vs. State of UP (2004) 7 SCC 257*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the principle of proportionately. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

In subsequent decisions, the supreme court has laid emphasis on proportional sentencing by affirming the doctrine of proportionality. In ***Shyam Narain vs State (NCT of delhi), (2013) 7 SCC 77,*** it was pointed out that sentencing for any offence has a social goal. Sentence is to be imposed with regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of just punishment is that the society may not suffer again by such crime. The principle of proportionality between the crime committed and the penalty imposed are to be kept in mind. The impact on the society as a whole has to be seen. Similar view has been expressed in ***Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463.***

14. In ***Kokaiyabai Yadav vs State of Chhattisgarh(2017) 13 SCC 449***, it has been observed that reforming criminals who understand their wrongdoing, are able to comprehend their acts,have grown and nartured into citizens with a desire to live a fruitful life in the outside world, have the capacity of humanising the world.

15. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166,*** the Supreme Court referred the judgments in ***Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734, Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463*** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of

law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system."

16. Considering the facts and circumstances of the case and the substantive period already undergone by the appellants in this case and the fact that the appellants are old and aged persons; there is no bread-earner in the family and by so far they have realized the mistake committed by them and are remorseful to their conduct and feel it necessary to serve with their polite and cooperative behaviour to the society which they belong to and now they want to transform themselves into a law abiding citizen, I am of the considered opinion that they should be given a chance to reform themselves and extend their better contribution to the society to which they belong to.

17. Considering the facts and circumstances of the case, considering the evidence available on record and considering the nature of injury, this Court deems it fit to alter the conviction from section 307/34 I.P.C. to section 324 I.P.C.

18. Consequently, taking into consideration the period already undergone in prison by the appellants in this case as well as considering that they have suffered physical and mental agony of trial and after conviction for a long period of about 30 years, the sentence awarded to them under Section 307/34 is converted under Section 324 I.P.C with fine of Rs. 5000/- each.

19. Accused-appellants are directed to deposit the fine of Rs. 5,000/-each before learned lower court within three months from the date of passing of the judgement, the entire amount deposited by the appellants shall be paid to the injured, if he is alive and in case he is dead then it would be paid to his legal heirs and in default of payment of fine as directed above, they shall undergo simple imprisonment for a period of fifteen days.

20. Appeal is partly allowed in the above terms and surety bonds of the sureties are discharged.

21. Office is directed to transmit a copy of this order to the learned Sessions Judge, Allahabad for compliance and compliance report be submitted to this Court also.

22. Office is also directed to send back the record of the trial court immediately.

23. Office is directed to transmit the lower court record along with a copy of this judgment to the learned court below for information and necessary compliance as warranted.

24. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad, self attested by the learned counsel for the applicant alongwith a self

attested identity proof of the said persons (preferably Aadhar Card) mentioning the mobile number (s) to which the said Aadhar Card is linked before the concerned Court/Authority/Official.

25. 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.

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**(2021)10ILR A118**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 07.10.2021**

**BEFORE**

**THE HON'BLE ANJANI KUMAR MISHRA, J.**
**THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.**

Criminal Appeal No. 2667 of 1988

**Nizam ...Appellant(In Jail)**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Sri Lal Ji Chaudhary A.C.

**Counsel for the Respondent:**
A.G.A.

**A. Criminal Law -Code of Criminal Procedure, 1973-Section 374(2) & Indian Penal Code,1860-Section 302-challenge to-conviction-witnesses PW-1, PW2, PW3 statement corroborated by the medical evidence-accused stabbed the deceased with knife-knife was recovered at the instance of accused from the chappar of co-accused-knife was blood stained-report of forensic examination corroborates the prosecution case-statement of deceased reliable u/s 32 of The evidence act- prosecution evidence proves the guilt of the accused-no illegality in the findings recorded by the trial court.(Para 1 to 18)**

**B. Circumstantial evidence-Where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of accused. 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. the instant case is based on ocular testimony, not on circumstantial evidence.(Para 16)**

**C. It is settled principle of law that oral testimony of a witness cannot be outrightly rejected merely on the ground that he is an interested or related witness. it requires cautious scrutiny. Some minor contradictions or discrepencies are natural but if they inspire confidence, the statements of witnesses cannot be discarded on some minor contradictions. (Para 13)** (E-6)

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri Lal Ji Chaudhary, learned Amicus Curiae for the appellant, learned A.G.A. for the State and perused the record.

2. This criminal appeal has been filed against the judgment and order dated 16.11.1988 passed by Ist Additional Sessions Judge, Aligarh in Session Trial No. 70 of 1987 and connected Session Trial No. 659 of 1987 convicting and sentencing the appellant to undergo life imprisonment under section 302 IPC.

3. In brief the prosecution case is that complainant Sultan gave an application dated 16.5.1986 at P.S. Harduwaganj alleging therein that on 15.5.1986 at 8:35 P.M. his younger brother Saddiq has gone to fetch bidi from the shop situated beneath the mosque. When he was coming back and reached near the house of Mazhar Husain, then Nizam resident of Jalali, P.S. Harduwaganj who is a bad character and criminal and Saddiq used to desist him from such acts, stabbed Saddiq with knife. On cries of Saddiq complainant, Shakir, Shabbir and other persons came there and Nizam ran away. When Saddiq was taken to hospital he died there. Before his death Saddiq has said that Nizam has inflicted knife blows on him.

On the aforesaid information Case Crime No. 96 of 1986, under section 302 IPC was registered against accused Nizam. Investigation of the case was conducted by S.I. Dal Chand. The inquest proceeding of the dead body was conducted and related papers were also prepared and body was sealed and sent for postmortem examination. The Investigating Officer recorded the statements of complainant and other witnesses, visited the place of occurrence and prepared the site plan. Accused Nizam was arrested by the police station Quarsi, District Aligarh and on his interrogation by the Investigating Officer he disclosed that the knife used in the incident has been concealed by him and at his instance on 19.5.1986 at 8:00 P.M. one knife with blood stains was recovered from the "Chhappar' in the house of Nanna, the maternal uncle of accused Nizam. Memo was prepared and knife was sealed and sent for forensic examination. Nanna was also implicated as an accused and after completion of investigation separate charge-sheet under section 302 IPC was filed against Nizam and Nanna.

Two session trial nos. 70 of 1987 and 659 of 1987 committed to the court of session were consolidated.

The trial court framed charge under section 302 IPC against accused Nizam and under section 302/34 IPC against accused Nanna.

The prosecution produced 7 witnesses who have proved 9 prosecution papers Ex. Ka-1 to Ex. Ka-9 and one material Exhibit (Knife). Statements of accused under section 313 Cr.P.C. were recorded in which they denied the prosecution case and statements of witnesses. Accused Nizam has also said that witnesses are deposing against him due to enmity. One defence witness Aharpal Singh, Junior Engineer has been produced as D.W. 1. The learned trial court by the impugned judgment has convicted accused Nizam under section 302 IPC and sentenced him to life imprisonment while acquitted accused Nanna from the charge under section 302/34 IPC.

4. The conviction of accused Nizam is under consideration in this appeal.

5. Postmortem of deceased Saddiq has been conducted on 16.5.1986 at 5:00 P.M. by Dr. I.H. Qureshi who has appeared as P.W. 5 and has proved the postmortem report as Ex. Ka-12.

According to postmortem report the age of the deceased was about 45 years. In external examination Average built body, rigor mortis was present in both upper and lower extremities, eyes closed, mouth half open, abdomen slightly distended, no signs of decomposition. Following ante mortem injuries were present on the body of the deceased:

1. Incised wound 1½ cm. X ½ cm x muscle deep on the right side chest, 1 cm. above right nipple.

2. Incised wound 5 cm. X 1½ cm. X chest cavity on the right side lower chest, 11 cm. below right nipple.

3. Incised wound 4 cm. X 1½ cm. X abdomen cavity on the left side upper abdomen, 12 cm. above umbilicus.

4. Incised wound 3½ cm. X 1 cm x abdomen cavity on the left side upper abdomen, 1½ cm. behind injury no. 3.

5. Incised wound 5 cm. X 1½ cm. X muscle deep on the middle of abdomen, 1½ cm. below the umbilicus.

6. Incised wound 3 cm. X 1½ cm. x abdomen cavity on the right side lower abdomen, 3 cm. above right anterior superior iliac spine.

on internal examination peritonium was lacerated. In the cavity of abdomen 1½ pint partially clotted blood mixed with faecal matter was present. Stomach was lacerated at two places. Small intestine was lacerated and gases and fluid were present. Large intestine was lacerated and gases and faecal matter were present. Pancreas was lacerated on upper part. Gall bladder was half full . Bladder was half full of urine.

In the opinion of doctor the death was due to shock and haemorrhage as a result of ante mortem injuries and duration of death was about one day. Dr. I.H. Qureshi has also said in his examination in chief that the injuries of the deceased may come on 15.5.1986 at 8:35 P.M. with knife and these injuries were sufficient to cause death.

6. To prove its case the prosecution has produced 7 witnesses out of which 3 are public witnesses. Saira (P.W. 1) is the daughter of deceased. In her examination-in-chief she has said that incident is of 1 year and 20 days earlier. It was 8:30 P.M. she with her mother was sitting on the roof of her house at Jalali. At that time she was unmarried. The shrieks of her father were heard from street beneath. She and her mother peeped down from the roof and saw that Nizam was stabbing his father. Two other persons were keeping him down and a third one was standing. She did not recognize any of these three. She and her mother came down. Accused Nizam said accosting her father that he was in habit of making complaint against him to the police. Her father has also told her and her mother that Nizam has stabbed him with knife and three persons were also with him. Shakir, Sultan and Shabbir also reached there. Her father died on the spot.

7. Nanhi (P.W. 2) is the wife of the deceased. In her examination-in-chief she has said that incident is of one year and one month earlier. It was 8:30 P.M. she was on the roof of her house with her daughters Saira and Aisha. She heard cries from the street then she peeped from the roof and came down from the roof where she saw Nizam holding a knife in his hand. Three persons were also with him. Her husband was lying injured on the ground. Nizam was saying that he was informant of the police and used to complain against him. She has also saw Nizam stabbing her husband with knife. There was light of the electric bulb in the street due to Ramzan. At the time of occurrence her brother-in-laws (Dewar) Shakir and (Jeth) Shabbir and Sultan also came there. Her dewar and Jeth carried her husband to the hospital but he died on the way.

8. Sultan (P.W. 3) is the complainant and brother of the deceased. In his examination-in-chief he has said that his brother Saddiq was murdered more than a year ago. He got the report of this incident scribed by Om Niwas, who wrote it on his dictation and after hearing it he put his

thumb impression on it and submitted it at police station Harduwaganj. Witness has proved the report as Ex. Ka-1. In his cross-examination the witness has also given the eye witness account of the incident and has said that he himself has seen the accused stabbing Saddiq with knife and thereafter he ran away.

9. S.I. Dal Chand (P.W. 4) is the Investigating Officer. The witness has stated that he reached at the place of occurrence on 15.5.1986 at 9:00 P.M. He has received the information at police outpost. The dead body of the deceased was near bus stand Jalali. The relatives of the deceased have carried him to the hospital and were returning from there because of his death. He has further stated that he got the copy of chik report on 16.5.1986, conducted the inquest proceedings of the dead body and prepared the related papers, sealed the dead body and sent it for postmortem examination. Recorded the statements of other witnesses. This witness has further stated that on 19.5.1986 he got the information that accused Nizam has been arrested by police station quarsi then he proceeded for police station quarsi and recorded the statement of accused Nizam and at his instance recovered the knife which was blood stained and used in the murder of Saddiq from the Chhappar of co-accused Nanna. He prepared the memo and also prepared the site plan of the said place of recovery. After completing the investigation submitted the charge-sheet.

10. Head constable Liyaqat Ali (P.W. 6) is the formal witness who has prepared the chik and G.D. and has proved the documents. Constable Sukhram Singh (P.W. 7) is also a formal witness who has stated that the dead body was handed over to him by S.I. Dal Chand and he carried it for postmortem examination.

11. Saira (P.W. 1) and Nanhi (P.W. 2) have given the eye witness account of the incident. They have said that they were on the roof of their house and on hearing noise and shrieks from the way (Rasta) they peeped down and saw accused Nizam stabbing Saddiq with a knife. They came down, then they heard Nizam saying that he (deceased) used to complain to the police. They have further said that they saw Nizam stabbing Saddiq with knife. Shakir, Shabbir and Sultan also came there. In the site plan Ex. Ka-8 the place of occurrence has been shown with sign X "A' in the Rasta in front of Baithak of the house of Mazhar Husain. The house of the deceased is in its west after the house of Chandrapal. The distance between the place of occurrence and the house of deceased is not shown in the site plan but the Investigating Officer S.I. Dal Chand (P.W. 4) in his cross-examination has said that distance between house of deceased and X "A' is 6 paces. So the place of occurrence is near the house of deceased and the witnesses have said that on shrieks they peeped down from their roof and saw the accused Nizam stabbing Saddiq. Witnesses have further said that they came down in the Gali and saw the accused stabbing Saddiq. As the place of occurrence is near the house of witnesses their presence and seeing of occurrence is natural and probable. It has also come in the evidence that incident is of Ramzan and after Iftar and Maghrib prayer the witnesses have come on the roof of the house. The incident is of the month of mid May the summer season, so it is also probable that after Iftar and offering prayer the witnesses may have come on their roof to relax. Although these witnesses are the daughter and wife of the deceased and

hence related and interested witnesses but considering the aforesaid facts it does not matter because their presence at the place of occurrence is natural and probable. It has also come in the evidence that in the east of the house of the deceased Rasta is slightly deviated so there may be a possibility that place of occurrence may not be visible from the roof of the house of the deceased but this fact has been categorically ruled out by the Investigating Officer S.I. Dal Chand (P.W. 4) in his cross-examination. The defence has put a specific question on this point and the witness in answer of that question has said that he himself has peeped down from the roof of the house of the deceased Saddiq and verified that place of occurrence was visible from there. So the oral statements of P.W. 1 Saira and P.W. 2 Nanhi also got corroboration from the aforesaid statement of Investigating Officer. The name of Saira and Nanhi are not mentioned in the FIR as witnesses but this fact has also been explained by the complainant Sultan (P.W. 3) in his cross-examination. He has said that he has written name of Shakir and Shabbir as witnesses in the report. He has also seen the wife of deceased at the place of occurrence. The daughter of deceased was also present there. He has not written the name of ladies in the report because he does not want that female members of the family should go in the court. So the explanation of absence of the names of witnesses Saira and Nanhi in the FIR as given by the complainant Sultan (P.W. 3) is also sufficient and this fact also does not affect the reliability of these witnesses. Sultan (P.W. 3) in his cross-examination has said that he himself has seen the occurrence. He has specifically said that he has seen Nizam stabbing his brother Saddiq with knife. In the FIR it is mentioned that on the shrieks of Saddiq he, Shakir and Shabbir reached there and seen the accused Nizam running away. In the FIR it is alleged that on hearing the shrieks of his brother when he, Shakir and Shabbir and others reached there Nizam ran away from there. So from the allegation of the FIR it appears that witness Sultan (P.W. 3) saw Nizam running away from the place of occurrence. He may have not seen the incident but he reached at the place of occurrence at the very moment and saw his brother in injured condition and Nizam running away from there.

12. Learned counsel for the appellant contended that the incident is of 8.30 P.M. Witnesses Saira (P.W. 1) and Nanhi (P.W. 2) have said that they have seen the occurrence in the light of electric bulb fitted on a pole in the Rasta while in the FIR there is no description of light of electric bulb. Contrary to it in the FIR it is mentioned that complainant and his companion saw Nizam running away in the light of torch. So the prosecution evidence is contradictory and there are major discrepancies regarding source of light. Learned counsel further contended that the defence has produced the evidence that at the time of occurrence there was shut down of electricity in Jalali town as the work of changing of transformer was in progress. So there was no source of light at the place of occurrence. The incident is of darkness so witnesses have no opportunity to see or identify the accused and identification of the accused is doubtful.

Learned A.G.A. submitted that in the FIR complainant Sultan has mentioned that he has seen the accused Nizam running away in the light of torch while other witnesses have said that an electric bulb was on in the Rasta and they have seen the occurrence in the light of electric bulb. There is no contradiction between the two

statements. Further Investigating Officer has also shown the place where the electric bulb was on by sign X "B'. He further contended that the documents produced by Aharpal Singh (D.W. 1) have so many discrepancies which the witness has admitted in his cross-examination, so no reliance can be placed on this evidence.

In the FIR it has been alleged that Nizam was seen in the light of torch while fleeing. It also appears from the perusal of original Tahreer that this particular line is an addition after completion of the whole contents which makes it doubtful. So torch as source of light is not reliable. The witnesses Saira (P.W. 1) and Nanhi (P.W. 2) in their statements have stated that they have seen the occurrence in the light of electric bulb which was fitted on a wooden pole on the Rasta. The Investigating Officer in site plan Ex. Ka-8 has also shown this with sign X "B' and its height is mentioned as 15 fit. In the site plan the distance between place of occurrence and the electric bulb is not shown but S.I. Dal Chand (P.W. 4) in his cross-examination has told this distance 8-9 paces. So it is established that near the place of occurrence there was an electric pole fitted with an electric bulb. Now the question comes whether the electricity supply was continued or disrupted at the time of occurrence.

The defence has produced Aharpal Singh, Junior Engineer (D.W. 1) who has said in his examination-in-chief that on 15.5.1986 he was posted as Junior Engineer in sub-station Akrabad and has brought the log sheet register of 15.5.1986 which is maintained by Sub-Station Officer Harpal Singh. He has further stated that there were two feeders of sub-station. From one feeder electricity was supplied to Gopi while from the other it was supplied to Akrabad and electricity supply to Jalali was from Akrabad feeder. The witness has further stated that according to entry of Log-sheet register on 15.5.1986 both the feeders were shut down at 18:10 because transformer of sub-station was being changed and Mr. Om Prakash of E.C.E. Company has come for this work. Both the feeders were again started at 21:30 after change of transformer. He was present at that time because he was incharge. Om Prakash the representative of E.C.E. Company signed it after restoration of electricity. The witness has filed the copy of log sheet register and has proved it as Ex. Kha-2. From the examination-in-chief of this witness coupled with the documents produced by him it appears that there was shut down of Akrabad feeder from 18:10 to 21:30 and there was no electricity in Jalali town at 8.35 P.M. This witness in his cross-examination has admitted that there are certain discrepancies in the log sheet register produced by him. He has also specifically said that there was supply of 3 phase light on that day from Akrabad and Gopi feeders till 9:30 P.M. and two phase supply was restored at 22 O'clock. The above statement of cross-examination contradicts his statement of examination-in-chief that there was no electricity supply from Akrabad feeder from 6.10 to 9.30 P.M. So the evidence produced by the defence that at the time of occurrence there was no electricity supply is not reliable.

Even if it is presumed that there was no electricity supply at the time of occurrence, it is clear from the evidence that accused and witnesses were well known to one another. It is not necessary that a person could be identified only by his face. A person can be identified through his appearance, gestures and voice also. It is also clear from the evidence that Saira (P.W. 1) and Nanhi (P.W. 2) had the opportunity to see the accused from

proximity. They have also heard his voice as he uttered some words while stabbing the accused. So they have full opportunity to see and identify the accused even if there was no light. Further it is not a case of one or two stabbing and incident has not occurred in a moment. 6 incised wounds have been found on the body of the deceased in the postmortem report. It establishes that deceased was repeatedly stabbed by the accused and it is not a case of hit and run. The accused remained on the spot for sometime and also made some statements so there was ample opportunity for witnesses to see and identify him. It is also pertinent to mention that although FIR has been lodged on the application of the complainant on 16.5.1986 at 2:10 but the perusal of the record reveals that prior to it an oral information was given by the complainant Sultan that his brother Saddiq has been stabbed with knife by Nizam and seriously injured and has been taken to district hospital on a cot. This oral information was entered in G.D. No. 16 at 21 O'clock on 15.5.1986. A copy of the said G.D. is on record. It clearly establishes that the information of the incident was promptly given at the police station just within half an hour of the incident by Sultan, brother of the deceased and in this information the name of the accused Nizam has been mentioned as culprit. So the involvement of the accused was certain from the very beginning. Considering the entire facts and evidence on the point it is quite clear that there is no doubt about the identification of the accused and hence, source of light does not matter.

13. Learned counsel for the appellant further contended that there are major contradictions between the statements of P.W. 1 Saira and P.W. 2 Nanhi. Saira (P.W. 1) in her cross-examination has said that she fell down on the dead body of her father and her clothes were stained with blood. She has shown her clothes to the sub-inspector. Clothes of her mother were also blood stained. Her mother has also broken her bangles at the dead body of her father, while Nanhi (P.W. 2) in her cross-examination has said that she has not fell down on the body of her husband. No broken bangles have been found by the Investigating Officer at the place of occurrence. Further Saira (P.W. 1) in her statement has stated that her father died on the spot while Nanhi (P.W. 2) has stated that her husband died on the way to the hospital. Learned counsel also contended that it has also come in the evidence that incident has occurred in front of Baithak of Mazhar Husain while people remain in Baithak of Mazhar Husain till 11:00 P.M. but no other independent/public person has been made a witness nor examined. On these grounds learned counsel submitted that statements of Saira (P.W. 1) and Nanhi (P.W. 2) who are related and interested witnesses can not be relied on.

Learned A.G.A. contended that it has come in the evidence that at the time of occurrence no one was present in Baithak of Mazhar Husain. It is also clear from the evidence that the incident is of month of Ramzan and people remain busy in prayers at the relevant time. He further contended that the contradictions or discrepancies in the statements of Saira (P.W. 1) and Nanhi (P.W. 2) are not of such a nature which create doubt about their reliability. Some minor contradictions or discrepancies are natural so only on this ground the oral testimony which is otherwise consistent can not be disbelieved.

It is settled principle of law that oral testimony of a witness can not be outrightly rejected merely on the ground

that he is an interested or related witness. What is required is a cautious scrutiny. Some minor contradictions or discrepancies are natural in the statements of witnesses . The contradictions or discrepancies as pointed out by the learned counsel for the appellant only indicate that witness Saira (P.W. 1) has exaggerated some facts but the testimony of the both the witnesses on material points are consistent. If scrutinized as a whole it inspires confidence and it is established from their evidence that first they have seen the occurrence from the roof of their house and thereafter they came down and saw it from beneath. They have seen the accused stabbing Saddiq and they have identified the accused. Their oral testimony also stands corroborated by the medical evidence on record according to which 6 incised wounds have been found on the body of the deceased and his death has occurred due to ante mortem injuries. The doctor has also confirmed the date, time and weapon used in the incident. So the oral statements of the witnesses are reliable and can not be discarded on some minor contradictions or discrepancies.

14. Besides the ocular testimony there is another piece of evidence. All the 3 public witnesses Saira (P.W. 1), Nanhi (P.W. 2) and Sultan (P.W. 3) have said that Saddiq said to them that Nizam has stabbed him with knife. It is also established from the evidence that all these three witnesses have reached at the place of occurrence, so it also appears to be natural and probable that Saddiq in injured condition had told them the name of person who stabbed him. This evidence is relevant Under Section 32 of the Evidence Act and is reliable.

15. Prosecution has also produced the evidence of recovery of the weapon i.e. knife used in the incident. Recovery has been made by the Investigating Officer at the instance of the accused at his pointing out from the Chhappar of co-accused Nanna. The knife was blood stained and was sent for forensic examination. The report of forensic examination is also on record which confirms that the human blood was found on the aforesaid knife. The fact of the recovery has been proved by S.I. Dal Chand (P.W. 3). This evidence further corroborates the prosecution case.

16. Learned counsel for the appellant placed reliance on citation of Hanuman Govind, Nargundkar and another Vs. State of M.P. 1952 0 AIR (SC) 343 in which it has been held that:

***"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. - Circumstantial evidence-Appreciation of-When sufficient for conviction. - Sections 18, 24-Admission of confession to be taken as a whole."***

The ruling cited by the learned counsel for the appellant relates to circumstantial evidence while in this case the prosecution case is based on ocular

testimony, hence this ruling has no application.

17. The evidence produced by the prosecution is reliable. The ocular testimony stands corroborated with medical evidence. There are also supporting evidence in the form of statement of the deceased about his death and the recovery of knife used in the incident and from prosecution evidence the guilt of the accused stands proved. The learned trial court has fully discussed and properly appreciated the entire evidence on record. The learned trial court has also analysed all the defence arguments and the findings recorded by the trial court are just and proper. There is no illegality or perversity in the findings recorded by the trial court which is liable to be upheld. The criminal appeal is liable to be dismissed.

18. According, this criminal appeal is hereby **dismissed.**

19. The accused is absconding and is not traceable. Proceedings against his sureties are pending which shall be put to a logical end. The trial court shall issue standing warrants against him and on his arrest he will be lodged in jail to serve out his sentence.

20. The lower court's record along with copy of the judgment be transmitted to the trial court immediately.

21. We appreciate the assistance rendered by Sri Lal Ji Chaudhary, Amicus Curiae. State Government is directed to pay him Rs. 7,000/- as his remuneration.

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**(2021)10ILR A126**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**

**DATED: ALLAHABAD 09.08.2021**

**BEFORE**

**THE HON'BLE AJAI TYAGI, J.**

Criminal Appeal No. 3003 of 2018

**Gore @ Sushil ...Appellant(In Jail)**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Sri Sudhakar Shukla, Sri Diwakar Shukla, Sri Shyam Singh Somvanshi, Sri Sudhakar Shukla

**Counsel for the Respondent:**
A.G.A.

**A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Section 376, 354, 452, 506 - Protection of Children from Sexual Offences Act, 2012-Section 4-challenge to-conviction-accused molested then victim and her mother was the eye-witness-Again accused committed rape after three years-victim statement before trial court remained intact and reliable-no definite opinion about the rape in medical report-it is settled law if the statement of victim intact and fully reliable, conviction can be based on her statement alone even if it is not corroborated by the medical evidence-no having criminal history of the accused is not at all relevant in such type of cases-Trial court rightly convicted the accused.(Para 1 to 20)**

**B. Evidence of prosecutrix stands on equal footing with that of injured witness and if evidence inspires confidence, corroboration is not necessary. The court may convict the accused on the sole testimony of the prosecutrix. (Para 15,16)**

**The appeal is dismissed.** (E-6)

**List of Cases cited:**

1. St. of H.P. Vs Prem Singh (2009) AIR SC 1090

2. Ram Das Vs St. of Mah.(2007) SCC 176

3. St. of Raj. Vs N.K.(2000) 5 SCC 30

4. Malkhan Singh Vs St. of U.P. (2000) 5 SCC 746

5. Wahid Khan Vs St. of M.P. (2010) 2 SCC 9

6. St. of Har. Vs Basti Ram (2013) AIR SC 1307

7. Sri Narayan Saha Vs St. of Tripura(2004) 7 SCC 775

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal is directed against the judgment and order dated 4.5.2018, passed by learned Additional Sessions Judge, Court No.4, Fatehpur, in Special Trial No.37 of 2013 (State of UP vs. Gore @ Sushil) arising out of Case Crime No.347 of 2013 under Sections 376, 354, 452, 506 IPC & Section 4 Protection of Children from Sexual Offences Act, 2012 (herein after referred to as 'the POCSO Act, 2012'), P.S.-Bindaki, District-Fatehpur, whereas the accused-appellant -Gore @ Sushil was awarded 3 years R.I. under Section 354 IPC, 5 years R.I. under Section 452 IPC, 3 years RI under Section 506 (2) IPC and 10 years RI under Section 4 of the POCSO Act, 2012, along with fine.

2. The brief facts of this appeal are that on 23.10.2013, the father of victim Ram Sanehi lodged an FIR at Police Station-Bindaki with averments that he resides in Delhi and does private service and he rarely comes at his native house at Fatehpur. At his residence, his wife resides with four daughters, one son and informant's aged mother. Gore son of late Pramod Kumar, who is of the same village often comes to the house of informant with intention he pressurize to make marital relationship with his elder daughter Kanchan, but when she refused to marry with him, he used to take his younger daughter, the victim for getting treatment at Kanpur as the victim was having white-spot on her leg. During the course of taking her to Kanpur for treatment, Gore committed rape with the victim and threatened her not to tell anybody, therefore, victim remained silent and Gore committed rape many times. Informant's elder daughter Kanchan alone ran away Mumbai and later on recovered from there.

3. Accused-appellant Gore @ Sushil was charged by the learned trial court under Sections 376, 452, 354, 506 (2) IPC and Section 4 of the POCSO Act, 2012. On finding guilty, learned trial court convicted and sentenced the appellant under Sections 452, 354, 506 (2) IPC and Section 4 of the POCSO Act, 2012. Aggrieved with the judgment of learned trial court, the appellant has preferred this appeal.

4. Heard learned counsel for the appellant, learned AGA for the State and perused the record.

5. Learned counsel for the appellant argued that in this case, accused has been falsely implicated. In medical examination, there is no corroboration of rape with the victim. It is argued that only motive behind the false implication of the appellant was that victim's parents wanted to marry their elder daughter Kanchan with appellant, but Kanchan fled away to Mumbai and when she was recovered, appellant refused to marry her. Due to this refusal, the accused was falsely implicated in this case.

6. *Per contra*, learned AGA argued that prosecution witnesses has supported the prosecution case. Victim was just 13 years of age, she has supported her version in her statement under Section 164 Cr.P.C. and appellant has rightly been convicted by the learned trial court.

7. Learned counsel for the appellant advanced arguments at length. First of all, it is argued that there was inordinate delay in lodging the FIR in this case. No date, time and place of occurrence is given in first information report by the informant. Victim's statement under Section 161 Cr.P.C. was recorded by the Investigating Officer after one month of filing FIR. First Information Report was lodged after three months of the alleged occurrence and no explanation is given by the prosecution for causing so mach delay in filing the FIR.

8. Learned counsel for the appellant argued that this delay in filing the FIR was fatal for prosecution case because there was enough time of three months with the informant and his family members to falsely implicate the accused-appellant and for that reason, after-thought story was made by them. In this regard, on perusal of the record, it is seen that as per victim's version, she was threatened by the appellant not to tell the incident to anybody otherwise she will be killed and her elder sister would be defamed. Prosecution witnesses have said that due to that fear, victim did not tell the occurrence to her family members soon after. Learned lower court also concluded in this regard that victim was just 13 years old child and it was natural for her to be scared when appellant intimidated her. Apart from it, in such type of cases, family members of victim think twice before lodging the FIR because their social reputation remains at stake as held by Hon'ble Apex Court in ***State of Himanchal vs. Prem Singh,*** AIR 2009 SC 1090. Hon'ble Apex Court also held in ***Ram Das vs. State of Maharashtra, 2007 SCC 176, State of Rajasthan vs. N.K.*** (2000) 5 SCC 30 and ***Malkhan Singh vs. State of UP*** (2000) 5 SCC 746 that if delay in filing the FIR is explained satisfactorily and statement of victim, who is best witness, is reliable then delay in lodging the FIR is not fatal. In this case also, keeping in view the tender age of the victim, it can be presumed that victim, just 13 years old, would have been scared when appellant intimidated her as stated by her as PW2 that she will be killed if she tells the occurrence to anybody.

9. Hence, in my opinion, the prosecution has satisfactorily explained the delay in filing the FIR and that delay is not fatal to the prosecution case. As far as argument of appellant that no date, time and place was mentioned in the first information report, it is settled law that FIR is not encyclopedia, but it is information to set the law into motion.

10. Learned counsel for the appellant argued that appellant was falsely implicated in this case because as per prosecution case, victim was taken to Kanpur for treatment by appellant on 27.7.2013 and she was taken to Dr.Mamta Bhura, who was examined as PW4. She has stated in her statement that victim came to her on 23.4.2013 and she gave her prescription for medicine. The prescription is also proved by her as Ex.ka4. Another prescription Ex.ka5 was also proved, which is of dated 10.6.2013. Hence, as per statement of PW4, there was no prescription of 27.7.2013, on which date, appellant is said to take the victim to Kanpur for treatment.

11. Learned counsel for the appellant further argued that in fact, the father of

victim borrowed Rs.26,000/- from the appellant for marriage of his daughter Vineeta and mortgaged his one and a half *bigha* agricultural land with him. Father of victim did not return the above Rs.26,000/- to the appellant and for that reason and to pressurize him to get married with his elder daughter Kanchan, accused-appellant was falsely implicated.

12. In this regard, it is clear from the record that treatment of victim in Kanpur was not denied by defence. Prescription from PW4 proved the fact that victim was under treatment with PW4 in Kanpur. As per prosecution version, appellant used to take victim to Kanpur for treatment and on 27.7.2013, he stayed in a guest-house/*dharmshala* with the victim where at night, he committed rape with the victim as the victim has stated in her statement under Section 164 Cr.P.C. and supported this statement before learned trial court as PW2. Victim's statement under Section 164 Cr.P.C. corroborated the statement given by victim as PW2. In that statement, she categorically stated that on 27.7.2013, she went to Kanpur with appellant and they went to Dr.Mamta Bhura and after that they returned to *dharmshala* where appellant has taken a room on rent and at night he committed rape with her. Prosecution has examined the Accountant (PW9-Rajesh Mishra) of said guest-house/*dharmshala*. PW9 appeared before learned trial court with relevant record of guest-house and said that he was posted as Accountant in that guest-house. On 27.7.2013 at about 8:30 p.m., one boy Sushil came to his guest-house with a girl. They had come for getting treatment and said that they were brother and sister and he got allotted Room No.14 on rent. Next day, i.e., 28.7.2013, at about 8:00-8:30 in the morning, they checked out. Room rent was paid by Sushil. PW9 filed receipts of rent and check out as Ex.ka 17-18 and also filed the copy of relevant register in the court in which entries of check-in and check-out were recorded. Hence, with this evidence, prosecution proved the fact that on 27.7.2013, appellant took the victim to the guest-house and stayed there for one night. Hence, the argument of counsel for the appellant that he was falsely implicated fails because it is very well proved by the prosecution that on the said date of occurrence, appellant was there in guest-house with the victim. Therefore, it hardly matters if there is no medicine prescription of 27.7.2013. So it cannot be believed that accused was falsely implicated by the informant just for the reason that he did not want to return the borrowed Rs.26,000/-. Moreover, when he had already mortgaged his agricultural land with the appellant, it can not be believed that a person will falsely implicate somebody with the rape allegation with his daughter or just to pressurize him to get married with his elder daughter.

13. Learned counsel for the appellant raised argument with force that in medical examination, no injury was found on the private part of the victim and there was no sign of rape. In this regard, learned counsel for the appellant referred to the medical report of the victim. The medical examination of the victim was conducted by Dr.Laxmi Singh, who was posted at CHC, Bindaki, Fatehpur. Learned counsel for the appellant said that Dr.Laxmi Singh was examined as PW5 and she had said in her report that there was no injury on body and private part of the victim and she had given her opinion that during medical examination, she found no sign of rape or intercourse. Learned counsel for the appellant argued that in such a situation,

prosecution case is not at all supported by medical evidence. Hence, on this score alone, appellant is liable to be acquitted. In his support, counsel for the appellant referred the judgment of Hon'ble High Court of Sikkim in Sandeep Tamang vs. State of Sikkim, 2016 Cr.LJ 4706 and said that in this case also, the prosecution allegation of rape was not supported by medical report of the victim and Hon'ble High Court of Sikkim, gave acquittal to the accused. In this regard, it is very much material that Dr.Laxmi Singh-PW4, who conducted the medical examination of the victim said in medical report that there was no injury on external or private part of the victim and in supplementary report, Ex.ka7, it is said that no living or dead spermatozoa was seen in the provided sewer-slide. It is worth keeping in mind that victim's medical examination was conducted approximately after three months of the said occurrence. As per medical jurisprudence, living spermatozoa may be found up to 48 hours or dead spermatozoa may be found up to 72 hours after intercourse.

14. PW2, the victim, in her statement before learned trial court, had stated that on 27.7.2013, appellant had taken her to guest-house where he took one room on rent and in the night, he committed rape with her and threatened her not to tell anybody. The same statement, victim had given to Investigating Officer earlier under Section 161 Cr.P.C and before the Magistrate under Section 164 CR.P.C. Her statement before learned trial court remained intact. Prosecution could not make any case in cross-examination, which have assailed the examination-in-chief of victim (PW2). In examination-in-chief, defence could not extract anything which could have been fatal for prosecution case. It is settled law that if victim's statement is intact and fully reliable, conviction can be based on her statement alone even if it is not corroborated by the medical evidence.

15. Hon'ble Apex Court in ***Wahid Khan vs. State of Madhya Pradesh,*** 2010 (2) SCC (9) has held that evidence of prosecutrix stands on equal footing with that of injured witness and if her evidence inspires confidence, corroboration is not necessary. In ***State of Haryana vs. Basti Ram***, AIR 2013 SC 1307, Hon'ble Apex Court held that if uncorroborated statement of prosecutrix is credible, conviction can be based on it. In this case, Hon'ble Apex Court after discussing the entire long issue concluded that law that emerges on the issue is to the effect that the statement of the prosecutrix if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix.

16. In another case, ***Sri Narayan Saha vs. State of Tripura,*** (2004) 7 SCC 775, there was also the position that doctor, conducting the medical examination of the victim, could not give definite opinion about the rape, but it was held of no consequence in view of unimpeachable evidence of the victim. The same position is with this case in hand. In this case also, doctor conducting medical examination of the victim could not give definite opinion about rape, but the testimony of the victim inspires full confidence and her evidence before learned trial court is unimpeachable. Hence, accused-appellant cannot get any benefit of the fact that there was no definite opinion of rape in medical report as testimony of prosecutrix is fully reliable

and worth believing. Therefore, reliance can be placed on her testimony without any doubt.

17. There was allegation under Section 354 IPC against the accused-appellant also. The victim (PW2) said in her statement that on 28.9.2013, accused came to her house and molested her by pressing her breast and on her crying, her mother came there and the accused fled away. Ramkali (PW3), who is mother of victim is also eye-witness of this fact. She also said in her statement that approximately before three years from the date of making the statement before learned trial court, she was working inside her house and victim was standing in court-yard. At that time, accused-appellant entered her house and started molesting the victim. On victim's crying, she went there and saw herself accused-appellant molesting the victim. Therefore, both PW2 and PW3 corroborated their statements. On this point also, defence could not extract anything in cross-examination, which could assail their credibility.

18. Lastly, learned counsel for the appellant stated that accused has no criminal history. In my opinion, this case is not the case where criminal history of the accused is relevant. There is charge of rape and molestation against the appellant. Hence, having or not having criminal history is not at all relevant in such type of cases.

19. No other argument was raised on behalf of appellant.

20. Hence, with the above observations, I am of the considered view that prosecution was very well succeeded in proving its case beyond doubt and learned trial court has rightly convicted and sentenced the accused-appellant for the charges levelled against him.

21. In view of above, I find no merit in this appeal.

22. Appeal is **dismissed**, accordingly.

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**(2021)10ILR A131**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 02.09.2021**

**BEFORE**

**THE HON'BLE AJAI TYAGI, J.**

Criminal Appeal No. 3030 of 2018

**Guddu ...Appellant(In Jail)**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Sri Amitabh Patel, Sri Manoj Kumar, Sri Viresh Misra

**Counsel for the Respondent:**
A.G.A.

**A. Criminal Law -Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Section 498-A, 304-B 302/34 - Dowry Prohibition Act, 1961-Section 4-challenge to-conviction-accused poured kerosene oil on his wife (deceased) and set her ablazed for non-fulfillment of additional demand of dowry-she remained alive for five days after making dying declaration-PW-7 (Doctor) and PW-9(Magistrate) independent witnesses had not turned hostile-she was in a fit condition to make the statement at the relevant time-she only attributed the acts of cruelty, beating and burning to her husband, who was a gambler and alcoholic-hostility of PW-1, PW-3 and PW-4 cannot demolish the value and reliability of the dying declaration as**

**none of the witnesses or the authorities involved in recording the dying declaration had turned hostile-trial court committed no error in convicting the appellant.(Para 1 to 44)**

**The appeal is dismissed.** (E-6)

**List of Cases cited:**

1. Koli Lakhmanbhai Chandabhai Vs St. of Guj.(1999) 8 SCC 524

2. Ramesh Harijan Vs St. of U.P. (2012) 5 SCC 777

3. St. of U.P. Vs Ramesh Prasad Misra & anr. (1996) AIR SC 2766

4. Lakhan Vs St. of M.P. (2010) 8 SCC 514

5. Krishan Vs St. of Har. (2013) 3 SC Cases 280

6. Ramilaben Hasmukhbhai Khristi Vs St. of Guj. (2002) 7 SCC 56

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This criminal appeal has been preferred by the appellant-Guddu, who was convicted and sentenced in S.T. No.124 of 2015 (State Vs. Guddu and others), arising out of Case Crime No.494 of 2014, registered under Sections 498-A, 304-B I.P.C. and 302/34 I.P.C. in alternative and Section 3/4 of Dowry Prohibition Act at Police Station Khandauli, District Agra by which appellant was convicted and sentenced for ten years R.I. under Section 304-B I.P.C., for one year R.I. under Section 498-A I.P.C. with fine of Rs. 5,000/- and two months in default and for six months R.I. under Section 4 of D.P. Act with fine of Rs.5,000/- and in default two months additional imprisonment.

2. The relevant brief facts of the case are that informant Bharat Singh lodged an F.I.R. on 07.11.2014 at Police Station Khandauli, District Agra with the averment that he had got married her daughter-Pinki on 23.03.2013 with Guddu-appellant son of Sriniwas, resident of village Poiya, Police Station Khandauli, District Agra and gave dowry according to his capacity but Pinki's husband, mother-in-law, father-in-law and other relatives and family members were not satisfied with the dowry and they started torturing his daughter for additional dowry. They started torturing mentally and physically to his daughter and demanded a motorcycle as additional dowry; his daughter told such type of treatment and demand to him several times and he tried to sort out the matter but in vain. His son-in-law and his family members continued their demand and threatened that in case their demand of additional dowry is not made out, his daughter would be killed. On 04.11.2014, at about 9 PM, Pinki's husband, mother-in-law Sheela Devi, father-in-law Sriniwas, brother of Sriniwas-Neta (Chahiya Sasur), brother-in-law Dinesh (Jeth), sister-in-law Meena (Jethani) and brother-in-law Matadeen (Dever) poured kerosene oil on his daughter and set her ablazed for non-fulfillment of their additional demand of dowry. On getting information of occurrence, informant went to Heritage Hospital, Agra where his daughter was admitted and fighting for life. Informant's daughter-Pinki told him the incident.

3. On the basis of above information, Case Crime No.494 of 2014 was registered at Police Station Khandauli, Agra. After investigation, investigating officer charge sheeted the husband of deceased Guddu, her father-in-law Sriniwas and mother-in-law Sheela Devi. Learned court below conduced the trial against above three accused persons by framing charge under

Sections 498-A, 304-B I.P.C. and Section 3 and 4 of Dowry Prohibition Act and in alternative under Section 302 read with section 34 I.P.C.

4. After conclusion of trial while passing the judgment, learned trial court acquitted Shriniwas, father-in-law and Sheela Devi, mother-in-law for all charges levelled against them and convicted the appellant-Guddu (husband of deceased) to undergo ten years R.I. under Section 304-B I.P.C., for one year R.I. under Section 498-A I.P.C. with fine of Rs. 5,000/- and two months in default and for six months R.I. under Section 4 of D.P. Act with fine of Rs.5,000/- and in default two months additional imprisonment. All sentences were directed to run concurrently.

5. Aggrieved with the judgment, appellant-Guddu preferred this appeal.

6. Heard learned counsel for the appellant and learned A.G.A. for the State. Perused the record.

7. Learned counsel for the appellant submitted that in this case, First Information Report was lodged against eight persons. During investigation, according to Investigating Officer no evidence was found against five persons except husband, father-in-law and mother-in-law of the deceased and charge sheet was filed only against them. Hence, it is clear that informant implicated all the family members of husband of the deceased falsely and the story of prosecution becomes more false by the fact that after trial, learned trial court acquitted father-in-law and mother-in-law of the deceased and only husband is convicted. So in all out of eight persons only one person was convicted, hence it is very much clear that all the family members of appellant were falsely implicated and on this score alone prosecution story becomes false and it is well proved that there was no demand for additional dowry and no one tortured the deceased either physically or mentally. Moreover, general allegations were made against all the persons named in F.I.R.

8. It is further submitted by learned counsel for the appellant that in this case, all the witnesses of fact have turned hostile and they did not support the prosecution case. Learned counsel for the appellant has submitted that P.W.-1 Bharat Singh, informant and father of the deceased has stated in his statement that no member of family of the appellant demanded additional dowry. They were satisfied with the dowry. He has also submitted that his daughter never made complaint of additional dowry or any sort of cruelty against her. This witness has also deposed that when he reached to hospital, all family members of appellant were present there and busy in treatment of her injured daughter.

9. Learned counsel for the appellant has also submitted that P.W.-3 Bhagirath is real brother of deceased. He has also reiterated in his statement that deceased never told him that his in-laws demanded motorcycle as additional dowry because they all were happy with the dowry given in marriage. He has also stated that when he reached to hospital after getting the news of occurrence, all family members of appellant were present there and he has very specifically stated that neither the appellant nor his family members set ablazed her sister. It is also said by learned counsel for the appellant that P.W.-4 Gabbar Singh is uncle of deceased Pinki. He has also stated in his statement that

Pinki never told him regarding any demand for additional dowry by her in-laws.

10. Learned counsel for the appellant has submitted that P.W.-1, P.W.-3 and P.W.4 all are very close family member of deceased. They have not supported the prosecution case rather they have specifically denied the factum of demand of additional dowry from deceased Pinki and causing mental or physical cruelty against her. They have also stated that they have no role in burning the deceased Pinki. All the three witnesses of fact have turned hostile and prosecution made their cross-examination but even in cross-examination nothing was extracted which could support the prosecution case. Hence, learned trial court has committed mistake by convicting the appellant on such type of unsupported evidence.

11. Learned counsel for the appellant mainly argued that learned trial court has convicted the appellant on the basis of dying declaration of the deceased but that dying declaration was not corroborated by any other evidence, moreover, the dying declaration Ex. KA-12 is not voluntarily or truthful but tutored. Moreover, the above dying declaration is fake because as per medico legal report of injured/ deceased, the deceased got 95% to 100% burn injuries and her entire body was burnt except her foot palm. P.W.-5, Dr. Sanjeev Lavaniya, who conducted the post-mortem of deceased has also stated in his statement that deceased had superficial to deep burn injuries on her entire body except both foot palm. Due to this reason, her right feet's toe impression was taken on her medico legal report, which was prepared in Heritage Hospital. It clearly shows that deceased/injured's thumbs of hands were not in position that their impression could be taken on medico legal report but on dying declaration Ex. KA-12 impression of her right hand thumb was taken. It casts heavy shadow on the genuineness of dying declaration because on dying declaration it was not possible to take the impression of thumb of any hand.

12. Regarding dying declaration, learned counsel for the appellant has submitted that the concerned doctor who treated the injured before her death, had not given fitness certificate on dying declaration. It is given by some other doctor. Dr. Aditya Rai who was produced as D.W.-2, treated the injured Pinki, while the fitness certificate on dying declaration is given by some other Dr. G.S. Chauhan. D.W.-2, Dr. Aditya Rai has specifically stated in his statement that he did not give fitness certificate of injured Pinki for making dying declaration so the said dying declaration becomes more doubtful.

13. Learned counsel for the appellant also submitted that as per the statement of real brother of deceased Bhagirath who has deposed as P.W.-3 at the time of dying declaration, he himself, his family members and many relatives were there. Learned counsel for the appellant also said that they had tutored the injured Pinki to make false dying declaration, hence, this declaration is the result of tutoring her. Hence, learned trial court has committed mistake on relying the dying declaration. It is next submitted by learned counsel for the appellant that dying declaration is also doubtful because there were some new version in dying declaration which was not the prosecution case as it is written in dying declaration that her husband eloped with a girl from village to Agra and her husband being the only child of his parents was very beloved to all. Such type of version in

dying declaration shows that it is fake and false and result of tutoring. Such type of uncorroborated dying declaration should not have been believed by the trial court, dying declaration was not corroborated by any evidence by prosecution, hence, learned trial court was negligent and in error on placing reliance on the dying declaration and wrongly convicted the appellant.

14. Learned counsel for the appellant has also submitted that real fact is that at the time of burning, the deceased was cooking food on Choola; suddenly the fire of Choola put out and for lighting up it again, the deceased put some kerosene oil in Choola, suddenly the kerosene oil caught fire and deceased also caught fire all of sudden in her cloths and due to that reason her body was burnt. At last learned counsel for the appellant also stated that prosecution story is also failed because after getting burn injuries, the injured/deceased was admitted to hospital by appellant and the material and articles, collected from the place of occurrence were not having smell of kerosene oil, it also falsify the prosecution story.

15. Learned A.G.A. has vehemently opposed the argument placed by learned counsel for the appellant and submitted that the witness of facts who turned hostile, was result of compromise between both sides. P.W.-1, P.W.-3 and P.W.-4 who were family members and relative of the deceased were won over by appellant and his family members, for that reason they turned hostile but their testimony cannot be washed off only due to this reason, if their testimony is analyzed as a whole, they have also supported the prosecution case.

16. Learned A.G.A. has also argued that even if witnesses have turned hostile, this does not make any dent in prosecution case because the dying declaration made by deceased is well proved by prosecution witnesses. Learned A.G.A. has also submitted that dying declaration was written by Additional City Magistrate and before starting and after completion of dying declaration, competent doctor has given fitness certificate regarding the consciousness and fit mental state of the deceased to make dying declaration. Learned A.G.A. has argued that if deceased was tutored for making dying declaration, she could have named other family members of appellant also but she did not do like that and dying declaration was proved by P.W.-7 Dr. G.S. Chauhan, who gave fitness certificate and P.W.-9 A. Dinesh Kumar, Additional City Magistrate who recorded the dying declaration.

17. Learned A.G.A. has submitted that if dying declaration is fully proved, made voluntarily and is truthful version of the occurrence then it can be the sole basis of conviction and requires no corroboration. Learned A.G.A. has submitted that it is wrongly argued by appellant that he got injured admitted in the hospital. According to the hospital record, injured Pinki was not brought to the hospital by the appellant. The record shows that she was brought by her father-in-law and mother-in-law. As far as the smell of kerosene oil is concerned, Investigating Officer collected the material and articles from the place of occurrence after five days of occurrence, hence, it was not possible the smell of kerosene oil to remain there for five days. Hence, this does not weaken the prosecution case.

18. Learned A.G.A. next submitted that learned trial court has rightly convicted the appellant on the basis of evidence on record and it has not committed any error by relying the well proved dying declaration which needed no corroboration.

19. At the outset learned counsel for the appellant has submitted that out of eight persons named in F.I.R., charge sheet was submitted only against three persons and out of these three, only one person i.e. husband of deceased, appellant was convicted by learned trial court and due to this reason the entire prosecution story becomes doubtful.

20. I am not convinced with the aforesaid argument of prosecution. Against whom Investigating Officer found evidence during investigation, he submitted charge sheet and during trial, whoever was found guilty was convicted and sentenced. It does not falsify the prosecution case.

21. Medico legal report of deceased shows that she was not brought hospital by appellant. In dying declaration also, the deceased has stated that her younger mother-in-law admitted her to hospital, hence, it is false to say that appellant got the deceased admitted in the hospital. Hence, appellant's bona fide is also not there and the argument regarding getting the injured hospitalized by him is entirely against the record.

22. Learned counsel for the appellant has emphasized the argument that prosecution has produced informant and father of deceased Bharat Singh as P.W.-1, real brother of deceased Bhagirath as P.W.-3 and uncle of deceased Gabbar Singh as P.W.-4 and all these witnesses of fact have turned hostile. Hon'ble Apex Court in ***Koli Lakhmanbhai Chandabhai Vs. State of Gujarat, 1999 (8) SCC 624*** as held that evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.

23. In ***Ramesh Harijan Vs. State of U.P., 2012 (5) SCC 777,*** the Hon'ble Apex Court has also held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

24. In ***State of U.P. Vs. Ramesh Prasad Misra and another, 1996 AIR (Supreme Court) 2766,*** the Hon'ble Apex Court held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. Thus, the law can be summarized to the effect that evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defence.

25. In this present case, informant-father of the deceased, P.W.-1 Bharat Singh, real brother of deceased, P.W.-3 Bhagirath and uncle of deceased P.W.-4 Gabbar Singh all turned hostile. P.W.-1,

Bharat Singh has supported the prosecution case in his examination-in-chief. He has stated regarding demand of additional dowry and torturing his daughter by the appellant and his family members. P.W.-3, Bhagirath has admitted in his evidence that dying declaration of deceased was recorded in Heritage Hospital, Agra. So it is not so that entire evidence of witnesses of fact should be rejected only due to the reason that they have turned hostile. They have supported the prosecution case to some extent and when it is looked in the light of the dying declaration of the deceased, prosecution case also gets more strength.

26. Learned counsel for the appellant has argued that dying declaration is doubtful and not corroborated by witnesses of fact, hence, it cannot be the sole basis of conviction. Legal position of dying declaration to be the sole basis of conviction is that it can be done so if dying declaration is completely voluntarily and reliable. In this regard, Hon'ble Apex Court has summarized law regarding dying declaration in ***Lakhan Vs. State of Madhya Pradesh (2010) 8 Supreme Court Cases 514***, in this case, Hon'ble Apex Court held that the doctrine of dying declaration is enshrined in the legal *maxim nemo moriturus praesumitur mentire*, which means, "a man will not meet his Maker with a lie in his mouth". The doctrine of dying declaration is enshrined in Section 32 of Evidence Act, 1872, as an exception to the general rule contained in Section 60 of Evidence Act, which provides that oral evidence in all cases must be directed i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

27. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. It is also held by Hon'ble Apex Court in the aforesaid case, that a dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by office of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

28. Learned counsel for the appellant has assailed the dying declaration of the deceased Pinki on following grounds;

*(i) Injured/deceased was not in position to make dying declaration,*

*(ii) Doctor, who did not treat the injured/deceased, gave fitness certificate,*

*(iii) Injured was tutored before making dying declaration, and*

*(iv) Some new version, apart from case, is there in dying declaration.*

29. Now as far as grounds no.(i) and (ii) are concerned, learned counsel for the appellant has submitted that deceased sustained burn injuries and her 95% to 100% body was having burn injuries. Doctor, who prepared medico legal report, was under compulsion to take the

impression of her right feet toe because her both hands were completely burnt while thumb impression of her right hand was taken on dying declaration. As per the medico legal report, deceased was not in position to make dying declaration, heavy 95% to 100% burn injuries.

30. I am not convinced with the argument of learned counsel for appellant because defence has produced Dr. Aditya Rai as D.W.-2, who treated the deceased before her death. He himself has stated in his statement that he had advised hospital management to conduct medico legal examination of the injured and for recording her dying declaration. So if deceased was not in position to make dying declaration, as argued by appellant, then why the doctor treating the patient, advised hospital management to record her dying declaration, it shows that she was in position to make dying declaration. Moreover, Dr. G.S. Chauhan, who gave fitness certificate on dying declaration before and after making it, has been produced by prosecution as P.W.-7. This doctor was also working in the same hospital. He has stated in his statement that patient was fully conscious. He has also stated that when he gave fitness certificate, the patient had bandage on all around her body but there was no bandage on her face. Although her face was burnt but there was no bandage on it and only medicine was applied on the face. It does not make any difference on the genuineness of dying declaration if certificate of fitness on it was given by some other doctor because Dr. G.S. Chauhan was also working in the same hospital on day of recording the dying declaration and it has nowhere questioned by the defence that Dr. G.S. Chauhan was not competent doctor. It is well within the domain of doctor as an expert to certify whether patient is conscious or not. No question is put by defence on qualification and ability of Dr. G.S. Chauhan to give fitness certificate. Any qualified doctor can judge whether patient is conscious and able to make dying declaration or not.

31. As far as ground no. (iii) is concerned, it is submitted by learned counsel for the appellant that injured was tutored before making dying declaration. In support his argument, learned counsel for the appellant has pointed out that P.W.-3, Bhagirath has stated in his statement that when he reached the hospital, family members of both sides and relatives were there near the patient and when dying declaration was being recorded then also all people were there. But this above statement of P.W.-3 is falsified by the statement of P.W.-7 Dr. G.S. Chauhan, who has stated in his cross-examination that before giving fitness certificate for dying declaration, he turned out all the persons from there. The similar statement is given by Additional City Magistrate, who recorded dying declaration. Additional City Magistrate, A. Dinesh Kumar, P.W.-9 also has said in his cross-examination that all the persons who were near the patient were turned out by him. P.W.-7, G.S. Chauhan and P.W.-9, A. Dinesh Kumar are independent witnesses and they both stated in their respective statement that before recording the dying declaration all the persons who were near the patient were turned out by them. It means that at the time of making dying declaration, no person was near the patient, who could tutore her. Hence, this argument of appellant does not have any force.

32. Lastly regarding point no. (iv) is concerned, a very weak argument is advanced by learned counsel for the appellant that some new version is there in

dying declaration as her husband had eloped with a girl from village to Agra earlier and he was very beloved to his parents.

33. In my opinion, if above version is there in dying declaration, it cannot make dying declaration doubtful. It is not necessary that dying declaration must be confined to the averments of First Information Report. In dying declaration Ex. KA-12, deceased has clearly stated how the occurrence took place, hence, this argument of additional version is not convincing argument.

34. All the above arguments raised by learned counsel for the appellant regarding truthfulness of dying declaration, do not have any force. Dying declaration of deceased Pinki is on record as Ex. KA-12, it is recorded by Additional City Magistrate and before making and after conclusion of dying declaration, doctor has given certificate of fitness of mental state of deceased.

35. Dr. G.S. Chauhan produced by prosecution as P.W.-7, he has stated in his statement that he has written on dying declaration before making it that patient was fully conscious and was in position to make dying declaration. This certificate was given by him on 05.11.2014 at 10 AM, he has also stated that after conclusion of dying declaration again he has given certificate, in which it was written that during statement Pinki was conscious. After writing the certificate, he put his signature on it at 10:30 AM on 05.11.2014. So by this statement, P.W.-7 Dr. G.S. Chauhan has legally proved the certificate of fitness on dying declaration.

36. Additional City Magistrate, A. Dinesh Kumar, who recorded the dying declaration, has been produced by prosecution as P.W.-9. He has stated in his statement that after obtaining fitness certificate from the doctor, he recorded the statement of Smt. Pinki and P.W.-9 has reproduced the statement of deceased in his examination-in-chief, hence, P.W.-9 has legally proved dying declaration and it was accepted as Ex. KA-12. Further in his statement, P.W.-9 has also corroborated the certificate of fitness given by Dr. G.S. Chauhan before and after making the dying declaration. So prosecution has completely succeeded in proving the dying declaration Ex. KA-12 of the deceased. Hence, there is no doubt regarding the veracity of dying declaration. Now it comes the question of corroboration of dying declaration. In this regard, learned counsel for the appellant has argued that trial court should not have placed reliance on dying declaration without corroboration. On reliability of dying declaration and acting on it without corroboration, Hon'ble *Apex Court* held in ***Krishan Vs. State of Haryana (2013) 3 Supreme Court Cases 280*** that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. Hence, in order to pass the test reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has

come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration.

37. In ***Ramilaben Hasmukhbhai Khristi Vs. State of Gujarat, (2002) 7 SCC 56,*** the Hon'ble Apex Court held that under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the from of question and answer and the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration.

38. From the above case laws, it clearly emerges that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with established practice and principles and if it is recorded so then there cannot be any challenge regarding its correctness and authenticity.

39. In dying declaration of deceased Ex. KA-12, it is also important to note that it was recorded on 05.11.2014 and the deceased died on 10.11.2014. It means that she remained alive for five days after making dying declaration. Hence, truthfulness of the dying declaration can further be evaluated from the fact that she survived for five days after making dying declaration from which it can reasonably be inferred that she was in a fit condition to make the statement at the relevant time. Moreover, in the dying declaration, the deceased did not unnecessarily involved the other family members of the accused-appellant, she only attributed the acts of cruelty, beating and burning to her husband and that too, on being him a gambler and alcoholic. It is also noteworthy that P.W.7 Dr. G.S. Chauhan and P.W.-9, A. Dinesh Kumar, Additional City Magistrate, both are absolutely independent witnesses. They have not turned hostile.

40. In such a situation, the hostility of P.W.-1, P.W.-3 and P.W.-4 cannot demolish the value and reliability of the dying declaration of the deceased, which has been proved by prosecution in accordance with law and is a truthful version of the events that occurred and the circumstances leading to her death. The same is reliable and in fact, to some extent, finds corroborations from the statement of other witnesses . Hence being it completely reliable dying declaration of deceased Ex. KA-12 does not require any corroboration.

41. As already noticed, none of the witnesses or the authorities involved in recording the dying declaration had turned hostile. On the contrary, they have fully supported the case of prosecution beyond reasonable doubt. The dying declaration is reliable, truthful and was voluntarily made by the deceased, hence, this dying declaration can be acted upon without corroboration and can be made the sole basis of conviction. Hence, learned trial court has committed no error on acting on

the sole basis of dying declaration. Learned trial court was completely justified in placing reliance on dying declaration Ex. KA-12 and convicting and sentencing the accused-appellant on the basis of it.

42. No other point or argument was raised from the side of the appellant.

43. Keeping in view of the above discussions, this Court is of definite opinion that learned trial court has rightly convicted and sentenced the accused-appellant and this appeal has no force.

44. The appeal lacks merit and is accordingly, **dismissed.**

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**(2021)10ILR A141**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 01.10.2021**

**BEFORE**

**THE HON'BLE RITU RAJ AWASTHI, J**
**THE HON'BLE ABDUL MOIN, J.**

P.I.L. Civil No. 22411 of 2021

**Devi Dayal ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Alok Singh

**Counsel for the Respondents:**
C.S.C.

**A. Civil Law -Constitution of India,1950-Article 226-challenge to- validity of holding of office of pradhan by respondent no. 5-the same attracted a disqualification being a clerk in the Bank-application u/s 6-A of the Act, 1947 for setting aside the election would not lie for the purpose sought by the petitioner-Moreso, the said election can be questioned, keeping in view the Article 243(O)(b) of the Constitution of India, would be by means of an election petition u/s 12(C) of the Act, 1947-After the election process has come to an end, the State Election Commissioner, District Magistrate and the Election Officer cease to have any jurisdiction and the only authority which can deal with and decide any complaint regarding the election is the Election Tribunal-Thus, the petitioner may avail other alternate remedies.(Para 1 to 21)**

**The petition is disposed of.** (E-6)

**List of Cases cited:**

1. Amrendra Singh Vs St. of U.P. & ors. (2006) 1 AWC 917

2. Smt. Smt. Ram Kanti Vs D.M. & ors. (1995) AWC 1465

3. N.P. Ponnuswami Vs Returning Officer, Namakkal Constituency (1952) AIR SC 64

4. Krishnamoorthy Vs Sivakumar & ors. (2015) AIR Vol-3 SCC 467

(Delivered by Hon'ble Ritu Raj Awasthi, J.
&
Hon'ble Abdul Moin, J.)

1. Notices on behalf of opposite parties no.1 to 3 have been accepted by the office of learned Chief Standing Counsel.

2. Heard learned counsel for the petitioner as well as Mr. Manish Mishra, learned Standing Counsel appearing on behalf of State Authorities.

3. The instant writ petition has been filed in the nature of public interest litigation seeking following reliefs:

*"1. Issue a writ, order or direction in the nature of mandamus directing the opposite parties no. 1 to 3 to*

*take effective measures for enquiring into the complaint dated 13.08.2021 preferred by the petitioner regarding the functioning of opposite party no. 5 on the post of Gram Pradhan, Gram Panchayat-Mohammadpur Nagara Garhi, Pargana Kasta, Tehsil-Mitauli, District-Kheri.*

*2. Issue a writ, order or direction in the nature of mandamus directing the opposite parties no. 2 and 3 to disqualify the opposite party no. 5 from the post of Gram Pradhan, Gram Mohammadpur Nagara Garhi, Panchayat Pargana-Kasta, Tehsil-Mitauli, District-Kheri exercising their power provided in chapter II-A Section-5-A sub rule-(c) U.P. Panchayat Raj Act, 1947.*

*3. Any other order or direction, which this Hon'ble Court may deem fit and proper, may also be passed in the interest of justice.*

*4. Allow the writ petition with cost."*

4. Learned counsel for the petitioner contends that the respondent no.5 has been elected as Gram Pradhan, Gram Panchayat Mohammadpur Nagara Garhi, Pargana Kasta, Tehsil Mitauli, District Kheri in April, 2021. It is alleged that she is holding the office of profit in the capacity of being a Clerk in the respondent no.4/Bank and thus the same has attracted a disqualification for her being elected as Pradhan. He further submits that in this regard the petitioner has already preferred an application under the provisions of Section of 6-A of Uttar Pradesh Panchayat Raj Act, 1947 (hereinafter referred to as 'the Act, 1947') and prays that the said application be directed to be decided in accordance with law within specified a time.

5. Mr. Manish Mishra, learned Standing Counsel appearing on behalf of the State Authorities, on the other hand, submits that once the respondent no.5 has been elected as Gram Pradhan the application under Section 6-A of the Act 1947 would not be maintainable, rather only an election petition can be filed under Section 12-C of the Act, 1947 to challenge the election of the respondent no. 5 for the alleged disqualification and thus the present writ petition would not be maintainable.

6. Having heard the learned counsel appearing for the contesting parties and having perused the records what is apparent is that by means of the instant petition, though the petitioner has sought for a mandamus commanding the respondents no. 1 to 3 to enquire into the complaint dated 13.08.2021 submitted by the petitioner regarding the functioning of the respondent no. 5 who admittedly has been elected as Gram Pradhan of the concerned Gram Panchayat yet in fact the petitioner wants the respondent no. 5 to be disqualified from the post of Gram Pradhan as would be apparent from the second prayer made in the petition. The ground taken is that on account of respondent no. 5 holding an office of profit in the capacity of being a clerk under the respondent no. 4-bank, she could not have been validly elected as Gram Pradhan. Though the writ petition is couched in very innocuous terms and seeks the decision on the application/complaint filed by the petitioner by invoking the disqualification as prescribed under Section 5 A of the Act, 1947 yet, as already indicated above, the resultant effect of the same is setting aside of the election of respondent no. 5, an elected Gram Pradhan.

7. For the purpose of consideration of the said prayer, we would have to consider the provisions of Section 12 C of the Act, 1947 which for the sake of convenience are reproduced below:-

*"12-C. Application for questioning the elections - (1) The election of a person as Pradhan [The words "of a Gaon Sabha" omitted by U.P. Act No.9 of 1994] or as member of a Gram Panchayat including the election of a person appointed as the Panch of the Nyaya Panchayat under Section 43 shall not be called in question except by an application presented to such authority within such time and in such manner as may be prescribed on the ground that -*

*(a) the election has not been a free election by reason that the corrupt practice of bribery or undue influence has extensively prevailed at the election, or*

*(b) that the result of the election has been materially affected -*

*i- by the improper acceptance or rejection of any nomination or;*

*ii- by gross failure to comply with the provisions of this Act or the rules framed thereunder.*

*(2) The following shall be deemed to be corrupt practices of bribery or undue influence for the purposes of this Act*

*(A) (1) Bribery, that is to say, any gift, offer or promise by a candidate or by any other person with the connivance of a candidate of any gratification to any person whomsoever, with the object, directly or indirectly, of inducing*

*(a) a person to stand or not to stand as, or to withdraw from being, a candidate at any election; or*

*(b) an elector to vote or refrain from voting at an election; or as a reward to*

*(i) a person for having so stood or not stood or having withdrawn his candidature; or*

*(ii) an elector for having voted or refrained from voting.*

*(B) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of a candidate or of any other person with the connivance of the candidate with the free exercise of any electoral right:*

*Provided that without prejudice to the generality of the provisions of this clause any such person as is referred to therein who*

*(i) threatens any candidate, or any elector, or any person in whom a candidate or any elector is interested, with injury of any kind including social ostracism and excommunication or expulsion from any caste or community; or*

*(ii) induces or attempts to induce a candidate or an elector to believe that he or any person in whom he is interested will become or will be rendered an object of divine displeasure or spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause.*

*(3) The application under sub-section (1) may be presented by any candidate at the election of any elector and shall contain such particulars as may be prescribed.*

*Explanation. Any person who filed a nomination paper at the election, whether such nomination paper was accepted or rejected, shall be deemed to be a candidate at the election.*

*(4) The authority to whom the application under sub-section (1) is made shall, in the matter of*

*(i) hearing of the application and the procedure to be followed at such hearing,*

*(ii) setting aside the election, or declaring the election to be void or declaring the applicant to be duly elected or any other relief that may be granted to the petitioner, have such powers and authority as may be prescribed.*

*(5) Without prejudice to the generality of the powers to be prescribed under sub-section (4) the rules may provide for summary hearing and disposal of an application under sub-section (1).*

*(6) Any party aggrieved by an order of the prescribed authority upon an application under sub-section (1) may, within thirty days from the date of the order, apply to the District Judge for revision of such order on any one or more of the following grounds, namely,*

*(a) that the prescribed authority has exercised a jurisdiction not vested in it by law;*

*(b) that the prescribed authority has failed to exercise a jurisdiction so vested;*

*(c) that the prescribed authority has acted in the exercise of its jurisdiction illegally or with material irregularity.*

*(7) The District Judge may dispose of the application for revision himself or may assign it for disposal to any Additional District Judge, Civil Judge or Additional Civil Judge under his administrative control and may recall it from any such officer or transfer it to any other such officer.*

*(8) The revising authority mentioned in sub-section (7) shall follow such procedure as may be prescribed, and may confirm, vary or rescind the order of the prescribed authority or remand the case to the prescribed authority for rehearing and pending its decision pass such interim orders as may appear to it to be just and convenient.*

*(9) The decision of the prescribed authority, subject to any order passed by the revising authority under this section, and every decision of the revising authority passed under this section shall be final.*

8. The language of Section 12-C of the Act, 1947 clearly provides that the election of a person appointed as Pradhan shall not be called in question **except** by an application presented to such authority within such time and in such manner as may be prescribed. The manner prescribed is as per Uttar Pradesh Panchayat Raj (Settlement of Election Disputes) Rules, 1994, which rules have been issued in exercise of powers conferred by Section 110 along with Section 12-C and 12-D of the Act, 1947.

9. Thus, once admittedly the respondent no. 5 was **elected** as Gram Pradhan, consequently whether the procedure sought to be adopted by the petitioner by filing of an application/complaint under Section 6 A of the Act, 1947 by invoking the disqualification against the respondent no.5 can be adopted or not, is the question which is to be considered by us.

10. For this purpose, we would have to consider the provisions of Section 6 A of the Act, 1947 which for the sake of convenience are reproduced below:-

***"6-A. Decision on question as to disqualification.*** *If any question arises as to whether a person has become subject to any disqualification mentioned in Section 5-A or in sub-section (1) of Section 6, the question shall be referred to the prescribed authority for his decision and his decision*

*shall, subject to the result of any appeal as may be prescribed, be final."*

11. The above provision requires that the question *whether a person has become subject to any disqualification* if arises, the said question shall be referred to the prescribed authority for his decision. Once Section 6 A of the Act, 1947 uses a phrase *"whether a person has become subject to any disqualification*" the same clearly indicates a stage anterior to the election inasmuch as the words used are "has become" which denote that such disqualification has been acquired anterior to election.

12. This is the interpretation of Section 6 A of the Act, 1947 as given by this Court in the case of **Amrendra Singh Vs. State of U.P and Ors reported in 2006 (1) AWC 917** wherein the Court has held as under:-

*"The above provision require that the question whether a person has become subject to any disqualification if arises, the said question shall be referred to the prescribed authority for his decision. Section 6-A uses the phrase whether a person has become subject to any disqualification. The above words clearly indicate a stage anterior to election. The word "has become" denotes that such disqualification has been acquired anterior to election...."*

13. Thus, keeping in view the interpretation given to Section 6 A of the Act, 1947 by this Court in the case of **Amrendra Singh (supra)** and admittedly the respondent no. 5 having been elected as a Gram Pradhan, it is apparent that an application under Section 6 A of the Act, 1947 for setting aside the election of respondent no. 5 by invoking this provision would not lie for the purpose sought by the petitioner.

14. Further, Article 243 (O) of the Constitution of India reads as follows:-

***Article-243-O.*** *Notwithstanding anything in this Constitution,--*

*(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243K, shall not be called in question in any court;*

*(b) no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.*

15. From a perusal of Article 243 (O) (b) it is apparent that no election to any Panchayat can be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.

16. The respondent no. 5 having been elected as a Pradhan, as such the only manner in which the said election can be questioned, keeping in view the Article 243 (O) (b) of the Constitution of India, would be by means of an election petition under Section 12 (C) of the Act, 1947 and by no other method.

17. As such, Section 6 A of the Act, 1947 would have to be read keeping in view the specific provision of Article 243 (O) (b) of the Constitution of India.

18. This aspect of the matter has also been considered by the Division Bench of this Court in the case of **Smt. Smt. Ram Kanti Vs. District Magistrate and Ors** reported in **1995 AWC 1465** wherein the

Division Bench of this Court has held as under:-

*"From the above provisions, it is thus, apparent that the State Election Commissioner, District Magistrate and the Election Officer are empowered to supervise, control and conduct the election.* ***After the election is over, they lose all jurisdiction over the matter and it is the Election Tribunal alone, which is competent to deal with the dispute arising out of or in connection with the election.*** *The meaning of the word election and when does the election process comes to an end has been considered by the Supreme Court from time to time while deciding the cases under the R.P. Act, leading case being N.P. Punnuswami v. Returning Officer AIR 1952 SC 64, wherein the election was given the wide meaning so as to connote the entire process culminating in a candidate being declared elected. It, thus, includes the entire procedure to be gone through to return a candidate to the Legislature. Same rule was reiterated in Mohinder Singh Gill v. Chief Election Commissioner AIR 1978 SC 851, wherein it was laid down that the election commences from the initial notification and culminates in the declaration of the return of a candidate. Election process, thus, comes to an end on the final declaration of returned candidates. As the pattern and the procedure for holding the election under the Act and the Rules is similar to that contained in the R.P. Act, the same definition of election has to be applied to the election held under the Act and the Rules.* ***After the election process has come to an end, the State Election Commissioner, District Magistrate and the Election Officer lose all their jurisdiction and the only authority, which can deal with and decide any complaint regarding the election is the Election Tribunal..."***

(emphasis by Court)

19. Likewise, the Division Bench of this Court in the case of Shambhu Singh Vs. State Election Commission, U.P and Ors reported in 2000 (4) AWC 2777 has held as under:-

*".....In our view, on proper interpretation of the Statute, after the election process has come to an end, the State Election Commissioner, District Magistrate and the Election Officer cease to have any jurisdiction and the only authority which can deal with and decide any complaint regarding the election is the Election Tribunal...."*

20. The Apex Court in the cases of ***N.P. Ponnuswami v. Returning Officer, Namakkal Constituency; AIR 1952 SC 64*** and ***Krishnamoorthy Vs. Sivakumar and others; (AIR 2015 Vol-3 SCC 467)*** have also held likewise.

21. Keeping in view the aforesaid discussion, the writ petition is dismissed leaving it open to the petitioner to avail other remedies that may be available to him.

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**(2021)10ILR A146**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 24.09.2021**

**BEFORE**

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

Civil Misc. Transfer Application No. 207 of 2021

**Anuj Kumar ...Applicant**
**Versus**
**Kshama ...Opposite Party**

**Counsel for the Applicant:**
Sri Prabhakar Srivastava, Sri Pabhat Kumar Srivastava

**Counsel for the Opposite Party:**
Sri Abhishek Gupta

**A. Civil matter-Code of Civil Procedure, 1908-Section 24-transfer sought on the ground that doubt the impartiality of the Judge-allegations imputing prejudice or bias to the Presiding officer of the Family Court on the ground alone that the Judge was trying to expedite hearing of the petition and turning down dilatory motions, is ex facie without substance-the fact that a judge is enthusiastic or works with dispatch to conclude a trial under supervisory directions issued by this Court to proceed and decide expeditiously within specified time, cannot be an index generally about the Judge's bias-litigant himself contribute very often to delays in Court-Absolutely unacceptable conduct for a litigant to raise a finger at a Judge-such conduct requires to be put down-costs in the sum of Rs. 25000/- payable to the opposite party.(Para 1 to 12)**

**The application is dismissed.** (E-6)

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

1. This transfer application, under Section 24 of the Code of Civil Procedure, has been instituted by Anuj Kumar, seeking transfer of Matrimonial Case no.589 of 2017, Kshama vs. Anuj Kumar, under Section 12 of the Hindu Marriage Act from the Additional Principal Judge, Family Court, Gautam Budh Nagar to any nearby district.

2. Heard Mr. Prakhar Srivastava, learned Counsel for the applicant and Mr. Abhishek Gupta, learned Counsel appearing on behalf of the opposite party.

3. A perusal of the grounds of transfer does not indicate that it is, in fact, a case for an inter-district transfer on grounds such as convenience of parties or other germane grounds to move the case out of the district. The transfer has been sought primarily on the ground that doubt the impartiality of the Judge. The reason, the applicant does not expect the Judge to decide fairly, is an inference drawn by the applicant from certain events in the course of proceedings. It is asserted in the affidavit that the applicant, who is a respondent to the petition for grant of a decree of nullity, made an application under Order VII Rule 11 CPC asking the Court to reject the petition. The ground urged in the application under Order VII Rule 11 CPC is that the petition for a decree of nullity is *ex facie* barred by the statutory limitation inasmuch as a period of one year has elapsed between the date of marriage and presentation of the petition. The said application was rejected by the Trial Judge *vide* order dated 17.03.2021, which the applicant says the Judge has done wrongly and illegally.

4. It is asserted that the applicant had cited authorities before the court in support of his case for a rejection of the petition, but the Trial Judge did not refer to any of those authorities while writing the order refusing to reject the petition under Order VII Rule 11 CPC. It is then asserted that the applicant moved an application on 18.03.2021 before the Trial Court to allow him fifteen days' time to file an appeal to this Court, but the learned Judge rejected that application, fixing 19.03.2021 for hearing. It is also asserted that on 19.03.2021, the learned Counsel for the applicant moved another application before the Trial Judge praying that he may be allowed time to file an appeal from the order dated 19.03.2021 to this Court, but the Trial Judge appeared adamant to decide the case. It is inferred from these facts that

the Court appeared to be *"interested"* to decide the case.

5. It is averred in paragraph 11 that from the attitude of the learned Trial Judge, it is apparent that he was *"very much interesting in this case for deciding the matter as early as possible"*. It is also averred in paragraph 12 that the attitude of the Trial Court clearly shows that the Court was leaning in favour of the opposite party and the applicant had no hope of justice from the learned Judge.

6. A counter affidavit has been filed on behalf of the opposite party, who has denied these allegations. It is asserted in paragraph no.8 of the counter affidavit that the applicant is lingering on the petition under Section 12 of the Hindu Marriage Act, indulging in dilatory tactics. The opposite party, therefore, moved a petition under Article 227 being Matter under Article 227 No.1461 of 2020 before this Court seeking a direction to the Principal Judge, Family Court, Gautam Budh Nagar to decide the petition expeditiously and within a specified time. This Court disposed of the said petition by an order dated 20.02.2020, reasoning and directing in the following terms:

"The courts cannot be held to ransom by the conduct of the parties or the strikes of the counsels. The process of law has to run its course unimpeded by any such obstructions. The courts have to pass appropriate orders in accordance with law when the parties or counsels are not cooperating with the trial proceedings. The court proceedings cannot come to a stand still under any circumstance.

In view of the preceding discussion, the matter is remitted to the learned trial court / learned Principal Judge, Family Court, Gautam Budh Nagar before whom the Original Suit No.589 of 2017 (Kshama Vs. Anuj Kumar) is pending. The following measures shall facilitate the learned trial court / learned Principal Judge, Family Court, Gautam Budh Nagar, to dispose of the said proceedings expeditiously and in light of the statutory mandate:

(I) The learned trial court / learned Principal Judge, Family Court, Gautam Budh Nagar is directed to decide the Original Suit No.589 of 2017 (Kshama Vs. Anuj Kumar) preferably within a period of six months from the date of receipt of a certified copy of this order.

(II) The learned trial court / learned Principal Judge, Family Court, Gautam Budh Nagar shall not grant any unnecessary adjournment to the parties.

(III) In case any adjournment is granted in the paramount interest of justice, the learned trial court / learned Principal Judge, Family Court, Gautam Budh Nagar shall impose costs not below Rs. 5,000/- for each adjournment.

III. In case the counsels abstain from work on account of strike call, the learned trial court / learned Principal Judge, Family Court, Gautam Budh Nagar shall proceed in the absence of such counsels and pass appropriate orders.

IV. The learned trial court / learned Principal Judge, Family Court, Gautam Budh Nagar shall record the names of counsels who abstain from work pursuant to strike call and do not appear before the learned trial court / learned Principal Judge, Family Court, Gautam Budh Nagar and shall not permit such counsels to appear in this case on all future dates of hearing.

(V) The learned trial court / learned Principal Judge, Family Court, Gautam Budh Nagar shall proceed with the

trial on a day to day basis, if required, to ensure that the all endeavours are made to decide the suit preferably within a period of six months."

7. It is averred in paragraph no.9 that despite the order dated 20.02.2020 passed by this Court, the applicant was lingering on the matter by moving frivolous applications and objections to delay proceedings. It is pleaded in paragraph no.10 that on 11.02.2021, the applicant made an application under Order XIV Rule 5 CPC asking the Court to frame a new issue to the effect: *"whether the petition u/s 12 of Hindu Marriage Act is time barred as it is given after 1 year of marriage"*. It is pointed out that the Court did frame a new issue *vide* order dated 13.03.2021 and fixed 08.03.2021 for address of arguments. At this stage, the applicant moved an application under Order VII Rule 11 CPC to reject the petition on the same ground, where the Court had earlier acted on the application under Order XIV Rule 5 and framed an issue.

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

9. The allegations in the affidavit imputing prejudice or bias to the Presiding Officer of the Family Court on the ground alone that the Judge was trying to expedite hearing of the petition and turning down dilatory motions, is *ex facie* without substance. Here, the Court notices that there is a very detailed order passed by this Court directing the Family Court Judge on 20.02.2020 to expedite proceedings of the petition for a decree of nullity, where the Judge was expected to decide the petition within six months from the date of receipt of a copy of that order. There are directions to impose costs in case of adjournment and record names of counsel who abstain from work pursuant to strike calls. This Court has directed the Family Court Judge to proceed with the trial on a day-to-day basis, a time frame of six months being allowed to conclude all proceedings.

10. In the circumstances, hardly any fault can be found with the Trial Judge's conduct in expediting proceedings and turning down a motion under Order VII Rule 11 CPC, particularly when the plea involved in the said motion was already subject matter of consideration as a preliminary issue. Quite apart, the fact that a Judge is enthusiastic or works with dispatch to conclude a trial or other proceedings, cannot be an index generally about the Judge's bias. It would be very unsafe to infer bias from the conduct of a Judge, who proceeds with a case swiftly, more so when he is doing so under supervisory directions issued by this Court to proceed and decide expeditiously within a specified time. It is, indeed, ironical that there is a complaint to be found amongst the public in general and the litigants in particular about unsavory Court delays and liberal adjournment of causes. This case is a classic illustration of how litigants themselves contribute very often to delays in Court. It is absolutely unacceptable conduct for a litigant to raise a finger at a Judge because the Judge endeavours to proceed expeditiously with a cause. This kind of conduct requires to be put down with a heavy hand.

11. This Court does not find the slightest of reason to accede to the applicant's prayer for transfer. Also, this Court is of firm opinion that given the nature of allegations and the conduct of the applicant, deterrent costs are required to be

imposed upon him so as to discourage such irresponsible allegations being made that deflect the smooth course of justice.

12. In the result, this application **fails** and is **dismissed** with costs in the sum of Rs.25,000/- payable by the applicant to the opposite party. The costs shall be remitted in the account of the opposite party within a month by the applicant through an appropriate instrument, bank transfer or electronic transfer. In the event, costs are not paid within a month, it shall be the duty of the Collector, Gautam Budh Nagar to ascertain the fact, whether costs have been paid by the applicant to the opposite, and if not, he will immediately recover the sum of money due in costs as arrears of land revenue from the applicant and remit the same to the opposite party in account.

13. Let this order be communicated to the Additional Principal Judge, Family Court, Gautam Budh Nagar concerned through the Principal Judge, Family Court, Gautam Budh Nagar and to the Collector, Gautam Budh Nagar by the Registrar (Compliance).

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**(2021)10ILR A150**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 16.09.2021**

**BEFORE**

**THE HON'BLE RAMESH SINHA, J.**
**THE HON'BLE MRS. SAROJ YADAV, J.**

U/S 378CR.P.C. No. 41 of 2021

**State of U.P. ...Appellant**
**Versus**
**Iqbal Ansari ...Respondent**

**Counsel for the Appellant:**
Sri Arunendra, AGA

**Counsel for the Respondent:**

**(A) Criminal Law - Appeal against acquital - The Code of criminal procedure, 1973 - Section 378(3) - grant of leave to appeal - Indian Penal Code, 1860 - Sections 498-A - Husband or relative of husband of a woman subjecting her to cruelty, Sections 304-B - Dowry death - Dowry prohibition Act,1961 - Section 3/4 .**

**(B) Indian Evidence Act, 1872 - Section 113-B - Presumption as to dowry death - The prosecution must at first establish the existence of the necessary ingredients for constituting an offence under Section 304B, IPC - Once these ingredients are satisfied, the rebuttable presumption of causality, provided under Section 113B, Evidence Act operates against the accused.(Para - 13)**

Marriage of deceased solemnized with accused/respondent - 1-1/2 years ahead of incident - accused/respondent used to demand dowry - tortured and harassed deceased for non fulfillment of dowry - left deceased outside the house of the complainant (brother of the deceased) in an unconscious state - complainant came out to see the deceased - found dead - Trial Court conclusion - major contradictions in the statements of the witnesses of facts - Prosecution could not establish charges framed against the accused/respondent - acquitted the accused/respondent - State-appellant preferred the present appeal.

**HELD:-**No factual or legal error in the appreciation of evidence by the Trial Court . Material contradiction in the statements of the witnesses of facts, who are the close relatives of the deceased . Neither of them remained stable in their cross-examinations nor they supported the prosecution version in their cross-examinations. View taken by the trial Court is a possible view. Trial Court has given valid, cogent, convincing and satisfactory reasons while passing the impugned judgment and order. (Para -15)

**Application seeking leave to appeal rejected & appeal dismissed.** (E-7)

**List of Cases cited:-**

Satbir Singh Vs St. of Har., (2021) 6 SCC

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This appeal alongwith application under Section 378(3) of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') has been filed by the State/appellant with the prayer that leave to appeal may be granted against the judgment and order dated 03.12.2020 passed by Additional Sessions Judge, Room No. 4/Special Judge, E.C. Act, Lucknow in Sessions Trial No. 1363 of 2008 arising out of Case Crime No. 243 of 2007, under Sections 498-A, 304-B of the Indian Penal Code, 1860 (in short 'I.P.C.') and Section 3/4 of The Dowry Prohibition Act (in short "D.P. Act"), Police Station Thakurganj, District Lucknow, whereby the trial Court acquitted the accused respondent.

2. Heard Sri Arunendra, learned Additional Government Advocate (in short 'A.G.A.') for the State appellant, perused the impugned judgment and order and the record of the trial Court.

3. A First Information Report (in short "F.I.R.") was registered on the basis of a written report presented by Mohd. Salim (brother of the decased -Reshma) on 01.06.2007. In the report, it was stated that marriage of his sister Reshma was solemnized with Iqbal Ansari 1-1/2 years ahead. After marriage, she used to live in her matrimonial home alongwith other family members. After two-three months, Iqbal Ansari, his mother, father and sister started demanding Rs. One Lac as dowry. They all started torturing her. He (complainant) tried to placate Iqbal 2-3 times that he is not in a position to give more dowry. On 01.06.2007 at about 12 O'clock, Iqbal left Reshma outside the house of the complainant in an unconscious state. When the complainant opened the door, he found his sister lying there and she was dead.

4. After investigation, charge sheet was submitted only against Iqbal Ansari/accused-respondent under Sections 498-A and 304-B IPC and Section 3/4 D.P. Act. The concerned Magistrate took cognizance and committed the case to the Sessions Court. The charges were framed against the accused/respondent under the aforesaid sections and also Section 302 IPC in alternate. He denied the charges and claimed to be tried.

5. In order to prove the charges framed against the accused/respondent, the prosecution examined Dr Neeraj Shekhar as P.W. 1, Mohd. Salim (complainant)-P.W. 2, Smt. Suraiya Begum (mother of the deceased)- P.W. 3, Smt. Nagma Bano (sister of the deceased)-P.W. 4, Head Constable Shiv Prasad-P.W. 5, Mohd. Nasim (brother of the deceased)-P.W. 6, Mohd. Wasim (brother of the deceased)-P.W. 7, Sri Chandra Shekhar-P.W. 8, Sri Ram Nayan Singh (first Investigating Officer)-P.W. 9 and Sri Chiranjiv Nath Sinha (Second Investigating Officer)- P.W. 10. Documentary evidence Exhibit Ka-1 to Ka-11 were proved.

6. The statement of the accused/respondent was recorded under Section 313 Cr.P.C. wherein he denied the charges and stated that F.I.R. has been lodged falsely. The witnesses have deposed falsely

due to enmity and he is innocent. In the defence the accused/respondent examined three witnesses-Asaf Ali Ansari-D.W-1, Furkan Ali-D.W. 2 and Mohd. Ahmad Ansari-D.W. 3. Thereafter, the Trial Court after hearing the arguments of both the sides and analyzing the evidence available on record came to the conclusion that there are major contradictions in the statements of the witnesses of facts. The prosecution could not establish the charges framed against the accused/respondent and acquitted the accused. Being aggrieved of acquittal of the accused/respondent, the State-appellant has preferred the present appeal.

7. Learned A.G.A has challenged the impugned judgment and order by arguing that learned Trial Court has wrongly acquitted the accused/respondent giving benefit of doubt. Learned Trial Court has not considered the point that deceased died in her matrimonial home within seven years of her marriage as an unnatural death. There are specific allegations in the F.I.R. as well as in the statements of the witnesses that accused/respondent demanded dowry and the deceased was tortured for non-fulfilment of dowry. Learned A.G.A. further argued that the Trial Court has not considered that as per Section 113-B of the Indian Evidence Act, presumption should be raised against the accused/respondent and the accused/respondent has not given any explanation to rebut the presumption so raised and has not explained under what circumstances ante-mortem injuries were caused on the body of the deceased. Hence, the impugned judgment and order should be set aside and the accused be acquitted.

8. Considered the submissions raised by learned A.G.A., perused the impugned judgment and order and the record of the trial Court.

9. Before moving forward, it appears appropriate to have a look at Section 304-B I.P.C. and Section 113-B of the Indian Evidence Act, 1872.

**Section 304-B IPC** reads as under:-

***"304B. Dowry death.--(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called ''dowry death', and such husband or relative shall be deemed to have caused her death.***

***Explanation.--For the purpose of this sub-section, ''dowry' shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).***

***(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."***

***Section 113-B of the Evidence Act, 1872* reads as under:-**

***"113-B. Presumption as to dowry death.--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.--For the purposes of this section, ''dowry death' shall have the same meaning as in Section 304B of the Indian Penal Code (45 of 1860)."***

***Hon'ble Apex Court in the case of Maya Devi and Another Versus State of***

***Haryana (2015) 17 Supreme Court Cases 405 has laid down as under:-***

***In order to convict an accused for the offence punishable under Section 304B IPC, the following essentials must be satisfied:***

***(i) the death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances;***

***(ii) such death must have occurred within seven years of her marriage;***

***(iii) soon before her death, the woman must have been subjected to cruelty or harassment by her husband or any relatives of her husband;***

***(iv) such cruelty or harassment must be for, or in connection with, demand for dowry.***

***When the above ingredients are established by reliable and acceptable evidence, such death shall be called dowry death and such husband or his relatives shall be deemed to have caused her death. If the abovementioned ingredients are attracted in view of the special provision, the court shall presume and it shall record such fact as proved unless and until it is disproved by the accused. However, it is open to the accused to adduce such evidence for disproving such conclusive presumption as the burden is unmistakably on him to do so and he can discharge such burden by getting an answer through cross-examination of the prosecution witnesses or by adducing evidence on the defence side."***

10. Now, we have to analyze the present case on the touch stone of above ingredients of Section 304-B IPC.

11. The first ingredient is death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances. In the present matter, in the F.I.R. it was mentioned that the accused/respondent left the deceased outside the house of the complainant in an unconscious state. When the complainant came out to see the deceased, he found her dead. In this regard, the statement of P.W. 1-Dr Neeraj Shekhar, who conducted the autopsy on the cadaver, is important. In his opinion, the death of the deceased occurred due to shock and hemorrhage as a result of ruptured fallopian tube on right side. As per norms, autopsy was conducted by a panel of two doctors. P.W.1 has also stated that another doctor was also of the opinion that death was caused due to shock and hemorrhage as a result of ruptured fallopian tube on right side. In the post-mortem report, it has also been mentioned that ***"Right fallopian tube ruptured, whole uterus, both ovary and both fallopian tubes preserved in formalin and sent to KGMU Pathology for Histopathological examination"***. P.W. 1 has stated that no mark of injury was found on the external or internal part of the body of deceased. This medical witness did not say that the death was unnatural. This witness has also stated that he did not see 'histopathological examination report' of the deceased, so he cannot say conclusively that death was natural. 'Histopathological-examination-report' of Post Graduate Department of Pathology, King George's Medical University, Lucknow is on record as Paper No. 33/2. This report is as under:-

***"HISTOPATHOLOGICAL EXAMINATION REPORT***

***GROSS:-***

***An opened up uterus, cervix and bilateral adenexa measuring 6x5x3.5 cms received. Outer surface is smooth. Cut surface shows a slit like uterine cavity. Posterior wall thickness is 1.5 cm.***

***Right adenexa measuring 4x2.5x2 cm received. Outer surface is smooth. Cuts soft. Cut surface shows one cyst measuring 1 cm and filled with gelatinous material.***

***Left adenexa measuring 3x2.5x1 cms received. Outer surface is smooth. Cuts soft. Cut surface shows corpus albican and hemorrhage.***

***MICROSCOPIC:-***

****Uterus: 3091-shows normal histology of uterus. There is no evidence of villi or haemorrhagic area.***

****Cervix:3092- shows normal cervical histology.***

****Right ovary :3093- Corpus luteal cyst shows normal histology of ovary.***

****Left ovary: 3094-Corpus luteal cyst-Normal histology of ovary."***

11. From the perusal and conjoint analysis of this report, statement of P.W. 1 and post mortem report, it comes to surface that death of deceased was not unnatural but she died due to rupture of fallopian tube. Thus, the ingredients of Section 304-B IPC is not fulfilled.

12. Now comes second ingredient, which requires, the death of the deceased must have occurred within seven years of her marriage. On this point, there is no dispute about the version of the F.I.R., wherein it has been mentioned that marriage of the deceased was solemnized with accused/respondent 1-1/2 years ahead of the incident. Hence, this ingredient is fulfilled.

13. Now comes third ingredient, which requires that soon before her death, a woman must have been subjected to cruelty and harassment by her husband and any relative of her husband and the fourth requirement is that such cruelty and harassment must be in connection with a demand of dowry. In the F.I.R., it has been mentioned that accused respondent used to demand dowry and he tortured and harassed the deceased for non fulfillment of dowry. The complainant (brother of the deceased) in his examination in chief has supported the version of F.I.R. but in cross-examination he has stated that when the marriage of the deceased was solemnized with accused/respondent, at that time, he was not in India. He also admitted that Reshma and Iqbal got married on their own sweet will and they solemnized "Nikaah" at Nadwa College and he was not present in the marriage. His sister told him about the 'Nikaah' after one month of her marriage. In his cross-examination he has also accepted that the dead body of his deceased sister was brought to his house by a vehicle from Trauma Centre. The accused respondent Iqbal came to his house and remained there for 10 minutes and all the family members were present there. The mother of the deceased has been examined as P.W. 3. In examination-in-chief, she has stated that her daughter solemnized marriage with Iqbal in Court. Thereafter, when she came to know about the marriage, they got performed their "Nikaah" and also gave dowry. She has also stated that Iqbal used to torture her daughter for Rs. One Lac and he left her daughter outside her house. His son Salim brought her daughter inside and went to call the Doctor and when Doctor came and examined the deceased, he declared her dead. This witness also in her cross examination has stated her deceased daughter used to come to her house about every day alongwith Iqbal and they were happy. They never complained anything on the date when her daughter died. She was admitted in the medical college or not, she did not know. Perusal of the statement of

this witness shows that she has given a contradictory statement and in cross-examination has not supported the prosecution version about the demand of dowry and torture for non fulfillment of dowry.

12. P.W. 4- Smt. Nagma Bano, who is sister of the deceased has stated that on 01.06.2007 when her brother went to the house of her deceased sister, he found that she was seriously ill. Upon it, her brother and sister in law took her to the hospital and her sister died there in the hospital. Thereafter, dead body was brought to home by her brother and sister in law. She has also stated that when dead body was being brought to the house, Iqbal left from the way. Thereafter he never came. In the cross-examination, this witness has stated that her sister Reshma used to live happily with Iqbal in a rented house. They have no complaint about each other. This witness has also not supported the prosecution version about the demand of dowry and torture. In similar way, P.W. 6-Mohd. Nasim and P.W., 7-Mohd. Wasim (brothers of the deceased) have given contradictory statements in their cross-examinations. Further more, all the three defence-witnesses have stated that deceased and accused/respondent Iqbal used to live happily and deceased died of sudden illness. The evidence of these witnesses of facts, who are the close relatives of the deceased have not established that the deceased was tortured for demand of dowry and she was subjected to cruelty soon before her death. Hence, 3rd and 4th ingredients are also not established by the prosecution. It is a burden of the prosecution to establish all these four ingredients/requirements of Section 304-B IPC by a reliable evidence. When these ingredients are established or proved, only then the presumption of dowry death is raised against the accused.

13. In the case of ***Satbir Singh Versus State of Haryana (2021) 6 SCC,*** the Hon'ble Apex Court has laid down as under:-

***"The prosecution must at first establish the existence of the necessary ingredients for constituting an offence under Section 304B, IPC. Once these ingredients are satisfied, the rebuttable presumption of causality, provided under Section 113B, Evidence Act operates against the accused."***

14. The argument of learned A.G.A. that the trial Court must have raised the presumption against the accused is baseless as prosecution could not establish the ingredients of Section 304-B of IPC, which is the requirement before raising the presumption under Section 113-B of the Evidence Act, 1872.

15. Hence, in the light of the above analysis and discussion, we do not find any factual or legal error in the appreciation of evidence by the Trial Court while passing the impugned judgment and order. There are material contradiction in the statements of the witnesses of facts, who are the close relatives of the deceased. Neither of them remained stable in their cross-examinations nor they supported the prosecution version in their cross-examinations. The view taken by the trial Court is a possible view. The trial Court has given valid, cogent, convincing and satisfactory reasons while passing the impugned judgment and order.

16. We therefore, do not consider it to be a fit case for grant of leave to appeal to the appellant. The application seeking leave

to appeal is, accordingly rejected and the appeal is also dismissed.

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**(2021)10ILR A156**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 22.10.2021**

**BEFORE**

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

U/S 482/378/407 No. 4035 of 2021

**Mata Bheekh Singh & Ors. ...Applicants**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicants:**
Virendra Singh

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

**A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Section 307,504,506-quashing of criminal proceedings-trial concluded-appeal against conviction-appeal allowed-parties compromise on their own without any coercion or compulsion and they had buried their differences-offences are purely personal, Thus quashing would not over-ride public interest-no untoward incident has occurred after the alleged assault took place long time ago in the heat of moment.(Para 1 to 10)**

**B. The extraordinary power bestowed upon the High Court u/s 482 Cr.P.C. can be invoked beyond metes and bounds of Section 320 Cr.P.C. Nonetheless, such powers being of wide amplitude, ought to be exercised carefully and in the context of quashing criminal proceedings bearing in mind (i) Nature and effect of the offence on the conscience of the society(ii) Seriousness of the injury, if any (iii) Voluntary nature of compromise between the accused and the victim (iv) Conduct of the accused persons, prior to and after the occurrence of the purported offence and other relevant considerations. (Para 5)**

**The application is disposed of.** (E-6)

**List of Cases cited:**

1. Ram Gopal & anr .Vs St. of M.P. CRLA No. 1489 of 2012

2. Krishnapa & ors. Vs St. of Karn. CRLA No. 1488 of 2012

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

(1) This petition has been filed with the following main prayer:-

*"(1) For the facts, reasons and circumstances as stated in the accompanying affidavit, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to quash the proceedings of criminal case at Trial No.292/2009 arising out of Case Crime No.335A/2007, under Sections 307/504/506 IPC, Police Station Sareni, District Rae Bareli, pending before the learned Additional Sessions Judge, Court No.6, Rae Bareli, on the basis of settlement/compromise executed in between the parties, as contained in Annexure No.7 in the interest of justice."*

(2) It has been submitted by the learned counsel for the petitioners that the opposite party no.2 had lodged an F.I.R. on 23.08.2007. The petitioners had also lodged an F.I.R. registered as Case Crime No.335/2007. A compromise has occurred between the parties. The true copy of the compromise has been filed through supplementary affidavit which has been taken on record today.

(3) Shri Dhirendra Singh, Enrollment No.9643/03, Advocate Roll No.B/ D0240/2012, has filed his Power on behalf of the opposite party no.2. He says that indeed a compromise has taken place between the parties.

(4) Ms. Sikha Sinha, learned AGA has pointed out that the trial has been going on since 2009 and is nearing completion. She has also pointed out the injury report annexed as annexure-02 which has mentioned at least six incised wounds on the face of the victim, and says that in such cases under Section 307 of the IPC, the inherent powers of quashing prosecution under Section 482 should not ordinarily be exercised.

(5) Sri Dhirendra Pratap Singh has brought to the notice of this Court a judgement rendered by the Division Bench of the Hon'ble Supreme Court on 29.09.2021 in Criminal Appeal No. 1489 of 2012 ***(Ram Gopal & Another vs. State of Madhya Pradesh)*** and Criminal Appeal No. 1488 of 2012 ***(Krishnapa & Others vs. State of Karnataka)*** where the Division Bench has observed, after considering the larger Bench decision of the Hon'ble Supreme Court in Gyan Singh vs. State of Punjab (2012) 10 SCC 303, and subsequent decision that the plenary jurisdiction of the superior judiciary including the High Courts to impart complete justice, under Section 482 Cr.P.C. is not inhibited by any statutory limits as imposed under Section 320 of the Cr.P.C. The extraordinary power bestowed upon the High Court under Section 482 Cr.P.C. can be invoked beyond the metes and bounds of Section 320 Cr.P.C. Nonetheless, such powers being of wide amplitude, ought to be exercised carefully and in the context of quashing criminal proceedings bearing in mind:-(i) Nature and effect of the offence on the conscience of the society; (ii) Seriousness of the injury, if any; (iii) Voluntary nature of compromise between the accused and the victim; & (iv) Conduct of the accused persons, prior to and after the occurrence of the purported offence and/or other relevant considerations.

(6) The Supreme Court had allowed the Appeals by observing that the offences involved in the appeal could be categorized as purely personal and having no over tones of offence against the State and the nature of injuries were such as not to appear to exhibit any mental depravity for commission of an offence of such a serious nature that its quashing would over-ride public interest. The Court exercised its power under Article 142 saying that it is immaterial that the trial against the appellant has been concluded and there is a appeal against conviction. The appeal should be dismissed because the parties on their own settlement without any coercion or compulsion, willingly and voluntarily had buried their differences and wished to give a quietus to their dispute. The Court also looked into the fact that the occurrences in both the cases took place long time ago and there was nothing on record that the appellants and the complainants being residents of the same villages had thereafter breached the peace. Therefore, the criminal justice system would remain unaffected on acceptance of amicable settlement between the parties and resultant acquittal of the appellants.

(7) No doubt, the Hon'ble Supreme Court has made such observations under Article 142 of the Constitution and has quashed a prosecution against the appellants not in the exercise of it's power of quashing under Section 482 of the

Cr.P.C. but under Article 142 which is designed to do complete justice between the parties. However, the observations made by the Hon'ble Supreme Court seem appropriate in this case also. It has been submitted by the counsel for the petitioners and also by the opposite party no.2 that no untoward incident has occurred after the alleged assault which took place long time ago and in the heat of the moment under grave provocation.

(8) Learned trial court be sent papers relating to this Application U/s 482 forthwith by the Registry. The compromise which has been filed in the original through supplementary affidavit by the counsel for the petitioners shall be returned to him.

(9) Accordingly, the Application U/s 482 stands **disposed of.**

(10) Learned trial court shall verify the compromise occurring between the parties and pass appropriate orders thereon. It shall be open for the petitioners to approach this Court again by filing the appropriate petition for quashing of the proceedings thereafter. Till appropriate orders are passed by the concerned trial court verifying the compromise occurring between the parties, no coercive steps be taken against the petitioners.

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**(2021)10ILR A158**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 25.10.2021**

**BEFORE**

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

U/S 482/378/407 No. 4045 of 2021

**Cosntable 52 Shiwakant Dubey ...Applicant**

**Versus**

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

**Counsel for the Applicant:**
Satish Singh, Anjeet Singh

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

**A. Criminal Law -Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Section 504 - Police Act-Section 29-quashing of chargesheet-who was working as constable was entrusted to take down the statement of his colleague who had reported for duty late after unauthorized absence-applicant failed to record the same-the superior got annoyed due to non-exercise of his official duty-applicant misbehaved and abused his Officer Incharge-no sanction u/s 197 Cr.P.C. was required-However, offence is minor in nature and only one witness has been examined, all the officers are retired now-applicant's retiral benefits have been withheld pending criminal proceedings-In such a situation trial may be expedite and trial court is directed to pass appropriate orders.(Para 1 to 12)**

**B. Sanction of the government, to prosecute a police officer for any act related to the discharge of an official duty, it is imperative to protect the police officer from facing harassive, retaliatory, revengeful and frivolous proceedings. To decide whether sanction is necessary, the test is whether the act is totally unconnected with official duty or whether there is a reasonable connection with the official duty. In the case of an act of a policeman or any other public servant unconnected with the official duty there can be no question of sanction.(Para 6)**

**The petition is disposed of.** (E-6)

**List of Cases cited:**

1. Devaraja Vs Owais Sabeer Hussain (2020) 7 SCC 695

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

(1) Heard Shri Anjeet Singh, learned counsel for the petitioner, learned A.G.A. and perused the record.

(2) The petitioner prays for quashing of the Charge-Sheet dated 15.09.2008 as well as the order taking cognizance and summoning the petitioner on 11.02.2009 and the entire criminal proceedings of Case No.434 of 2009 **(State Vs. Shiwakant Dubey)** arising out of Case Crime No.498 of 2008, under Section 29 Police Act and Section 504 IPC, Police Station Kotwali Nagar, District Pratapgarh, pending in the court of learned Chief Judicial Magistrate, Pratapgarh.

(3) Learned counsel for the petitioner submits that the petitioner was working as a Constable at Police Station Kotwali Nagar. He was directed by the Sub Inspector, Santosh Kumar Dubey to take down the statement of his colleague Constable Ram Adhar Ram who had reported for duty late after unauthorized absence. The petitioner failed to record the statement of Constable Ram Adhar Ram. Consequently, the Sub Inspector got annoyed and F.I.R. was lodged under Section 29 of the Police Act and Section 504 IPC. The statements under Section 161 Cr.P.C. were recorded on 01.09.2008 and 15.09.2008 of Police Personnel, colleagues of the petitioner who supported the version of the F.I.R. However, despite cognizance being taken more than 12 years ago till date only one witness has been examined. In the meantime, the petitioner has retired from his services on 31.05.2021 and Constable Ram Adhar Ram who was the only witness who had given statement under Section 161 Cr.P.C. has also retired from service and the informant, the Sub Inspector may also have retired. There is no chance of any of the witness appearing in the court.

(4) Additionally it has been submitted by the learned counsel for the petitioner that the petitioner was working as a Constable in the Police Force and whatever action he had taken was in the discharge of his official duty, therefore, sanction under Section 197 of the Cr.P.C. should have been taken which was not taken. The Trial is going on and the learned Trial Court has taken cognizance without applying its mind to the necessity of the sanction from the Government for prosecution of Police Officer.

(5) Learned counsel for the petitioner has placed reliance upon the judgment rendered by the Hon'ble Supreme Court in the case of **D. Devaraja Vs. Owais Sabeer Hussain reported in 2020 (7) SCC 695,** where the Hon'ble Supreme Court has made observation in Paragraph No.67 that requirement of sanction to entertain/ take cognizance of an offence allegedly committed by a Police Officer under Section 197 Cr.P.C. had been settled by the Supreme Court in its earlier binding precedent.

(6) This Court has carefully perused the judgment placed before this Court. The relevant paragraphs of the judgment in the case of **D. Devaraja (supra)** namely Paragraph Nos.67, 68, 69, 70, 71, 72, 73, 74, 75 & 76 are being quoted hereinbelow:-

*"67. The law relating to the requirement of sanction to entertain and/or take cognizance of an offence, allegedly*

*committed by a police officer under Section 197 of the Code of Criminal Procedure read with Section 170 of the Karnataka Police Act, is well settled by this Court, inter alia by its decisions referred to above.*

*68. Sanction of the Government, to prosecute a police officer, for any act related to the discharge of an official duty, is imperative to protect the police officer from facing harassive, retaliatory, revengeful and frivolous proceedings. The requirement of sanction from the government, to prosecute would give an upright police officer the confidence to discharge his official duties efficiently, without fear of vindictive retaliation by initiation of criminal action, from which he would be protected under Section 197 of the Code of Criminal Procedure, read with Section 170 of the Karnataka Police Act. At the same time, if the policeman has committed a wrong, which constitutes a criminal offence and renders him liable for prosecution, he can be prosecuted with sanction from the appropriate government.*

*69. Every offence committed by a police officer does not attract Section 197 of the Code of Criminal Procedure read with Section 170 of the Karnataka Police Act. The protection given under Section 197 of the Criminal Procedure Code read with Section 170 of the Karnataka Police Act has its limitations. The protection is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and official duty is not merely a cloak for the objectionable act.*

*70. An offence committed entirely outside the scope of the duty of the police officer, would certainly not require sanction. To cite an example, a police man assaulting a domestic help or indulging in domestic violence would certainly not be entitled to protection. However if an act is connected to the discharge of official duty of investigation of a recorded criminal case, the act is certainly under colour of duty, no matter how illegal the act may be.*

*71. If in doing an official duty a policeman has acted in excess of duty, but there is a reasonable connection between the act and the performance of the official duty, the fact that the act alleged is in excess of duty will not be ground enough to deprive the policeman of the protection of government sanction for initiation of criminal action against him.*

*72. The language and tenor of Section 197 of the Code of Criminal Procedure and Section 170 of the Karnataka Police Act makes it absolutely clear that sanction is required not only for acts done in discharge of official duty, it is also required for an act purported to be done in discharge of official duty and/or act done under colour of or in excess of such duty or authority.*

*73. To decide whether sanction is necessary, the test is whether the act is totally unconnected with official duty or whether there is a reasonable connection with the official duty. In the case of an act of a policeman or any other public servant unconnected with the official duty there can be no question of sanction. However, if the act alleged against a policeman is reasonably connected with discharge of his official duty, it does not matter if the policeman has exceeded the scope of his powers and/or acted beyond the four corners of law.*

*74. If the act alleged in a complaint purported to be filed against the policeman is reasonably connected to discharge of some official duty, cognizance thereof cannot be taken unless requisite sanction of the appropriate government is obtained under Section 197 of the Code of*

*Criminal Procedure and/or Section 170 of the Karnataka Police Act.*

*75. On the question of the stage at which the Trial Court has to examine whether sanction has been obtained and if not whether the criminal proceedings should be nipped in the bud, there are diverse decisions of this Court.*

*76. While this Court has, in D.T. Virupakshappa (supra) held that the High Court had erred in not setting aside an order of the Trial Court taking cognizance of a complaint, in exercise of the power under Section 482 of Criminal Procedure Code, in Matajog Dobey (supra) this Court held it is not always necessary that the need for sanction under Section 197 is to be considered as soon as the complaint is lodged and on the allegations contained therein. The complainant may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty and/or under colour of duty. However the facts subsequently coming to light in course of the trial or upon police or judicial enquiry may establish the necessity for sanction. Thus, whether sanction is necessary or not may have to be determined at any stage of the proceedings."*

(7) It is evident that the Supreme Court had observed in the aforecited judgment that the sanction is necessary only where the offence is committed either during the discharge of official duty by the Police Personnel or where there is a reasonable connection between the act and the performance of the official duty. The sanction is required not only for an act done in discharge of official duty, it is also required if a Police Officer is accused of any act done under the colour or in excess of any such duty or authority as aforesaid.

(8) In the case of the petitioner he was asked to record the statement of a fellow colleague who was also a Constable. He failed to take down the statement also, despite the orders of the superior officer for not recording the return *(Waapsi)* of Constable Ram Adhar Ram from his unauthorized absence, till his statement is given, recorded the Wapsi in the General Duty.

(9) These to actions of the petitioner can be said to have been done in the purported exercise or non-exercise of his official duty that was entrusted to him. However, there is an allegation that the petitioner started misbehaving and abusing Officer Incharge by using vulgar language when he was asked to comply with the orders. Such an act cannot be said to have been committed in the discharge of his official duty and therefore, no sanction under Section 197 Cr.P.C. was required in so far as the mis-behaviour with his superior fellow colleagues as has been mentioned in the F.I.R., was necessary.

(10) However, taking into account the fact that the offence is minor in nature under Section 504 IPC, and despite summoning order being issued on 11.02.2009, only one witness has been examined by the learned Trial Court and the petitioner's retiral benefits have been withheld pending criminal proceedings, this Court finds it appropriate to expedite the Trial.

(11) It is expected that the learned Trial Court shall complete all evidence and pass appropriate orders in accordance with the procedure prescribed under law within a period of six months from the date a certified copy of this order is produced before him.

(12) This petition stands **disposed of.**

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**(2021)10ILR A162**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 25.10.2021**

**BEFORE**

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

U/S 482/378/407 No. 4047 of 2021

**Golu ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Shrikant Mishra

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

**A. Criminal Law -Code of Criminal Procedure, 1973-Section 482, 319 - Indian Penal Code, 1860-Section 302, 201-challenge to-interlocutory order passed u/s 319- applicant-Six prosecution witnesses named the petitioner as one of the three persons who were last seen with the deceased-trial court observed that initially in the F.I.R. and statements made before the police showed that the applicant had been named as a co-accused-Trial court rightly summoned the applicant after recording a prima facie satisfaction-Hence, no interference requires.(Para 1 to 17)**

**B. 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 u/s 319 Cr.P.C. In section 319 Cr.P.C. the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not 'for which such person could be convicted.'(Para 10 to 15)**

**The petition is dismissed.** (E-6)

**List of Cases cited:**

1. Prabhu Chawla Vs St.of Raj. & anr. CRLA No. 842 of 2016

2. Raj Kapoor Vs St. (1980) 1 SCC 43: 1980 SCC (Cri) 72

3. Madhu Limaye Vs St. of Mah.(1977) 4 SCC 551: 1978 SCC (Cri) 10

4. Ramesh Chandra Srivastava Vs St. of U.P. CRLA No. 990 of 2021

5. Hardeep Singh Vs St. of Punj. & ors. (2014) 3 SCC 92

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

1. Heard learned counsel for the petitioner, Sri Pradeep Tiwari, Advocate, who has filed power on behalf of opposite party no.2 and Sri S.P. Tiwari, learned A.G.A. for the State.

2. This petition under Section 482 Cr.P.C. has been filed with the following main relief:-

*"It is, therefore, most respectfully prayed that this Hon'ble Court be pleased to quash the impugned order dated 02/11/2020 passed by the Additional Session Judge Court No.1, U/S 319 Cr.P.C. in Session Trial No.277/2013:- State of U.P.*

*Vs. Ram Kushal and others related to Crime No.383/2012, u/s 302, 201 of the I.P.C., Police Station Kotwali Akbarpur, District Ambedkar Nagar."*

3. This Court had earlier given time to learned counsel for the petitioner to produce case laws to the effect that even where a Criminal Revision is maintainable, a petition under Section 482 Cr.P.C. can be filed and entertained by the High Court.

4. Learned counsel for the petitioner has produced before this Court a copy of the judgment rendered by Larger Bench of three Judges in Criminal Appeal No.842 of 2016: Prabhu Chawla Vs. State of Rajasthan and another; decided on 05.09.2016. Learned counsel has read out the judgment cited. It has been submitted that the appellants therein Prabhu Chawla, Jagdish Upasane and others had filed a Criminal Appeal No.24 of 2009 where the High Court of Rajasthan had dismissed the petitions preferred by the appellants under Section 482 Cr.P.c. on the ground that they were not maintainable as the remedy under Section 397 Cr.P.C. of filing Criminal Revision was maintainable. The Division Bench which initially considered the Criminal Appeal had expressed prima facie opinion that the judgment of the High Court of Rajasthan was against the law settled by Supreme Court in *Dhariwal Tobacco Products Ltd. and others Vs. State of Maharashtra and another.* The Division Bench however noticed a later Division Bench judgment in the case of *Mohit Alias Sonu and another Vs. State of U.P. and another,* wherein apparently contrary view was taken that when an order under challenge is not interlocutory in nature and is amenable to the revisional jurisdiction, then inherent jurisdiction under Section 482 Cr.P.C. could not be exercised. In view of such conflict, the matter was placed by the Chief Justice before the Larger bench of three judges for fresh consideration on merits regarding the scope of inherent powers available to the High Court under Section 482 Cr.P.C.

5. The Supreme Court observed that the Appeals had arisen out of Misc. Petition under Section 482 Cr.P.C. having been filed by the appellants before the High Court of Rajasthan against the order dated 30.11.2006 passed by the learned Judicial Magistrate, Jodhpur in Complaint Case no.1669 of 2006, whereby it had taken cognizance against the appellants under Section 228A of the I.P.C. and summoned them through bailable warrants to face proceedings in the case.

6. The Supreme Court in paragraph-5 of the judgment rendered in Prabhu Chawla (supra) has referred paragraph-10 of the judgement rendered in Raj Kapoor Vs. State, 1980 (1) SCC 43, and observed thus:-

*"5. Mr Goswami also placed strong reliance upon the judgment of Krishna Iyer, J. in a Division Bench in Raj Kapoor v. State [Raj Kapoor v. State, (1980) 1 SCC 43 : 1980 SCC (Cri) 72] . Relying upon the judgment of a Bench of three Judges in Madhu Limaye v. State of Maharashtra [Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551 : 1978 SCC (Cri) 10] and quoting therefrom, Krishna Iyer, J. in his inimitable style made the law crystal clear in para 10 which runs as follows: (Raj Kapoor case [Raj Kapoor v. State, (1980) 1 SCC 43 : 1980 SCC (Cri) 72] , SCC pp. 47-48)*

*"10. 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, can 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 Code. In Madhu Limaye v. State of Maharashtra [Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551 : 1978 SCC (Cri) 10] 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 the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction'. (SCC pp. 555-56, para 10)*

*In short, there is no 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 injustice 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 Untwalia, J.: (SCC p. 556, para 10)*

*'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 an appropriate case under its inherent powers. The present case*

*undoubtedly falls for exercise of the power of the High Court in accordance with Section 482 of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible.'*

*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."*

7. It has been argued on the basis of judgement rendered by the Larger Bench that Section 482 Cr.P.C. starts with a non obstante clause regarding the plenary jurisdiction of the High Court which cannot be curtailed in any manner and even where remedy in other sections of the Code is provided for instance, Section 397 of the Cr.P.C. The Court had observed that there is no limitation except that of self-restraint. The policy of 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 injustice stares the court in the face. The Court thereafter considered the facts of the case and observed that in the Criminal Appeals the facts were such that they would undoubtedly call for the exercise of the power of the High Court in accordance with Section 482 Cr.P.C., even assuming, although not accepting that invoking the revisional power of the High Court is impermissible.

8. The Larger Bench of the Supreme Court reiterated the law as enunciated in *Dhariwal Tobacco Products Ltd. and others (supra)* and stated that the judgment rendered in *Mohit Alias Sonu and another Vs. State of U.P. and another,* does not state the law correctly.

9. In view of the submissions made by learned counsel for the petitioner, this Court is of the opinion that this petition under Section 482 Cr.P.C. is maintainable against an order summoning the petitioner under Section 319 Cr.P.C. However, with regard to the merits of the case, learned counsel for the petitioner has tried to convince this Court that in terms of the observations made by the Supreme Court in Criminal Appeal NO.990 of 2021: Ramesh Chandra Srivastava Vs. State of U.P.; decided on 13.09.2021, the order summoning the petitioner as an accused to face trial along with the other accused could not have been issued by the learned trial court.

10. It has been submitted that in the judgment rendered by Ramesh Chandra Srivastava (supra), the Court observed that a satisfaction should be recorded by the learned trial court while summoning the accused who is not named in the F.I.R. that during the course of trial the evidence that was produced 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.

11. This Court has carefully perused the judgement rendered in Ramesh Chandra

Sirvastava (Supra), but the observations made by Hon'ble Supreme Court in Larger Bench decision rendered in Hardeep Singh Vs. State of Punjab and others 2014 (3) SCC 92, are more apt and settles the law undoubtedly. In paragraph-106 of the case of Hardeep Singh (supra) is quoted in the judgement of Ramesh Chandra Srivastava (supra), the Supreme Court made the following observations:-

*"106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not 'for which such person could be convicted'. There is, therefore, no scope for the court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused."*

12. It is evident from perusal of observations made hereinabove by the Supreme Court in *Hardeep Singh Vs. State of Punjab and others*, that the Supreme Court has emphasized the fact that the words used in section are such that it only require a satisfaction by the learned trial court to be recorded to the extent that from the evidence produced before it during the trial, such facts had come its knowledge that *"such a person could be tried"* together with the Appeal. The words used are not *"for which such person could be convicted"*. The Court had observed that there is no scope for the learned trial court under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused.

13. In the case of the petitioner herein , learned counsel for the petitioner has read out in detail the statements of father of the victim and two independent witnesses, namely, Hansraj and Shri Ram before the learned trial court to show an apparent contradiction between such statements. However, this Court has perused the order under Section 319 Cr.P.C. passed by learned trial court. Learned trial court has observed that initially in the F.I.R., and in the statements made before the police, the petitioner Golu s/o Arun Kumar had been named as a co-accused. Thereafter statements of six prosecution witnesses were also made before the learned trial court. All of the six prosecution witnesses had named the petitioner as one of the three persons who were last seen with the deceased, the son of informant.

14. After recording the statement of prosecution witnesses, learned trial court made the following observations:-

*"Is Prakar uprokt sakshigan ke bayan ke avlokan se pratham drashtya yah spasht hai ki mritak ko golu, pradeep tatha jayram ka bhanja pradeep dwara apne sath le jate hue vaadi ke gaon ke Shri Ram va Hans Raj ne dekha tha tatha vaadi va uski patni ko bataya bhi tha. Vaadi dwara prastut kiye gae tahreer me bhi Golu, Pradeep va gaon ke Jay Ram ka bhanja Pradeep dwara uske putra ka apaharan kar*

*kahin le jane ka tathya ankit hai. Prastavit abhiyuktgan pratham suchna report me naamit kiye gae hain. Is prakar pratham suchna report tatha nyayalay ke samaksh saakshi P.W.1 Neeraj Rajbhar va P.W.2 Meena Devi va P.W.5 Sri Ram va P.W. 6 Hans Raj urf Hansu sabhi ke dwara Golu, Pradeep tatha Jayram ka bhanja Pradeep ki ghatna me shamil hone ka ullekh kia gaya hai. Atah Golu putra Arun Kumar, Pradeep putra Mewalal va Pradeep putra Sri Ram Yadav ko dhara 302, 201 bhartiya dand sanhita ke antargat prasangyan lete hue abhiyuktgan ki haisiyat se vicharan hetu talab kiye jane ka santoshjanak aadhar hai. Tadanusar prarthnapatra kagaj sankhya 17B svikar kiye jane yogya hai.*

*Aadesh*

*Tadanusar prarthana patra antargat dhara 319 Dand Prakriya Sanhita kaagaj sankhya 17B swikar kiya jata hai. Golu putra Arun Kumar, Pradeep putra Mewalal niwasi Gram Bhardha Bhiyura va Pradeep putra Sri Ram Yadav ko vicharan hetu abhiyuktgan ki haisiyat se jariye summon dinank 25.11.2020 ke liye talab kiya jae. Yah aadesh antrim nirnay ko prabhavit nahi karega."*

15. It is evident that learned trial court had summoned the petitioner after recording a prima facie satisfaction that his name being mentioned in the F.I.R. and in the statements of prosecution witnesses, there were facts which had come to the knowledge of the trial court "for which such person could be tried together with the accused".

16. This Court therefore does not find any good ground to show interference in the order impugned in exercise of inherent powers under Section 482 Cr.P.C.

17. The petition is accordingly ***dismissed***.

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**(2021)10ILR A167**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 06.10.2021**

**BEFORE**

**THE HON'BLE RAJAN ROY, J**
**THE HON'BLE SURESH KUMAR GUPTA, J.**

Special Appeal No. 147 of 2020
with other connected cases

**U.P. State Sugar Corp. Ltd. Lko. & Anr.**
**...Appellants**
**Versus**
**Ravi Shankar Mishra & Ors.**
**....Respondents**

**Counsel for the Appellants:**
Sudhanshu Chauhan

**Counsel for the Respondents:**
C.S.C., Gopal Singh Bisht[G.S.Bi, Vijay Kumar Srivastava

**A. Service Law – Voluntary retirement – It's consequence – Dearness allowance revised subsequently – Entitlement – Held, the law with regard to voluntary retirement is that one who accepts the Golden Handshake would only be entitled to the sum promised under the Voluntary Retirement Scheme and no other amount – Golden Handshake includes ex-gratia and other payments which such retiree would otherwise not get had he continued in service – Quashing the writ order, the Division Bench observed that writ court failed to consider the law on it and posted the matter before the writ court. (Para 8, 13 and 17)**

**Appeal allowed in part.** (E-1)

**Cases relied on :-**

1. Writ Petition no.259 (S/B) of 2011; U.P. State Sugar Corp. Ltd. Vs Up Kaushal Kumar Sharma & anr decided on 09.07.2012

2. Prantiya Vidhut Mandal Mazdoor Federation & ors. Vs Rajasthan State Electricity Board and Ors.; (1992) 2 SCC 723

3. IFCI Ltd. Vs Sanjay Behari & ors.; 2019 SCC Online SC 1211

4. National Insurance Special Voluntary Retired/ Retired Employees Association & anr. Vs United India Insurance Co.Ltd. & anr.; (2018) 18 SCC 186

5. Manojbhai N. Shah & ors. Vs U.O.I. & ors.; (2015) 4 SCC 482

6. ITI Ltd. & etc. Vs ITI Ex./ Vr. Employees & etc; (2002 LAB I.C.1036)

7. ITI Ltd. & etc. Vs ITI EX/ VR Employees/ Officers Welfare Assc. & ors.; (2010) 12 SCC 347

(Delivered by Hon'ble Rajan Roy, J.
&
Hon'ble Suresh Kumar Gupta, J.)

1. Heard Sri Subhanshu Chauhan, learned counsel for the appellants and Sri Vijay Kumar Srivastava along with Sri Gopal Singh Bisht, learned counsel for the respondents.

2. These special appeals have been filed by the U.P. State Sugar Corporation Ltd. through its Managing Director hereinafter referred to as "the Corporation' challenging a common judgment rendered by the writ court on 14.10.2019 in a bunch of writ petitions, the leading Writ Petition being No. 47 (S/B) (now Service Single) of 2014 (Ravi Shankar Mishra vs. State of U.P.).

3. The facts of the case, in brief, are that the respondents herein are erstwhile employees of the appellant-corporation. A scheme of voluntary retirement was floated on 13.10.2009 (page no.76 of the Special Appeal) in pursuance to which, they applied for voluntary retirement which was accepted. Accordingly, they retired voluntarily. It is informed that they had an option to continue with the company which was purchasing the sugar mills of the appellant-Corporation but the respondents did not choose to do so, instead, they applied for voluntary retirement which was accepted. The nineteen respondents in these nineteen appeals, retired on 30.08.2010, 18.09.2010, 15.10.2010, 18.09.2010, 18.09.2010, 05.10.2010, 07.10.2010, 07.10.2010, 15.10.2010, 07.10.2010, 07.10.2010, 07.10.2010, 07.10.2010, 07.10.2010, 07.10.2010, 30.08.2010, 07.10.2010, 30.08.2010, 30.08.2010, 15.10.2010 respectively. They were working on different posts in the mills being run by the appellant-Corporation. On 25.08.2010, dearness allowance of the State Government employees was revised in pursuance to the recommendations of the Fourth Pay Commission from 115 % to 129 % w.e.f. 01.01.2010. Thereafter on 11.09.2009, a Government Order was issued in exercise of powers of the State Government under the U.P. Control of Public Corporations Act, 1975 which was addressed to all public corporations/ undertakings, which included the appellant-Corporation herein, wherein, it was mentioned that the State Government had accepted, in principle, enhancement of dearness allowance for employees of such corporations / undertakings, however subject to certain conditions mentioned therein one of which was the paying capacity of the corporation which was to be assessed by an "Empowered Committee' as mentioned therein. In pursuance to the aforesaid Government Order, the meeting of such Empowered Committee took place on 16.09.2010. The minutes of the meeting

are annexed at page no. 240 of the appeal. The Empowered Committee was informed that enhancement of dearness allowance from 115% to 129% w.e.f. 01.01.2010 for employees of the appellant-Corporation would entail an additional burden of Rs.4.87 lac per month or Rs.58.44 lac per year upon the appellant-Corporation. The Empowered Committee on being informed that the Corporation had the means to meet the aforesaid expenditure, it approved such enhancement for its employees. We asked learned counsel for the appellant vide our order dated 08.09.2021 as to whether the proposal which was placed before the Empowered Committee in its meeting dated 16.09.2010 included the financial burden which would have to be borne by the corporation in respect to the seven of the retired employees who are respondents herein, meaning thereby, the respondents who had retired prior to 16.09.2010/ 24.09.2010. He informed that as the proposal which was placed before the Empowered Committee on 16.09.2010 was prepared on 28.08.2010 and these seven respondents were in service at that time, they having retired subsequently, therefore, the proposal included the amount payable to them. He asserted that this was not on account of the fact that they were eligible for enhanced dearness allowance even after acceptance of voluntary retirement but for the reason aforesaid.

4. After the decision of the Empowered Committee dated 16.09.2010 which was communicated to the Corporation on 23.09.2010, the Managing Director of the Corporation i.e. appellant no.2 issued an order on 29.09.2010 in compliance thereof notifying enhancement in Dearness Allowance. However, in his order, the Managing Director stated that such enhanced dearness allowance would not be available to such officers/ employees whose application for voluntary retirement had been accepted prior to the meeting of the Board of Directors held on 24.09.2010. The minutes of the Board meeting dated 24.09.2010 are not before us. Being aggrieved by this order of Managing Director dated 29.09.2010, twelve of the respondents herein filed writ petitions before the writ court under Article 226 of the Constitution of India and the remaining seven respondents though they also asserted their claim to enhanced dearness allowance, as informed by Sri Subhanshu Chauhan, learned counsel for the appellants, did not challenge the order of the Managing Director before the writ court. The prayers relating to revised pay as per the Sixth Pay Commission's recommendations which in Writ Petition no.47 (S/S) of 2014 are reliefs nos.2 and 3 were not pressed before the writ court meaning thereby, the claim was confined to the payment of enhanced Dearness allowance as per Forth Pay Commission Recommendations as is also mentioned in the impugned judgment.

5. It is not out of place to mention that apart from the aforesaid enhancement of dearness allowance from 115 % to 129 % w.e.f. 01.01.2010 there was a second consideration for payment of enhanced dearness allowance from 129 % to 145% w.e.f. 01.07.2010 by the Empowered Committee in the light of Government Order dated 11.09.2009 in its meeting held on 08.04.2011 pertaining to employees of the appellant-Corporation and therein also a similar decision was taken as was earlier taken on 16.09.2010. Here again, as a consequence to the aforesaid, the matter was taken before the Board of Directors of the appellant-Corporation in its meeting dated 24.03.2011 and thereafter the

Managing Director issued an order on 19.04.2011 granting enhanced dearness allowance as aforesaid subject again to the condition that this enhanced dearness allowance would not be available to the officers/ employees whose application for voluntary retirement had been accepted prior to 24.03.2011 which was the date on which the Board of Directors held its meeting in this context. Here again, the minutes of the Board meeting dated 24.03.2011 are not before us, therefore, we do not know as to whether this condition was imposed by the Board of Directors or by the Managing Director as was the case with regard to decision dated 29.09.2010. Consequent to this decision, the remaining twelve respondents who retired subsequent to 24.09.2010 and have been granted the first enhancement of dearness allowance from 115% to 129 % w.e.f. 01.01.2010 became ineligible rather they were excluded from being given the subsequent enhancement from 129% to 145% w.e.f. 01.07.2010. Needless to say that other seven respondents were neither given the first enhancement nor the second enhancement. This subsequent decision of the Managing Director dated 19.04.2011 was also subject matter of challenge in all the writ petitions before the writ court by the respondents.

6. The writ court allowed the writ petitions of the respondents only on the ground that a similar writ petition pertaining to another employee of the appellant-Corporation who, in fact, had retired in 2002, albiet, voluntarily, was given the enhanced dearness allowance as and when it was enhanced subsequently, but with retrospective effect, and on a claim being raised before the tribunal, the same was accepted and thereafter the writ petition of the appellant-Corporation before this Court was dismissed. The special leave petition of the appellant-Corporation against the judgment of the High Court was dismissed at the S.L.P. stage itself in *limine*. We have perused the order of the Supreme Court of India dated 11.02.2013 which is at page no.289. From the nature of the order passed, it is evident that the decision of the Division Bench of this Court in the case of ***U.P. State Sugar Corporation Limited vs. Up Kaushal Kumar Sharma & Anr*** passed in Writ Petition no.259 (S/B) of 2011 decided on 09.07.2012 cannot be treated as having been affirmed or having merged in the order of the Supreme Court as the Special Leave Petition was dismissed in *limine* without giving detailed reasons for the same, except that, the Supreme Court was not inclined to interfere in the matter.

7. We have perused the judgment passed by the writ court and we find that except for relying upon the decision of the Division Bench in ***Up Kaushal Kumar Sharma (supra)*** no other reasons had been given therein for allowing the writ petition of the respondents. Now, in this context, we have perused the judgment of the Co-ordinate Bench in ***Up Kaushal Kumar Sharma (supra)*** which is at page no.280 of the appeal and we find from the recitals contained therein that at the relevant time when a cause accrued in favour of Mr. Up Kaushal Kumar Sharma, there was a Resolution of the Board of Directors of the appellant-Corporation that 'dearness allowance may be granted at the State rate to all category of staff in the Corporation irrespective of the fact that they were drawing D.A. or not. **This D.A. would automatically be revised from time to time when rates of D.A. applicable to State Government employees were revised'.** As informed by learned counsel

for the appellant vide G.O. dated 11.09.2009, this Resolution became ineffective because the State Government issued necessary directions in exercise of its powers under the U.P. Control Over Public Corporations Act, 1975 that though it accepts the enhancement of dearness allowance for employees of public corporations/ undertakings governed by the said Government Order, in principle, its implementation was made conditional, one of the conditions being the paying capacity of the Corporation i.e. its financial capacity to bear the additional burden. Thus, the Resolution that dearness allowance would get enhanced automatically once it was enhanced for the State government employees was no longer effective. Secondly, we find that in the said judgment of ***Up Kaushal Kumar Sharma (supra)***, the Co-ordinate Bench relied upon judgment of the Supreme Court rendered in ***Prantiya Vidhut Mandal Mazdoor Federation and Ors. vs. Rajasthan State Electricity Board and Ors.*** (1992) 2 SCC 723, which, we find was not a case of voluntary retirement but it was a case of wage arrears which included the emoluments. Moreover, we find also find that proposals which were placed before the Empowered Committee on 16.09.2010, though it included the money payable to the seven of the respondents herein, this was not on account of the fact that they would otherwise be eligible for such enhanced dearness allowance even after they retire voluntarily, but only on account of the fact that proposal was prepared on 28.08.2010 on which date they were still in service and therefore, treating them in service, the matter was accordingly placed before the Empowered Committee. All these aspects of the matter have escaped consideration of the writ court though they were relevant.

8. We also find merit in the submission of learned counsel for the appellant that the law with regard to voluntary retirement is that one who accepts the Golden Handshake would only be entitled to the sum promised under the Voluntary Retirement Scheme and no other amount. This is for the reason that such Golden Handshake includes ex-gratia and other payments which such retiree would otherwise not get had he continued in service. We may refer to the decision of the Supreme Court in the case of ***IFCI Ltd. vs. Sanjay Behari and Others*** 2019 SCC Online SC 1211 wherein this aspect of the matter fell for consideration and the law in this regard was explained in para no.21 to 24 which are quoted herein below:-

*"21. The principle ground for assailing the impugned order is that any scheme for voluntary retirement is a package by itself. One cannot, thus, look to other voluntary retirement schemes, or other rules and regulations for the said purpose. 22. In our view, there can be no quibble with this fundamental principle. In fact, we had the occasion to recently propound the legal position in this behalf, in National Insurance Special Voluntary Retired/Retired Employees Association v. United India Insurance Co. Ltd.. The view taken is that it is not appropriate to add or subtract from the Scheme, nor can any concessions be given contrary to the Scheme, or if they are not provided for under the Scheme. What is to be seen are the clauses of the scheme under which voluntary retirement has been taken and the terms of the scheme must be strictly followed. This Court observed as under:*

*"19. We have, thus, no hesitation in coming to the conclusion that statutory or contractual, such voluntary retirement schemes as the SVRS-2004 Scheme have to be strictly adhered to, and the very objective of having such schemes would be defeated, if parts of other schemes are sought to be imported into such voluntary retirement schemes. What is offered by the employer is a package as contained in the schemes of voluntary retirement, and that alone would be admissible.*

*20. The issue which arose in Manojbhai N. Shah (Manojbhal N. Shah v. Union of India, (2015) 4 SCC 482: (2015) 2 SCC (L&S) 55] was qua the revision of pay, with retrospective effect. That was the only issue. That issue was decided against the beneficiaries of the SVRS-2004 Scheme. If there are certain observations made by that Bench while deciding so, qua aspects which are not forming the subject matter of that dispute, the same cannot be read to amount to grant of rellef/benefits, contrary to the terms of the Scheme, and that too, in the absence of any specific directions.*

*22. It is, thus, abundantly clear that nothing more would be given than what is stated in the scheme, and for that matter, nothing less. If the employees avail of the benefit of such a scheme with their eyes open, they cannot look here and there, under different schemes, to see what other benefits can be achieved by them, by seeking to take advantage of the more beneficial schemes, while simultaneously enjoying the more beneficial aspects of the SVRS-2004 Scheme."*

*23. In the present case, VRS-2008 has received consideration right till the Supreme Court and attained finality on the issue of benefits and Incentives sought to be claimed beyond the Scheme, in P.P. Vaidyal case. Interestingly, some of the respondents, apparently, are common between that case and the present case. Thus, not having succeeded on one aspect, another aspect is now sought to be agitated.*

*24. We may usefully refer to the judgment in A.K. Bindal v. Union of India, which set forth the very rationale of introducing a scheme for voluntary retirement, l.e., to reduce surplus staff and to bring in financial efficiency. It is in this context that it is referred to as the 'Golden dshake'. Ex gratia amounts are paid, not for doing any work or rendering any service, but in lieu of employees leaving services of the company and foregoing any further claims or rights in the same. It is optional, not compulsory. It is a take it or leave it situation. Thus, anyone availing of a VRS does so with his eyes wide open. On having availed of the benefits under the scheme, if there are future changes, which may give any of the monetary benefits, the same cannot be read into the scheme. This would defeat the very purpose of having a VRS, i.e., to bring in financial efficiency, as it would not be possible that despite having paid the amounts, the organization can be lumped with further financial liability arising from re -thoughts by such persons, who have already availed of the VRS. The VRS cannot be frustrated in this manner."*

9. It has been similarly held by the Supreme Court in the case of ***National Insurance Special Voluntary Retired/ Retired Employees Association and Anr. vs. United India Insurance Company Ltd. And Anr.*** (2018) 18 SCC 186. Para no.19 of the which reads as under:-

*"19. We have, thus, no hesitation in coming to the conclusion that statutory or contractual, such voluntary retirement schemes as the SVRS-2004 Scheme have to be strictly adhered to, and the very*

*objective of having such schemes would be defeated, if parts of other schemes are sought to be imported into such voluntary retirement schemes. What is offered by the employer is a package as contained in the schemes of voluntary retirement, and that alone would be admissible."*

10. We may also refer to another decision of the Supreme Court in ***Manojbhai N. Shah and ors. vs. Union of India and ors. (2015) 4 SCC 482***, wherein the question which fell for consideration was as to whether the employees who had opted for voluntary retirement under the scheme were entitled to get the benefit of additional pension on the basis of revised salary in pursuance to the Notification which was applicable in the said case or not. In this regard, the submissions made by learned counsel for the parties were noticed in para no.20, 21, 22, 23, 24, 25 and 26 and thereafter, it was held that employees who had taken the benefit under the scheme and had already retired would not be entitled to additional pension due to retrospective increase in pay in pursuance of the Notification dated 21.12.2005. They would be entitled only to revision of ex-gratia amount upon retrospective increase in the salary. This latter part was on account of a clear stipulation in the Notification which is quoted in para no.13 of the said judgment that in case, wage revision is effected from a date prior to the date of this notification in the Official Gazette, the benefit of revised pay for the purpose of payment of ex gratia will be allowed. According to learned counsel for the appellant, in the case at hand, there is no such provision. However, it is a moot point as to whether assuming for a moment that the enhanced dearness allowance would not be available to the respondents retrospectively whether they would be entitled to the enhancement of the ex gratia amount under the Voluntary Retirement Scheme which they have received or for that matter whether they would not be entitled for the same merely because there is no provision in the scheme at hand in this regard. This aspect of the matter has also not been considered by the writ court.

11. We have referred to the aforesaid decision to drive home the law on the subject that merely because there is revision of pay or dearness allowance subsequent to voluntary retirement, albeit, retrospectively one who has voluntary retired and has accepted a Golden Handshake in the form of amount payable under such scheme including ex-gratia amount which he would not have got had he continued in service, would not be entitled to anything extra than what has already been received by him under this voluntary retirement scheme as per the said decisions. We may quote para no.28, 29, 30, 31 , 32, 33 of the said decision.

*"28. There is no doubt that the Scheme had been framed by the employers to see that their expenditure in long term is decreased by making one-time payment of additional amount to the employees opting for retirement under the Scheme. Strength of the staff was going to be reduced substantially due to voluntary retirement of several employees and the reduction in the staff was to result in reduction in the burden of salary and establishment expenditure. With the aforestated intention, which had been clearly revealed in the Scheme, the employers had floated the Scheme and several employees of the employers had taken due advantage of the Scheme by opting under the Scheme and by taking not only ex gratia payment of salary but also additional pension, which they*

*would not have received otherwise. It is not in dispute that the employees opting for retirement under the Scheme were to get benefit of additional five years of service while calculating the pension. As stated hereinabove, the said benefit was substantial and the said benefit along with benefit of ex gratia payment, tempted number of employees who opted under the Scheme and retired happily after getting all retiral benefits.*

*29. Normally, retrospective rise in salary is given to those who are in service at the relevant time or who had retired in normal circumstances. The employees who had opted under the Scheme had not retired as per the normal conditions of service but had retired under the Scheme upon taking some special additional benefits.*

*30. It is also pertinent to consider Clause 5(2) of the Scheme, which has been reproduced hereinabove. According to the said clause, ex gratia amount was to be paid to the employees concerned on the date of his/her being relieved and it was clarified that in case of wage revision effected from a date prior to the date on which the said Scheme had been notified in the Official Gazette, the benefit of revised pay for the purpose of payment of ex gratia would be allowed. Meaning thereby, the employees who had opted under the Scheme and retired from service were entitled only to revision of ex gratia amount upon retrospective increase in the salary. Intention of the employers. is clearly revealed from Clause 5(2) of the Scheme. The intention was to give. benefit only in relation to ex gratia amount and not in relation to the pension. Had the intention been to give benefit of additional pension also, the said fact would have been incorporated in the aforesaid clause. In normal circumstances when an employee retires from service, his relationship with a the employer comes to an end. It is also a well-settled legal position that after retirement, normally no disciplinary action can be initiated against the employee concerned, Similarly, the retired employee would not have any right of redetermination of his pension but only in cases where salary is revised with retrospective effect, the retired employee gets the benefit of additional pension and that too in certain cases.*

*31. In the instant case, it is crystal clear that the employees had already opted under the Scheme-under a specially made scheme, which was framed only with an intention to reduce future expenditure of the employers. If all these benefits are given to the persons who had already opted under the Scheme and had retired, the real purpose with which the Scheme had been framed would be frustrated.*

*32. We do not agree with the submission made on behalf of the employees that action of the employers in not giving pay rise to the employees in pursuance of the notification is discriminatory in nature. The employees who retired under the Scheme form a separate class of employees who were given many benefits, which are not given to the employees retiring in normal course. If they all form a separate class, by no stretch of imagination can it be said that all those who retired under the Scheme and those who retired in normal course, are similarly situated. Thus, in our opinion, there is no violation of Article 14 of the Constitution of India in the instant case.*

*33. Similarly, there is no violation of the principle of equal pay for equal work. True, that those who retired under the Scheme did the same work which was being done by those who retired in*

*normal course, but one cannot forget the fact that those who retired under the Scheme got substantially higher retirement benefits. In the circumstances, we do not accept the said submission also."*

12. We may also take note of the fact that as regards reliance placed by Sri Up Kaushal Kumar Sharma in his case decided by a Co-ordinate Bench as already referred hereinabove, upon a decision of the Karnataka High Court in the case of ***ITI Limited and etc. Vs. ITI Ex./ Vr. Employees and Etc (2002 LAB I.C.1036),*** the said decision, though, it was not relied specifically by the Co-ordinate Bench in his case, was set aside by the Supreme Court of India vide a decision reported in (2010) 12 SCC 347 ***ITI Limited and etc. Vs. ITI EX/ VR Employees/ Officers Welfare Association and Ors.***

13. The law as discussed hereinabove has also not been considered by the writ court.

14. During the course of argument, we were taken through Regulation no.43 of the relevant Regulations applicable to the employees of the corporation according to which the allowances payable were to be determined by the Board or by the Managing Director if such power was delegated to him by the Board. The appellants sought to bring on record a Resolution of the Board allegedly delegating such power in favour of the Managing Director. This Resolution has been placed before us along with the supplementary affidavit on 27.09.2021. We have perused the said Resolution, especially, Sl. no.5 and 18 thereof which were relied by learned counsel for the appellant. Sl. no.5 relates to fixation of pay. We asked learned counsel for the appellant as to whether under the service rules or under the scheme of the service rules, pay includes allowances such as dearness allowance, he could not point out any such provision before us. As regards Sl. no.18 which relates to sanction of recurring revenue expenditure, we are not convinced that entitlement of employees to dearness allowance would be included in it per se as this heading would be attracted only after initial decision is taken by the competent authority as regards entitlement of employees to enhanced dearness allowance. However, as already stated earlier, the Managing Director in his order has referred to two Resolutions of the Board of Directors, one dated 24.09.2010 and the other dated 24.03.2011 which are not on record. Therefore, it is not very clear as to whether the orders issued by the Managing Director are merely in compliance of any decision taken by the Board of Directors i.e. so far as they decline the benefit of enhanced dearness allowance to the respondents herein or it is an independent decision taken by the Managing Director himself without any such decision of the Board, thereby dis-entitling the respondents herein from such benefits. But this aspect of the matter as to whether the Managing Director had competence in this regard and whether the decision was taken at the competent level or not has also not been considered by the writ court. It is also a moot point as to whether, assuming that the Managing Director independently took such a decision which he was not authorized to take would make any difference in the matter if, in view of the law discussed hereinabove, the respondents were otherwise not entitled to the said benefit, but as already stated these aspects have not been considered by the writ court. These aspects would have to be considered by the writ court to the extent required in

the light of what has been discussed in this judgment.

15. Now, there is another aspect of the matter as pointed out by Sri V.K. Srivastava, learned counsel for the respondents that subsequent to retirement of the respondents herein there were other voluntary retirements of employees of the appellant-Corporation in 2012 to whom the benefit of enhanced dearness allowance with retrospective effect was extended in 2013. The respondents have brought on record certain documents but we find that this aspect of the matter has also not been considered by the writ court. Learned counsel for the appellant submits that the scheme under which the respondents herein retired and the scheme under which other persons retired subsequently in respect to whom it is said that they have been given the same benefit was very different. While in the first V.R.S. was brought in pursuance to disinvestment exercise wherein certain mills were to be sold out to certain purchasers and the employees had an option either to continue with the purchasers or to opt for voluntary retirement. The respondents herein opted for voluntary retirement. He says that the subsequent scheme was for reducing the expenditure. As the writ court has not considered this aspect of the matter, therefore, we decline to record any conclusive opinion on this count as to whether the respondents have been discriminated or not subject of course to the law on the subject discussed hereinabove.

16. Sri V.K. Srivastava, learned counsel for the respondents informed that retirees of 2012 who were given the enhanced dearness allowance retrospectively in 2013, were also initially declined the said benefit but the said Managing Director by his orders granted the same. Therefore, it is matter to be seen as to how far the Managing Director has competence in this regard, if it is so. Counsel for the appellant says that there was a resolution of the Board in this regard.

17. In view of the above discussions, as the writ court has decided the writ petitions only on the basis of the decision in ***Up Kaushal Kumar Sharma (supra)*** without considering the law on the subject as discussed hereinabove as also relevant factual aspects pointed out hereinabove, especially, in view of the fact that at the time when Up Kaushal Kumar Sharma retired, there was a Resolution of the Board of Directors for automatic enhancement of dearness allowance to employees of the corporation consequent to any such enhancement in respect of the State Government employees, whereas in this case, the said Resolution was not applicable because of Government Order dated 11.09.2009, and also as the Special Leave Petition against the judgment in ***Up Kaushal Kumar Sharma,*** after being converted into civil appeal, was dismissed with the observation that the question of law is left open, which we have now clarified, therefore, for all these reasons the impugned judgment can't be sustained. We quash the judgment of the writ court. The writ petitions shall now be restored for hearing afresh in the light of this judgment. We request learned Single Judge to dispose of the writ petitions at the earliest say within two months. The writ petition shall be posted before the writ court on 10.11.2021 amongst the first ten cases of the day.

18. The appeals are allowed in part.

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**(2021)10ILR A177**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 07.10.2021**

**BEFORE**

**THE HON'BLE RAJESH SINGH CHAUHAN, J**

Service Single No. 279 of 2020

**Abdul Rauf ...Petitioner**
**Versus**
**U.P. Coop. Fed. Ltd. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Apoorva Tewari, Aditya Tewari

**Counsel for the Respondents:**
Shireesh Kumar

**A. Service Law – Punishment of Dismissal – Dismissal order was quashed in earlier writ petition – Effect – Consequential service benefit, revision of pay scale etc. – Entitlement – Held, quashing of the punishment order would result in restoration of the position as it stood on the date of passing of the order – It shall be treated as if the punishment order was not in existence and in that case, the petitioner would be entitled for all service benefits. (Para 29)**

**B. Service Law – Consequential benefit – Meaning and Scope – Consequential benefits are such benefits which are easily quantifiable, namely, those in the nature of loss of salary, emoluments and other benefits – The reliefs in respect of revision of pay scale by providing the annual increments, grant of first promotional pay scale and the benefit of Sixth Pay Commission on the basis of revised pay scale come within the purview of '*emoluments* and *other benefits*' – Colonel Ran Singh Rudee's case followed. (Para 34)**

**Writ petition allowed.** (E-1)

**Cases relied on :-**

1. U.O.I. & ors. Vs Colonel Ran Singh Rudee; (2018) 8 SCC 53

2. Shree Chamundi Mopeds Ltd. Vs Church of South India Trust Association CSI Cinod Secretariat, Madras; (1992) 3 SCC 1

3. Lt. Col. K.D. Gupta Vs U.O.I. & ors.; 1989 Supp (1) SCC 416

4. U.O.I.& ors. Vs Lt. Gen. Rajendra Singh Kadyan & anr.; (2000) 6 SCC 698

5. Chief Regional Manager, United India Insurance Co. Ltd. Vs Siraj Uddin Khan; (2019) 7 SCC 564

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Apoorva Tewari, learned counsel for the petitioner and Sri Shireesh Kumar, learned counsel for the opposite parties.

2. By means of the present writ petition, the petitioner has prayed following reliefs:-

*"Wherefore, it is most respectfully prayed that this Hon'ble Court may very kindly be pleased to:*

*a) To issue a writ, order or direction in the nature of certiorari to quash the impugned orders dated 06.07.2018 and 21.07.2018 annexed as Annexure No. 1 and 2 respectively to this writ petition;*

*b) To issue a writ, order or direction in the nature of mandamus commanding the opposite parties to revise the salary of the petitioner by providing the annual increments to the petitioner from 01.02.1999 till 31.07.2017 and to grant the first promotional pay scale to the petitioner w.e.f. the year 2004 and further grant the benefits of the sixth pay commission on the basis of the revised salary;*

*c) To issue a writ, order or direction in the nature of mandamus commanding the opposite parties to revised the gratuity payable to the petitioner on the basis of the revised salary as aforesaid;*

*d) To issue a writ, order or direction in the nature of mandamus commanding the opposite parties to pay the arrears due consequent to the revision of salary and gratuity as aforesaid;*

*e) To issue a writ, order or direction in the nature of mandamus commanding the opposite parties to pay the petitioner his provident fund dues for the period 2009 to 2017 and arrears of salary for the period the petitioner remained under suspension;*

*f) To issue any other writ, order or direction which this Hon'ble Court may deem just, fit and proper in the interest of justice.*

*g) To award costs to the petitioner."*

3. Brief facts of the case are that the petitioner was appointed on the post of Junior Engineer in the U.P. Cooperative Federation Limited (hereinafter referred to as "Federation" in short) on ad-hoc basis on 6.2.1984. Services of the petitioner were regularized on 19.4.1991.

4. On 22.8.2002, the petitioner was placed under suspension in contemplation of disciplinary proceedings. The charge sheet dated 29.11.2002 was rescinded and a fresh charge sheet was issued to the petitioner on 14.2.2003. The petitioner replied to the charge sheet on 30.9.2003 under protest as he was not afforded an opportunity to inspect the documents.

5. On 6.2.2004, the suspension of the petitioner was revoked and he resumed his regular duties. The petitioner was paid only 50% of the salary as subsistence allowance during the period of his suspension i.e. from 22.8.2002 to 6.2.2004.

6. On 4.2.2009, the petitioner was dismissed from service of the Federation and recovery to the tune of Rs.17,52,764.58 was directed to be made from him.

7. Feeling aggrieved from the order of dismissal dated 4.2.2009, the petitioner filed a writ petition before this Court bearing Service Single No.2954 of 2009; Abdul Rauf Vs. U.P. Co-Operative Federation Ltd. & Another.

8. During pendency of aforesaid writ petition, the petitioner reached the age of superannuation on 31.7.2017.

9. This Court allowed the writ petition of the petitioner and quashed the punishment order 4.2.2009 vide judgment and order dated 18.12.2017. The aforesaid order is enclosed as Annexure No.6 to the writ petition. Operative portion of the judgment and order dated 18.12.2017 reads as under:-

*"This Court having regard to the facts and circumstances of the case, is of the considered opinion that the impugned order being illegal and arbitrary calls for the issuance of a writ of certiorari and accordingly the order contained in Annexure-1 issued on 4.2.2009 is hereby quashed with all consequences. The petitioner would be entitled to 50% salary from the date of dismissal from service up to the date of retirement. The pensionery benefits admissible to the petitioner shall, however, remain unaffected and he shall be treated as if he was in service up to the date of attaining the age of superannuation. The consequential benefits shall be paid*

*not later than a period of three months from the date of service of a certified copy of this judgement.*

*The writ petition is allowed with no order as to cost."*

10. As per Sri Tewari, this Court not only quashed the punishment order dated 4.2.2009 but directed that the petitioner shall be entitled for all consequences. This Court further provides that the petitioner would be entitled to 50% salary from the date of dismissal to the date of his retirement. It further provides that the pensionery benefits admissible to the petitioner shall remain unaffected and he shall be treated as if he was in service upto the date of attaining the age of superannuation.

11. Therefore, as per Sri Tewari, this Court has categorically clarified the benefits extended to the petitioner pursuant to the judgment and order dated 18.12.2017. Sri Tiwari has informed that the Federation has not challenged the aforesaid judgment and order dated 18.12.2017 by filing special appeal before this Court or by filing Special Leave to Appeal before the Apex Court. As a matter of fact, the aforesaid judgment has attained finality.

12. Sri Tewari has submitted that immediately after receiving the certified copy of the judgment and order dated 18.12.2017, the petitioner served the judgment upon opposite party no.2 on 22.12.2017 but no compliance has been made. Thereafter, the petitioner sent a reminder representation on 24.5.2018 but to no avail. Under such compelling circumstances, the petitioner filed a contempt petition bearing Contempt No.1544 of 2018, Abdul Rauf Vs. Pramod Kumar Upadhyaya, M.D., U.P. Coop. Federation Ltd. & Anr.

13. After service of contempt notice upon the opposite party, opposite party no.2 passed an order dated 6.7.2018 whereby it has been decided that the petitioner would be paid arrears of salary on the basis of salary as drawn by the petitioner on 1.2.1999, effectively denying the petitioner all pay revisions made available to other identically placed employees of the Federation.

14. On 21.7.2018, the arrears of salary have been worked out without granting the petitioner benefit of all pay revisions made available to other identically situated employees of the Federation. On 23.7.2018, the petitioner was paid a sum of Rs.11,15,558/- as arrears of salary and retiral dues.

15. On 1.8.2019, the contempt notices in contempt petition were discharged, however, liberty was given to the petitioner to agitate the issue of the reliefs which the petitioner felt entitled in terms of the judgment and order dated 18.12.2017 passed by this Court in his case.

16. Sri Tewari has submitted that the petitioner and one Sri Vijay Singh Yadav were regularized vide the same order and Sri Yadav retired from service from the post of Junior Engineer on 30.9.2018 and his last salary drawn amounted to Rs.1,00,576/- whereas the last drawn salary of the petitioner was treated as Rs.13,730/-.

17. Sri Apoorva Tewari has submitted that in compliance of the judgment and order dated 18.12.2017, the petitioner should have been paid all consequential service benefits ignoring the impugned

punishment order dated 4.2.2009 as if such order was not passed against the petitioner and the petitioner remained in service till his age of superannuation. However, pursuant to the judgment and order dated 18.12.2017, the petitioner was only entitled for 50% salary from the date of his dismissal of service to the date of his retirement but for other consequential benefits including pensionery benefits, he was entitled for all benefits, which have been paid to the identically placed employees. Since the judgment and order dated 18.12.2017 has not been assailed by the Federation before the superior court, rather accepted such judgment, therefore, the concerning authority might have not legally deviated from such directions of this Court.

18. Sri Tewari has placed reliance upon para-24 of the dictum of the Apex Court in re; **Union of India and Others v. Colonel Ran Singh Rudee, (2018) 8 SCC 53,** which reads as under:-

*"24. The first question that arises is regarding the significance of the expression "consequential benefits" as used in the Order dated 20-11-2013. The matter which was directly in issue and under consideration was the correctness and validity of General Court Martial proceedings. While annulling the findings and effect of such General Court Martial proceedings, the idea was to confer those benefits which the officer stood denied directly as a result of pendency of such proceedings. Such benefits would therefore be those which are easily quantifiable, namely, those in the nature of loss of salary, emoluments and other benefits. But the expression cannot be construed to mean that even promotions which are strictly on the basis of comparative merit and selection must also stand conferred upon the officer. It is true that as a result of pendency of the General Court Martial proceedings the respondent was kept out of service for nearly nine years and as such his profile would show inadequacy to a certain extent. On the other hand, the Department was also denied of proper assessment of the profile of the respondent for those years. The correct approach in the matter is the one which was considered by this Court in K.D. Gupta v. Union of India [K.D. Gupta v. Union of India, 1989 Supp (1) SCC 416 : 1989 SCC (L&S) 448] as under : (SCC pp. 420-21, para 8)*

*"8. The respondents have maintained that the petitioner has not served in the appropriate grades for the requisite period and has not possessed the necessary experience and training and consequential assessment of ability which are a precondition for promotion. The defence services have their own peculiarities and special requirements. The considerations which apply to other government servants in the matter of promotion cannot as a matter of course be applied to defence personnel of the petitioner's category and rank. Requisite experience, consequent exposure and appropriate review are indispensable for according promotion and the petitioner, therefore, cannot be given promotions as claimed by him on the basis that his batchmates have earned such promotions. Individual capacity and special qualities on the basis of assessment have to be found but in the case of the petitioner these are not available. We find force in the stand of the respondents and do not accept the petitioner's contention that he can be granted promotion to the higher ranks as cl*aimed by him by adopting the promotions obtained by his batchmates as the measure."

19. Sri Tewari has submitted that the Apex Court in re; **Colonel Ran Singh Rudee** (supra) has interpreted the expression 'consequential benefits'. As per the Apex Court in the aforesaid case, the 'consequential benefits' would be those, which are easily quantifiable, namely, those in the nature of *loss of salary, emoluments and other benefits*. But the expression cannot be construed to mean that even promotions which are strictly on the basis of comparative merit and selection must also stand conferred upon the officer.

20. Therefore, Sri Tewari has submitted that the petitioner is not claiming promotion or selection since he is a retired employee but the term 'consequential benefits' includes the *loss of salary, emoluments and other benefits*, therefore, the benefits claimed by the petitioner are fully covered with the term *'emoluments and other benefits'*. Sri Tewari has drawn attention of this Court towards paragraphs 24 and 25 of the writ petition, wherein he has categorically indicated that the petitioner and one Sri Vijay Singh Yadav were regularized by the same order and both were retired from the post of Junior Engineer. Sri Yadav retired on 30.9.2018 whereas the petitioner reached the age of superannuation on 31.7.2017. The basic pay of Sri Yadav was Rs.30,370/- and his last salary drawn was Rs.1,00,576/- whereas basic pay of the petitioner was treated as Rs.5,875/- as was being drawn by the petitioner on 1.2.1999 and his last pay drawn was treated as Rs.13,730/-, without assigning any cogent reasons to that effect vide impugned orders dated 6.7.2018 and 21.7.2018 (Annexure Nos.1 & 2 to the writ petition). No specific denial has been given in paras 31 & 32 of the counter affidavit, only this much has been indicated that the petitioner has been paid strictly in terms of judgment and order dated 18.12.2017.

21. Sri Tewari has referred the dictum of **Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association CSI Cinod Secretariat, Madras, (1992) 3 SCC 1,** submitting that the Apex Court has held that quashing of any order results in the restoration of the position as it stood on the date of passing of the order which has been quashed. Therefore, when the impugned punishment order has been quashed, the petitioner shall be restored back in a position which stood on the date of passing such order which has been quashed and in that case, the petitioner shall be entitled for all consequential benefits as prayed in the writ petition.

22. *Per contra*, Sri Shireesh Kumar, learned counsel for the opposite parties has submitted that the present writ petition is not maintainable as it has been filed seeking those reliefs to which the petitioner is not entitled. Further, the petitioner throughout in the writ petition has not made any averment to establish his entitlement to the reliefs claimed by him in the present writ petition and the petitioner has not averred his entitlement to revision of gratuity, provident fund, salary and gratuity on the basis of revised gratuity.

23. Sri Shireesh Kumar has further contended that the present writ petition is barred by the principles of constructive resjudicata and the provisions of Order 2 Rule 2 C.P.C. inasmuch as the present writ petition has been instituted seeking those reliefs which had willingly not being claimed by the petitioner in Writ Petition No.2954 (S/S) of 2009 and once the petitioner did not choose to claim those

benefits in earlier writ petition, then the present writ petition is not maintainable.

24. Sri Shireesh Kumar has further submitted that the present writ petition has been filed for the enforcement of judgment and order dated 18.12.2017 claiming those benefits, which were neither claimed by the petitioner nor allowed to him by this Court through the judgment and order dated 18.12.2017.

25. Sri Shireesh Kumar has also placed reliance upon the dictum of the Apex Court in re; **Colonel Ran Singh Rudee** (supra) referring paras 23 to 27 and 30 & 31 by submitting that the Apex Court has observed in that case that though prejudice was caused to the respondent by wrongly proceeding against him in General Court Martial (GCM) consequent to which he (petitioner of that writ petition) lost 9 years of serve is apparent but sympathy cannot outweigh considerations on merit since the respondent was found unfit for selection as "Colonel" by Selection Board though he was granted time-scale promotion to the rank of Colonel after putting in required service. Therefore, Sri Shireesh Kumar has submitted that the consequential benefits so prayed by the petitioner are similar to the selection, which is granted after evaluating the work and performance of the employee and since the work and performance of the present petitioner was not upto the mark, therefore, he could have not been paid his first promotional pay scale and benefit of Sixth Pay Commission on the basis of revised salary.

26. So as to strengthen his aforesaid submission, he has cited the judgment of the Apex Court in re; **Lt. Col. K.D. Gupta v. Union of India and Others, 1989 Supp (1) SCC 416.**

27. Sri Shireesh Kumar while referring the dictum of the Apex Court in re; **Union of India and Others v. Lt. Gen. Rajendra Singh Kadyan and Another, (2000) 6 SCC 698,** has submitted that the petitioner is not fit and legally eligible for promotional scale and other reliefs as those benefits could have been provided after the assessment of performance by the Committee, therefore, those benefits may not be treated as consequential benefits.

28. While referring the dictum of the Apex Court in re; **Chief Regional Manager, United India Insurance Company Limited v. Siraj Uddin Khan, (2019) 7 SCC 564,** Sri Shireesh Kumar has submitted that grant of the reliefs in the present writ petition is not automatic on quashing of the punishment order but specific pleadings for suitability, entitlement and eligibility are missing, as such the present writ petition deserves to be dismissed.

29. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that after quashing the punishment order dated 4.2.2009 by this Court vide judgment and order dated 18.12.2017 in Service Single No.2954 of 2009 would result in restoration of the position as it stood on the date of passing of the order. In other words, it shall be treated as if the punishment order dated 4.2.2009 was not in existence and in that case, the petitioner would be entitled for all service benefits, which have been prayed by him ignoring the punishment order dated 4.2.2009. Furthermore, the judgment and order dated 18.12.2017 has not been assailed by the Federation before the superior court by filing Special Appeal before the High Court or Special Leave Petition before the Apex

Court, therefore, that order has attained finality.

30. To me, while passing judgment and order dated 18.12.2017, this Court has clearly held that (i) the punishment order dated 4.2.2009 is quashed with all consequences; (ii) the petitioner would be entitled to 50% salary from the date of dismissal from service up to the date of retirement; (iii) the pensionery benefits admissible to the petitioner shall remain unaffected; (iv) the petitioner shall be treated as if he was in service up to the date of attaining the age of superannuation.

31. Admittedly, salary of the petitioner has not been revised by providing him annual increment w.e.f. 1.2.1999 till 31.7.2017, the date of superannuation. He has not been granted the first promotional pay scale w.e.f. the year 2004 and has not been given the benefit of Sixth Pay Commission on the basis of revised pay scale thereby he has not been paid his post retiral dues after making the aforesaid exercise.

32. The main contention of Sri Shireesh Kumar is that the aforesaid benefits would not come within the purview of 'consequential benefits' as such, 'consequential benefits' are dependent upon the assessment by a Selection Committee which had no occasion to assess the performance of the petitioner as he was out of employment since 4.2.2009 till he reached at the age of superannuation. Sri Shireesh Kumar has also submitted that in earlier writ petition, the petitioner has not prayed any relief, which has been prayed in this writ petition, however, such relief could have been prayed by him at that point of time, therefore, the present writ petition is barred by the constructive resjudicata.

. I am afraid as to how an employee, who was very much in service prior to passing the order of dismissal dated 4.2.2009 and at the time of filing of writ petition in the year 2009, could have prayed those reliefs, which have been prayed by him in the present writ petition after he reached the age of superannuation.

34. The case laws so cited by Sri Shireesh Kumar are mainly relating to the serving Officers of the Army wherein there is a clear cut mechanism providing promotion up to the rank of Lt. Colonel and from the post of Colonel onwards. Therefore, unless the Selection Board/Committee assesses the merit of the Lt. Colonel, he could have not been given actual promotion on the post of Colonel and onwards but no similar mechanism is provided in the present case. The Apex Court in re; **Colonel Ran Singh Rudee** (supra) has clearly observed that the consequential benefits are such benefits which are easily quantifiable, namely, those in the nature of *loss of salary, emoluments and other benefits*. Therefore, the reliefs prayed in the present writ petition in respect of revision of pay scale by providing the annual increments to the petitioner w.e.f. 1.2.1999 till 31.7.2017, grant of first promotional pay scale w.e.f. the year 2004 and the benefit of Sixth Pay Commission on the basis of revised pay scale come within the purview of *'emoluments and other benefits'*. I could not find any cogent reason in the impugned orders dated 6.7.2018 and 21.7.2018 (Annexure Nos.1 & 2 to the writ petition) providing the pay scale of Rs.5,875/- to the petitioner which was being paid to him w.e.f. 1.2.1999 as the logic to this effect is absolutely missing in both the orders. The petitioner has indicated such fact in para-21 (a) of the writ petition but proper reply

thereof has not been given vide para-22 of the counter affidavit.

35. Besides, the factum of hostile discrimination with identically placed person, namely, Sri Vijay Singh Yadav has not been explained by the opposite parties properly and the law is trite to the effect that if the hostile discrimination of a person is not explained by the authority, who has done such discrimination, then the said action would be treated as violative of Articles 14, 16 & 21 of the Constitution of India.

36. In view of what has been considered above and also in view of the dictums of the Apex Court so cited by the learned counsel for the parties, I hereby **allow** the present writ petition.

37. A writ of certiorari is issued quashing the orders dated 6.7.2018 and 21.7.2018, which are contained as Annexure Nos.1 & 2 to the writ petition.

38. A writ of mandamus is issued commanding the opposite parties to revise the salary of the petitioner by providing the annual increments to the petitioner from 01.02.1999 till 31.07.2017 and to grant the first promotional pay scale to the petitioner w.e.f. the year 2004 and further grant the benefits of the Sixth Pay Commission on the basis of the revised salary.

39. A writ in the nature of mandamus is issued commanding the opposite parties to revise the retiral benefits on the basis of last pay drawn calculating the same in terms of judgment of this Court thereby making payment of arrears of salary and arrears of retiral dues.

40. This order shall be complied with expeditiously, preferably within a period of eight weeks, failing which the petitioner shall be entitled for interest on aforesaid dues at the current market rate.

41. No order as to costs.

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**(2021)10ILR A184**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 20.10.2021**

**BEFORE**

**THE HON'BLE DINESH KUMAR SINGH, J**

Service Single No. 12020 of 2020
alongwith
Service Single No. 12834 of 2020
alongwith
Service Single No. 17765 of 2020

**Rajesh Kumar Tandon & Ors. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Vijay Kumar Srivastava, Shailendra Kumar Dubey

**Counsel for the Respondents:**
C.S.C., Alok Saxena, Dilip Mani, Girdhari Lal Shukla, Shobhit Mohan Shukla, Vijay Dixit

**A. Service Law – U.P. Government Servants Seniority Rules, 1991 – Rules 8(1) & 8(2) – Seniority – Post of Assistant Commissioner – Promotion and direct appointment made in the same year – Inter se Seniority amongst direct recruits and promotees – Determination – Rules 8(1) or Rule 8(3) – Applicability – Held, if the appointment to the post of Assistant Commissioner Commercial Tax is made through direct recruitment and promotion in the same year of recruitment, their seniority must be determined applying the provisions of Rule 8(3) of the Rules, 1991 – Rule 8(1) cannot be applied for**

**determining inter se seniority of direct recruits and promotees, if the selection and appointments are made in the same recruitment year through direct recruitment and promotion. (Para 6)**

**Writ Petition dismissed.** (E-1)

**Cases relied on :-**

1. Writ Petition No. 19231(SB) of 2016; Shanti Shekhar Singh Vs St. of U.P. & ors.

2. St. of Bihar Vs Arbind Jee; 2021 SCC OnLine SC 821

3. Ravindra Nath Pandey Vs St. of U.P.; 2014 (6) AWC 6389

4. Anil Kumar Vs St.of U.P. & ors.; 2015 (33) LCD 1609

5. Arun Kumar Saxena Vs St. of U.P. & ors.; 2008 (6) AWC 6474

6. U.O.I. Vs N.R. Parmar; (2012) 13 SCC 340

7. Harish Chandra Ram Vs Mukh Ram Dubey; 1994 Supp (2) SCC 490

8. Jagdish Ch. Patnaik Vs St.of Orissa; (1998) 4 SCC 456

9. K.Meghachandra Singh & ors .Vs Nigam Siro & ors.; (2020) 5 SCC 689

10. National Insurance Co. Ltd. Vs Pranay Sethi; (2017) 16 SCC 680

11. U.O.I. & ors. Vs M.K. Sarkar; (2010) 2 SCC 59

12.U.O.I. & ors. Vs C.Girija &orrs; (2019) 15 SCC 633

13. St. of Orissa Vs Pyarimohan Samantaray & ors.; (1977) 3 SCC

14. K.R.Mudgal & ors. Vs R. P. Singh & ors. ; (1986) 4 SCC 531

15. Malcom Lawrence Cecil D'souza Vs U.O.I. & ors.; (1976) 1 SCC 599

16. K.A. Abdul Majeed Vs St.of Kerala & ors.; (2001) 6 SCC 294

17. Aflatoon & ors. Vs Lt. Governor, Delhi & ors.; AIR 1974 SC 2077

18. St. of Mysore Vs V.K. Kangan & ors.; AIR 1975 SC 2190

19. Pt. Gidharan Prasad Missir Vs St. of Bihar & or.s; (1980) 2 SCC 83

20. H.D. Vora Vs St. of Mah.; AIR 1984 SC 866

21. Bhoop Singh Vs U.O.I. ; AIR 1992 SC 1414

22. The Ramjas Foundation & ors. Vs U.O.I. & ors.; AIR 1993 SC 852

23. Ram Chand Vs U.O.I. ; (1994) 1 SCC 852

24. St. of Mah. Vs Digambar; AIR 1995 SC 1991

25. Municipal Corporation of Greater Bombay Vs Industrial Development Investment Co. (P) Ltd. & ors..; (1996) 11 SCC 501

26. Padma vs Dy Secy. to the Govt. of Tamil Nadu (1997) 2 SCC 627

27. Hindustan Petrolium Corp. Ltd., Vs Dolly Das; (1999) 4 SCC 450

28. L.I.C. of India Vs Jyotish Chandra Biswas; (2000) 6 SCC 562

29. L. Muthu Kumar & anr. Vs St. of T.N. & ors.; (2000) 7 SCC 618

30. Municipal Council, Ahmadnagar & anr. Vs Shah Hyder Beig & ors.; AIR 2000 24 SC 671

31. Inder Jit Gupta Vs U.O.I. & ors.; (2001) 6 SCC 637

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

**1. WRIT PETITIONS:**

These petitions have been filed for quashing the seniority list dated 09.08.2012 issued by the State Government for the cadre of Assistant Commissioner, Commercial Tax as well as order dated 20.03.2020 passed by the Government whereby representation dated 3.08.2019 given by one of the petitioners for re-fixing/revisiting the seniority list dated 09.08.2012 by placing Direct recruit Assistant Commissioners en-block over

and above the promotees Assistant Commissioners has been rejected.

**2. FACTS:**

Since common questions of fact and law are involved, the facts of the lead petition are mentioned hereinbelow for deciding the controversy involved in these petitions.

(i) The petitioners and private respondents are posted as Deputy Commissioner in different districts of Uttar Pradesh in Commercial Tax Department, U.P. after they were promoted in the year 2014 based on seniority list dated 09.08.2012. Services of the petitioners as well as private respondents are governed under U.P. Sales Tax Service Rules, 1983 (hereinafter referred to as 'Rules, 1983') as amended from time to time.

(ii) The petitioners are direct recruits to the post of Assistant Commissioner, Commercial Tax whereas private respondents are promotee officers, who were promoted from the post of Sales Tax Officer Grade-II. Post of Deputy Commissioner and above are to be filled up only by promotion. Nomenclature of the Sales Tax Department was changed as Trade Tax Department and, thereafter name was again changed as Commercial Tax Department.

(iii) In pursuance to the advertisement issued for holding selection for the Combined State Public Service Examination, 2005 by the Uttar Pradesh Public Service Commission, the petitioners were selected as per merit list prepared by the Commission. They joined the service on different dates in the year 2008-09. Private respondents who were holding post of Commercial Tax Officer were promoted under 50% quota to the post of Assistant Commissioner vide order dated 27.02.2009 and they joined the said post on the same day.

(iv) Final seniority list for the cadre of Assistant Commissioner Commercial Tax from Serial No.173 to 2115 was issued on 09.08.2012, wherein the officers appointed directly and through promotion on the post of Assistant Commissioner in the recruitment year 2008-09 were placed in order of seniority as per the relevant Rules in the ratio of 1:1.

(v) The petitioners as well as respondent Nos.3 to 11 were promoted on the post of Deputy Commissioner, Commercial Tax by means of a common order in the year 2014 based on seniority list dated 09.08.2012.

(vi) Petitioner No.8 submitted representation dated 03.08.2019 against the seniority list dated 09.08.2012. Respondent No.1 considered the representation and rejected the same vide impugned order dated 20.03.2020 stating that the seniority list dated 09.08.2012 was prepared in accordance with law.

**3. RELEVANT STATUTORY PROVISIONS: -**

In order to regulate the services of officers of Sales Tax Department, service rules named as U.P. Sales Tax Service Rules, 1983 were promulgated which consisted of three posts namely, Sales Tax Officer, Assistant Commissioner and Deputy Commissioner.

(i) Rule 5 of Rules, 1983 provides for source of recruitment to the various categories of post in the services.

For convenience Rule 5 is extracted hereunder: -

**"5. Source of Recruitment: -**

(1) Recruitment to the various categories of posts in the Service shall be made from the sources indicated against each:

(a) Sales Tax Officer. - (i) By direct recruitment on the result of competitive examination conducted by the Commission, and

(ii) By promotion, through the Commission, from amongst permanent Sales Tax Officers, Grade-II who have put in not less than seven years' service as such.

Note. - A combined competitive examination may be held by the Commission for recruitment to the U.P. Civil (Executive) Service and any other State Services including this Service.

(b) Assistant Commissioner. - By promotion from amongst permanent Sales Tax Officers who have put in not less than seven years' service as such.

(c) Deputy Commissioner. - By promotion from amongst permanent Assistant Commissioners who have put in not less than seven years' service as such.

(2) If suitable candidates are not available for promotion on the posts of Sales Tax Officer from the prescribed field of eligibility, the Governor may, in consultation with the Commission, extend the field of eligibility to the extent considered necessary."

(ii) Rule 18 of the Rules, 1983 provides for preparation of combined select list if any year of recruitment appointments are made both by direct recruitment and by promotion. The aforesaid rule provides that select list shall be prepared in such a manner that the prescribed percentage is maintained and first name in the list being of the person appointed by promotion.

For ready reference, Rule 18 of Rules, 1983 is extracted hereinbelow: -

**"18. Combined Select List.** - If in any year of recruitment appointments are made both by direct recruitment and by promotion, a combined select list shall be prepared by taking the names of candidates from the relevant lists, in such manner that the prescribed percentage is maintained, the first name in the list being of the person appointed by promotion."

(iii) Sub-Rule 2 of Rule 19 provides that where, in any year of recruitment, appointments are to be made both by direct recruitment and by promotion, regular appointments shall not be made unless selections are made from both the sources and a combined list is prepared in accordance with Rule 18. Sub-Rule 3 however, provides that if more than one orders of appointment are issued in respect of any one selection, a combined order shall also be issued mentioning the names of the persons in order of seniority as determined in the selection, or, as it stood in the cadre from which they are promoted. It is further provided that if the appointments are made both by direct recruitment and by promotion, names shall be arranged in accordance with the list prepared under Rule 18.

(iv) Rule 22 of the Rules, 1983 relates to general rule of seniority which provides that the seniority of persons in any category of post shall be determined from the date of order of substantive appointment.

Rule 22 of the Rules, 1983 is reproduced hereunder: -

**"22. Seniority. -**

(1) Except as hereinafter provided, the seniority of persons in any category of posts shall be determined from the date of the order of substantive appointment and if two or more persons are appointed together, by the order in which their names are arranged in the appointment order:

Provided that if the appointment order specifies a particular back date with effect from which a person is substantively appointed, that date will be deemed to be

the date of order of substantive appointment and, in other cases, it will mean the date of issue of the order:

Provided further that, if more than one orders of appointment are issued in respect of any one selection, the seniority shall be as mentioned in the combined order of appointment issued under sub-rule (3) of Rule 19.

(2) The seniority inter -se of persons appointed directly on the result of any one selection shall be the same as determined by the Commission:

Provided that a candidate recruited directly may lose his seniority if he fails to join without valid reasons when vacancy is offered to him. The decision of the appointing authority as to the validity of reason shall be final.

(3) The seniority inter se of persons appointed by promotion shall be the same as it was in the cadre from which they were promoted.

(v) The State Government framed U.P. Government Servants Seniority Rules, 1991 (hereinafter referred to as 'Rules, 1991') under Article 309 of the Constitution of India for determination of the seniority of persons appointed to the service under the State Government. It is provided that the Rules would be applicable to all government servants in respect of whose recruitment and conditions of service, rules may be or have been framed separately.

(vi) Seniority Rules, 1991 have overriding effect so far as determination of seniority of government servants is concerned. Under Rule 4, substantive appointment has been defined as appointment, not being an ad-hoc appointment, on a post in the cadre of Service, made after selection in accordance with the service rules of the respective services.

(vii) Rule 5 deals with determination of the seniority where appointments are made by direct recruitment only. Rule 6 deals with the determination of the seniority where appointments are made only from promotion from a single feeding cadre. Rule 7 deals with a situation where appointments are made by promotion from more than one feeding cadre.

(viii) Rule 8 is in respect of determination of seniority where appointments are made by promotion and direct recruitment. Rule 8 would be relevant for the purpose of determination of the controversy involved in the writ petitions.

For convenience, Rule 8 is reproduced hereunder: -

"8. Seniority where appointments by promotion and direct recruitment. -

(1) Where according to the service rules appointments are made both by promotion and by direct recruitment, the seniority of persons appointed shall, subject to the provisions of the following sub-rules, be determined from the date of the order of their substantive appointments, and if two or more persons are appointed together, in the order in which their names are arranged in the appointment order:

Provided that if the appointment order specifies a particular back date, with effect from which a person is substantively appointed that date will be deemed to be the date of order of substantive appointment and, in other cases, it will mean the date of issuance of the order:

Provided further that a candidate recruited directly may lose his seniority, if he fails to join without valid reasons, when vacancy is offered to him the decision of the appointing authority as to the validity of reasons, shall be final.

(2) The seniority inter-se of persons appointed on the result of any one selection: -

(a) through direct recruitment, shall be the same as it is shown in the merit list prepared by the Commission or by the Committee, as the case may be;

(b) by promotion, shall be as determined in accordance with the principles laid down in Rule 6 or Rule7 accordingly as the promotion are to be made from as single feeding cadre or several feeding cadres.

(3) Where appointments are made both by promotion and direct recruitment on the result of any one selection, the seniority of promotees vis -a-vis direct recruits shall be determined in a cyclic order (the first being a promotee) so far as may be, in accordance with the quota prescribed for the two sources.

Illustrations. -(1) Where the quota of promotees and direct recruits is in the proportion of 1: 1 the seniority shall be in the following order-

First ... Promotee
Second ...Direct recruit
and so on.

(2) Where the said quota is in the proportion of 1:3 the seniority shall be in the following order-

First ...Promotee
Second to fourth . ...Direct recruit
Fifth ...Promotee
Sixth of eight ...Direct recruit
and so on.
provided that-

(i) Where appointments from any source are made in excess of the prescribed quota, the persons appointed in excess of quota shall be pushed down, for seniority, to subsequent year or years in which there are vacancies in accordance with the quota;

(ii) Where appointment from any source fall short of the prescribed quota and appointment against such unfilled vacancies are made in subsequent year or years, the persons so appointed shall not get seniority of any earlier year but shall get the seniority of the year in which their appointments are made, so however, that their names shall be placed at the top followed by the names, in the cyclic order of the other appointees;

(iii) Where in accordance with the service rules the unfilled vacancies from any source could, in the circumstances mentioned in the relevant service rules be filled from the other source and appointment in excess of quota are so made, the persons so appointed shall get the seniority of that very year as if they are appointed against the vacancies of their quota."

**4. SUBMISSIONS:**

Heard Mr. Vijay Kumar Srivastava and Mr. Ajay Pratap Singh, Advocates for the petitioners, as well as Mr. Sandeep Dixit, learned Senior Advocate, assisted by Mr. Vijay Dixit, Advocate, Mr. Alok Saxena, Advocate, Mr. Ran Vijay Singh, Additional Chief Standing Counsel for respondents and Mr. Shobhit Mohan Shukla, Advocate for intervener.

(i) Learned counsel for the petitioner has submitted that in preparing the seniority list dated 09.08.2012, the State Government had wrongly applied the provisions of Rule 8(3) of the Rules, 1991 as the petitioners were directly recruited on the post of Assistant Commissioner, Commercial Tax in the year 2005. However, private respondents were promoted through selection held in 2009 and, therefore, it is submitted that selection of the petitioners and the private respondents are different selections and

their appointments to the post of Assistant Commissioner, Commercial Tax were not as a result of same selection, therefore, Rule 8(3) should not have been applied for determining the seniority between the petitioners (direct recruits) and the promotees (private respondents). Seniority list ought to have been prepared as per Rule 8(1) from the respective dates of substantive appointment.

(ii) It has been further submitted that private respondents (promotee) have been made senior to the petitioners in the seniority list dated 09.08.2012 though they were promoted after the appointments of the petitioners. It is submitted that the promotee officers have been given seniority from the date when they were not even born in the cadre of Assisstant Commissioner, Commercial Tax.

(iii) It has been further submitted by learned counsel for the petitioners that for making another selection for the post of Assistant Commissioner, Commercial Tax through direct recruitment, an advertisement was issued in 2007, which got completed in the year 2010. Persons selected and appointed on the post of Assistant Commissioner, Commercial Tax through direct recruitment joined their services from December 2010 onwards. In the same year, another selection through promotion on the post of Assistant Commissioner, Commercial Tax from the post of Commercial Tax Officer was held and promotion order was issued on 28.07.2010. Seniority of these officers was determined on the basis of date of substantive appointment and the promotee officers were placed en block above direct requirements who were appointed after date of promotion of the promotees i.e. 28.07.2010 and, accordingly seniority list dated 8.07.2016 was issued.

(iv) Seniority list dated 08.07.2016 was challenged before this Court by direct recruitment who were selected in the year 2010 by filing several writ petitions leading **Writ Petition No.19231(SB) of 2016 (*Shanti Shekhar Singh* vs State of U.P. & Ors)** praying therein for fixing seniority of direct recruits and promotees in cyclic manner as was done in the case of the present petitioners and private respondents in seniority list dated 09.08.2012. This Court dismissed the said writ petition vide judgment and order dated 04.05.2017 and laid down principles for determining the seniority in para 127 of the said judgment.

(v) This Court has held that the seniority list should be given from the date of entry in a particular service or the date of substantive appointment. It has been further held that seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively. Judgment and order dated 04.05.2017 was challenged before the Supreme Court in S.L.P. (Civil) Diary No.8268 of 2018, however, the same was dismissed by the Supreme Court vide order dated 18.05.2018.

(vi) Learned counsel for the petitioners has placed reliance on the judgment of the Supreme Court in the case of **State of Bihar vs Arbind Jee:2021 SCC OnLine SC 821** to submit that retrospective seniority cannot be given from the date when the persons were not even born in the cadre. He, therefore, has submitted that counting the seniority of the private respondents from the date when they were not even born in the cadre of Assistant Commissioner, Commercial Tax is against the express provision of the seniority Rules, 1991 and, the petitioners ought to have been placed en block senior to the private respondents in the seniority list dated 09.08.2012 as they were appointed on the post of Assistant Commissioner Commercial Tax earlier than the private respondents. It has been,

therefore, submitted that the impugned seniority list dated 09.08.2012 as well as order dated 20.03.2020 are liable to be quashed.

(vii) On the other hand, Mr. Sandeep Dixit, learned Senior Advocate assisted by Mr. Vijay Dixit for private respondents and Mr. Ranvijay Singh, Ld. Addl. Chief Standing Counsel appearing for State have submitted that challenge in the writ petition is seniority list of Assistant Commissioners, Commercial Tax dated 09.08.2012 and, the writ petition has been filed after a delay of about 9 years. Aforesaid seniority list was not challenged in all these years. The said seniority list was acted upon inasmuch as the promotions were made to the post of Deputy Commissioner, Commercial Tax from the same seniority list in the year 2014. Belated challenge by the petitioners to the long-standing seniority list dated 09.08.2012 is to be rejected as the petition is barred by gross delay and latches.

(viii) It has been further submitted that the representation of the petitioner No.8 on which the decision has been rendered on 20.03.2020 by respondent No.1 cannot confer a fresh cause of action to the petitioners as delay and latches are to be considered with reference to date on which impugned seniority list was published and not from the date when order was passed on the representation of the petitioner No.8.

(ix) It has also been submitted by learned Senior Advocate that settled seniority position should not be unsettled after substantial lapse of time. Anyone who feels aggrieved by the administrative decision affecting one's seniority should act with diligence and promptness. One cannot be allowed to knock the door of the Court after substantial lapse of time of 9 years from the date when the final seniority list dated 09.08.2012 was issued and acted upon subsequently.

(x) Under Rule 8(3) of Rules, 1991, phrase "one selection' would mean selection in the same recruitment year. To substantiate the said submission, learned Senior Advocate has placed reliance on two judgments of this Court reported in **2014 (6) AWC 6389 :Ravindra Nath Pandey vs State of U.P. and 2015 (33) LCD 1609: Anil Kumar vs State of U.P. & Ors.**

(xi) In respect of the seniority list dated 18.07.2016 from Serial Nos.2116 to 2702, it has been contended that the said seniority list was issued in respect of the persons who have been appointed through direct recruitment and promotion on the post of Assistant Commissioner Commercial Tax in different years after 2009. For each recruitment year, different provisions of Rules, 1991 were applied as can be seen that for recruitment year 2009-10 to 2012-13 Seniority list was prepared based on provisions of Rule 8(1) and 8(2) of the Rules, 1991 whereas in the recruitment year 2013-14, Rule 8(3) of the Rules, 1991 was applied.

(xii) It has been further submitted that since selection was made in case of the petitioners and private respondents in the same recruitment year as such provisions of Rule 8(3) would apply. Provisions of Rule 8(1) is subject to provisions of Rule 8(3) and, therefore, the seniority of promotees and direct recruits for the recruitment year 2008-09 was determined on rotation in the ratio of 1:1. It has been further submitted that judgment of *Shanti Shekhar Singh (supra)* while considering the dispute with respect to inter se seniority of promotees and direct appointment did not take into consideration the law laid down by the Division Bench of this Court in the case of *Ravindra Nath Pandey (supra)* which is of equal strength and, it appears that the

judgment passed in the case *Shanti Shekhar Singh (supra)* is per incuriam.

(xiii) Mr. Shobhit Mohan Shukla, learned counsel appearing for interveners has submitted that the promotions were made from the same seniority list dated 09.08.2012 to the post of Deputy Commissioner and, after a gap of around 9 years when promotion to the next higher post of Joint Commissioner is due and in process, the petitioners have come to this Court assailing the said seniority list. He has further submitted that applicants are much higher in gradation list than the petitioners. Therefore, even if the writ petitions are allowed, the applicants would remain above the petitioners in the gradation list. However, on account of filing of the present writ petitions, promotion of the applicants in pursuance to the recommendation of the Departmental Promotion Committee is held up. Mr. Shobhit Mohan Shukla, learned counsel has submitted that the Departmental Promotion Committee has considered the promotion against 19 posts of Joint Commissioner which are existing and accruing in near future. The applicants are facing hardship as their promotion is held up because of the pendency of the present writ petitions though they would remain senior to the petitioners as well as private respondents even if the writ petitions stand allowed.

(xiv) Mr. Shobhit Mohan Shukla, learned counsel has supported the submissions advanced on behalf of Mr. Sandeep Dixit, learned Senior Advocate with respect to gross delay and latches in challenging the seniority list dated 09.08.2012.

**5.ANALYSIS:-**

(i) It is admitted position that the seniority list of the petitioners and private respondents is to be prepared in accordance with Government Servants Seniority Rules, 1991. The question which arises for consideration is whether inter-se seniority of the petitioners and private respondents is to be determined from the date of their substantive appointment in accordance with Rule 8 (1) or it is to be determined in accordance with Sub-Rule 3 of Rule 8 of the Seniority Rules 1991?

(ii) From perusal of Rule 8, it is evident that under Sub-Rule 1, seniority is to be determined from the date of the order of substantive appointment unless the appointment order specifies a particular back date with effect from which a person would be deemed to be substantially appointed but in other cases, date of issuance of the order of appointment would be date of substantive appointments. Under Sub-Rule 2 of Rule 8 inter se seniority of persons appointed on the result of any one selection shall be same as shown in the merit list prepared by the Commission.

(iii) Sub-Rule 3 of Rule 8 deals with a situation where appointments are made both by promotion and direct recruitment on the result of any "one selection'. The sub rule (3) provides that in such a case, the seniority of promotees vis-a-vis direct recruits is to be determined in a cyclic order 'the first being a promotees' in accordance with the quota prescribed for two sources where the quota of promotees and direct recruits is in the ratio of 1:1, the first person in the seniority list shall be promotee officer and the second shall be direct recruit and so on and so forth.

(iv) Final seniority list dated 09.08.2012 of the Assistant Commissioner, Commercial Tax from Serial Nos.1732 to 2115 was finalized and issued as per provisions of Rule 8(3) of Rules, 1991 and the promotees and direct recruits for the recruitment year 2008-09 were placed in ratio of 1:1.

(v) The issue regarding what is the import and purport of phrase "one selection' occurring in sub-rule (3) has to be dealt with first before proceeding further in the matter. Ordinarily, appointments through direct recruit and promotion to a post are not made by one selection inasmuch as direct recruitment to the post of Assistant Commissioner in the present case is made by the Uttar Pradesh Public Service Commission through competitive examination whereas promotion is made by the Departmental Promotion Committee constituted for the said purpose.

(vi) This Court in the case of **Ravindra Nath Pandey vs State of U.P.: 2014(6) AWC 6389** has held that Sub-rule 3 of Rule 8 of Rules, 1991, should be construed in such a manner so that rule does not become inoperative. It has been held that phrase "one selection" occurring in Rule 8(3) should be construed to mean the selection made in the same "year of recruitment' and seniority of all persons who are appointed by direct recruitment or promotion in the same recruitment year, should be determined as per Rule 8(3) of Rules, 1991.

(vii) Paragraphs 27 and 31 of the said judgment are relevant for the purpose of present case which are extracted hereunder:-

"27. In view of above, sub Rule (3) of Rule 8 of 1991 Seniority Rules should be construed in such a manner which may not make the rule inoperative. Further external aid from 1992 Service Rules may be taken while interpreting 1991 Seniority Rules for removal of ambiguity and doubt, if any.

.....…28. So far as the mandate contained in Rule 8(3) of 1991 Seniority Rules to the effect where appointments are made both by promotion and direct recruitment on the result of one selection, seniority of promotees and direct recruits will be determined by a cyclic order, is concerned, since admittedly and ordinarily, in one selection, appointment and direct recruitment may not be done, then while construing the provisions harmoniously, the provision contained in Sub Rule (3) may be interpreted relating it to the "year of recruitment' as defined by Sub Rule (m) of Rule 3 of 1992 Rules. It means all persons who have been appointed by direct recruitment or by promotion in a recruitment year shall be entitled to be considered for seniority in pursuance to 1991 Seniority Rules. The seniority list shall contain the names of officers in order of their recruitment against substantive vacancy relating back to the recruitment year. The appointment should have been done in accordance with rules."

(viii) This Court in the case of **Arun Kumar Saxena vs State of U.P. & Ors : 2008 (6) AWC 6474** while interpreting Clause 3 or Rule 8 of Rules, 1991 has held that Rule 8(3) contemplates determination of seniority between direct recruits and promotees as a result of "one selection', meaning thereby that the aforesaid Rule will have application only where appointments both by direct recruitment and the promotion are made as a result of "one selection'. If selections are made in different recruitment years, Rule 8(3) will have no application. It means that Rule 8(3) would come into play when selection is made by direct recruitment as well as by promotion in the same "recruitment year' and not otherwise.

(ix) This Court in the case of **Anil Kumar vs State of U.P. [2015 (33) LCD 1609]** while interpreting phrase 'one selection' has held that as there cannot be one selection for direct recruitment and promotion, therefore, one selection according to Rule 8(3) can only mean "selection in the same year"

Para 9 of the aforesaid judgment which is extracted hereunder:-

"9.Now coming to the validity of the rejection order dated 18.5.2006 we find that the source of recruitment on the post of State Radio Officer is promotion. Direct recruitment has been permitted as an alternative in the event no eligible person is available for promotion. Nevertheless, considering the fact that both direct recruitment and promotion to the post in question was made in the same recruitment year, a combined list ought to have been prepared as per the said provisions of Rule 16, 17 and 18 of the Rules 1979 wherein the promotee officer should have been placed first. As the source of recruitment under Rule 5 (iii) is promotion, therefore, the promotee officer ought to have been placed above for this reason also. On the same analogy a combined list ought to have been prepared under Rules 16 and 17 and based thereon the combined appointment orders ought to have been issued placing the names in the same order as they figure in the seniority list prepared under Rules 16 and 17, but it does not appear to have been done. Even under Rule 8(3) of the Seniority Rules, 1991 the placement in the seniority list where appointments are made both by promotion and direct recruitment, the seniority of promotee viz a viz direct recruit shall be determined in a cyclic order (the first being a promotee), as far as may be, in accordance with the quota prescribed for the two sources, though no quota is prescribed for such direct recruitment, nevertheless, considering the peculiar facts of the case and the proviso to Rule 5 (iii) of the Rules 1979, the principle applicable in Rule 8(3) of the Seniority Rules, 1991 should have been applied and based thereon the seniority ought to have been determined. As there cannot be "one selection" for direct recruitment and promotion, therefore, the words mentioned in Rule 8(3) can only mean selection in the same year. In these circumstances the order of rejection can also not be sustained."

(x) Thus, one selection occurring in Rule 8(3) of Rules,1991 means in the same year. If appointments are made to a post by direct recruitment and by promotion as per their quota in the same "recruitment year', then their inter se seniority is to be determined applying the provisions of Rule 8(3) of Rules, 1991.

(xi) "Recruitment year' or "year of recruitment' is defined under Rules, 1983 to mean 12 months commencing from 1st day of July of calendar year. Rule 3(o) defines "year of recruitment' which is reproduced hereinbelow:-

"3.(o) "Year of recruitment' means a proof of twelve months commencing from the first day of July of calendar year."

(xii) The term "recruitment year' does not mean the year in which, recruitment is initiated or the year in which vacancy arises. The Supreme Court has held that contrary view expressed in **Union of India vs N.R. Parmar: (2012) 13 SCC 340** is not correct view. The Supreme Court has defined "recruitment year' means the year in which the recruitment takes place i.e., by issuing of an appointment letter. "Recruitment year' would not mean when vacancy occurred for a post as it is not incumbent upon the Government to fill up the post as soon as the vacancy arises. In the case of **Harish Chandra Ram Vs Mukh Ram Dubey, 1994 Supp (2) SCC 490** in para 5, it has been held as under: -

"5. In view of the afore stated resolutions, it is clear that the general candidates will not be considered for promotion to the post for SC, ST or BC reserved candidates. The reserved candidates even if they are not available, it is settled law that unless de reservation is done the vacancy will not be thrown open

to the general category. It is not incumbent upon the Government as soon as the vacancy arises that it must be filled by recruiting the candidates either by direct recruitment or promotion from feeder cadre or by transfer. So, as and when recruitment takes place the cases of all the candidates including reserved candidates must be considered according to rules which would arise only when recruitment takes place. Take for instance a hypothetical case. A and B are eligible for consideration and were considered in 1980 for two vacancies and B was found suitable and was appointed to one vacancy in 1982. One more vacancy arose in 1983. In the year 1983, A, C and D were considered. A and D were promoted in 1984. The recruitment years are 1982 and 1984, and not 1980 when one vacancy existed or 1983 when two vacancies existed. So, each year is not the year of recruitment. As and when recruitment takes place in a particular year, it would be the year of recruitment."

(Emphasis Supplied)

(xiii) Recruitment means appointment after completion of recruitment process. Recruitment and appointment are not two different concepts in service jurisprudence. Unless the selection is complete in all respects to a post, it cannot be said that a person has been recruited to the service. In the case of direct recruits, the process of recruitment starts with invitation of applications by the Commission, and in case of promotion, it begins with the nomination made by the competent authority by holding D.P.C. However, in both cases final selection gets completed when appropriate orders for appointment are issued. Until final selection is made, and appropriate order is issued for appointment, no person can be said to have been recruited in the service. Persons appointed through direct recruitment and by promotion cannot claim seniority from the date when the vacancies occur in their respective quota, but it must be determined when final recruitment/appointment is made after selection/recruitment process. It is well settled that year in which vacancy occurs is not relevant for the purposes of determining the seniority irrespective of the year when a person is recruited.

(xiv) The Supreme Court in the case of **Jagdish Ch. Patnaik vs State of Orissa : (1998) 4 SCC 456** in para 32 has explained the aforesaid concept as under:-

"32. The next question for consideration is whether the year in which the vacancy accrues can have any relevance for the purpose of determining the seniority irrespective of the fact when the persons are recruited? Mr Banerjee's contention on this score is that since the appellant was recruited to the cadre of Assistant Engineer in respect of the vacancies that arose in the year 1978 though in fact the letter of appointment was issued only in March 1980, he should be treated to be a recruit of the year 1978 and as such would be senior to the promotees of the years 1979 and 1980 and would be junior to the promotees of the year 1978. According to the learned counsel since the process of recruitment takes a fairly long period as the Public Service Commission invites application, interviews and finally selects them whereupon the Government takes the final decision, it would be illogical to ignore the year in which the vacancy arose and against which the recruitment has been made. There is no dispute that there will be some time lag between the year when the vacancy accrues and the year when the final recruitment is made for complying with the procedure prescribed but that would not give a handle to the Court to include something which is not there in the

rules of seniority under Rule 26. Under Rule 26 the year in which vacancy arose and against which vacancy the recruitment has been made is not at all to be looked into for determination of the inter se seniority between direct recruits and the promotees. It merely states that during the calendar year direct recruits to the cadre of Assistant Engineer would be junior to the promotee recruits to the said cadre. It is not possible for the Court to import something which is not there in Rule 26 and thereby legislate a new rule of seniority. We are, therefore, not in a position to agree with the submission of Mr Banerjee, the learned Senior Counsel appearing for the appellants, on this score."

(xv) On commencement of the selection/recruitment process, a candidate does not get recruited to the service, only on completion of selection/recruitment process a candidate gets selected for appointment. Under the service jurisprudence, seniority cannot be claimed from a date when an incumbent is yet to be borne in the cadre. The Supreme Court in the case of ***K.Meghachandra Singh* & Ors vs Nigam Siro & Ors: (2020) 5 SCC 689** while relying the judgment in the case of **Jagdish Ch.Patnaik vs State of Orissa (supra)** has overruled the ratio of the judgment in the case of **Union of India vs N.R. Parmar (supra),** wherein it was held that seniority of the direct recruits would be of the year when the selection process commenced. The Supreme Court in the case of *N.P. Parmar (supra)* held that administrative delay in finalization of recruitment leading to delayed appointment should not deprive the individual of his due seniority. Paras 28 and 29 of the judgment in the case of *K.Meghachandra Singh(supra)* are extracted hereinbelow:-

"28. Before proceeding to deal with the contention of the appellants' counsel vis-à-vis the judgment in *N.R. Parmar [Union of India v. N.R. Parmar*, (2012) 13 SCC 340 : (2013) 3 SCC (L&S) 711] , it is necessary to observe that the law is fairly well settled in a series of cases, that a person is disentitled to claim seniority from a date he was not borne in service. For example, in *Jagdish Ch. Patnaik [Jagdish Ch. Patnaik v. State of Orissa*, (1998) 4 SCC 456 : 1998 SCC (L&S) 1156] the Court considered the question whether the year in which the vacancy accrues can have any bearing for the purpose of determining the seniority irrespective of the fact when the person is actually recruited. The Court observed that there could be time-lag between the year when the vacancy accrues and the year when the final recruitment is made. Referring to the word "recruited" occurring in the Orissa Service of Engineers Rules, 1941 the Supreme Court held in *Jagdish Ch. Patnaik [Jagdish Ch. Patnaik v. State of Orissa*, (1998) 4 SCC 456 : 1998 SCC (L&S) 1156] that person cannot be said to have been recruited to the service only on the basis of initiation of process of recruitment but he is borne in the post only when, formal appointment order is issued.

29. The above ratio in *Jagdish Ch. Patnaik [Jagdish Ch. Patnaik v. State of Orissa*, (1998) 4 SCC 456 : 1998 SCC (L&S) 1156] is followed by this Court in several subsequent cases. It would however be appropriate to make specific reference considering the seniority dispute in reference to the Arunachal Pradesh Rules which are in pari materia to the MPS Rules, 1965 *[vide Nani Sha v. State of Arunachal Pradesh [Nani Sha v. State of Arunachal Pradesh*, (2007) 15 SCC 406 : (2010) 1 SCC (L&S) 719] ]. Having regard to the similar provisions, the Court approved the view that seniority is to be reckoned not from the date when vacancy arose but from the date on which the appointment is made

to the post. The Court particularly held that retrospective seniority should not be granted from a day when an employee is not even borne in the cadre so as to adversely impact those who were validly appointed in the meantime."

(xvi) If appointments through process of direct recruitment and promotion are made to a post in accordance with quota prescribed under the relevant rules in 12 months commencing from 1st July to 30th June, then inter se seniority of such direct recruitments and promotees is to be determined applying the principles of Rule 8(3) of 1991 Rules. In the present case, final selection and appointments to the post of Assistant Commissioner, Commercial Tax through direct recruitment (petitioners) and promotion (private respondents) was concluded in the "year of recruitment' 2008-09 i.e. 01.07.2008 to 30.06.2009. The petitioners were issued appointment letters on 19.12.2008 in pursuance thereof, they joined between 24.12.2008 to 16.06.2009 whereas the promotion order in respect of private respondents was issued on 27.02.2009 and all the promotees submitted their joining on the same day i.e. 27.02.2009.

(xvii) Learned counsel for the petitioners has submitted that seniority list of Assistant Commissioner, Commercial Tax dated 18.07.2016 in respect of the promotees and direct recruits of the year of recruitment year 2010 was prepared as per provisions of Rule 8(1) of the Rules, 1991 on the basis of date of substantive appointment and thereby promotee officers were placed en block above the direct recruits, who were issued appointment orders after the date of promotion of the promotees i.e. 28.07.2010. Several writ petitions were filed by the direct recruits leading Writ Petition No.19231(SB) of 2016: *Shanti Shekhar Singh* vs State of U.P. & Ors claiming for fixation of seniority between direct recruits and promotees of the year 2010 in cyclic manner in the ratio of 1:1 as provided under Rule 8(3) and as the impugned seniority list dated 09.08.2012 was prepared.

(xviii) The Division Bench of this Court vide judgment and order dated 04.05.2017 rejected the claim of the petitioners in the said writ petitions and in para 127 while laying down the principles for determination of seniority held that the seniority had to be given from the date of substantive appointment. Para 127 of the judgment and order dated 04.05.2017 is reproduced hereunder:-

"127. We think it appropriate to issue the following directions to the respondents: -

I. The Departmental Promotion Committee should be convened at a regular interval to draw panels which could be utilized on making promotions against the vacancies occurring during the course of a year. For this purpose, it is essential for the concerned appointing authorities to initiate action to fill up the existing as well as anticipated vacancies well in advance of the expiry of the previous panel by collecting relevant documents like CRs, integrity certificates, seniority list etc. for placing before the Departmental Promotion Committee. The DPC could be convened every year if necessary, on a certain fixed date. The Departments should lay down a time schedule for holding DPCs under their control and after laying down such a schedule the same should be monitored by making one of their officers responsible for keeping a watch over the various cadre authorities to ensure that they are held regularly. Holding of DPC meetings need not be delayed or postponed on the ground that recruitment rules for a post are being

reviewed/amended. A vacancy shall be filled in accordance with the recruitment rules in force on the date of vacancy unless rules made subsequently have been expressly given retrospective effect. Since Amendment to recruitment rules normally have only prospective application, the existing vacancies should be filled as per the recruitment rules in force.

II. Where for reasons beyond control, the DPC not be held in a year, even though the vacancies arose during that year, the first DPC that meets thereafter should follow the procedure of determination of actual number of regular vacancies that arose in each of the previous year immediately preceding and the actual number of regular vacancies proposed to be filled in the current year separately and consider the officers who would be within the field of choice with reference to the vacancies of each year starting with the earliest year onwards. After considering the eligibility list the select list be prepared according to the vacancy of recruitment year.

III. The requisition for selection by way of direct recruitment be sent to the Public Service Commission by calculating the existing vacancies and vacancies likely to occur during the recruitment year as per existing rules and be sent to the Public Service Commission in advance so that the process of recruitment be conducted and completed within a time frame and recommendation from the Public Service Commission be sent to the Government before the starting of the recruitment year so that the vacancies must be filled up within time.

Accordingly, we decide the pending writ petitions on the following principles:-

i. Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources.

ii. Any departure in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

iii. The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively.

iv. The promotion takes effect from the date of being granted and not from the date of occurrence of vacancy or creation of the post.

v. Appointment be issued in "order as it stood in the cadre from which they are promoted".

vi. Unless there is specific rule entitling the applicants to receive promotion from the date of occurrence of vacancy, the right of promotion does not crystallize on the date of occurrence of vacancy and the promotion is to be implemented on the date when it is actually effected by way of appointment (in case of sealed cover procedure when the recommendations are kept in sealed cover awaiting the outcome of the disciplinary proceedings, promotions have to be retrospectively made with or without financial benefits subject to decision of the appointing authority)."

(xix) A Special Leave Petition filed against the said judgment and order dated 04.05.2017 was dismissed in limine by the Supreme Court being SLP(C) Diary No.8268 of 2018 vide order dated 18.05.2018. It has been submitted that since the seniority list dated 18.07.2016, which was prepared as per provisions of Rule 8(1)

of the 1991 Rules has been upheld by this Court in the said judgment in the case of *Shanti Shekhar Singh (supra)* and the Supreme court has dismissed the S.L.P., the impugned seniority list dated 09.08.2012 as well as order dated 20.03.2020 are untenable and liable to be quashed and the Department should be directed to prepare the seniority list in accordance with Rule 8(1) of Rules, 1991 inasmuch as in the same Department two seniority list applying the different provisions of Rules, 1991 should not exist.

(xx) Thus, the petitioners did not have any grievance till the Supreme Court dismissed the S.L.P. against the judgment and order dated 04.05.2017 passed by the Division Bench in the case of *Shanti Shekhar Singh (supra)*. Once the S.L.P. got dismissed, one of the petitioners filed the representation against the seniority list dated 09.08.2012, which came to be rejected on 20.03.2020. This Court did not take note of the judgment in the case of *Ravindra Nath Pandey (supra)*, which is of co-equal strength in its judgment in the case of in the case of *Shanti Shekhar Singh (supra)*. There can be no scintilla of doubt that an earlier decision of co-equal Bench binds the Bench of same strength. It is well settled law that in limine dismissal of the SLP does not amount to the affirmation/upholding of the judgment/order of the High Court by the Supreme Court.

(xxi) The Supreme Court in the case of ***National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680*** after taking note of several judgments on this aspect in para 28 held as under:-

"28. In this context, we may also refer to *Sundeep Kumar Bafna v. State of Maharashtra [Sundeep Kumar Bafna v. State of Maharashtra*, (2014) 16 SCC 623 : (2015) 3 SCC (Cri) 558] which correctly lays down the principle that discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench. There can be no scintilla of doubt that an earlier decision of co-equal Bench binds the Bench of same strength. Though the judgment in *Rajesh case [Rajesh v. Rajbir Singh*, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] was delivered on a later date, it had not apprised itself of the law stated in *Reshma Kumari [Reshma Kumari v. Madan Mohan*, (2013) 9 SCC 65 : (2013) 4 SCC (Civ) 191 : (2013) 3 SCC (Cri) 826] but had been guided by *Santosh Devi [Santosh Devi v. National Insurance Co. Ltd.*, (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC (L&S) 167] . We have no hesitation that it is not a binding precedent on the co-equal Bench."

(xxii) Next question which arises for consideration is that whether the petitioners who had no grievance against the impugned seniority list dated 09.08.2012 till the year 2020, when the S.L.P. against the judgment and order dated 04.05.2017 passed in the case of *Shanti Shekhar Singh (supra)* was dismissed, get cause of action in the year 2020 to challenge the said seniority list as representation filed by one of the petitioners got rejected vide impugned order dated 20.03.2020? It is well settled

law that a party does not get cause of action to get a dispute reopened, which is finally settled between the parties because of change of law or decision of the Court.

(xxiii) In the present case, impugned seniority list dated 09.08.2012 remained unchallenged for 9 long years. Promotions were made in the year 2014 based on this seniority list to the post of Dy Commissioner, Commercial Tax without any demur by the petitioners, therefore, I am of the view that the petitioners do not get a cause of action to raise the dispute against the seniority list dated 09.08.2012 in the year 2020 because of the judgment in the case of *Shanti Shekhar Singh (supra).*

(xxiv) In number of decisions, it has been held that delay and latches have to be seen from the original cause of action and not from the date of representation or from the decision on the representation, if any e.g;

(i) Union of India & Ors vs M.K. Sarkar: (2010) 2 SCC 59; (para 15 &16) and;

(ii) Union of India & Ors vs C.Girija & Ors: (2019) 15 SCC 633; (para 16 & 20

(xxv) If the petitioners were aggrieved by the seniority list dated 09.08.2012, they could have come to this Court before promotion to the post of Dy Commissioner, Commercial Tax was held from the said seniority list. They have approached this Court in the year 2020 and, therefore, these writ petitions are barred by gross delay and latches, which are liable to be dismissed on this ground alone.

(xxvi) It is also well settled that settled seniority of persons in a service should not be disturbed after much delay as seniority in service should not be a variable factor. It would be apt to mention a few judgments on this aspect as under:-

(i) State of Orissa vs Pyarimohan Samantaray & Ors: (1977) 3 SCC 396 (para 6);

(ii) K.R.Mudgal & Ors vs R. P. Singh & Ors. (1986) 4 SCC 531 (para 7-9); and

(iii) Malcom Lawrence Cecil D'souza vs Union of India & Ors : (1976) 1 SCC 599 (para 8-9)

(xxvii) In this case, it would be wholly unjustified to unsettle the seniority position of the petitioners and private respondents, which has held the field for long 8-9 years without any challenge and promotions were made to the posts of Dy Commissioner, Commercial Tax from that seniority list. The Supreme Court in the case of **K.A. Abdul Majeed Vs State of Kerala & Ors: (2001) 6 SCC 294,** held that the seniority assigned to any employee could not be changed after a lapse of 7 years, though even on merit it was found that seniority of the petitioner therein had correctly been fixed.

(xxviii) Any claim for seniority at a belated stage is required to be rejected as it seeks to disturb the vested right of other persons regarding seniority, rank and promotion, which have accrued to them during the intervening period. Delay and latches in challenging the seniority is always fatal. The petitioners have been fence sitters. After the SLP against the decision in the case of *Shanti Shekhar Singh (supra)* came to be dismissed, they have approached this Court. It is well settled that fence sitters cannot be allowed to raise a dispute or challenge the validity of the order after its conclusion. A few judgments are mentioned herein below:-

[(i) Aflatoon & Ors vs Lt. Governor, Delhi & Ors AIR 1974 SC 2077; (ii) State of Mysore vs V.K. Kangan & Ors, AIR 1975 SC 2190; (iii)Pt. Gidharan Prasad Missir vs State of Bihar & Ors: (1980) 2 SCC 83; (iv) H.D. Vora vs State of Maharashtra, AIR 1984 SC 866; (v) Bhoop Singh vs Union of India, AIR 1992

SC 1414; (vi) The Ramjas Foundation & Ors vs Union of India & Ors: AIR 1993 SC 852; (vii) Ram Chand Vs Union of India : (1994) 1 SCC 852 (viii) State of Maharashtra vs Digambar, AIR 1995 SC 1991;(ix) Municipal Corporation of Greater Bombay vs Industrial (Development Investment Co. (P) Ltd. & Ors,, (1996) 11 SCC 501;(x) Padma vs Dy Secy. To the Govt. of TamilNadu (1997) 2 SCC 627; (xi) Hindustan Petrolium Corp. Ltd., vs. Dolly Das: (1999) 4 SCC 450; (xii) Life Insurance Corporation of India vs Jyotish Chandra Biswas: (2000) 6 SCC 562; (xiii) L. Muthu Kumar & Anr vs State of Tamil Nadu & Ors: (2000) 7 SCC 618; (xiv) Municipal Council, Ahmadnagar & Anr vs Shah Hyder Beig & Ors AIR 2000 SC 671; and (xv) Inder Jit Gupta vs Union of India & Ors: (2001) 6 SCC 637]

**6. CONCLUSIONS:** -

(a) In view of the aforesaid discussion, it is held that if the appointment to the post of Assistant Commissioner Commercial Tax is made through direct recruitment and promotion in the same year of recruitment, their seniority must be determined applying the provisions of Rule 8(3) of the Rules, 1991.

(b) In the present case, since the appointment on the post of Assistant Commissioner was made through direct recruitment and by promotion in the recruitment year 2008-09, their seniority was rightly determined applying the principle of Rule 8(3) while publishing the seniority list dated 09.08.2012. Rule 8(1) cannot be applied for determining inter se seniority of direct recruits and promotees, if the selection and appointments are made in the same recruitment year through direct recruitment and promotion. Thus, it is held that the impugned seniority list is correctly prepared and settled seniority position should not and cannot be reopened after 8-9 years.

Thus, the writ petitions fail and are hereby **dismissed.**

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**(2021)10ILR A201**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 04.10.2021**

**BEFORE**

**THE HON'BLE VIVEK CHAUDHARY, J.**

Rent Control No. 7699 of 2019

**Mahtab Husain ...Petitioner**
**Versus**
**Iiird Addl Dist. Judge Kheri & Ors. ...Respondents**

**Counsel for the Petitioner:**
Mohammad Aslam Khan

**Counsel for the Respondents:**
Upendra Kumar, S. Saxena

**A. Tenancy Law – UP Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 – Ss. 16 and 21(1)(c) – Release application u/s 21 filed, while process u/s 16 was pending – Maintainability – Held, since there is no bar under law upon the landlord in filing the release application, for which he is not even required to serve a notice under Section 21 of the Act of 1972 upon the tenant, merely because he has given notice and thereafter taken time in filing the release application would not bar the same – There is no force in the submission that proceedings u/s 21 of the Act of 1972 are not maintainable as proceedings u/s 16 are pending. (Para 15 and 18)**

**B. Pleading – Writ proceeding – No counter filed – Effect – Finding of both the Court below challenged – Petitioner failed to prove from the record that any material illegality or irregularity is committed by**

**the courts below or the finding in impugned orders are perverse – High Court rejected the argument to allow the writ petition merely on the ground of uncontroverted pleading of writ. (Para 28 and 29)**

**Writ petitioner dismissed.** (E-1)

**Cases relied on :-**

1. Ravi Shanker Vs A.D.J. - II, Kanpur & ors.; 1979 ARC 273

2. Smt. Suman Lata Vs Prescribed Authority (Munsif), Etawah & ors.; 1985(2) ARC 454

3. Smt. Ganga Devi Vs D.J., Ghaziabad; 1980 ARC 335

4. T.C. Rekhi Vs Prescribed Authority, Nainital; 1983 (2) ARC 223

5. Munni Lal Vs Prescribed Authority, Agra; 1992 ACJ 789

6. Buddu Lal alias Budh Ram Vs D.J., Allahabad; 1998 (1) ARC

597

7. Lakshmi Traders, Akbarpur Mandi & ors. Vs Navin Rastogi & anr.; (2019) 132 ALR 652

8. Vijay Sethi Vs Anil Kumar Gupta & ors.; 2015 (3) ARC 24

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Present writ petition is filed by the petitioner-tenant against the judgment and order dated 20.8.2014 passed by the Prescribed Authority as well as order dated 3.1.2019 passed by the appellate authority, whereby the release application of respondent no.3-landlord is allowed and the order dated 20.8.2014 is affirmed.

2. The dispute is with regard to a shop under tenancy of the petitioner for which, a release application was filed by respondent no.3-landlord, claiming that both his sons are not having any job and are at the age of marriage, therefore, in the said shop, he intends to engage his sons for carrying on business of computer, mobile phones and other related equipment and materials.

3. Both the courts below have found the need of respondent no.3-landlord bona fide and genuine and directed for eviction of of the petitioner from the shop.

4. I have heard for the petitioner Sri Mohd. Arif Khan, learned Senior Advocate, assisted by Sri Mohd. Aslam Khan and for respondent no.3, Sri Samarth Saxena, learned Advocate and perused the record.

5. The first submission, challenging the impugned orders, raised by learned Senior counsel for the petitioner, is that before moving of application under Section 21(1)(c) of U.P. Act No.13 of 1972 (for short "the Act of 1972'), respondent no.3 had moved an application under Section 16 of the Act of 1972, claiming that petitioner is an unauthorized occupant and, therefore, the landlord cannot raise both the arguments simultaneously, that, petitioner is a tenant as well as, that, he is an unauthorized occupant. Thus, both the proceedings simultaneously cannot be held and, therefore, the application under Section 21 of the Act of 1972, is liable to be rejected. For the said purpose, learned counsel for the petitioner has relied upon the judgment in the case of ***Ravi Shanker vs. Additional District Judge II, Kanpur and others***, reported in ***1979 ARC 273*** and ***Smt. Suman Lata vs. Prescribed Authority (Munsif), Etawah and others,*** reported in ***1985(2) ARC 454.***

6. I have gone through the said judgment and I find that the fact of the case

of ***Ravi Shanker*** (supra) are entirely different from the facts of the present case. Paragraph-2 of the said judgment notes the facts, which reads:

*"2. In this case, the dispute is about one shop of the aforesaid building which had been let out to one Sant Saran. The petitioner filed suit No.1046 of 1976 against Sant Saran and another for ejectment on the ground that as Sant Saran had illegally sub-let the shop to Maiku, he was liable to ejectment. During the pendency of the suit before the Civil Court, Respondent No.3 Ram Shankar Shukla made an application for the allotment of the shop under Section 16 of the U.P. Act No.13 of 1972, on the ground of deemed vacancy. His case was also that as Sant Saran allowed the shop to be occupied by a person, who was not a member of his family, the shop was to be treated as vacated."*

7. Therefore, in the said case, there was no application filed under Section 21 of the Act of 1972 for release of the property along with an application under Section 16. Thus, the said judgment is not applicable to the facts of the present case.

8. So far as the judgment in the case of **Smt. Suman Lata** (supra) on which reliance is placed by learned counsel for the petitioner, is concerned, the same is only a judgment running in three paragraphs, which reads as follows:

*"1. Notice of this petition was accepted on behalf of respondent Nos. 2 to 8 by Sri V.N.L. Katiyar, Advocate.*

*2. This petition is directed against the order dated 11-7-1984 passed by the Prescribed Authority, Etawah. The landlords respondents No.2 to 8, who are the owners of the premises in dispute, filed an application under Section 21(1)(a) of Act No. 13 of 1972. It was averred in the application that the tenant Hulas Rai Bhagan Dass has closed their business and vacated the premises after subletting the premises to respondent No.10 Smt. Jagrani. It was further averred in the application that the landlords do not accept Smt. Jagrani as subtenant and she is in unauthorised occupation. Since there was no relationship of landlord and tenant, the application under Section 21 is not maintainable. The landlords in such circumstances have alternative remedy under the Act. The impugned order passed by the Prescribed Authority therefore deserves to be quashed.*

*3. The writ petition is allowed. The impugned order dated 11-7-1984 is set aside but there will be no order as to costs. It would be open to the landlords to take such proceeding which is permissible under the law."*

9. There is no law discussed or declared by the Court, therefore, same is not a judgment in the eyes of law and merely an observation of the Court.

10. The issue as to whether the proceedings can be simultaneously proceeded with, i.e., under Section 21 as well as under Section 16 of the Act of 1972, is considered at length in number of judgments. Reference can be made to the case of ***Smt. Ganga Devi vs. District Judge, Ghaziabad, 1980 ARC 335***, wherein the Court has made the following observations:

*"Having heard learned counsel for the parties, I am of opinion that the contention of the learned counsel for the petitioner is well founded and has to be*

*accepted. The learned District Judge is of the view that once the jurisdiction of the Rent Control and Eviction Officer is invoked under Section 16 of the aforesaid Act, and the matter becomes pending before him, the Prescribed Authority would have no jurisdiction thereafter to proceed under Section 21 of the Act. I do not agree with this broad and sweeping statement of the law. There is no warrant for such a conclusion either on the plain language of Sections 21 and 16 of the aforesaid Act or even in the scheme underlying the Act. Section 21 of the Act, in my judgment is available so long as the tenant is holding on the to the building in question and is in lawful occupation thereof. The provisions of Section 21 of the Act are applicable against who may be described as a sitting tenant. The mere fact that the matter relating to declaration of vacancy and allotment of the building in question happens to be pending for adjudication before the Rent control and Eviction Officer does not automatically deprive the Prescribed Authority of the jurisdiction to deal with an application under Section 21 of the Act. The position would, however, be different if after final adjudication of vacancy, the building is allotted to some one. Section 21 will have no application in that contingency, for in that eventuality the continued occupation of the tenant wold be unlawfull and the tenant would be deemed to have ceased to occupy the building by virtue of Section 13 of the aforesaid Act which provides that after a building is allotted or released under Section 16, no person shall occupy the same, and if he does so in contravention of the order of allotment or release, he would be deemed to be an unauthorised occupant of such building. In such a case, it is obvious that there would be no question or necessity of a landlord seeking an order of eviction against a tenant under Section 21 of the aforesaid Act. Nor can the tenant be characterised, in that eventuality, as a sitting tenant."*

11. In ***T.C. Rekhi vs. Prescribed Authority, Nainital, 1983 (2) ARC 223,*** the landlord filed a release application under Section 21(1)(a) during pendency of a writ petition whereunder he had challenged the order of the Rent Control and Eviction Officer, setting aside the release order passed in his favour under Section 16(1)(b) and remitting the matter for a fresh consideration. The tenant challenged the maintainability of release application filed by the landlord under Section 21 exactly on the same ground. The

*".....The argument of learned counsel for petitioner that permitting the landlord to take proceedings u/s. 21(1)(a) and Section 16(b) amounts to abuse of process of law cannot be accepted. There is no specific bar in the Act prohibiting a landlord from filing an application u/s. 21(1)(a) if he has already filed an application u/s. 16(1)(b). True in a case where order declaring vacancy has become final probably it might not be possible to file an application u/s. 21(1)(a) as the person against whom it is filed ceased to be tenant by operation of law. But it would not be the same in a case where the application has been filed when the matter is still pending adjudication. As has been seen above Section 16(1)(b) application has not been decided on merits as yet. To say in the circumstances that application u/s. 21 was not maintainable is not correct."*

12. In ***Munni Lal vs. Prescribed Authority, Agra, 1992 ACJ 789,*** this Court explained the difference in causes of action

for initiating proceedings under Section 16(1)(b), Section 21(1) and Section 20 in the following words:

*"6. A close scrutiny of the provisions of the Act would show that the causes of action for initiating proceedings under Section 16(1)(b) or under Section 21(1) or for instituting a suit for eviction of a tenant are entirely different. In proceedings under Section 21(1) the tenant asserts that he is in occupation of the building and the landlord also admits the said fact. In proceedings under Section 16(1)(b) though the tenant says that he is continuing in occupation of the building and is in lawful occupation thereof the landlord asserts that on account of one of the acts enumerated in sub-section (1), (2) or (3) or Section 12 of the Act, done by the tenant he shall be deemed to have vacated the building within the meaning of sub-section (4) thereof. Thus in such a proceeding the landlord seeks to rely upon the legal fiction created by sub-section (4) of Section 12 of the Act. Therefore, there can be no confliction the facts which have to be alleged and proved by a landlord for getting an order in his favour while initiating proceedings under Section 16(1)(b) for under Section 21(1) of the Act."*

13. Similar view has been taken by this Court in ***Buddu Lal alias Budh Ram vs. District Judge, Allahabad, 1998 (1) ARC 597,*** by holding that there is no provision in the Act, which bars moving of an application under Section 21(1)(a) even where a deemed vacancy under Section 12 of the Act may have occurred. The considerations which weighed with the Court while coming to such a conclusion are contained in paragraph 6, which reads:

*"6. The main argument of the learned Counsel for the petitioner is that once the landlord himself came with the case that the petitioner-tenant was not residing in the tenanted accommodation and was actually residing at 60, Akhara Man Khan accommodation, there occurred a deemed vacancy as per his own admission and, therefore, the only course open for him was to move an application under Section 16 of the Act and application under section 21(1)(a) of the Act was not legally maintainable. This argument of the learned counsel for the petitioner must be rejected out rightly as not tenable. It may be relevant to mention here that in his application under Section 21(1)(a) of the Act, the landlord made an averment that the tenant-petitioner was not in need of the disputed accommodation as he has started residing at 60, Akhara Man Khan, Allahabad. From this averment it cannot be inferred either on fact or in law that the petitioner no longer remained the tenant of the landlord. So long as tenancy subsists it is always open for the landlord to more an application under Section 21(1)(a) of the Act. It was also open for the landlord to have approached the Rent Control & Eviction Officer under Section 16 of the Act for the release on the ground that the accommodation should be deemed to be vacant by legal fiction under the provisions of Section 12 of the Act. It is true that a different consideration weigh with the authorities while considering an application under Section 21(1)(a) and an application under Section 16 of the Act. In an application moved under Section 21(1)(a) besides providing bona fide need, the landlord has also to show that he will suffer a greater hardship than that of the tenant. Such a comparison of hardship is not at all required to be gone into in an application under Section 16 of the Act."*

14. Taking into consideration all the aforesaid judgments in the case of ***Lakshmi***

***Traders, Akbarpur Mandi and others vs. Navin Rastogi and another, (2019) 132 ALR 652,*** this Court again reaffirmed the long settled law that both the proceedings can be simultaneously held.

15. Further, admittedly, the proceedings which were initiated under Section 16 of the Act of 1972 were dismissed and even the revision against the same was also dismissed. Learned counsel for the petitioner has argued that the same are pending before the High Court, being Writ Petition No.82 (RC) of 1992.

16. Learned counsel for respondent no.3 has placed before this Court documents to show that the said writ petition itself stands decided on 8.12.2004. He has informed the Court that the said writ petition stands dismissed. Therefore, it is wrong to suggest that there are any proceedings under Section 16 of the Act of 1972 pending before this Court at this stage. Thus, even otherwise, there is no force in the submission of learned counsel for the petitioner and the proceedings under Section 21 of the Act of 1972 are not maintainable as proceedings under Section 16 are pending.

17. The next submission of learned counsel for the petitioner is that on 28.2.2005, a notice was given by the landlord and thereafter, the release application was filed on 16.10.2008, therefore, for around three years after giving notice, he did not proceed with the filing of the release application and thus, his need is neither bona fide nor genuine.

18. It is incorrect to make any such presumption merely because after giving notice, for certain period, the landlord did not file the release application. So far as the notice is concerned, the same is not filed by the petitioner before this Court. There is only a vague averment made in Para-8 of the writ petition. No such ground was raised before the courts below. Even presuming that after giving the notice, landlord took some time in filing the release application, the same would not put any bar on his right to file release application. There could be so many reasons; he may be trying to settle his sons otherwise, may be presuming the tenant would vacate the property, may be looking for some alternative livelihood or any such other reasons. Since there is no bar under law upon the landlord in filing the release application, for which he is not even required to serve a notice under Section 21 of the Act of 1972 upon the tenant, merely because he has given notice and thereafter taken time in filing the release application would not bar the same. There is no force in the said submission of learned counsel for the petitioner.

19. The next submission of learned counsel for the petitioner is that both the courts below were required to look into the aspect that the shop in question could be bifurcated and divided in a manner that need of both the parties may be fulfilled.

20. The said right is being claimed by the petitioner on the basis of Rule 16(1)(d) read with Rule 16(2) of U.P. Urban Building (Regulation of Letting, Rent and Eviction) Rules, 1972.

21. A bare perusal of Rule 16(1) shows that it provides for part release in respect of residential premises. For residential premises, the said Rule makes it mandatory for the Prescribed Authority to decide the issue of part release. But no such provision is made under Rule 16(2), which

is in respect of commercial building. The said Rules are again considered in number of judgments of this Court. One such case is reported in ***2015 (3) ARC 24: Vijay Sethi vs. Anil Kumar Gupta and others***, wherein this Court has taken into consideration the said Rules as well as law settled by this Court and held:

*"4. It is clear from the rule that there is a distinction made by the Legislature in framing the two sets of the Rules, Rule 16(1) is applicable to residential premises, whereas, Rule 16(2) is applicable to non-residential premises. The application in the present case is for release of the non-residential accommodation, therefore, Rule 16(2) would apply. A perusal of Rule 16(2) will demonstrate that there is nothing like Sub rule (1)(d) of Rule 16. In this view of the matter, the argument is not available to the learned counsel for the petitioner, therefore, this Court declines to entertain the argument for the reason that the argument was not raised either before the Prescribed Authority, or before the appellate authority, therefore, it cannot be raised for the first time before the writ court."*

22. Thus, the aforesaid ground raised by learned counsel for the petitioner has no force and is rejected.

23. It is further submitted by learned counsel for the petitioner that before the appellate court, a submission was made by the petitioner-tenant that he is looking for an alternative accommodation, but he is not getting the same. The said statement is wrongly treated by the appellate court to be an admission of the petitioner with regard to bona fide need of the landlord. Thus, the appellate court has committed an illegality in making such a presumption.

24. I have perused the order passed by the trial court as well as order passed by the appellate court. There are detailed findings of fact with regard to bona fide need of respondent no.3 with regard to his sons as well as on hardship. The said observation is only one of the observations made by the appellate court, other than that, there are detailed discussions made by both the courts below. Therefore, there is no force in this submission also of the learned counsel for the petitioner.

25. Learned counsel for the petitioner further submits that the court below has wrongly rejected the applications moved by the petitioner with regard to interrogatory and cross-examination by different orders, which ought to have been allowed.

26. No doubt, any interim order by which, applications are decided, which may impact the rights of a party to a case, can be challenged by him while challenging the final order. But while filing a writ petition, record of the courts below is not summoned in normal course, like in an appeal, therefore, it is incumbent upon the parties challenging the said interim orders, to file the same before the Court. None of the said orders, by which applications of the petitioner were rejected by the court below, are filed along with the writ petition. There is also no ground raised for challenging the said orders or such relief sought. Therefore, during course of argument before this Court, the petitioner cannot be now permitted to say that he is challenging the said orders. Therefore, I do not find any force in the submission of learned counsel for the petitioner.

27. Lastly, a feeble attempt is made by learned counsel for the petitioner that since no counter affidavit is filed by respondent no.3, therefore, his writ petition should be allowed.

28. No doubt, there are judgments, which provide that uncontroverted pleadings in a plaint can be taken to be correct. However, in the present case, the petitioner is required to challenge findings of both the courts below. Merely his statement that the findings are bad, would not make them bad. He is required to prove from the record that any material illegality or irregularity is committed by the courts below or the finding in impugned orders are perverse. The petitioner has failed to do the same.

29. In view thereof, even the aforesaid submission of learned counsel for the petitioner is bound to be rejected and is ***rejected.***

30. In view of the aforesaid discussions, I find no force in the present writ petition. It is accordingly dismissed.

**[Vivek Chaudhary,J.]**
Dated: October 04, 2021
Sachin

After the aforesaid order was passed, learned Senior Advocate Sri Mohd. Arif Khan assisted by Sri Mohd. Aslam Khan, learned counsel for petitioner, appeared and prays that the petitioner may be granted some time to vacate the premises.

Learned counsel for respondent no.3 has no objection in case a reasonable time is granted to the petitioner provided, he files an undertaking before the court below by way of an affidavit that he shall vacate the premises within the time granted by this Court.

In view thereof, nine months time is granted to the petitioner to vacate the premises provided, he files an affidavit before the Prescribed Authority to the effect that he shall vacate the premises without causing any hindrance before expiry of nine months from this date and he shall also pay rent to respondent no.3 regularly every month. In case of violation of said condition, the same shall be amongst other things, treated to be a violation of undertaking given by him to this Court.

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**(2021)10ILR A208**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 30.09.2021**

**BEFORE**

**THE HON'BLE RAJAN ROY, J.**
**THE HON'BLE RAVI NATH TILHARI, J.**

First Appeal No. 70 of 2020

**Vishal Prajapati ...Appellant**
**Versus**
**Smt. Monika Prajapati ...Respondent**

**Counsel for the Appellant:**
Manoj Kumar Dubey

**Counsel for the Respondent:**
Rakesh Kumar Agarwal, Saksham Agarwal

**A. Civil Law -Family Courts Act,1984-Section 19-challenge to-issue of overlapping jurisdiction- application u/s 24 of H.M. Act, 1955 allowed-interim maintenance u/s 125 deserves no adjustment or set off as the wife has no source of income and two minor daughter-thus, she deserves total amount granted**

**under both statutes along with additional amount for daughters-there is no bar to seek maintenance both under Section 125 Cr.P.C. and under H.M. Act or D.V. Act.(Para 1 to 22)**

**B. To overcome the issue of overlapping jurisdiction, and avoid conflicting orders being passed in different proceedings, The Hon'ble Supreme Court directed that in a subsequent maintenance proceeding, the applicant shall disclose the previous maintenance proceeding, and the orders passed therein, so that the Court would take into consideration the maintenance already awarded in the previous proceeding, and grant an adjustment or set-off of the said amount. if the order passed in the previous proceeding requires any modification or variation, the party would be required to move the concerned court in the previous proceeding.(Para 14)**

**The appeal is dismissed.** (E-6)

**List of Cases cited:**

1. Rajnesh Vs Neha & anr.CRLA No. 730 of 2020

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

1. Heard Sri Manoj Kumar Dubey, learned counsel for the appellant and Sri Saksham Agarwal, learned counsel for the sole respondent.

2. On the request of the learned counsels for the parties to argue the matter on merits for final disposal of the appeal, the matter was heard and the judgment/order was reserved.

3. This appeal under Section 19 of the Family Courts Act, 1984 has been filed challenging the order dated 28.02.2020 passed by the learned Additional Principal Judge, Family court, court no. 1, Lucknow in Misc. Case No. 107-C/16 (original case no. 667/2016), on an application of the respondent-wife under Section 24 of the Hindu Marriage Act, 1955 *(in short 'the H.M. Act'*), whereby the application was partly allowed with a direction to the appellant-husband to make payment of Rs. 2500/- per month, as interim maintenance upto the final judgment in Original Case no. 667/2016.

4. The marriage of the plaintiff-appellant with the defendant-respondent was solemnized on 14.12.2005 but due to differences between them, the appellant filed Original Case No. 667/2016 for divorce under Section 13 of the H.M. Act. In this case, the respondent filed petition under Section 24 of the H.M. Act being Misc. Case no. 107-C/2016 for maintenance and *pendente lite* expenses.

5. In the application it was, *inter alia* stated that she had no source of income for her support. She was having two minor daughters and was unable to maintain herself and the minor daughters as also to bear the expenses of the litigation. The monthly income of the appellant was stated to be about Rs. 90,000/- per month from his Gym Club and the rent of the houses under his ownership/landlordship.

6. The appellant filed objection and *inter alia* denied the claim of the respondent and submitted that the respondent had source of livelihood and her monthly income was about Rs. 60,000/- and denied that his monthly income was Rs. 90,000/-.

7. The family court vide order dated 28.02.2020 allowed the petition under Section 24 of the H.M. Act and awarded pendente lite maintenance of Rs. 2500/- per month and Rs. 6000/- as one time expenses

of the litigation and an amount of Rs. 100/- for each date of personal appearane of the respondent towards travelling expenses.

8. The respondent herein had filed criminal case no. 1179 of 2016 under Section 125 of the Code of Criminal Procedure, 1973 for maintenance to her and two minor daughters in which the Incharge Principal Judge, Family court, Lucknow vide order dated 09.09.2016 allowed interim maintenance of Rs. 1500/- per month for the respondent and a further sum of Rs. 1000/- per month to each of the two minor daughters was also allowed.

9. Sri Manoj Kumar Dubey, learned counsel for the appellant raised the only submission that the respondent-wife and two minor daughters are already receiving interim maintenance which was granted in the proceedings under Section 125 Cr.P.C. but deliberately the respondent did not disclose the same in the petition under Section 24 of the H.M. Act. The appellant cannot be saddled with liability of maintenance in both the proceedings and the amount of maintenance granted under Section 125 Cr.P.C. to the wife was liable to be adjusted, in the proceedings under Section 24 of the H.M. Act.

10. Sri Saksham Agarwal, learned counsel for the respondent submitted that the appellant has not paid any amount towards interim maintenance awarded vide order dated 09.09.2016 under Section 125 Cr.P.C. The appellant, admittedly, is running Gymnasium. The amount of *pendente lite* maintenance of Rs. 2500/- per month and the amount of interim maintenance of Rs. 1500/- per month under Section 125 Cr.P.C. to the respondent-wife in total, amounting to Rs. 4000/- per month cannot be said to be unreasonable, although even in such amount, it is very difficult for the respondent to maintain herself. He submits that the appellant did not raise the plea of adjustment or set off the amount of interim maintenance under Section 125 Cr.P.C. before the family court in proceedings under Section 24 of the Hindu Marriage Act.

11. In view of the submissions made hereinabove, the point that arises for consideration is whether the amount of interim maintenance granted to the respondent under Section 125 Cr.P.C. deserves to be adjusted in the proceedings under Section 24 of the Hindu Marriage Act ?

12. We have considered the submissions advanced and perused the material on record.

13. In the case of **Rajnesh vs. Neha & Anr.** passed in Criminal Appeal No. 730 of 2020 [arising out of SLP (Crl.) No. 9503 of 2018] dated 04.11.2020, on the issue of overlapping jurisdiction in grant of maintenance, the Hon'ble Supreme Court has held as under:-

"**Final Directions**

*In view of the foregoing discussion as contained in Part B - I to V of this judgment, we deem it appropriate to pass the following directions in exercise of our powers under Article 142 of the Constitution of India :*

***(a) Issue of overlapping jurisdiction***

*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."*

14. The Hon'ble Apex Court has thus held that a wife can make a claim for maintenance under different statutes. For instance, there is no bar to seek maintenance both under the Protection of Women against Domestic Violence Act, 2005 and Section 125 of the Cr.P.C., or under Hindu Marriage Act. It would, however, be inequitable to direct the husband to pay maintenance under each of the proceedings, independent of the relief granted in a previous proceeding. It has further been held that if maintenance is awarded to the wife in a previously instituted proceeding, she is under a legal obligation to disclose the same in a subsequent proceeding for maintenance, which may be filed under another enactment. While deciding the quantum of maintenance in the subsequent proceeding, the civil court/family court shall take into account the maintenance awarded in any previously instituted proceeding, and determine the maintenance payable to the claimant. To overcome the issue of overlapping jurisdiction, and avoid conflicting orders being passed in different proceedings, the Hon'ble Supreme Court directed that in a subsequent maintenance proceeding, the applicant shall disclose the previous maintenance proceeding, and the orders passed therein, so that the Court would take into consideration the maintenance already awarded in the previous proceeding, and grant an adjustment or set-off of the said amount. If the order passed in the previous proceeding requires any modification or variation, the party would be required to move the concerned court in the previous proceeding.

15. Learned counsel for the appellant submitted that the respondent-wife did not disclose that she was granted interim maintenance under Section 125 Cr.P.C. However, he could also not point out that the appellant had brought to the notice of the court below, regarding grant of interim maintenance to the respondent-wife under Section 125 Cr.P.C. vide order dated 09.09.2016 nor that the appellant claimed its adjustment, while granting the prayer of the respondent for maintenance under Section 24 of the Act.

16. A perusal of the objection filed by the appellant to the application under Section 24 of the Act dated 06.02.2020, does not show that the appellant raised the plea, before the family court that under Section 125 Cr.P.C., the respondent-wife was granted interim maintenance which should be taken into consideration for

adjustment in proceedings under Section 24 of the Act.

17. In view of the aforesaid, the family court had no occasion to consider that aspect of the matter.

18. We however proceed to consider the above aspect.

19. The interim maintenance awarded to the respondent-wife is Rs. 1500/- per month under Section 125 Cr.P.C. In the proceedings under Section 24 of the Hindu Marriage Act, the maintenance has been awarded @ Rs. 2500/- per month. Thus the total amount of monthly maintenance comes to Rs. 4000/- to the wife. Undisputedly, she is also having two minor daughters of growing age to maintain as well, to whom maintenance @ Rs. 1000/- per month each has been awarded under Section 125 Cr.P.C. Thus, in totality, Rs. 6000/- per month would be available to the respondent-wife to maintain herself and two minor daughters.

20. We are satisfied that any adjustment of an amount of Rs. 1500/- awarded to the respondent under Section 125 Cr.P.C., would not be in the interest of justice considering the total amount being received by the respondent towards maintenance and the number of children, which deserves no adjustment or set off.

21. No other point was argued.

22. The appeal is accordingly **dismissed**.

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**(2021)10ILR A212**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:LUCKNOW 30.09.2021**

**BEFORE**

**THE HON'BLE RAVI NATH TILHARI, J.**

FAFO Defective No. 178 of 2021

**A.G.M. Uttarkhand State Road Transport Corp. Kotdwar ...Appellant**
**Versus**
**Ram Sumer Singh & Ors. ...Respondents**

**Counsel for the Appellant:**
Prabhakar Tiwari

**Counsel for the Respondents:**

**(A) Civil Law - Review - Motor Vehicle Act, 1988 - Motor Vehicle Rules, 1998 - Although there may be no power of review under the Act of 1988 like the power vested in a court under Section 114 r/w order 47 C.P.C. or under any other provision but, in the case of dispute with respect to statement of fact in the judgment and award of the Tribunal, the only way to have the record corrected is to approach the same Tribunal. If no such step is taken then the matter must necessarily end there.** If the party approaches the Tribunal raising the grievance, contradicting the statement in the judgment, the Tribunal shall have the limited power to review, to that limited extent, on the principle of '*actus curiae neminem gravabit*' which means that no act of the Court, in the course of the proceedings does an injury to the suitors in the Court. (Para 22)

**Appeal Rejected.** (E-10)

**List of Cases cited:**

1. Bijoy Kumar Dugar Vs Bidyadhar Dutta & ors.. AIR 2006 SC 1255 *(distinguished)*

2. United India Insurance Co. Ltd. Vs Smt. Meena & ors. 2010 (1) ALJ 112

3. Patel Narshi Thakershi & ors. Vs Shri Pradyumansinghji AIR 1970 SC 1273

4. Lily Thomas, Etc. Vs U.O.I. (2000) 6 SCC 224

5. S. Nagraj Vs St. of Karn. (1993) Supp. 4 SCC 595

6. St.of Mah.Vs Ramdas Shrinivas Nayak & ors. (1982) 2 SCC 463 *(followed)*

7. Bhavnagar University Vs Palitana Sugar Mill (P) Ltd.& ors. (2003) 2 SCC 111 *(followed)*

8. Usha Rajkhowa & ors. Vs Paramount Industries & ors.. (2009) 14 SCC 71

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

1. Heard Ms. Pooja Arora, holding brief of Sri Prabhakar Tiwari, learned counsel for the appellant.

2. Instant appeal under Section 173 of the Motor Vehicles Act, 1988 has been filed against the judgment and award dated 24.03.2021 passed by the Motor Accident Claims Tribunal (South), Lucknow (in short "the Tribunal') in Motor Accident Claims No. 134/2018 (Ram Sumer Singh and Ors. vs. Assistant General Manager, Uttrakhand, State Road Transport Corporation, Kotdwar, Garhwal, Uttrakhand and Anr.).

3. By award dated 24.03.2021, the Tribunal has awarded compensation of Rs. 9,26,800/- along with interest @ 7 per cent from the date of filing claim petition till the date of payment to the claimant/respondent nos. 1 to 3.

4. The facts of the case are that the claimant-respondents filed claim petition no. 134/18 before the Motor Accident Claims Tribunal, Lucknow claiming compensation of Rs. 1,00,20,000/- on account of death of late Sujit Singh, in the accident dated 10.11.2016, near Shyampur on Najeebabad-Haridwar National Highway no. 74 caused due to rash and negligent driving of Driver of the Bus bearing Registration No. UK 07 PA 3177 of the Uttrakhand State Road Transport Corporation, Kotdwar, Garhwal, Uttrakhand (in short "the Corporation').

5. The appellant/opposite party no. 1 in the claim petition, denied the claim of the claimant-respondent and pleaded inter alia that the accident was caused due to contributory negligence of the driver of the Maruti Car No. UP 32 FM 1777.

6. The respondent no. 4/opposite party no. 2 in the claim petition, the driver of the Bus also filed reply-written statement to the same effect as of the present appellant.

*"1. क्या दिनांक 10.11.2016 को जब मृतक सुजीत अपने दोस्तों के साथ हरिद्वार गंगा स्नान करने के लिए जा रहा था कि रास्ते में थाना श्यामपुर से पहले हरिद्वार की ओर से आ रही उत्तराखंड परिवहन निगम कोटद्वार की बस संख्या यू के - 0 7 पी ए - 3177 को उसके चालक द्वारा काफी तेजी व लापरवाही से चलाते हुए सुजीत सिंह की कार संख्या यू पी 32 एफ एम 1777 में सामने से जोरदार टक्कर मार दी जिससे सुजीत सिंह की मौके पर ही मृत्यु हो गयी ?*

*2. क्या उक्त दुर्घटना याची की योगदायी उपेक्षा के कारण घटित हुई ?*

*3. क्या दुर्घटना के समय दुर्घटना कारित करने वाली बस संख्या यू के - 0 7 पी ए - 3177 के चालक के पास वैध एवं प्रभावी ड्राइविंग लाइसेंस था ?*

*4. क्या दुर्घटना से समय दुर्घटना कारित करने वाली बस संख्या यू के - 0 7 पी ए -*

*3177 बीमा शर्तों के उल्लंघन में चलायी जा रही थी?*

*5. क्या याचीगण कोई प्रतिकर प्राप्त करने का अधिकारी है यदि हाँ तो कितनी और किससे?"*

8. In evidence the claimants examined Ram Sumer as P.W. 1 and Srikant Singh as P.W. 2 and filed documentary evidence. In the evidence on behalf of the appellants, any witness was not examined, which is clear from the judgment/award at page 2 thereof, which fact has also not been disputed.

9. The Tribunal vide judgment and award under challenge allowed the claim petition in favour of the claimant-respondents.

10. On issue no. 1, the Tribunal recorded the finding that the accident was caused due to rash and negligent driving of the Driver of the bus of the appellant; resulting into the death of Sujit Singh, on the date, time and place mentioned in the claim petition. On Issue nos. 3 & 4, it was recorded that the Bus of Corporation was exempted from the insurance policy and on the date of the accident, the Driver of the appellant's Bus had effective and valid driving licence. On Issue no. 5, the Tribunal awarded an amount of Rs. 9,26,800/- with interest @ 7 per cent from the date of filing of the claim petition upto the date of payment.

11. On Issue no. 2, "if the accident was caused due to contributory negligence of the deceased', the Tribunal, specifically recorded that the opposite parties in the claim petition (the appellant and respondent no. 4 herein) did not press Issue no. 2, which was decided accordingly.

12. Ms. Pooja Arora submitted that the Issue no. 2 was pressed before the Tribunal by the appellant but has not been decided and it has been incorrectly recorded in the judgment/award that the Issue no. 2 was not pressed.

13. She submits that the evidence in the form of the site plan of the place of accident, established contributory negligence of the deceased in causing accident which was head on collusion. If Issue no. 2 had been tried, the finding would have been in favour of the appellant and consequently, the liability of the appellant for the amount of compensation, would not have been same as determined by the Tribunal but would have been reduced.

14. L earned counsel has placed reliance on the judgments in the case of ***Bijoy Kumar Dugar v. Bidyadhar Dutta & Ors. [AIR 2006 SC 1255] and United India Insurance Co. Ltd. vs. Smt. Meena & Ors. [ 2010 (1) ALJ 112]*** of which reference shall be made shortly.

15. The points that arise for consideration are (i) when the judgment of the Tribunal records that Issue no. 2 was not pressed, if plea to the contrary can be raised in this appeal ? (ii) if there was any contributory negligence on the part of the driver of the Maruti Car ?

16. I have considered the submissions advanced and perused the material on record.

17. On the first point, Mr. Pooja Arora, when confronted that in a case, as is here, disputing the statement in judgment, the appellant should have approached the Tribunal itself, which could have

determined if the appellant pressed Issue no. 2 or not, submitted that there is no provision of review, before the Tribunal under the Motor Vehicle Act, 1988 and only appeal is maintainable against the award under Section 173 of the Act, 1988. She also referred to Rule 221 of the Uttar Pradesh Motor Vehicles Rules, 1998 (hereinafter referred to as "the Rules, 1988') to submit that Section 114 r/w Order 47 C.P.C. does not apply before the Tribunal.

18. It is true that the power of review is not an inherent power. In ***Patel Narshi Thakershi and Ors. vs. Shri Pradyumansinghji, [AIR 1970 SC 1273]***, the Hon'ble Supreme Court held that "it is well settled that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication." In ***Lily Thomas, Etc. vs. Union of India & Ors. [(2000) 6 SCC 224]*** also it has been held that "the dictionary meaning of the word "review" is "the act of looking; offer something again with a view to correction or improvement. It cannot be denied that the review is the creation of a statute. Therefore, the power of review unless conferred by the statute cannot be exercised by a Court, Tribunal or authority". But the power of review is necessitated by way of invoking the doctrine "actus curiae neminem gravabit' which means that no act of the court in the course of whole of the proceedings does an injury to the suitors in the court.

19. It is also well settled that the procedural review inheres in every judicial, quasi judicial or even an administrative authority, if the order is passed under an erroneous assumption of one's own power going to the root of the matter or if it is found that a fraud has been practiced or there was willful suppression. Besides, in the case of ***S. Nagraj vs. State of Karnataka [(1993) Supp. 4 SCC 595],*** the Hon'ble Apex Court has observed that it is the duty of the Court to rectify, revise and recall its orders as and when it is brought to its notice that certain of its orders were passed on a wrong or mistaken assumption of facts and that implementation of those orders would have serious consequences.

20. In ***State of Maharashtra vs. Ramdas Shrinivas Nayak and Ors. [(1982) 2 SCC 463],*** the Hon'ble Supreme Court held that the principle is well settled that the statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges, who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there.

21. In ***Bhavnagar University vs. Palitana Sugar Mill (P) Ltd. And Others [(2003) 2 SCC 111]***, Hon'ble Supreme Court referred to the case of ***Ramdas Shrinivas (supra)*** and held as under in paragraph 61:-

*61. Before parting with the case, we may notice that Mr Tanna appearing on behalf of South Gujarat University in CA No. 1540 of 2002 submitted that various other contentions had also been raised before the High Court. We are not*

*prepared to go into the said contentions inasmuch as assuming the same to be correct, the remedy of the appellants would lie in filing appropriate application for review before the High Court. Incidentally, we may notice that even in the special leave petition no substantial question of law in this behalf has been raised nor has any affidavit been affirmed by the learned advocate who had appeared before the High Court or by any officer of the appellant who was present in court that certain other submissions were made before the High Court which were not taken into consideration. In State of Maharashtra v. Ramdas Shrinivas Nayak [(1982) 2 SCC 463 : 1982 SCC (Cri) 478 : AIR 1982 SC 1249] this Court observed: (SCC p. 467, para 4)*

*"4. When we drew the attention of the learned Attorney-General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation.' (Per Lord Atkinson in Somasundaram Chetty v. Subramanian Chetty [AIR 1926 PC 136] .) We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error (Per Lord Buckmaster in Madhu Sudan Chowdhri v. Chandrabati Chowdhrain [AIR 1917 PC 30 : 21 CWN 897] .) That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment."*

22. In view of the aforesaid judgments, this Court is of the considered view that although there may not be power of review in the Motor Accident Claims Tribunal under the Act, 1988 and the Rules, 1998, like the power of review as is vested in a court under Section 114 C.P.C. r/w order 47 C.P.C. or for that reason under any other specific provision, but, in the case of dispute with respect to statement of fact in

the judgment and award of the Tribunal, as is in the present case, if any issue was pressed or not and such statement in judgment is contradicted, then in view of ***Ramdas Shrinivas Nayak (supra) and Bhavnagar University (supra)***, "the only way to have the record corrected is to approach the same Tribunal, and if no such step is taken, the matter must necessarily end there. If the party approaches the Tribunal raising the grievance, contradicting the statement in the judgment, the Tribunal shall have the power to review, to that limited extent, on the principle of "actus curiae neminem gravabit' which means that no act of the Court, in the course of the proceedings does an injury to the suitors in the Court.

23. On point no. 2, the submission of Ms. Pooja Arora is that in view of the site plan, there was contributory negligence of the deceased, which was not considered by the Tribunal.

24. There can be no Rule of thumb that a head on collision must always be taken as resultant to contributory negligence of both vehicles. It depends on facts of each case which are required to be proved like any other fact. A finding of contributory negligence turns on a factual investigation whether the deceased contributed to his or her own loss by failing to take reasonable care of his or her own person or property. What is reasonable care, depends on the circumstances of the case. There are variable factors in determining whether contributory negligence exists, and if so, to what degree. The breach or failure on the part of the deceased, if any, has to be proved by the Insurance Company, as it was its burden to prove that.

25. The Tribunal has recorded finding on Issue no. 1 that the driver of the appellant's bus was negligent. The accident was caused as resultant to a rash driving of the Bus. Nothing could be pointed out even from the evidence of P.W. 1 or P.W. 2 that there was any negligence on the part of the driver of the Maruti Car which contributed, to the happening of the accident. As mentioned above, no oral evidence was produced to prove that fact. The Insurance Company failed to discharge its burden.

26. So far as the site plan, prepared by the Police is concerned, it only has its face value for the purpose of satisfaction of the Tribunal in the summary proceedings for the purpose of determination of compensation, as has beeen observed in the case of ***Smt. Meena (supra),*** upon which reliance was placed by Ms. Pooja Arora. Merely on the basis of the site plan, the finding of contributory negligence cannot be arrived, as for determining contributory negligence, various factors are required to be proved. The site plan may prove the spot of accident, where the vehicle colluded but that by itself cannot prove the contributory negligence, as the possibility of the vehicles, in the accident going to a wrong direction or side during accident cannot be ruled out. The contributory negligence has to be proved by positive evidence and it would not be safe to draw inference merely on the basis of site plan.

27. In the case of ***Usha Rajkhowa and Others vs. Paramount Industries and Others [(2009) 14 SCC 71],*** the Hon'ble Supreme Court has held in paragraph nos. 20, 21 & 22, as under:-

*"20. The question of contributory negligence on the part of the driver in case of collision was considered by this Court in Pramodkumar Rasikbhai Jhaveri v. Karmasey Kunvargi Tak [(2002) 6 SCC*

*455: 2002 SCC (Cri) 1355] . That was also a case of collision between a car and a truck. It was observed in SCC p. 458, para 8:*

*"8. ... The question of contributory negligence arises when there has been some act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as "negligence'. Negligence ordinarily means breach of a legal duty to care, but when used in the expression "contributory negligence' it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an "author of his own wrong'.'*

*21. This Court further relied on an observation of the High Court of Australia in Astley v. Austrust Ltd. [(1999) 73 ALJR 403] to the following effect:*

*"A finding of contributory negligence turns on a factual investigation whether the plaintiff contributed to his or her own loss by failing to take reasonable care of his or her person or property. What is reasonable care depends on the circumstances of the case. In many cases, it may be proper for a plaintiff to rely on the defendant to perform its duty. But there is no absolute rule. The duties and responsibilities of the defendant are a variable factor in determining whether contributory negligence exists and, if so, to what degree. In some cases, the nature of the duty owed may exculpate the plaintiff from a claim of contributory negligence; in other cases, the nature of the duty may reduce the plaintiff's share of responsibility for the damage suffered; and in yet other cases, the nature of the duty may not prevent a finding that the plaintiff failed to take reasonable care for the safety of his or her person or property. Contributory negligence focuses on the conduct of the plaintiff. The duty owed by the defendant, although relevant, is one only of many factors that must be weighed in determining whether the plaintiff has so conducted itself that it failed to take reasonable care for the safety of its person or property.'*

*22. Keeping these principles in mind, we find that there was absolutely no evidence to suggest that there was any failure on the part of the car driver to take any particular care or that he had breached his duty in any manner. Such breach on his part had to be proved by the insurance company as it was its burden and for that, the panchnama of the spot, showing tyre marks caused by brakes, and the panchnama of the damaged car and the truck could have been brought on record. The insurance company has obviously failed to discharge its burden. We, therefore, respectfully follow the abovementioned judgment."*

28. In Bijoy Kumar Dugar (supra), the accident was head on collision but, there, the Motor Accident Claims Tribunal, had, on the basis of evidence and material on record, recorded a finding of contributory negligence. In the present case, finding is that the Driver of the Bus was negligent. The judgment in *Bijoy Kumar Dugar (supra)* is of no help to the appellant.

29. For the aforesaid, on point no. 2, it is held that the appellant failed to discharge its burden to prove contributory negligence on the part of the driver of the Maruti car.

30. For the aforesaid reasons, the appeal has got no force and is dismissed at the admission stage.

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**(2021)10ILR A219**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:LUCKNOW 04.10.2021**

**BEFORE**

**THE HON'BLE RAVI NATH TILHARI, J.**

FAFO No. 190 of 2021

**Nirali Dixit ...Appellant**
**Versus**
**State Of U.P. & Anr. ...Respondents**

**Counsel for the Appellant:**
Ashok Kumar Singh, Mahima Pahwa

**Counsel for the Respondents:**

**(A) Civil Law - The Guardians and Ward Act, 1890: Section 7 - Civil Procedure Code, 1908 - Section 107 r/w Order 41 Rule 33 -Practice & Procedure - Custody -** Merely by making amendment by adding the name of the appellant before the name of the deceased-Aditya Singh in the order dated 15.12.2020, in which the guardianship was ordered in favour of Aditya Singh, guardianship could not have been converted in favour of the appellant. A fresh application is required to be moved for fresh consideration in the light of provisions of Section 17 of the Act which inter alia provides the factor of age and sex of the proposed guardian to which the courts have to give due regard.(Para 41)

Nevertheless, after the death of the guardian, in view of Section 42 of the Act the courts have the power to appoint a guardian on the application filed under Chapter II as well as on its own motion by exercising its *parens patriae* jurisdiction. (Para 48)

**The welfare of the minor requires consideration also *qua*, the proposed guardian. The welfare of the minor if already determined *qua* , one guardian cannot necessarily and automatically be read, with respect to the new proposed guardian, for which the court has to consider the welfare. (Para 50)**

**Appeal Disposed of.** (E-10)

**List of Cases cited:**

1. Saiyad Mohanmmad Bakar El-Edroos Vs Abdulhabib Hasan Arab & ors. (1998) 4 SCC 343

2. Smriti Madan Kansagra Vs Perry Kansagra (2020) SCC (online) SC 887 *(followed)*

3. ABC Vs State (NCT of Delhi) 2015 10 SCC 1

4. Laxmi Kant Pandey Vs U.O.I .1984 AIR 469

5. Nil Ratan Kundu & ors. Vs Abhijit Kundu (2008) 9 SCC 413 *(followed)*

6. Lachmi Narain & ors. Vs U.O.I. (1976) 2 SCC 953

7. Nasiruddin & ors. Vs Sita Ram Agarwal (2003) 2 SCC 577

8. Dhaninder kumar Vs Deep Chand (1991) ALJ 25 *(followed)*

9. Narottam Vs Tapesra (1934 ALJ 652

10. V. Ravi Chandran Vs U.O.I. & ors. (2010) 1 SCC 174 *(followed)*

11. Charan Lal Sahu Vs U.O.I. (1990) 1 SCC 613

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

1. Heard Sri Prashant Chandra, learned Senior Counsel, assisted by Ms. Mahima Pahwa, learned counsel for the appellant.

2. This appeal has been filed under Section 47 of the Guardians and Wards Act, 1890 (*hereinafter referred to as "the*

*Act, 1890)* challenging the judgment and order dated 09.09.2021 passed by learned Additional District and Sessions Judge/Special Court, Prevention of Corruption Act, court no. 2, Lucknow in Misc. Case No. 529 of 2021 (Nirali Dixit vs. State of U.P. and Ors.) whereby appellant's application B-3, was rejected as not maintainable.

3. The appellant is widow of Aditya Singh, the elder brother of Aryan Singh (minor)- respondent no. 2.

4. Misc. Civil Case No. 516 of 2020; CNR No. UPLKO10092532020 was filed by Aditya Singh, for his appointment as Guardian of the Minor under Section 7 of the Guardians and Wards Act, 1890 on 28.09.2020, upon the death of the parents of the minor, which was allowed vide judgment and order dated 15.12.2020, appointing Aditya Singh to be the Guardian of Aryan Singh (minor).

5. Aditya Singh also died (suicide) on 09.08.2021.

6. The appellant filed an application B-3 under Section 151 of the Code of Civil Procedure r/w Section 7 of the Act, 1890, in Misc. Case No. 516 of 2020; which was registered as Misc. Case No. 529 of 2021: Nirali Dixit vs. State of U.P., The prayer made was to amend/alter the order dated 15.12.2020 passed in Misc. Case no. 516 of 2020, by incorporating the word "Nirali Dixit wife of" before the words "Aditya Singh", in the first line of the operative portion of the order dated 15.12.2020. The prayer in the application B-3 is being reproduced as under:-

*"Wherefore, it is most respectfully prayed that this Hon'ble Court may graciously be pleased amend/altered the order dated 15.12.2020 passed by this Hon'ble Court in Regular suit no. 516 of 2020 by incorporating the word "Nirali Dixit wife of" before the words Aditya Singh, occurring in the first line of the operative portion of the order dated 15.12.2020 and such other orders which this Hon'ble Court may deem fit and proper in the interest of justice."*

7. The State of U.P. through District Magistrate, Lucknow/respondent no. 1, filed objection inter alia that the application B-3, was not maintainable and the relief prayed therein could not be legally granted.

8. The learned Additional District and Sessions Judge/Special Court P.C. Act, court no. 2, Lucknow, vide judgment and order dated 09.09.2021 rejected the application.

9. Learned court below held that Aditya Singh was appointed guardian of the minor, as per the provisions of the Act, 1890, after following the due procedure and on the legal considerations. The appellant-applicant wants to be appointed the guardian of the minor, without following the prescribed procedure, simply by adding her name before the name of Aditya Singh, in Misc. Case No. 516/2020, which was already decided on 28.09.2020. The prayer of the appellant cannot be granted under Section 151 C.P.C., as there is specific provision for appointment of guardianship under the Act, 1890 and without fulfilling the legal requirements.

10. Sri Prashant Chandra, learned Senior Counsel submits that Aditya Singh was married in Canada and in consultation with his wife-the appellant, he decided to take the minor along with him to Canada,

as there was no other person to take care of the minor and to give proper care and look after his upbringing and to safeguard his welfare and accordingly the application dated 29.08.2020 under Section 7 of the Act, 1890 was made, specifically stating therein that to enable Aditya Singh to take his minor brother to Canada, to procure a dependent VISA, it was necessary to have a formal declaration of his being a guardian of the minor from the court. He submits that there was no contest to such application, except that an objection was filed by the State/District Magistrate Lucknow, emphasizing that the person seeking guardianship of the minor must ensure that the minor is properly looked after and that it would be the sole responsibility of the guardian, that all requirements of the minor are fulfilled. After publication in the newspaper and service of notice upon the minor, through process of the court, the matter was heard and after considering in totality the circumstances of the case as also the welfare of the minor, the Court had allowed the application of Aditya Singh, appointing him the Guardian of the minor.

11. Sri Prashant Chandra, learned Senior Advocate further submits that after passing the order dated 15.12.2020, Aditya Singh and the appellant took necessary steps for issuance of dependent VISA for the minor and completed all the formalities before the Canadian authorities but the consideration of the application was delayed, in view of the COVID-19 pandemic, and, unfortunately, pending such consideration, Aditya Singh died (suicide on 09.08.2021). The appellant, in order to take the minor to Canada, as there was no one to look after and take care of the minor, applied for the amendment in the application for grant of dependent VISA, already filed by Late Aditya Singh, but for such amendment also, a formal order appointing the appellant as guardian of the minor by the Court was required, and consequently the application B-3 was filed in Court in Misc. Case No. 516/2020.

12. Learned Senior Advocate submits that the appellant is the widow of Aditya Singh and there being an order in favour of Aditya Singh, now the procedure prescribed under the Act, 1890 for appointment of guardianship, need not be followed, as the earlier order in favour of Aditya Singh was passed after following the due procedure and observance of the due procedure again, would result in delay in grant of dependent VISA and then, there would be nobody to look after the minor. He further submits that in appointing the guardian, the court exercises "parens patriae' jurisdiction, and is expected to give due weight to the child's ordinary comfort etc. and such cases are not to be decided by following strict rules of procedure or by precedence i.e. by insisting upon the procedural compliance, as per the Act, 1890. Reliance has been placed on the judgment of Hon'ble Supreme Court in the case of ***Saiyad Mohammad Bakar El-Edroos vs Abdulhabib Hasan Arab And Ors [(1998) 4 SCC 343] and Smriti Madan Kansagra vs. Perry Kansagra [(2020) SCC (online) SC 887].***

13. I have considered the submissions advanced and perused the material brought on record as also the case laws cited which will be referred shortly.

14. The points that arise for consideration are:-

*(i) Whether on the application B-3 as filed by the appellant, she should have*

*been appointed the guardian of the minor by allowing the prayer, as made, by incorporating her name in the judgment and order dated 15.12.2020 in Misc. Case No. 516/2020 which was in favour of Aditya Singh ?*

*(ii) Whether the procedure under the Act 1890 is not required to be followed in appointment of another guardian on the death of a guardian appointed by the court ?*

*(iii) Whether the application B-3 having been rejected as not maintainable, what further course of action, if any, was required to be adopted by the learned court below ?*

15. All the aforesaid points are related to each other and, therefore, are being taken up simultaneously.

16. A brief look on the legal provisions under the Act, 1890 is necessary at this very stage.

17. Section 7 of the Act, 1890 provides for power of the court to order for guardianship, which is quoted herein below:-

***"7. Power of the Court to make order as to guardianship.--***

*(i) Where the Court is satisfied that it is for the welfare of a minor that an order should be made--(a) appointing a guardian of his person or property or both, or (b) declaring a person to be such a guardian the Court may make an order accordingly.*

*(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.*

*(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.*

18. Section 8 of the Act, 1890 provides as to who are the persons entitled to apply for an order under Section 7. Section 8 reads as under:-

***"8. Persons entitled to apply for order-*** *An order shall not be made under the last foregoing section except on the application of--(a) the person desirous of being, or claiming to be, the guardian of the minor; or*

*(b) any relative or friend of the minor; or*

*(c) the Collector of the district or other local area within which the minor ordinarily resides or in which he has property; or*

*(d) the Collector having authority with respect to the class to which the minor belongs."*

19. Section 9 of the Act, 1890 provides for the jurisdiction of the Court to entertain application. Section 10 of the Act 1890 provides for form of application, which reads as under:-

***"10. Form of application****.--(i) If the application is not made by the*

*Collector, it shall be by petition signed and verified in manner prescribed by the Code of Civil Procedure, 1882 (14 of 1882)1, for the signing and verification of a plaint, and stating, so far as can be ascertained,--*

*(a) the name, sex, religion, date of birth and ordinary residence of the minor;*

*(b) where the minor is a female, whether she is married and if so, the name and age of her husband;*

*(c) the nature, situation and approximate value of the property, if any, of the minor;*

*(d) the name and residence of the person having the custody or possession of the person or property of the minor;*

*(e) what near relations the minor has and where they reside;*

*(f) whether a guardian of the person or property or both, of the minor has been appointed by any person entitled or claiming to be entitled by the law to which the minor is subject to make such an appointment;*

*(g) whether an application has at any time been made to the Court or to any other Court with respect to the guardianship of the person or property or both, of the minor and if so, when, to what Court and with what result;*

*(h) whether the application is for the appointment or declaration of a guardian of the person of the minor, or of his property, or of both;*

*(I) where the application is to appoint a guardian, the qualifi-cations of the proposed guardian;*

*(j) where the application is to declare a person to be a guardian, the grounds on which that person claims*

*(k) the causes which have led to the making of the application; and*

*(l) such other particulars, if any, as may be prescribed or as the nature of*

*the application renders it necessary to state.*

*(2) If the application is made by the Collector, it shall be by letter addressed to the Court and forwarded by post or in such other manner as may be found convenient, and shall state as far as possible the particulars mentioned in sub-section (1).*

*(3) The application must be accompanied by a declaration of the willingness of the proposed guardian to act, and the declaration must be signed by him and attested by at least two witnesses."*

20. Section 11 of the Act provides for the procedure, on admission of application which reads as under:-

*"**11. Procedure on admission of application**.- (1) If the Court is satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing thereof and cause notice of the application and of the date fixed for the hearing--*

*(a) to be served in the manner directed in the Code of Civil Procedure, 1882 (14 of 1882)1 on--*

*(i) the parents of the minor if they are residing in 2[any State to which this Act extends];*

*(ii) the person, if any, named in the petition or letter as having the custody or possession of the person or property of the minor;*

*(iii) the person proposed in the application or letter to be appointed or declared guardian, unless that person is himself the applicant, and*

*(iv) any other person to whom, in the opinion of the Court, special notice of the application should be given; and*

*(b) to be posted on some conspicuous part of the Court-house and of the residence of the minor, and otherwise published in such manner as the Court, subject to any rules made by the High Court under this Act, thinks fit.*

*(2) The State Government may, by general or special order, re- quire that when any part of the property described in a petition under section 10, sub-section (1), is land of which a Court of Wards could assume the superintendence, the Court shall also cause a notice as aforesaid to be served on the Collector in whose district the minor ordinarily resides and on every Collector in whose district any portion of the land is situate, and the Collector may cause the notice to be published in any manner he deems fit.*

*(3) No charge shall be made by the Court or the Collector for the service or publication of any notice served or published under sub-section (2)."*

21. Section 12 provides for power to make interlocutory order for production of minor and for interim protection of person or property of minor. Section 13 provides for hearing of the application and evidences on the date fixed before making an order.

22. Section 17 of the Act, 1890 provides for the matters to be considered by the Court in appointing or declaring the guardian. Section 17 reads as under:-

***"17. Matters to be considered by the Court in appointing guardian.**--(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.*

*(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.*

*(3) If minor is old enough to form an intelligent preference, the Court may consider that preference.*

*3[***]*

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

23. Present is a case where the guardian of the minor- i.e. Aditya Singh appointed by the court vide order dated 15.12.2020 died and as such Sections 41 & 42 of the Act 1890 are also relevant.

24. Section 41 of the Act, 1890 provides for the circumstances, under which the powers of a guardian of the person cease, and under Clause (a) of sub-Section 1, the powers of guardian cease by his death.

25. Section 41 of the Act, 1890 reads as under:-

Section 41 in The Guardians and Wards Act, 1890

*"41. Cessation of authority of guardian.--*

*(I) The powers of a guardian of the person cease--*

*(a) by his death, removal or discharge;*

*(b) by the Court of Wards assuming superintendence of the person of the ward;*

*(c) by the ward ceasing to be a minor;*

*(d) in the case of a female ward, by her marriage to a husband who is not unfit to be guardian of her person or, if the guardian was appointed or declared by the Court, by her marriage to a husband who is not, in the opinion of the Court, so unfit; or*

*(e) in the case of a ward whose father was unfit to be guardian of the person of the ward, by the father ceasing to be so or, if the father was deemed by the Court to be so unfit, by his ceasing to be so in the opinion of the Court.*

*(2) The powers of a guardian of the property cease--*

*(a) by his death, removal or discharge;*

*(b) by the Court of Wards assuming superintendence of the property of the ward; or*

*(c) by the ward ceasing to be a minor.*

*(3) When for any cause the powers of a guardian cease, the Court may require him or, if he is dead, his representative to deliver as it directs any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward.*

*(4) When he has delivered the property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities save as regards any fraud which may subsequently be discovered."*

26. Section 42 of the Act, 1890 provides that when a guardian appointed or declared by the court is discharged or, under the law to which the ward is subject, ceases to be entitled to act, or when any such guardian or a guardian appointed by Will or other instrument is removed or dies, the Court, of its own motion or on application under Chapter II, may, if the ward is still a minor, appoint or declare another guardian of his person or property, or both, as the case may be.

27. Section 42 of the Act, 1890 reads as under:-

***"42. Appointment of successor to guardian dead, discharged or removed-*** *When a guardian appointed or declared by*

*the Court is discharged, or, under the law to which the ward is subject, ceases to be entitled to act, or when any such guardian or a guardian appointed by Will or other instrument is removed or dies, the Court, of its own motion or on application under Chapter II, may, if the ward is still a minor, appoint or declare another guardian of his person or property, or both, as the case may be."*

28. Now the Court proceeds to consider some case laws on the subject.

29. In ***ABC vs. State (NCT of Delhi) [2015 10 SCC 1]***, the Hon'ble Supreme Court has held that in the matter of appointment or declaration of guardian of the minor, the Court is called upon to discharge its parens patriae jurisdiction. Upon a guardianship petition, being laid before the Court, the child concerned ceases to be in the exclusive custody of the parents; thereafter, until the attainment of majority, the child continues in curial curatorship. In ***Smriti Madan Kansagra vs. Perry Kansagra [(2020) SCC (online) SC 887]***, the Hon'ble Supreme Court held that it is a well-settled principle of law that the courts while exercising parens patriae jurisdiction would be guided by the sole and paramount consideration of what would best subserve the interest and welfare of the child, to which all other considerations must yield. The welfare and benefit of the minor child would remain the dominant consideration throughout. ***In Laxmi Kant Pandey vs. Union of India [1984 AIR 469]***, the Hon'ble Supreme Court held that the welfare of the child takes priority above all else, including the rights of the parents. In ***Nil Ratan Kundu and Others vs. Abhijit Kundu [(2008) 9 SCC 413],*** it was held that it is the welfare of the minor and of the minor alone, which is the paramount consideration.

30. In ***Nil Ratan Kundu (supra)***, the Hon'ble Supreme Court has held in paragraphs 41 to 45, which are as under:-

*"41. In Saraswatibai Shripad Ved v. Shripad Vasanji Ved [AIR 1941 Bom 103 : ILR 1941 Bom 455] , the High Court of Bombay stated : (AIR p. 105)*

*"... It is not the welfare of the father, nor the welfare of the mother, that is the paramount consideration for the Court. It is the welfare of the minor and of the minor alone which is the paramount consideration; (emphasis supplied)*

*42. In Rosy Jacob v. Jacob A. Chakramakkal [(1973) 1 SCC 840] , this Court held that the object and purpose of the 1890 Act is not merely physical custody of the minor but due protection of the rights of the ward's health, maintenance and education. The power and duty of the court under the Act is the welfare of the minor. In considering the question of welfare of a minor, due regard has of course to be given to the right of the father as natural guardian, but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship. The Court further observed that merely because there is no defect in his personal care and his attachment for his children, which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. The Court also observed that children are not mere chattels, nor are they toys for their parents. The absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions,*

*must yield to the consideration of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of the* welfare of the minor children and the rights of their respective parents over them.

*43.Again, in Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka [(1982) 2 SCC 544] , this Court reiterated that the only consideration of the court in deciding the question of custody of a minor should be the welfare and interest of the minor and it is the special duty and responsibility of the court. Mature thinking is indeed necessary in such situation to decide what will enure to the benefit and welfare of the child.*

*44. In Surinder Kaur Sandhu v. Harbax Singh Sandhu [(1984) 3 SCC 698 : 1984 SCC (Cri) 464] this Court held that Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as a natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. (See also Elizabeth Dinshaw v. Arvand M. Dinshaw [(1987) 1 SCC 42 : 1987 SCC (Cri) 13] and Chandrakala Menon v. Vipin Menon [(1993) 2 SCC 6 : 1993 SCC (Cri) 485] .)*

*45. Recently, in Mausami Moitra Ganguli v. Jayant Ganguli [(2008) 7 SCC 673 : JT (2008) 6 SC 634] , we have held that the first and the paramount consideration is the welfare of the child and not the right of the parent. We observed : (SCC p. 678, paras 19-20)*

*"19. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably, the provisions of law pertaining to the custody of child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.*

*20. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the court to exercise its judicial discretion judiciously in the background of all the*

*relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration."*

31. In paragraph 52 of the case of ***Nil Ratan Kundu (supra)***, the Hon'ble Supreme Court summarised the principles of the custody of minor children, which reads as under:-

***"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."*

32. In ***Smriti Madan Kansagra vs. Perry Kansagra [(2020) SCC (online) SC 887],*** the Hon'ble Supreme court has held in paragraphs 94-103, which are as under:-

*"94. The issue which has arisen for our consideration is as to what should be the dispensation to be followed with respect to the custody of the minor child-Aditya who is now 11 years of age, till he attains the age of majority in 7 years' time.*

*95. It is a well-settled principle of law that the courts while exercising parens patriae jurisdiction would be guided by the sole and paramount consideration of what would best subserve the interest and welfare of the child, to which all other considerations must yield. The welfare and benefit of the minor child would remain the dominant consideration throughout.*

*96. The courts must not allow the determination to be clouded by the inter se disputes between the parties, and the allegations and counter-allegations made against each other with respect to their matrimonial life. In Rosy Jacob v. Jacob A Chakarmakkal1 this Court held that:*

*"15...The children are not mere chattels : nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society.*

*(emphasis supplied)*

*97. A three Judge bench of this Court in V. Ravichandran (2) v. Union of India2 opined:*

*"27...it was also held that whenever a question arises before a Court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of the parties, but on the sole and predominant criterion of what would serve the best interest of the minor." (emphasis supplied)*

*98. Section 13 of the Hindu Minority and Guardianship Act, 1956 provides that the welfare of the minor must be of paramount consideration while deciding custody disputes. Section 13 provides as under:--*

*"13. Welfare of minor to be paramount consideration*

*(1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.*

*(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor."*

*99. This Court in Gaurav Nagpal v. Sumedha Nagpal3 held that the term "welfare" used in Section 13 must be construed in a manner to give it the widest interpretation. The moral and ethical welfare of the child must weigh with the court, as much as the physical well-being. This was reiterated in Vivek Singh v. Romani Singh4, wherein it was opined that the "welfare" of the child comprehends an environment which would be most conducive for the optimal growth and development of the personality of the child.*

*100. To decide the issue of the best interest of the child, the Court would take into consideration various factors, such as the age of the child; nationality of the child; whether the child is of an intelligible age and capable of making an intelligent preference; the environment and living conditions available for the holistic growth and development of the child; financial resources of either of the parents which would also be a relevant criterion, although not the sole determinative factor; and future prospects of the child.*

*101. This Court in Nil Ratan Kundu v. Abhijit Kundu5 set out the principles governing the custody of minor children in paragraph 52 as follows:*

*"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."*

*102. Section 17 of the Guardian and Wards Act, 1890 provides:*

*"17. Matters to be considered by the Court in appointing guardian*

*(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.*

*(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.*

*(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.*

*(4) deleted*

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

*103. In the present case, the issue of custody of Aditya has to be based on an overall consideration of the holistic growth of the child, which has to be determined on the basis of his preferences as mandated by Section 17(3), the best educational opportunities which would be available to him, adaptation to the culture of the country of which he is a national, and where he is likely to spend his adult life, learning the local language of that country, exposure to other cultures which would be beneficial for him in his future life."*

33. Thus, Section 7(1) (a) of the Act, 1890 provides that where the Court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property or both, or declaring a person to be such a guardian, the Court may make an order accordingly. Section 8, however, specifically provides that an order shall not be made under Section 7, except on the application of (a) the person desirous of being, or claiming to be the guardian of the minor or (b) any relative or friend of the minor; or (c) the Collector of the District or other local area within which the minor ordinarily resides or in which he has property; or (d) the Collector having authority with respect to the class to which the minor belongs. Section 8, therefore, clearly provides that no order under Section 7 shall be passed except on an application by the person or authority as mentioned in clause (a) to (d). The form of the application is to be as per Section 10, according to which if the application is not made by the Collector, it shall be by petition signed and verified in the manner prescribed by the Code of Civil Procedure, for the signing and verification of a plaint, and stating, so far as can be ascertained, the points/information as mentioned in Clauses (a) to (l). As per sub

Section (3) of Section 10, the application must be accompanied by a declaration of the willingness of the proposed guardian to act, which declaration must be signed by the proposed guardian and attested by at least two witnesses.

34. In the matter of appointment of guardian, Section 8 specifically provides that "no such order under Section 7 shall be passed except on the application'. Use of such language shows clearly the legislative intent that the provision is mandatory. In the case of ***Lachmi Narain and Others vs. Union of India and Ors. [(1976) 2 SCC 953],*** Hon'ble Supreme Court has held that if the provision is couched in prohibitive or negative language, it can rarely be directory, the use of peremptory language in a negative form is per se indicative of the intent that the provision is to be mandatory. In ***Nasiruddin and Others vs. Sita Ram Agarwal [(2003) 2 SCC 577],*** the Hon'ble Supreme Court has held that it is also equally well settled that when negative words are used the courts will presume that the intention of the legislature was that the provisions are mandatory in character. In view of this Court, the requirements of the application, if not filed by the District Magistrate, in confirmity with the provisions of Section 10 of the Act, providing requisite information, as in Clauses (a) to (l) accompanied by a declaration of the willingness of the proposed guardian to act, signed by the proposed guardian and attested by two witnesses, are with an object, in the interest of the child to secure his welfare. In ***Dhaninder Kumar vs. Deep Chand [(1991) ALJ 25], this Court followed the Division Bench in Narottam vs. Tapesra [(1934 ALJ 652]*** in which it was held that "a Judge is not authorized by law, in the absence of an application for appointment of a guardian to pass an order appointing the guardian of a minor. But, once an application has been filed in accordance with the provisions of Section 10, the jurisdiction of the court comes into play. In ***Dhaninder Kumar (supra)***, in view of Section 8 it was held that "What appears is that the Judge cannot suo moto appoint a guardian of a minor, but when an application for appointment is before the Judge, he can, considering the welfare of the minor appoint even a non-applicant provided he consents to his appointment.

35. It is also well settled that the welfare of the child is of paramount consideration. In ***ABC vs. State (NCT of Delhi) (supra)***, the Hon'ble Supreme Court has further held that as the intention of the Act is to protect the welfare of the child the applicability of Section 11 which is procedural would have to be read accordingly. There is no harm or mischief in relaxing its requirements to attain the intendment of the Act, if the child's welfare is in peril. There is thus no mandatory and inflexible procedural requirement of notice. Thus, it is also settled that the purely procedural provisions can be relaxed or even dispensed with, to attain the intendment of the Act, if there is no harm or mischief in relaxing those requirements, in the welfare of the child, which takes priority above all else. The criterion for relaxation of purely procedural provision, therefore appears to be, if, it is, in the welfare of the child. If by relaxing the procedural provision, the welfare of the child would be undermined or if the procedural law itself is intended for the welfare of the minor, such provisions are not to be relaxed. In ***ABC (supra)***, the custody petition was preferred by the natural mother of the minor and the procedural requirement of notice to be

served to the putative father was not consiered to be mandatory and inflexible procedural requirement. This court is of the further view that the procedural provisions, the strict compliance of which may undermine the welfare of the minor, may, in the discretion of the court, be relaxed in appropriate cases, for the reasons to be recorded. Recording of reasons is necessary so that in case of challenge to the order of appointment of guardian, or otherwise, the Superior Courts may know what necessitated dispensing/relaxing of the procedural provisions, and if, it was or was not in the welfare of the minor.

36. The submission of Sri Prashant Chandra, learned Senior Advocate, that once the procedure has been followed in the appointment of Aditya Singh as guardian, the same need not be followed again and as in the application by the elder brother, any objection was not filed by any person, except the State, and, therefore, the procedure of publication need not be followed, cannot be accepted. Even if, in response to the earlier application filed by Aditya Singh, any objection, might not have been filed, might be for the reason that the parents of the minor had died and it was the real elder brother, who had applied for the guardianship and therefore, any other relative, might not have come forward to oppose the application or for seeking his/her appointment as guardian in preference to that of Aditya Singh. But, now, the situation has changed. The proposed guardian is the widow of Aditya Singh. In the application B-3 as also in the affidavit, in support of the application for interim relief filed along with the appeal, it has been stated that she is settled in Canada and is in settled service in Canada. Her marriage was solemnised with Aditya Singh on 14.02.2020, who died (suicide) on 09.08.2021. Any other near relative of the minor, coming forward in pursuance of the publication of the notice, to take care of the child, cannot be ruled out at least at this stage. Merely because in pursuance of the publication of the application of Aditya Singh (deceased), no person came forward, cannot be a ground to dispense with the notice required under Section 11 of the Act, 1890, in the present case.

37. In the exercise of guardianship or custody, jurisdiction, the welfare of the minor and minor alone is of paramount consideration. The court shall be guided generally by Section 17 of the Act, 1890, which specifically provides that in appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of Section 17, guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. If the minor is old enough to form an independent opinion or preference, the Court may consider that aspect, as well. Hon'ble Supreme Court has held in Nil ***Ratan Kundu (supra),*** that "the court is 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.'

38. In ***V. Ravi Chandran vs. Union of India & Ors. [(2010) 1 SCC 174***], the

Hon'ble Supreme Court held that while dealing with a case of a custody of a child, removed by a parent from one country to another, in contravention of the orders of the court where the parties had set up their matrimonial home, the court in that country to which the child has been removed must first consider the question whether the court would conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to child's welfare be investigated in a court of its own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talent. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and pursuasive effect of a foreign judgment must depend on the circumstances of each case.

39. In ***Smriti Madan Kansagra (supra)*** also, the Hon'ble Supreme Court held that "to decide the issue of the best interest of the child, the Court would take into consideration various factors, such as the age of the child; nationality of the child; whether the child is of an intelligible age and capable of making an intelligent preference; the environment and living conditions available for the holistic growth and development of the child; financial resources of either of the parents which would also be a relevant criterion, although not the sole determinative factor; and future prospects of the child."

40. This Court is conscious of the fact that ***V. Ravi Chandran (supra)*** as also ***Smriti Madan Kansagra (supra)*** are the cases where the child was removed from other country to this country, and the question arose for sending the child back to that country, in which the court of that country had also passed some orders; whereas in the present case, the minor had not been removed from other country to this country, but in view of this Court, the considerations as mentioned in those judgments, in the welfare of the minor, are of significance, in the present case also, for the reason that as per the application B-3 that the appellant filed such application B-3 to take the child to Canada from India. Therefore, in exercise of parens patriae jurisdiction, in such cases, the court should also consider the factors which have been laid down in ***V. Ravi Chandran (supra)*** and ***Smriti Madan (supra)*** to determine the welfare and happiness of the child. It should go into all relevant aspects of child including stability and security, loving and understanding care and guidance and full development of child's character, personality and talent, nationality of the child, the environment and the living conditions, moral and ethical values for the growth and development of the child.

41. The welfare of the child in custody matters, is required to be considered in relation to the person applying for guardianship/custody. The welfare of the child with respect to one guardian appointed by the court cannot neither necessarily nor automatically be considered to be the same, when some other person, the proposed guardian, files an application for his/her appointment. It requires fresh consideration in the light of the provisions of Section 17 of the Act, 1890 which inter alia provides the factors of age and sex of the proposed guardian to

which the courts have to give due regard. The various factors settled in law by various pronouncements as discussed above, also require consideration. Merely by making amendment in the order dated 15.12.2020 in name, the way it was prayed by the appellant, by adding her name before the name of the deceased-Aditya Singh, the order of appointment of guardianship passed in favour of Aditya Singh could not be converted in favour of the appellant.

42. For all the aforesaid reasons and there being no application by the appellant complying with Sections 7 & 10 of the Act, 1890, the prayer as made in the application B-3, could not be legally granted. The court below did not commit any illegality in rejecting the application B-3.

43. However, that is not the end of the matter. The jurisdiction to appoint guardian is parens patriae. The expression parens patriae, literally means parent of the country and refers traditionally to the role of the State as a sovereign and guardian of persons under legal disability. When the court exercises the power as parens patriae, it means that the court has to act as parent or guardian of the person under legal disability. In the case of ***Charan Lal Sahu v. Union of India [(1990) 1 SCC 613]***, the Hon'ble Supreme Court has held as under:-

*"35. There is the concept known both in this country and abroad, called parens patriae. Dr B.K. Mukherjea in his "Hindu Law of Religious and Charitable Trust", Tagore Law Lectures, Fifth Edition, at page 404, referring to the concept of parens patriae, has noted that in English law, the Crown as parens patriae is the constitutional protector of all property subject to charitable trusts, such trusts being essentially matters of public concern. Thus the position is that according to Indian concept parens patriae doctrine recognized King as the protector of all citizens and as parent. In Budhkaran Chaukhani v. Thakur Prosad Shah [AIR 1942 Cal 331 : 46 CWN 425] the position was explained by the Calcutta High Court at page 318 of the report. The same position was reiterated by the said High Court in Banku Behary Mondal v. Banku Behary Hazra [AIR 1943 Cal 203 : 47 CWN 89] at page 205 of the report. The position was further elaborated and explained by the Madras High Court in Medai Dalavoi T. Kumaraswami Mudaliar v. Medai Dalavoi Rajammal [AIR 1957 Mad 563 : (1957) 2 MLJ 211] at page 567 of the report. This Court also recognized the concept of parens patriae relying on the observations of Dr Mukherjea aforesaid in Ram Saroop v. S.P. Sahi [1959 Supp 2 SCR 583 : AIR 1959 SC 951] at pages 598 and 599. In the "Words and Phrases" Permanent Edition, Vol. 33 at page 99, it is stated that parens patriae is the inherent power and authority of a legislature to provide protection to the person and property of persons non sui juris, such as minor, insane, and incompetent persons, but the words parens patriae meaning thereby "the father of the country', were applied originally to the King and are used to designate the State referring to its sovereign power of guardinaship over persons under disability. (emphasis supplied) Parens patriae jurisdiction, it has been explained, is the right of the sovereign and imposes a duty on sovereign, in public interest, to protect persons under disability who have no rightful protector. The connotation of the term parens patriae differs from country to country, for instance, in England it is the King, in America it is the people,*

*etc. The Government is within its duty to protect and to control persons under disability. Conceptually, the parens patriae theory is the obligation of the State to protect and takes into custody the rights and the privileges of its citizens for dischargings its obligations. Our Constitution makes it imperative for the State to secure to all its citizens the rights guaranteed by the Constitution and where the citizens are not in a position to assert and secure their rights, the State must come into picture and protect and fight for the rights of the citizens. The Preamble to the Constitution, read with the Directive Principles, Articles 38, 39 and 39-A enjoin the State to take up these responsibilities. It is the protective measure to which the social welfare state is committed. It is necessary for the State to ensure the fundamental rights in conjunction with the Directive Principles of State Policy to effectively discharge its obligation and for this purpose, if necessary, to deprive some rights and privileges of the individual victims or their heirs to protect their rights better and secure these further. Reference may be made to Alfred L. Snapp & Son, Inc. v. Puerto Rico [73 L Ed 2d 995 : 458 US 592 : 102 SCR 3260] in this connection. There it was held by the Supreme Court of the United States of America that Commonwealth of Puerto Rico have standing to sue as parens patriae to enjoin apple growers' discrimination against Puerto Rico migrant farm workers. This case illustrates in some aspect the scope of parens patriae. The Commonwealth of Puerto Rico sued in the United States District Court for the Western District of Virginia, as parens patriae for Puerto Rican migrant farmworkers, and against Virginia apple growers, to enjoin discrimination against Puerto Ricans in favour of Jamaican workers in violation of the Wagner-Peyser Act, and the Immigration and Nationality Act. The District Court dismissed the action on the ground that the Commonwealth lacked standing to sue, but the Court of Appeal for the Fourth Circuit reversed it. On certiorari, the United States Supreme Court affirmed. In the opinion by White, J., joined by Burger, C.J. and Brennan, Marshall, Blackmun, Rehnquist, Stevens, and O'Connor, JJ., it was held that Puerto Rico had a claim to represent its quasi-sovereign interests in federal court at least which was as strong as that of any State, and that it had parens patriae standing to sue to secure its residents from the harmful effects of discrimination and to obtain full and equal participation in the federal employment service scheme established pursuant to the Wagner-Peyser Act and the Immigration and Nationality Act of 1952. Justice White referred to the meaning of the expression parens patriae. According to Black's Law Dictionary, 5th edn. 1979, page 10003, it means literally "parent of the country' and refers traditionally to the role of the State as a sovereign and guardian of persons under legal disability. Justice White at page 1003 of the report emphasised that the parens patriae action had its roots in the common law concept of the "royal prerogative". The royal prerogative included the right or responsibility to take care of persons who were legally unable, on account of mental incapacity, whether it proceeds from nonage, idiocy or lunacy to take proper care of themselves and their property. This prerogative of parens patriae is inherent in the supreme power of every state, whether that power is lodged in a royal person or in the legislature and is a most beneficent function. After discussing several cases Justice White observed at page 1007 of the report that in order to maintain an action,*

*in parens patriae, the State must articulate an interest apart from the interests of particular parties, i.e. the State must be more than a nominal party. The State must express a quasi-sovereign interest. Again an instructive insight can be obtained from the observations of Justice Holmes of the American Supreme Court in the case of State of Georgia v. Tennessee Copper Co. [51 L Ed 1038 : 206 US 230 (1906) : 27 SCR 618] , which was a case involving air pollution in Georgia caused by the discharge of noxious gases from the defendant's plant in Tennesee. Justice Holmes at page 1044 of the report described the State's interest as follows:*

*"This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power....*

*... When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests..."*

44. The court below acquired knowledge that the guardian, the elder brother, appointed by the court of minor, had died. The parents had died earlier. The court below should have shown concern for the future and welfare of the child. Rather, it was the duty of the court below, to have proceeded to appoint guardian of the minor, considering his welfare by adopting the legal procedure of its own motion. The matter could not be left, only by rejecting the application, as not maintainable. Even if the application was rejected, as not maintainable, the court below was under duty and it should have discharged its *''parens patriae jurisdiction'* also considering Section 42 of the Act, 1890, according to which on the death of a guardian appointed or declared by the court, if the ward is still a minor, the court of its own motion or an application under Chapter II, may, appoint or declare another guardian. Therefore, appointment of another guardian, after the death of a guardian appointed by the court can be made exercising the power, on the application under Chapter II i.e. the application by the persons entitled to apply for order of appointment of guardian under Section 8, and also by the court of its own motion. In the present case, the court finds that there being no application under Chapter II, complying with the provision of Section 10 of the Act, 1890 and application B-3 filed by the appellant, having been rejected, as not maintainable, nonetheless the court having acquired knowledge of the death of the guardian appointed by the court and the minor still being minor, it ought to have proceeded to appoint the guardian of the minor on its own motion.

45. It should not be lost sight of and must be emphasized that in custody cases, the claim to the custody of the child by the proposed guardian is in the nature of Trust, only for the benefit of the minor. The welfare of the minor so far as the guardianship, regarding person of the minor is concerned, is the primary consideration. The Trust reposed in the court is to be discharged by following the

principles under the Act, 1890 and the principles settled by judicial pronouncement, which is the best way.

46. In ***Saiyad Mohammad Bakar El-Edroos (supra)***, upon which reliance has been placed by the appellant's counsel, it has been held that a procedural law is always in aid of justice, not in contradiction or to defeat the very object which is sought to be achieved. A procedural law is always subservient to the substantive law. Nothing can be given by a procedural law what is not sought to be given by a substantive law and nothing can be taken away by the procedural law what is given by the substantive law. The said proposition is well settled but it requires consideration in each and every case if to comply with the procedural law would be in aid of justice or it would defeat the very object which is sought to be achieved.

47. In the present case, as the appointment of the guardian, is after the death of the guardian, appointed by the court, and, therefore, in view of Section 42 of the Act, the courts have power to appoint on the application filed under Chapter II as well as of its own motion and to that extent, the law as laid down in ***Dhaninder Kumar (supra)*** is to be considered.

48. The court below, therefore deserves to be directed to exercise its parens patriae jurisdiction to appoint guardian of the minor-respondent no. 2, by following the due procedure of law keeping in view the welfare of the minor as of paramount consideration, considering all the relevant aspects of the matter, as discussed above.

49. Before concluding, it needs to be observed that, although, the State/District Magistrate is well within its right to oppose the grant of guardianship, in favour of any person, in the welfare of the minor and it is also the duty of the State/District Magistrate to do so, but the point which needs to be emphasized is that the endeavour should be not merely to get the application rejected but to ensure that the minor gets a guardian appointed as per law to secure his welfare, for which the State/District Magistrate concerned has also been given power to apply under Section 8 (c) & (d) of the Act, 1890.

50. The points formulated in para 14 are answered, as under:-

(i) On the application B-3, as filed by the appellant, she could not be appointed a guardian of the minor by allowing the prayer, as made by incorporating her name in the judgment and order dated 15.12.2020 in Misc. Case No. 516/2020, which was in favour of Aditya Singh.

(ii) On the death of the guardian, appointed by the court, if the minor is still minor, new guardian has to be appointed on the application of the proposed guardian filed under Chapter II Section 8, complying with the requirements of the Act, 1890 and the court also have the jurisdiction and duty to appoint of its own motion. In either case, the procedural provisions which are intended to be in the welfare of the minor cannot be relaxed or dispensed with. However, if there is no harm or mischief in relaxing the procedural provision or dispensing therewith, in the welfare of the child which takes priority above all else, the court, may in its discretion, relax or dispense with the same, but, the court should record reasons for such relaxation or dispensation, so that the superior courts if

occasion arises, may see whether such relaxation or dispensation with purely procedural provision is or is not, necessary in the welfare of the minor. The welfare of the minor is also required to be considered, keeping in view the provisions of Section 17 of the Act, 1890, as also on the principles, as settled by Hon'ble the Apex Court, inter alia in the cases of ***Nil Ratan Kundu (supra), V. Ravi Chandran (supra), Smriti Madan Kansagra (supra).*** The welfare of the minor requires consideration also qua, the proposed guardian. The welfare of the minor if already determined qua, one guardian cannot necesarily and automatically be read, with respect to thenew proposed guardian, for which the court has to consider the welfare, keeping in view the aforesaid.

(iii) Even after rejection of the application of the appellant, as not maintainable, the court in exercise of its parens patriae jurisdiction and in view of Section 42 of the Act, 1890, should have proceeded on its own, to appoint the guardian of the minor, as per law.

51. Section 107 C.P.C. r/w Order 41 Rule 33 C.P.C. provides for the powers of the appellate court according to which, in exercise of such powers, the appellate court may, pass any decree and make any order which ought to have been passed or made. This Court in exercise of appellate jurisdiction, passes the following order:-

*(i) The order dated 09.09.2021 rejecting the appellant's application B-3, for the prayer made, as not maintainable, does not call for any interference.*

*(ii) The jurisdiction being parens patriae, as also in view of Section 42 of the Guardians and Wards Act, 1890, the court below is directed to proceed of its own motion to appoint the guardian of minor-Aryan Singh (respondent no. 2), in accordance with the provisions of law and on settled principles as mentioned above.*

*(iii) The court below shall also consider and make order for temporary custody and protection of the person of the minor, as it thinks proper under Section 12 of the Act, 1890.*

52. It shall be open for the appellant, if so desires, to apply for her appointment as guardian of the minor under Chapter II Section 8(a) (b) of the Act, 1890 by filing application, as per law.

53. It shall also be open for the District Magistrate, Lucknow in view of Section 8, (c) & (d) of the Act, 1890 to file an application for appointment of guardian of the minor.

54. The appeal is decided finally in the aforesaid terms.

55. No order as to costs.

56. Let a copy of this judgment be sent to the learned District Judge, Lucknow as also the District Magistrate, Lucknow.

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**(2021)10ILR A238**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:ALLAHABAD 07.09.2021**

**BEFORE**

**THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.**
**THE HON'BLE SUBHASH CHAND, J.**

FAFO No. 269 of 2020

**Raj Nand Jaiswal & Ors. ...Appellant**
**Versus**
**New India Assurance Co. Ltd., Muzaffarnagar & Ors. ...Respondents**

**Counsel for the Appellant:**
Sri Siddharth, Sri Manoj Kumar Singh

**Counsel for the Respondents:**
Sri Sushil Kumar Mehrotra

**(A) Quantum of Compensation -** Even though in the year 1990 to 2000, the addition of future prospects was not ruled out just because tribunals in U.P. were not granting future losses. (Para 10)

**Appeal Partly Allowed.** (E-10)

**List of Cases cited:**

1. National Insurance Co. Ltd.Vs Pranay Sethi & ors. 2017 0 Supreme (SC) 1050

2. Jitendra Khimshankar Trivedi & ors. Vs Kasam Daud Kumbhar & ors. (2015) 4 SCC 237

3. General Manager, Kerala S.R.T.C., Trivandrum Vs Susamma Thomas & ors. (1994) 2 SCC 176

4. U.P.S.R.T.C. & ors. Vs Trilok Chandra & ors. (1996) 4 SCC 362

5. Sarla Dixit Vs Balwant Yadav AIR 1996 SC 1274

6. Hardeo Kaur Vs Rajasthan State Transport Corporation 1992 2 SCC 567

7. Puttamma Vs K.L. Narayana Reddy AIR 2014 SC 706

8. Raman Vs Uttar Haryana Bijli Vitran Nigam Limited

9. Bijay Kumar Dugar Vs Bidyadhar Dutta 2006 (3) SCC 242

10. R.K. Malik Vs Kiran Pal AIR 2009 SC 2506

11. National Insurance Co. Ltd.Vs Pranay Sethi AIR 2017 SC 5157

12. Raj Rani Vs Oriental Insurance Co. Ltd. 2009 (13) SCC 654

13. Ritaben alias Vanitaben Wd/o. Dipakbhai Hariram and Anr. Vs Ahmadabad Municipal Transport Service & Anr. 1998 (2) G.L.H. 670

14. New India Assurance Co. Ltd. Vs Urmila Shukla & ors. LL 2021 SC 359

15. A.V. Padma Vs Venugopal 2012 (1) GLH (SC) 442

16. Smt. Hansaguti P. Ladhani Vs The Oriental Insurance Co. Ltd. 2007 (2) GLJ 291

17. Smt. Sudesna & ors Vs Hari Singh & Anr. Review Application No. 1 of 2020 in First Appeal From Order No. 23 of 2001

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard Shri Manoj Kumar Singh, learned counsel for the appellants; Shri Sushil Kumar Mehrotra, learned counsel for the respondents; and perused the record.

2. This appeal, at the behest of the claimants, challenges the judgment dated 17.7.1999 passed by Motor Accident Claims Tribunal/VIIth Additional District Judge/Additional District Judge, Muzaffarnagar (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No.242 of 1997 awarding a sum of Rs.7,24,500/- with interest at the rate of 12% as compensation.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The respondent concerned has not challenged the liability imposed on

them. The only issue to be decided is, the quantum of compensation awarded.

4. The appeal is of the year 1999, the accident took place in the year 1996. In this appeal we are concerned with the litigation the legal representatives/heirs of late Suman Jaiswal during the pendency of this appeal, the father-in-law and mother-in-law, namely, grand father and grand mother of the minor daughter Km. Nainsi Jaiswal passed away. The recent judgment of the Apex Court has held that the compensation has to be computed when the cause of action accrued.

5. It is submitted by learned counsel for the appellants that the Tribunal has not granted any amount towards future loss of income of the deceased which is required to be granted in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.** It is further submitted that amount under non-pecuniary heads granted and the interest awarded by the Tribunal are on the lower side and require enhancement. The learned counsel submitted which proves that the income of the deceased was Rs.5000/- per month as she was a teacher. It is also submitted that as the deceased was survived by her daughter and parents and hence the deduction towards personal expenses of the deceased should be 1/3 and not 1/2.

6. The multiplier has to be as per the age of deceased. Learned counsel for the appellants has cited also relied on judgments of the Apex Court **(i) Jitendra Khimshankar Trivedi and others v. Kasam Daud Kumbhar and others, (2015) 4 SCC 237.**

7. Learned counsel for the respondents, has vehemently objected the contentions raised by the learned counsel for the appellants and has submitted that the compensation awarded by the Tribunal is just and proper and does not call for any enhancement as the father-in-law and mother-in-law were not dependent on the deceased.

8. Having heard the learned counsel for the parties and considered the factual data, it is undisputed that the accident occurred on 23.6.1996 causing death of Suman Jaiswal who was 38 years of age and left behind her, in-laws/grandparents of one minor daughter (now major). The Tribunal has assessed the income of the deceased to be Rs.1250/- per month and has granted notional income. It is submitted that the claimants were entitled to income as decided by the Apex Court in Jitendra Khimshankar Trivedi (Supra) and should have granted just and reasonable compensation. The decision of the Apex Court considered the accident of the year 1990 whereas in our case, the accident took place in the year 1996 and therefore, the income should have been at least Rs.5,000/- per month.

9. The submission that the Tribunal has not granted any amount towards future loss of income. Grant of future prospects will have to be traced back and reference can be had to the decision in **General Manager, Kerala S.R.T.C., Trivandrum v. Susamma Thomas & Ors.,(1994) 2 SCC 176** wherein addition of future prospects was also calculated. The decision in Susamma Thomas (Supra) was referred in **U.P.S.R.T.C. & Ors. v. Trilok Chandra & Ors.(1996) 4 SCC 362** which have been considered by the Apex Court in **Sarla Dixit Versus Balwant Yadav AIR 1996 SC 1274** and the Apex Court has considered decision in **Hardeo Kaur V/s. Rajasthan State Transport Corporation, 1992 2 SCC 567.** The decision in **Sarla Dixit**

has been considered to be good law in **(1) Puttamma Vs. K.L.Narayana Reddy, AIR 2014 SC 706 (2) Raman Vs. Uttar Haryana Bijli Vitran Nigam Limited, Bijoy Kumar Dugar Vs. Bidyadhar Dutta, 2006 (3) SCC 242 : (3) Sarla Verma (supra)(4)R.K.Malik Vs. Kiran Pal, AIR 2009 SC 2506 (5)National Insurance Company Limited Vs. Pranay Sethi, AIR 2017 SC 5157 Raj Rani Vs. Oriental Insurance Company Limited, 2009 (13) SCC 654.** We have gone through the decisions in those days referred to herein above and the judgment of Gujarat high court in **Ritaben alias Vanitaben Wd/o. Dipakbhai Hariram and Anr. v/s.Ahmedabad Municipal Transport Service & Anr., 1998 (2) G.L.H. 670,** wherein, the Court has observed as under:

*"para-7: It is settled proposition of that the main anxiety of the Tribunal in such case should be to see that the heirs and legal representatives of the deceased are placed, as far as possible, in the same financial position, as they would have been, had there been no accident. It is therefore, an action based on the doctrine of compensation.*

*para-8: It may also be mentioned that perfect determination of compensation in such tortuous liability is, hardly, obtainable. However, the Tribunal is required to take an overall view of the facts and the relevant circumstances together with the relevant proposition of law and is obliged to award an amount of compensation which is just and reasonable in the circumstances of the case.*

*para-10: Even in absence of any other evidence an able bodied young man of 25 years, otherwise also presumed to earn an amount of Rs.1000/- or more per month, on that basis the prospective income could be calculated by doubling the one prevalent on the date of the accident, which is required be divided by half, so as to reach the correct datum figure which is required to be multiplied by appropriate multiplier. Even taking a conservative view in the matter, the deceased would be earning not less than an amount of Rs.1000/- per month and considering the prospective average income of Rs.2000/- and divided by half, would, obviously come to Rs.1500/."*

10. Thus even in year 1990 to 2000, the addition of future prospects was not ruled out, just because tribunals in Uttar Pradesh were not granting future loss, it cannot hold field where the decision of Apex Court is otherwise as demonstrated with decision though of persuasive value of Gujarat High Court referred herein above wherefore, the submission of Sri Shukla that no amount under the head of future loss of income was admissible in those days, will have to be considered. The decision of the Apex Court in **New India Assurance Company Ltd. Vs. Urmila Shukla and others, LL 2021 SC 359** will have to be looked into. Therefore, we will have to consider the same in the light of the recent decisions as well as the decisions of the Apex Court prevailing.

11. I n Malarvizhi & Others and Indiro Devi & Others (Supra), it has been held that Income Tax is the mirror of one's income unless proved otherwise. Even in the earlier days, the factors to be considered for issuing quantum of compensation reads as follows:

i. To give present value, a reasonable deduction or reduction is required as lump sum amount is given at a

stretch under the head of prospective economic loss;

**ii. The tax element is also required to be considered as observed in the Gourley's case (1956 AC 185).**

**iii. The resultant impairment/death on the earning capcity of the claimant/claimants .**

**iv. That the amount of interest is awarded also on the prospective loss of income.**

**v. That the amount of compensation is not exemplary or punitive but is compensatory.**

12. Hence, the total compensation payable to the legal heirs of the deceased in view of the decision of the Apex Court in Pranay Sethi (Supra) is computed herein below:

i. Income Rs.3,000/- p.m.

ii. Percentage towards future prospects : 40% namely Rs.1200/-

iii. Total income : Rs. 3000 + 1200 = Rs.4200/-

iv. Income after deduction of 1/3 : Rs.2800/-

v. Annual income : Rs.2800 x 12 = Rs.33,600/-

vi. Multiplier applicable : 15(as the deceased was in the age bracket of 36-40 years)

vii. Loss of dependency: Rs.33,600 x 15 = Rs.5,04,000/-

viii. Amount under non pecuniary heads : Rs.40,000/- for minor child (now major)

ix. Total compensation : Rs.5,44,000/-.

13. It goes without saying that the interest as per the repo rates in the year 1996 and the interest payable would be 6%. We would go by the repo rate and not by Schedule and grant 6% interest as appeals have remained pending for no fault of the advocates. The rate of interest could remain same throughout. The matter is remain pending since the year 1999, it was also a defective appeal where there was delay for a period of 20 years. The matter remain pending on the defective file only in the year 2019, the appellant filed application for condonation of delay for deleting appellant nos. 1 and 2. The delay was condoned. Appeal was numbered in the year 2020 and, therefore, we feel that interest should be not granted but as it is the sole surviving the claimant was a minor, we grant interest at the rate of 6% as accepting the submission of the counsel for the respondent that even in the year 1996, the rate of interest was not 12%, hence his oral submission is accepted. On the awarded amount from the date of filing of the claim petition till the amount is deposited flate rate of 6% would be admissible.

14. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442, the order of investment is not passed because applicant /claimant is neither illiterate nor rustic villager.

15. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291**, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 **(Smt. Sudesna and others Vs. Hari Singh and another)** while disbursing the amount.

16. In view of the above, the appeal is **partly allowed**. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount along with additional amount 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 amount is deposited and 6% thereafter as the appeal remain pending for no fault of either of the parties. The amount already deposited be deducted from the amount to be deposited.

17. As far as claimant Nos.2 and 3 are concerned, namely grand-father and grand-mother have passed away and hence, the amount be disbursed to the daughter (legal representative of deceased) who by now must have attained majority.

18. This Court is thankful to both the counsels to see that the matter is disposed of.

19. Record and proceedings be sent back to the Tribunal after two weeks.

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**(2021)10ILR A243**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:ALLAHABAD 17.09.2021 & 07.10.2021**

**BEFORE**

**THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.**
**THE HON'BLE SUBHASH CHAND, J.**

FAFO No. 906 of 2008

**Neelesh Kumar Agarwal & Ors.**
**...Appellants**
**Versus**
**Sanjay Kumar Agarwal & Ors.**
**...Respondents**

**Counsel for the Appellants:**
Sri B. Dayal

**Counsel for the Respondents:**
Sri Amit Manohar, Sri Viqar Ahmed Ansari, Sri S.D. Ohja

**(A) Quantum of Compensation -** Even though in the year 1990 to 2000, the addition of future prospects was not ruled out just because tribunals in U.P. were not granting future losses. (Para 10)

**Appeal Partly Allowed.** (E-10)

**List of Cases cited:**

1. Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. First Appeal From Order No. 1818 of 2012

2. General Manager, Kerala S.R.T.C., Trivandrum Vs Susamma Thomas & ors. (1994) 2 SCC 176

3. U.P. S.R.T.C. & ors. Vs Trilok Chandra & ors. (1996) 4 SCC 362

4. Sarla Dixit Vs Balwant Yadav AIR 1996 SC 1274

5. Hardeo Kaur Vs Rajasthan State Transport Corp. 1992 2 SCC 567

6. Puttamma Vs K.L. Narayana Reddy AIR 2014 SC 706

7. Raman Vs Uttar Haryana Bijli Vitran Nigam Limited

8. Bijoy Kumar Dugar Vs Bidyadhar Dutta 2006 (3) SCC 242

9. R.K. Malik Vs Kiran Pal AIR 2009 SC 2506

10. National Insurance Co. Ltd. Vs Pranay Sethi AIR 2017 SC 5157

11. Raj Rani Vs Oriental Isurance Co. Ltd. 2009 (13) SCC 654

12. Ritaben @ Vanitaben W/o Dipakbhai Hariram & Anr. Vs Ahmedabad Municipal Transport Service & anr. 1998 (2) G.L.H. 670

13. New India Assurance Co. Ltd. Vs Urmila Shukla & ors. LL 2021 SC 359

14. Munna lal Jain & anr. Vs Vipin Kumar Sharma & ors. 2015 (6) SCALE 552

15. National Insurance Co. Ltd. Vs Mannat Johal & ors. 2019 (2) T.A.C. 705 (S.C.)

16. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd. 2007 (2) GLH 291

17. Tej Kumari Sharma Vs Chola Mandlam M. S. General Insurance Co. Ltd. First Appeal From First Order No. 2871 of 2016

18. Smt. Sudesna & ors. Vs Hari Singh & Anr. Review Application No. 1 of 2020 in First Appeal From Order No. 23 of 2001

19. A.V. Padma Vs Venugopal 2012 (1) GLH (SC) 442

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard Sri B. Dayal, learned counsel for appellants and Sri Amit Manohar, learned counsel appearing for insurance company.

2. The present appeal has been filed challenging the judgment and award dated 15.12.2007 passed by Motor Accident Claims Tribunal, Pilibhit (hereinafter referred to as 'Tribunal') in M.A.C.P. No. 52 of 2002.

3. This is claimants appeal and is pending since 2008. The Tribunal has considered all other aspects. There is no controversy. The issue which we have to decide are the issue of negligence and the quantum of compensation awarded to the claimant-appellants. While going through the record, it is clear that the accident took place on 28.02.2002 where the deceased who was Bachelor and was running his own business died. As far as the respondent insurance company is concerned, they have accepted the liability.

4. Having heard the learned counsel for the parties, issue of negligence be considered from the perspective of the law laid down.

5. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a

circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply.

6. The principle of contributory negligence has been discussed time and again. A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place.

7. The Division Bench of this Court in **First Appeal From Order No. 1818 of 2012 ( Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 has held as under :

*"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.*

*17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.*

*18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which*

*deceased was riding, was approaching intersection.*

*19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in* ***Rylands V/s. Fletcher, (1868) 3 HL (LR) 330.*** *From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.*

*20. These provisions (sec.110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.*

*21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits (****per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).***

*22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side."* *emphasis added*

8. While considering the evidence of D.W.1, namely, the bus driver, the principles of ***falsus in uno falsus in omnius*** will apply in the facts of the present case. The words ***falsus in uno falsus in omnius*** meaning thereby false one thing would be false in everything should be applied to the facts of this case also. His testimony is totally silent on the way how the accident occurred as even in his oral testimony, he has maintained that his vehicle was not involved in the accident. The deceased did on the spot. The deceased was trying to overtake the horse cart. The charge-sheet was led against the bus driver and therefore, we hold the deceased 25% negligent and not 50% as has been held by the Tribunal.

9. The submission that the Tribunal has not granted any amount towards future loss of income. Grant of future prospects will have to be traced back and reference can be had to

the decision in **General Manager, Kerala S.R.T.C., Trivandrum v. Susamma Thomas & Ors.,(1994) 2 SCC 176** wherein addition of future prospects was also calculated. The decision in **Susamma Thomas (Supra) was referred in U.P.S.R.T.C. & Ors. v. Trilok Chandra & Ors.(1996) 4 SCC 362** which have been considered by the Apex Court in **Sarla Dixit Versus Balwant Yadav AIR 1996 SC 1274** and the Apex Court has considered decision in **Hardeo Kaur V/s. Rajasthan State Transport Corporation, 1992 2 SCC 567.** The decision in Sarla Dixit has been considered to be good law in (1) **Puttamma Vs. K.L.Narayana Reddy, AIR 2014 SC 706 (2) Raman Vs. Uttar Haryana Bijli Vitran Nigam Limited, Bijoy Kumar Dugar Vs. Bidyadhar Dutta, 2006 (3) SCC 242 : (3) Sarla Verma (supra)(4)R.K.Malik Vs. Kiran Pal, AIR 2009 SC 2506 (5) National Insurance Company Limited Vs. Pranay Sethi, AIR 2017 SC 5157 Raj Rani Vs. Oriental Insurance Company Limited, 2009 (13) SCC 654.** We have gone through the decisions in those days referred to herein above and the judgment of Gujarat high court in **Ritaben alias Vanitaben W/o. Dipakbhai Hariram and Anr. v/s. Ahmedabad Municipal Transport Service & Anr., 1998 (2) G.L.H. 670,** wherein, the Court has observed as under:

*"para-7: It is settled proposition of that the main anxiety of the Tribunal in such case should be to see that the heirs and legal representatives of the deceased are placed, as far as possible, in the same financial position, as they would have been, had there been no accident. It is therefore, an action based on the doctrine of compensation.*

*para-8: It may also be mentioned that perfect determination of compensation in such tortuous liability is, hardly, obtainable. However, the Tribunal is required to take an overall view of the facts and the relevant circumstances together with the relevant proposition of law and is obliged to award an amount of compensation which is just and reasonable in the circumstances of the case.*

*para-10: Even in absence of any other evidence an able bodied young man of 25 years, otherwise also presumed to earn an amount of Rs.1000/- or more per month, on that basis the prospective income could be calculated by doubling the one prevalent on the date of the accident, which is required be divided by half, so as to reach the correct datum figure which is required to be multiplied by appropriate multiplier. Even taking a conservative view in the matter, the deceased would be earning not less than an amount of Rs.1000/- per month and considering the prospective average income of Rs.2000/- and divided by half, would, obviously come to Rs.1500/."*

10. Thus even in the year 1990 to 2005, the addition of future prospects was not ruled out, just because tribunals in Uttar Pradesh were not granting future loss, it cannot hold field where the decision of Apex Court is otherwise as demonstrated with decision though of persuasive value of Gujarat High Court referred herein above wherefore, the submission of Sri Amit Manohar that no amount under the head of future loss of income was admissible in those days, will have to be considered. The decision of the Apex Court in **New India Assurance Company Ltd. Vs. Urmila Shukla and others, LL 2021 SC 359** will have to be looked into. Therefore, we will have to consider the same in the light of the recent decisions as well as the decisions of the Apex Court prevailing.

11. In **Malarvizhi & Others and Indiro Devi & Others (Supra)**, it has been held that Income Tax is the mirror of one's income unless proved otherwise. In our case, the returns as it reflects, proved income of deceased to be Rs. 2,04,000/- per annum. On what basis, the Tribunal has disregarded this income cannot be fathomed as a man's income would increase unless proved otherwise. Even in the earlier days, the factors to be considered for issuing quantum of compensation reads as follows:

12. While considering the evidence of D.W.1, namely, the bus driver, the principles of ***falsus in uno falsus in omnius*** will apply in the facts of the present case. The words ***falsus in uno falsus in omnius*** meaning thereby false one thing would be false in everything should be applied to the facts of this case also. His testimony is totally silent on the way how the accident occurred as even in his oral testimony, he has maintained that his vehicle was not involved in the accident. The deceased did on the spot. The deceased was trying to overtake the horse cart. The charge-sheet was led against the bus driver and therefore, we hold the deceased 25% negligent and not 50% as has been held by the Tribunal.

13. Learned counsel for the appellants has submitted that deceased was 26 years of age and was a Bachelor. It is submitted that the Tribunal has considered his income to be Rs.1,20,000/- per annum which is made and it should be at least Rs. 2,04,000/- per annum. It is further submitted that the Tribunal has not added any amount under the head of future loss of income of the deceased which should be 25% of the income in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050;** that multiplier should be applied on the basis of the age of the deceased and not on the basis of age of the parents and for that he has relied on the decision of the Apex Court in **Munna Lal Jain & Anr. Vs. Vipin Kumar Sharma & Ors. 2015 (6) SCALE 552** wherein it has been held that multiplier should be on the basis of the age of the deceased. It also submitted that the interest and the amount under the head of non pecuniary damages are on the lower side and requires enhancement.

14. After hearing the learned counsel for the claimant-appellants and perusing the judgment and order of the Tribunal, which is under challenge before this Court, the income of the deceased should be considered to be Rs.10,000/-. As per the document 86-G the Tribunal could not go on deducting the amount first at the rate of 20% towards personal expenses that is 1/3 of the amount but the Tribunal has deducted 2/3 amount, which is highly deplorable. The computation of the compensation would be as per the provisions of Section 166 of the Motor Vehicle Act. From the record, it is clear that the deceased was upshot his business and he was earning Rs.6,923/- per month and then his income would be Rs.2,43,280/- per annum. All these facts have been ignored by the Tribunal while considering the annual income of the deceased which is bad in the eye of law. Therefore, we hold that the deceased would be earning Rs.1,20,000/- per annum, hence his monthly income would be Rs.10,000/- per month. The Tribunal has held the deceased negligent to the tune of 40% but as per our view it would be 25% and deduction towards personal expenses would be 1/2 as he was Bachelor and

multiplier would be 18 as the deceased died at the age of 26 years, which falls under the age bracket of (26-30). As far as the interest is concerned, the Tribunal has allowed the interest of 6%, which would be 7.5%.

15. The total compensation payable to the claimants is computed herein below:

i. Annual Income Rs. 10,000/-

ii. Percentage towards future prospects : 25% (2500)

iii. Total income : Rs.12,500/-

iv. Income after deduction of 1/2 =Rs.6,250/-

v. Annual income= Rs. 6,250 x 12 =75000/-

v. Multiplier applicable : 18

vi. Loss of dependency: Rs.75000 x 18 =13,50,000/-

vii. Amount under non-pecuniary head : 70,000/-

viii. Total compensation : 14,30,000/-

16. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

*"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."*

17. 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 amount be deposited by the respondent-Insurance Company within a period of 12 weeks from today with interest at the rate of 7.5%. The amount already deposited be deducted from the amount to be deposited.

**DEDUCTIONS OF INCOME TAX FROM THE COMPENSATION AWARDED:**

18. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagori P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291** and this High Court, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimants in their proportion for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceed Rs.50,000/- in any financial year, the deduction is not permissible, registry of the Tribunal is

directed to allow the claimants to withdraw the amount, without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) and in First Appeal From Order No.2871 of 2016 **(Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.)** decided on 19.3.2021 while disbursing the amount.

**DISBURSEMENT BY TRIBUNAL**:

19. The claimants being major and not an illiterate person the judgment of **A.V. Padma Vs. Venugopal, [2012(1) GLH (SC), 442]** will be followed by Tribunal as 11 years have already elapsed since the time of appeal and amount be granted.

20. This Court is thankful to both the counsels for getting this matter disposed of.

21. Let record of court below be sent back to the Tribunal concerned.

Heard Shri S.D. Ojha on behalf of Shri Amit Manohar, learned counsel for the respondent.

This modification application is only for clarifying that out of the total compensation payable, 25% should be deducted as the negligence of the deceased himself.

Correction application is basically modification application, hence this order shall form part of the judgement dated 17.9.2021.

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**(2021)10ILR A250**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:ALLAHABAD 01.09.2021 & 22.09.2021**

**BEFORE**

**THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.**
**THE HON'BLE SUBHASH CHAND, J.**

FAFO No. 1066 of 2021

**Smt. Sunita Pandey & Ors. ...Appellants**
**Versus**
**Bal Kishun & Anr. ...Respondents**

**Counsel for the Appellants:**
Sri Ramesh Chandra Pathak

**Counsel for the Respondents:**
Sri Pradeep Kumar Sinha

**(A) Quantum of Compensation -** The total compensation payable was calculated in view of the decision of the Apex Court in National Insurance Company Limited Vs Pranay Sethi. (Para 9)

**Appeal Partly Allowed.** (E-10)

**List of Cases cited:**

1. National Insurance Company Limited Vs Pranay Sethi and Ors. 2017 0 Supreme (SC) 1050 *(followed)*

2. Sarla Verma Vs Delhi Transport Corporation (2009) 6 SCC 121

3. Vimal Kanwar &ors. Vs Kishore Dan & ors. AIR 2013 SC 3830

4. A. V. Padma Vs Venugopa 2012 (1) GLH (SC) 442

5. Smt. Hansaguti P. Ladhani Vs The Oriental Insurance Co. Ltd. 2007 (2) GLH 291

6. Smt. Sudesna & ors. VsHari Singh and Anr. Review Application No. 1 of 2020 in First Appeal From Order No. 23 of 2001

7. National Insurance Co. Ltd. Vs Mannat Johal & ors. 2019 (2) T.A.C. 705 (S.C.)

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard Shri Ramesh Chandra Pathak, learned counsel for the appellants; Shri Pradeep Kumar Sinha, learned counsel for the respondents; and perused the record.

2. This appeal, at the behest of the claimants, challenges the judgment dated 07.09.2017 passed by Motor Accident Claims Tribunal/Special Judge (E.C. Act), Basti (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No.85 of 2016 awarding a sum of Rs.8,94,700/- with interest at the rate of 7% as compensation.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The respondent concerned has not challenged the liability imposed on them. The only issue to be decided is, the quantum of compensation awarded.

4. I t is submitted by learned counsel for the appellants that the Tribunal has not granted any amount towards future loss of income of the deceased which is required to be granted in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050**. It is further submitted that amount under non-pecuniary heads granted and the interest awarded by the Tribunal are on the lower side and require enhancement. It is also submitted that as the deceased was survived by his wife, one minor son and father, and hence the deduction towards personal expenses of the deceased as 1/3 which is not in dispute. The multiplier has to be as per that of deceased.

5. Learned counsel for the respondents, has vehemently objected the contentions raised by the learned counsel for the appellants and has submitted that the compensation awarded by the Tribunal is just and proper and does not call for any enhancement.

6. Having heard the learned counsel for the parties and considered the factual data, this Court found that the tribunal did not consider the case of the appellants in its proper prospective. The accident occurred on 20.10.2015 causing death of Anjani Kumar Pandey who was 37 years of age and left behind him, wife, one minor son and father. The tribunal decided the issue of negligence in favour of the appellants and, therefore, the same is not discussed. The discussion in this appeal is confined to award of compensation as decided in issue No.11. The facts as the emerged from the judgment and findings in issue No.11 goes to show that deceased Anjani Kumar Pandey was the husband of appellant No.1 and father of appellant No.2 and son of appellant No.3. At the time of the accident, he was aged about 34 years. The deceased was a Teacher in Primary School in Village Chaturi, District Sravasti and was getting Rs.7300/- per month. The deceased was in hospital after the accident which took place on 20th October, 2015 and the deceased died after six days, when he was admitted in Trauma Centre Lucknow. The appellants examined three witnesses but we are more concerned with the evidence of PW-3, Shri Viswanath Shukla who was serving in Zila Basti as a Teacher and who deposed on oath that the deceased was getting

Rs.7300/- per month and if he would have been appointed his pay band Rs.9300/-. The tribunal unfortunately considered his income to be Rs.7300/- per month. The tribunal deducted 1/3 as personal expenses and held that Rs.58,400/- per annum datum figure available to the family. The tribunal considered the judgment of **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** and granted multiplier of 15, Rs.8700/- granted for medical expenses and Rs.10,000/- for non pecuniary damages with 7% rate of interest.

7. It is contended that the learned tribunal did not consider any amount under the head of future loss of income though the deceased was in employment and the accident had occurred in the year 2015 much after the judgment in **Vimal Kanwar and others v. Kishore Dan and others, AIR 2013 SC 3830.** The fact that the delay in FIR has not been accepted to be a ground for discarding the evidence as the tribunal has not considered delay in filing of the FIR. Therefore, we do not delve with the same, the opponent has not examined any witness, the charge-sheet has lodged against the driver of the truck. As per the site plan, the truck came from behind and dashed with the vehicle. The post mortem report as discussed by the tribunal showed that the injuries caused due to the accident. The findings of the fact that accident was caused because of negligence of the truck driver. Hence, we are unable to concur with the oral submission of learned counsel for Insurance Company that we should re-valuate the negligence and hold the deceased to be contributory negligence.

8. The submission of learned counsel for respondents cannot be countenanced as even as per the Uttar Pradesh Motor Vehicles Act, 1998 will not permit us to concur with the tribunal. To which as the deceased was age bracket of 36-40 years, 50% of the income will have to be added as future prospects in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.** As far as deduction towards personal expenses of the deceased is concerned, it should be 1/3 as the deceased had three persons to feed and multiplier of 15 is maintained. The medical expenses would be Rs.25,000/- looking to the hospitalize of 6 days and Rs.70,000/- for under the non pecuniary heads.

9. Hence, the total compensation payable to the appellants in view of the decision of the Apex Court in Pranay Sethi (Supra) is computed herein below:

i. Income Rs.7300/- p.m.

ii. Percentage towards future prospects : 50% namely Rs.3650/-

iii. Total income : Rs. 7300 + 3650 = Rs.10950

iv. Income after deduction of 1/3 : Rs.7300/- (rounded figure)

v. Annual income : Rs.7300 x 12 = Rs.87,600/-

vi. Multiplier applicable : 15(as the deceased was in the age bracket of 36-40 years)

vii. Loss of dependency: Rs.87600 x 15 = Rs.131400/-

viii. Amount under non pecuniary heads : Rs.70,000/- and Rs.25,000/- (for medical expenses looking to the hospitalize of 6 days)

ix. Total compensation : Rs.14,09,000/-.

10. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442,** the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

11. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291**, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income-Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 **(Smt. Sudesna and others Vs. Hari Singh and another)** while disbursing the amount.

12. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and not blindly apply the judgment of A.V. Padma (supra). The same is to be applied looking to the facts of each case.

13. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

*"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."*

14. 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 along with additional 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.

15. Record and proceedings be sent back to the Tribunal after two weeks.

16. We are thankful to learned counsels who have ably assisted the Court.

Order corrected.

Correction application is allowed.

We are thankful of Sri P.K. Sinha for bringing this correction to the notice of the Bench

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**(2021)10ILR A254**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:ALLAHABAD 16.09.2021**

**BEFORE**

**THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.**
**THE HON'BLE SUBHASH CHAND, J.**

FAFO No. 1169 of 2020

**Smt. Pinki & Ors. ...Appellants**
**Versus**
**Himanshu Kumar & Anr. ...Respondents**

**Counsel for the Appellants:**
Sri Nigamendra Shukla

**Counsel for the Respondents:**
Sri Aditya Singh Parihar

**(A) Quantum of Compensation -** The Tribunal erred in fixing the national income of the deceased by rejecting his appointment letter as well as the testimony of the Shivam Infocom Pvt. Ltd., where he was working. (Para 13)

**Appeal Partly Allowed.** (E-10)

**List of Cases cited:**

1. Lakshmi Dharnayak & ors. Vs Jugal Kishore Behera & ors. 2018 (1) TAC (SC)

2. Sarla Verma Vs DTC 2009 (6) SCC 121

3. National Insurance Co. Ltd. Vs Pranay Sethi 2017 (13) SCALE *(followed)*

4. Bjaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. First Appeal From Order No. 1818 of 2012

5. Khenyei Vs New India Assurance Co. Ltd. & ors. 2015 Law Suit (SC) 469

6. Smt. Indira Pathak Vs A.D.J.-2, Allahabad & ors. 1989 A.W.C. 281

7. Malarvizhi & ors. Vs United India Insurance Co. Ltd.& anr. 2020 (4) SCC 228

8. United India Insurance Co. ltd. Vs Indiroo Devi & ors. 2018 (7) SCC 715

9. The Oriental Insurance Co. Ltd. Vs Mangey Ram & ors. 2019 0 Supreme (All) 1067

10. New India Assurance Company Vs Urmila Shukla MANU/SCOR/24098/2021

11. Kriti & ors. Vs Oriental Insurance Co. Ltd. 2021 (1) TAC 1

12. National Insurance Co. Ltd. Vs Mannat Johal & ors. 2019 (2) T.A.C. 705 (S.C.) *(followed)*

13. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co Ltd. 2007 (2) GLH 291 *(followed)*

14. Smt. Sudesna & ors. Vs Hari Singh and Anr. Review Application No. 1 of 2020 in First Appeal From Order No. 23 of 2001 *(followed)*

15. Tej Kumari Sharma Vs Chola Mandlam M.S. General Insurance Co. Ltd. First Appeal From Order No. 2871 of 2016 *(followed)*

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard Sri Nigamendra Shukla, learned counsel for the appellant and Shri Aditya Singh Parihar, learned counsel for the respondent-Insurance Company.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 01.02.2020 passed by Motor Accident Claims Tribunal/Additional District Judge (F.TC.), Bulandshahar (hereinafter referred to as 'Tribunal') in M.A.C. No. 327 of 2014.

3. Brief facts as culled out from the record are that on 22.07.2014 at around 2:30 p.m deceased Arvind Kumar was on his way to his office by his motor-cycle bearing no. U.P-13AQ-2367, when he reached near P-3 Gol Chakkar, Noida, Gautambudhnagar in front of C & C Factory a Bolero bearing no. UP-17T-6826 driven rashly, negligently by his driver from either side dashed into the motor-cycle of deceased Arvind Kumar as a result of which he sustained grievous and fatal injuries and was admitted to Yatharth Hospital, Greater Noida where he succumbed to his injuries.

4. The deceased was 34 years of age at the time of accident. He was working as a technician in Shivam Infocom Pvt. Ltd. He was survived by his father, mother, wife and two minor children. The Tribunal has considered his income to be Rs. 4,500/- p.m, deducted 1/4th towards personal expenses of the deceased, granted multiplier of 16, granted Rs.40,000/- towards compensation for loss of consortium, granted Rs,. 15,000/- for compensation for loss of estate, granted Rs. 15,000/- towards funeral expenses and ultimately assessed the total compensation to be Rs.9,77,000/-.

5. Learned counsel for the appellant has submitted that the deceased Himanshu Nagaria was 34 years, working as technician in Shivam Infocom Pvt. Ltd and was earning Rs. 12,460/- p.m. The learned counsel for the appellant contends that he was below the age of 40 years, the tribunal should have added 50% to his income but the tribunal had added only 40% to his income. It is submitted by him that amount of non pecuniary of Rs. 70,000/- requires to be enhanced.

6. As against this, Shri Aditya Singh Parihar, learned counsel for the respondent-insurance Company contends that deduction of 1/4rd from personal expenses is not just and proper, it should be 1/3nd. As far as rate of interest is concerned it is further submitted that interest granted by the Tribunal is 6% is just and proper.

7. Having heard the learned counsel for the parties, income considered by tribunal of deceased is Rs. 4,500/- per month on the basis that the documentary evidence produced did not inspire confidence of the Tribunal. The deceased was employed in Shivam Infocom Pvt. Ltd. where he had taken training much prior to his appointment as technician. The tribunal relied on decision of **Lakshmi Dharnayak and Others Vs. Jugal Kishore Behera and Others 20108 (1) TAC (SC), Sarla Verma Vs. DTC 2009 (6) SCC 121 and National Insurance Company Ltd. Vs. Pranya Sethi 2017 (13) SCALE** and discarded the evidence produced before it. The Tribunal has committed error is the submission of appellant which is vehemently objected by Shri Aditya Singh Parihar, learned counsel for the respondent-Insurance Company. It is contended by Shri Aditya Singh Parihar, learned counsel for the respondent-Insurance Company that deceased was in private employment, therefore, future prospects added at 40 % of income is just and proper. It is further submitted that now this Court is hearing this appeal under Section 173 M.V. Act,

Order 43 Rule 7 C.P.C, his oral objections may be considered. He further contends that father cannot be considered to be dependent on his son as he would have his own income and two minor children is alone would be dependent along with widow. Let us consider the negligence from the perspective of the law laid down as is is orally submitted by Shri Aditiya Singh Parihar, learned counsel for the respondent-Insurance Company that deceased was also negligent.

8. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply.

9. The principle of contributory negligence has been discussed time and again. A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place.

10. The Division Bench of this Court in **First Appeal From Order No. 1818 of 2012 ( Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 has held as under: :

*"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.*

12. The latest decision of the Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 Law Suit (SC) 469** has laid down one further aspect about considering the negligence more particularly composite/contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care. In this case the deceased was not the author or the co-author of the accident. The finding of fact regarding non negligence of the deceased cannot be fault with. The Insurance Company now the owner of the vehicle entered the witness box. The deceased died ot of the injuries which was caused to him. Evidence of P.W-3 and P.W.-4 corroborates each other.

P.W.-3 has deposed that deceased was on the correct side when the Bolero came and dashed with him and he has taken the deceased to the hospital. The tribunal has relied on decision of Smt. Indira Pathak Vs. Additional District Judge-2, Allahabad and others, 1989 A.W.C. 281. The oral prayer of ld. Counsel for Insurance Company that deduction of 50% from the compensation be made is rejected.

13. This takes this Court to the compensation awarded. We would place reliance on the Apex court decision in **Malarvizhi & Ors Vs. United India Insurance Company Limited and Another, 2020 (4) SCC 228 and United India Insurance Co. Ltd. Vs. Indiro0 Devi & Ors, 2018 (7) SCC 715. and in The Oriental Insurance Company Ltd. Vs. Mangey Ram and others, 2019 0 Supreme (All) 1067** and the recent judgment of the Apex Court in **New India Assurance Company Vs. Urmila Shukla decided by the Apex Court on 6.8.2021 reported in MANU/SCOR/24098/2021 and Kirti and others vs oriental insurance company ltd reported in 2021(1) TAC 1It could not be culled out from record that** on what basis, the Tribunal has deducted the pecuniary benefits from the income of a salaried person cannot be fathomed. The Tribunal did not rely on the appointment letter of the deceased which was produced at 51C2/2. The Tribunal did not believe it because the document showed that it was given on 25.04.2014 at 9:30 a.m. The Tribunal did not believe the testimony as the name of Shivam Infocom Pvt. Ltd. and there was some discrepancy. The Tribunal therefore, discarded this document which it could not have done in view of the decision of the Apex Court in **Anita Sharma's (Supra).** Hence, fixing notional income of the deceased was bad when he was a salaried person. The income of the deceased in the year of accident and looking to his vocation can be considered to be Rs.10,000/- per month as the deceased is below 40 years, 50% as future loss of income requires to be added in view of the decision of the Apex Court in **Pranay Sethi (Supra).** As far as amount under the head of non-pecuniary damages are concerned, it should be Rs.70,000/- + 10% increase as per the decision of the Apex Court in Pranay Sethi (Supra) as three years have elapsed hence, the lump sum amount under this head would be Rs.1,00,000/-. As far as multiplier is concerned, it is 16.

14. Hence, the total compensation payable to the appellants is computed herein below:

i. Income= Rs.10,000/-

ii. Percentage towards future prospects : (50%) Rs.5000/-

iii.Total income : Rs. 10,000 + 5,000= Rs.15,000/-

iv. Income after deduction of 1/3 : Rs. 10,000/-

v. Annual income : Rs. 10,000 x 12 = Rs.1,20,000/-

vi. Multiplier applicable : 16

vii. Loss of dependency: Rs.1,20,000 x 16 = Rs.19,20,000/-

viii. Amount under non-pecuniary head= 70,000/-Plus Rs 30,000/as per pranay sethi (supra) = 1,00,000/-

ix. Total compensation :RS: 20,20,000/-

15. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

*"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."*

16. In view of the above, the appeal is partly allowed. Oral cross objections is allowed as far as certain calculation is concerned and compensation is recalculated. Judgment and award 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. The Insurance Company will deposit the entire amount.

17. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagori P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291** and this High Court in , total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 **(Smt. Sudesna and others Vs. Hari Singh and another) and in First Appeal From Order No.2871 of 2016 (Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.)** decided on 19.3.2021 while disbursing the amount.

18. Record be sent back to tribunal forthwith.

19. This Court is thankful to both the learned Advocates for getting this matter disposed of during this pandemic.

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**(2021)10ILR A258**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:ALLAHABAD 30.09.2021**

**BEFORE**

**THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.**
**THE HON'BLE SUBHASH CHAND, J.**

FAFO No. 1408 of 2021

**Smt. Dareshwati & Anr. ...Appellant**
**Versus**
**Meerut City Transport Services Ltd.& Ors. ...Respondents**

**Counsel for the Appellant:**
Sri Pranshu Gupta

**Counsel for the Respondents:**
Sri Sunil Kumar Misra

**(A) Quantum of Compensation -** The calculation has to be done namely, (i) the income of deceased; (ii) then ass future loss of income; (iii) then deduct the personal expenses of deceased as per dependents**;** (iv) add multiplier as per age of deceased not that of dependents; (v) add pecuniary damages; and (vi) interest as per provisions of Section 171 Motor Vehicle Act, 1988 and if there is negligence attributable to deceased, no deduction. (Para 6)

**Appeal Partly Allowed.** (E-10)

**List of Cases cited:**

1. National Insurance Co. Ltd. Vs Pranay Sethi & Ors. 2017 0 Supreme (SC) *(followed)*

2. Munna Lal Jain & anr. Vs Vipin Kumar Sharma & ors. 2015 Law Suit (SC) 536

3. National Insurance Co. Ltd. Vs Mannat Johal & ors. 2019 (2) T.A.C. 705 (S.C.) *(followed)*

4. A.V. Padma Vs Venugopal 2012 (1) GLH (SC) 442 *(followed)*

5. Smt. Hansaguri P. Ladhani Vs The Oriental Insurance Co. Ltd. 2007 (2) GLH 291 *(followed)*

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard Sri Pranshu Gupta, learned counsel for the appellants, Sri S.K. Mishra, learned counsel for the respondent and perused the judgment and order impugned.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 22.1.2021 passed by Motor Accident Claims Tribunal, Meerut (hereinafter referred to as 'Tribunal') in M.A.C.No.65 of 2018 awarding a sum of Rs.7,66,134/- with interest at the rate of 7% as compensation. 3. Despite

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The respondent has not challenged the liability imposed on them. The only issue to be decided is, the quantum of compensation awarded.

4. Despite the fact that the Tribunal has referred to the Judgment of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050**, it has held that law prescribes that multiplier is applicable to the age of the parent which is vehemently objected by Sri Pranshu Gupta that the Tribunal has misread the law on the point.

5. Judgment in **Munna Lal Jain and another v. Vipin Kumar Sharma and others, 2015 Law Suit (SC) 536** and Pranay Sethi **(supra)** would not permit us to concur with the Tribunal as the multiplier has to be as per the age of the deceased. In that view of the matter, the finding of the Tribunal in para 31 is reversed. Multiplier of 17 would be applicable in the present case.

6. This now takes us to the quantum awarded by the Tribunal. The Tribunal has fallen in error and has misdirected itself in granting what can be said to be 40% under the head of future loss of income. Pranay Sethi (supra) only bifurcates self employed, non-employed and people who are in employment. Evidence categorically shows that the

deceased was working as peon in ICICI Bank Branch Bachcha Park, Meerut and was getting salary also, which is clear from paragraph 29. He had joined in the pay scale of Rs.8,810/- which thereafter was increased to Rs.11,047/-. However, the amount of Rs.10,617/- was deposited in the month of 2017 in his bank accounts and, therefore, we also consider the same as his income.We are unable to be accept the submission of Sri Mishra that 40% awarded by the Tribunal is just and proper. It should be 50%. One more aspect is noted namely that the Tribunal has considered the income, namely Rs.10617/- then deducted 1/2 as expenses of deceased, who was bachelor, and then added 40% which cannot be done. The caluculation has to be considered, namely, (a) the income of deceased; (b) then add future loss of income (c) then deduct the personal expenses of deceased as per dependents; (d) add multiplier as per age of deceased not that of dependents; (e) add non pecuniary damages; and (f) interest as per provisions of Section 171 Motor Vehicles Act, 1988 and if there is negligence attributable to deceased, no deduction. The total compensation payable to the appellants in view of the decision of the Apex Court in Pranay Sethi (Supra) is computed herein below:

i. Income Rs.10,617/- p.m.

ii. Percentage towards future prospects (50%) : Rs.5,308/- (rounded up)

iii. Total income : Rs.10,617/- +Rs.5,308/- = Rs.15,925/-

iv. Income after deduction of 1/2 towards personal expenses : Rs.7,962/- (rounded up)

v. Annual income : Rs.7,962/- x 12 = Rs.95,544/-

vi. Multiplier applicable : 17

vii. Loss of dependency: Rs.95,544/- x 17 = Rs.16,24,248/-

viii. Amount under non pecuniary heads : Rs.70,000/-

ix. Total compensation : Rs.16,94,248/-

7. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

8. No other grounds are urged orally when the matter was heard.

9. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V.**

**Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442,** the order of investment be passed.

10. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguri P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291**, total amount of interest, accrued on the principal amount of compensation has to be apportioned in every financial year to financial year basis and if the interest payable to claimant for any financial year exceeds taxable limits, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income-Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) while disbursing the amount.

11. 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.

12. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Registrar General is requested to forward the Judgment to learned Presiding Authority of the Tribunal so that such glaring errors are not committed in future.

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**(2021)10ILR A261**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:ALLAHABAD 31.08.2021**

**BEFORE**

**THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.**
**THE HON'BLE SUBHASH CHAND, J.**

FAFO No. 1519 of 2020

**Sanjay Kumar Sadwani & Anr....Appellants**
**Versus**
**M/S Ramlal & Sons & Ors. ...Respondents**

**Counsel for the Appellants:**
Sri Shreesh Srivastava

**Counsel for the Respondents:**
Sri Pawan Kumar Singh

**(A) Appeal -** The claim petition under the provisions of Motor Vehicle Act, 1988 has to be decided with all preponderance of probability and on taking holistic approach in such matters. (Para 14)

**Appeal Disposed of.** (E-10)

**List of Cases cited:**

1. Sunita & ors. Vs Rajasthan State Road Transport Corporation & anr. 2019 LawSuit (SC) 190

2. Mangla Ram Vs Oriental Insurance Co. Ltd. & ors. 2018 LawSuit (SC) 303

3. Parshuram Pal Vs Ram Lakhan 2014 (1) TAC 621

4. Jai Prakash Vs National Insurance Co. Ltd. (2010) 2 SCC 607

5. Vimla Devi & ors. Vs National Insurance Co. Ltd. & anr. (2019) 2 SCC 186

6. Anita Sharma & ors. Vs The New India Assurance Co. Ltd. & anr. 2021 (1) SCC 171

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard Sri Shreesh Srivastava, learned counsel for appellant and Sri Pawan Kumar Singh, learned counsel for respondent and perused the record.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 22.07.2020 and the decree dated 29.09.2020 passed by Motor Accident Claims Tribunal, Kanpur Nagar (hereinafter referred to as 'Tribunal') in M.A.C.P. No.1153 of 2014 (Sanjay Kumar Sadwani and another Vs. M/s Ramlal and others) whereby the claim petition filed by the claimant-appellants has been dismissed.

3. Factual data as culled out from the record will go to show that the deceased was not *tort feasor*. Factual data as revealed from the record is that on the fateful day the deceased along with his friend wanted to go for a ride at night though on the date of the night the driver of the car drove the vehicle rashly and negligently and the car turned turtle and due to this accident occurred in the night on 05.09.2014. Unfortunately the death of only son of the claimant occurred on 11.09.2014 after being treated in the hospital.

4. The claimants instituted the claim seeking compensation. The father of the deceased d eposed though as P.W.1 and one Raman Deep Katariya as P.W. 2.

5. The P.W.2 Ramadeep Kataria was himself travelling in the car with the deceased he was an eye witness of the incident and appeared before the Tribunal and established the factum of accident having taken place but the learned Tribunal without any rebuttal from opposite side disbelieved the factum of the accident and straight way rejected the claim petition.

6. The driver and owner of the vehicle have disputed the facts as alleged in the claim petition. The insurance company has lastly filed its reply of rebuttal contending therein that the vehicle was not insured with them. The respondent no.3 Vishal Arora filed its reply and contended that accident did not occur due to his negligence or because of it. The tribunal has framed as far as four issued but decided issue nos. 1 and 4 against the claimants and dismissed the claim petition.

7. The tribunal while dismissing the claim petition recorded finding of fact which is based on conjecture and surmises holding that it was the duty of the friends of the deceased, who were sitting with him to inform about the accident to the concerned police station.

8. he learned counsel for the appellants has placed reliance in the case **Sunita and others Vs. Rajasthan State Road Transport Corporation and another [2019 LawSuit (SC) 190] and Mangla Ram Vs. Oriental Insurance Co. Ltd. and others [2018 LawSuit (SC) 303].**

9. Sri Pawan Kumar Singh, learned counsel for respondent has contended that the judgment which is assailed cannot be found fault with as it is unbelievable how the person travelling alone sustained

injuries rather fatal. The postmortem report is also silent about the same.

10. The Tribunal has erred on facts while deciding the issue of delay in lodging the FIR but the factum of delay has been clearly explained by the claimants stating therein that just after the accident, they took the deceased to the hospital where he was remain admitted for six days and during this interregnum period the claimant was busy in providing best treatment to his only son so that the life of his son could be saved. Ultimately, they could not saved the life of his son and he succumbed to the injuries but the learned Tribunal has ignored all these facts and has illegally rejected the claim of the claimants.

11. It is admitted position that the deceased son of the claimants' remained hospitalized for about six days. The medical certificate as well as documentary evidence also go to show the factum of accident. It appears that learned Tribunal has been over hyper technical while rejecting the claim of the claimants. Had not it been a cause of collision the respondent would not have filed its reply disputing his presence also. The charge-sheet was laid against the vehicle of the driver. The first information report was belated because of the reason that the father of the deceased was busy with the care of his own son who was battling for life.

12. The decisions on which reliance has been placed would permit us to hold that the death was caused due to the injuries which the deceased had sustained when the Car turned turtled. The FIR was lodged on 11.09.2014 and that the deceased was shifted to the hospital where he breathed his last on 26.09.2014. The deceased was non tort feasor. The evidence of P.W.2 has not been believed. The Tribunal has given reasons that three friends of the deceased did not file any report and that on 05.09.2014 at 1.00 AM the deceased whether was in the vehicle or not was not known. The learned Tribunal has heavily relied on the decision in the case of **Parshuram Pal Vs. Ram Lakhan, 2014 (1) TAC 621,** which according to us is misreading of factual data. The documentary evidence produced goes to show that the charge-sheet which was laid on the medico legal report also shows that one Ankit Sadwani was also brought and it was reported that his condition was critical as he was in a vehicle which hit on a pole.

13. The Tribunal has further misdirected itself in brushing aside the factual data. The judgment of **Jai Prakash Vs. National Insurance Company Ltd., (2010) 2 SCC 607** where the detail guidelines are given the Tribunal should have before rejecting the claim petition on minor contradictions ought to have considered the evidence of eye witnesses, which was such, which brought home the facts alleged in the claim petition.

14. The recent judgments of the Apex Court in **Vimla Devi and others Vs. National Insurance Company Ltd. and another (2019) 2 SCC 186 and Anita Sharma and others Vs. The New India Assurance Company Limited and another 2021 (1) SCC 171** will also not permit us to concur with the Tribunal that on hyper technical and cryptic manner in which the claim petition has been dismissed, cannot be permitted. The claim petition under the provisions of Motor Vehicle Act, 1988 has to be decided with all preponderance of probability and on taking holistic approach in such matters.

15. Thus in view of the decisions of Apex Court and the injury on the temporal

bone and the postmortem report will permit us to hold that the vehicle was involved in the accident and that the deceased died due to accidental injuries, as a recent matter we do hesitate to decide the quantum and other aspects, hence the Tribunal is directed to decide the same, as expeditiously as possible but not later than 31st of December, 2021.

16. We are thankful to the counsel for the parties who have assisted the Court in disposing of this appeal finally.

17. Let record of court below be sent back to the concerned Tribunal.

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**(2021)10ILR A264**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:ALLAHABAD 16.09.2021**

**BEFORE**

**THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.**
**THE HON'BLE SUBHASH CHAND, J.**

FAFO No. 2253 of 2015
With
FAFO No. 2507 of 2015

**Israt Jahan & Ors. ...Appellants**
**Versus**
**Sandeep Kumar & Ors. ...Respondents**

**Counsel for the Appellants:**
Sri Ram Singh

**Counsel for the Respondents:**
Sri Pravin Kumar Singh, Sri Ajay Kumar Srivastava, Sri Archit Mehrotra, Sri Atul Kumar Srivastava, Sri Sushil Kumar Mehrotra

**(A) Quantum of Compensation -** The total compensation payable was calculated in view of the decision of the Apex Court in National Insurance Company Limited Vs Pranay Sethi. (Para 10)

**Appeals Partly Allowed.** (E-10)

**List of Cases cited:**

1. Kishan Gopal & anr Vs Lala & ors. (2014) 1 Supreme Court Cases 244

2. Rajendra Singh & ors. Vs National Insurance Co. Ltd. 2020 0 Supreme (SC) 411

3. Nagma Bano Vs Harish Chandar Gupta & 3 ors. 2017 LawSuit (All) 4510

4. United India Insurance Co. Ltd. Vs Satinder Kaur @ Satwinder Kaur & ors. 2020 (3) TAC 6 (SC)

5. Saiyyad Azadar Husain Vs Swami Viveka Nand Vidhyashram & anr. FAFO No. 2235 of 2014

6. National Insurance Co. Ltd. Vs Pranay Sethi & ors. 2017 0 Supreme (SC) 1050 *(followed)*

7. National Insurance Co. Ltd. Vs Mannat Johal & ors. 2019 (2) T.A.C. 705 (S.C.)

8. A.V. Padma Vs Venugopal 2012 (1) GLH (SC) 442

9. Smt. Hansaguti P. Ladhani Vs The Oriental Insurance Co. Ltd. 2007 (2) GLH 291

(Delivered by Hon'ble Subhash Chand, J.)

1. Heard Sri Ram Singh, learned counsel for the appellants, Sri S.K. Mehrotra, learned counsel for the respondent-Insurance Company in both the appeals.

2. Both these appeals challenge the Judgment and award dated 22.5.2015 passed by Motor Accident Claim Tribunal/Special Judge SC/ST, District Fatehpur (hereinafter referred to as 'the Tribunal') in Motor Accident Claim

Petition Nos. 87 of 2014 & 88 of 2014 awarding a sum of Rs. 1,60,000/- and Rs. 5,27,000/- respectively.

3. Facts in brevity as per the claim petition are that on 16.2.2014, husband of the deceased, namely, Mohd. Sabir and daughter of Kausar Jahan, after attending an invitation at Village Ladigavna, PS Lalauli, District Fatehpur, were coming back to Village Bilandpur, PS Kotwali, District Fatehpur riding on motor cycle bearing Registration No. UP 71 L 6352. As soon as they reached on Banda Sagar thoroughfare falling under area area Ghazipur, District Fatehpur near Mohini Nagar Board ahead R.V.S. International School, driver of pick up van bearing Registration No. UP 71 T 4087 on its way Fatehpur to Bahuwa, driving rashly and negligently, without blowing horn came and dashed the motor cycle as a result of which husband of the claimant died on the spot while her daughter was rushed to District Hospital, Fatehpur where she was declared dead. At the time of death Mohd. Sabir was aged 33 years while the daughter was about 12 years of age.

4. Claimant-legal heirs of both the deceased filed a claim petition under Section 140 read with Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'the Act'). The respondent filed its reply one of the denial. Neither the Insurance Company nor the owner led any evidence. The accident having occurred involving both the vehicles is now accepted position as neither the owner nor the Insurance Company have challenged the findings on any of the issues decided against them by the Tribunal.

5. The only question in both the appeals to be decided by us is the quantum awarded.

6. The Tribunal has awarded a sum of Rs.1,60,000/- with 7 per cent interest for the death of minor daughter of the claimant. Deceased was 12 years of age at the time of accident. The Tribunal has gone on the basis of principles for grant of compensation as per Section 163 A of M.V. Act and has considered the income of the deceased to be Rs. 15,000/- per year and has deducted 1/3rd for personal expenses and multiplied the same with 16 and granted Rs.10,000/- as non pecuniary damages.

7. Learned counsel Sri Ram Singh for the appellants has relied on the Judgments of Apex Court in **Kishan Gopal and another Vs. Lala and others, (2014) 1 Supreme Court Cases 244; Rajendra Singh and others Vs. National Insruance Company Ltd. And others, 2020 0 Supreme (SC) 411;** and Judgment of this Court in **Nagma Bano Vs. Harish Chandar Gupta and three others, 2017 LawSuit (All) 4510** so as to contend that the claimant, who is mother, is entitled to a sum of Rs.5,00,000/- for the death of twelve year old child.

8. The decision in Nagma Bano **(supra**), Kishan Gopal **(supra)**, which is distinguished in Rajendra Singh **(supra)** and, without further delving into this issue, we grant a sum of Rs.2,95,000/- as granted in Rajendra Singh for the death of minor daughter, namely, Kausar Jahna with 7.5 interest from date of claim petition till deposit of differential amount before the Tribunal.

9. As far as the death of husband of the claimant is concerned, the deceased was serving in a foreign country. The recent Judgment of the Apex Court in United India Insurance Company Ltd. Vs. Satinder Kaur

@ Satwinder Kaur and others, 2020 (3) TAC 6 (SC) and the Judgment of this Court in FAFO No. 2235 of 2014, Saiyyad Azadar Husain Vs. Swami Viveka Nand Vidhyashram and another, decided on 5.8.2021, which are pressed into service would enure for the benefit of the appellants. The evidence has been disbelieved by the Tribunal only on the ground that the claimants did not examine anybody from office where the deceased was serving in foreign country. The passport, visas and all other material, which we have perused, would permit us to consider his income as Rs.10,000/- as he was skilled labourer and was in a foreign country. As he was having a fixed income, the addition of 50 per cent towards future prospect made by the Tribunal is maintained. The deceased had a wife and two minor children, hence, deduction of 1/3rd is maintained, multiplier of 16 is also maintained. The amount granted for non-pecuniary damages by the Tribunal is enhanced to Rs.70,000/-.

10. Hence, the total compensation payable to the appellants in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050** is computed herein below:

i. Income Rs.10,000 p.m.

ii. Percentage towards future prospects : Rs.5,000/-

iii. Total income : Rs.10,000/- +Rs.5,000/- = Rs.15,000/-

iv. Income after deduction of 1/3rd towards personal expenses : Rs.10,000/-

v. Annual income : Rs.10,000/- x 12 = Rs.1,20,000/-

vi. Multiplier applicable : 16

vii. Loss of dependency: Rs.1,20,000/- x 16 = Rs.19,20,000/-

viii. Amount under non pecuniary heads : Rs.70,000/-

ix. Total compensation : **Rs.19,90,000/-**

11. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

12. No other grounds are urged orally by any of the advocates when the matter is being heard and decided.

13. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of

investment is not passed because applicant /claimant is neither illiterate nor rustic villager.

14. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291,** total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) while disbursing the amount.

15. In view of the above, both these appeals are 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.

16. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and not blindly apply the judgment of **A.V. Padma (supra).** The same is to be applied looking to the facts of each case.

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**(2021)10ILR A267**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:ALLAHABAD 28.09.2021**

**BEFORE**

**THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.**
**THE HON'BLE VIVEK VARMA, J.**

FAFO No. 2388 of 2018

**Smt. Poonam Devi & Ors. ...Appellants**
**Versus**
**Manager United India Insurance Co. Ltd., Varanasi & Ors. ...Respondents**

**Counsel for the Appellants:**
Sri Shrawan Kumar Ojha, Sri S.D. Ojha

**Counsel for the Respondents:**
Sri Sushanshu Pandey, Sri Mohan Srivastava, Ruchi Mishra, Sri Satya Deo Ojha

**(A) Practice & Procedure - Motor Accident Claims -** The principles of evidence and standard of proof like in a criminal trial are inapplicable in motor accident claim cases. (Para 19)

The Tribunal erred in rejecting the claim petition just because the mother of the deceased was not an eye witness to the incident. (Para 20)

**Appeal Allowed.** (E-10)

**List of Cases cited:**

1. Anita Sharma & ors. Vs The New India Assurance Co Ltd. & anr. 2020 0 Supreme (SC) 704 *(followed)*

2. Vimla Devi & ors. Vs National Insurance Co. Ltd. & anr. (2019) 2 SCC 186

3. Mangla Ram Vs Oriental Insurance Co. Ltd. (2018) 5 SCC 656

4. Munna lLal Jain Vs Vipin kumar Sharma 2016 (2) ACCD 1094

5. Smt. Sarla Verma Vs Delhi Transport Corp. & anr. 2009 (2) ACCD 924

6. Vinod Shankar Shukla Vs Bhoruka Logistic Pvt. Ltd. 2017 (1) DMP 232

7. Sumitra Kaur Vs New India Assurance Co. Ltd. 2013 (1) ACCD 60

8. Reliance General Insurance Co. Ltd. Vs Rekha Devi 2018 (1) ACCD 301

9. Jai Prakash Vs National Inurance Co ltd. 2010 (2) GLR 1787 (SC)

10. Smt. Saroj & anr Vs Rajendra Singh & anr. First Appeal From Order No.3481 of 2012

(Delivered by Hon'ble Vivek Varma, J.)

1. Heard Sri S.D. Ojha, learned counsel for the appellants, Sri Mohan Srivastava, learned counsel for respondent no. 1 i.e. Insurance Company, and Sri Sudhanshu Pandey, learned counsel for respondent no. 3 i.e. driver of the vehicle.

2. The present first appeal from order has been preferred by the claimants-appellants against the judgment and order dated 20.03.2018 passed by the Motor Accident Claims Tribunal/ Additional District Judge, Court No. 3, Ballia (hereinafter referred to as the "Tribunal") in Motor Accident Claim Petition No. 56 of 2016 (Smt. Poonam Devi and others v. Prabandhak, United India Insurance Co. and others), whereby the claim petition has been rejected.

3. It is the case of the appellants that on 10.03.2016 Sri Suraj Pratap Singh (deceased) was travelling from Azamgarh to Lucknow by Scorpio Jeep, bearing Registration No. UP60 X 2715 (hereinafter referred to as the "vehicle"), along with respondent nos. 2 and 3 and two others. The respondent no. 3- Sri Gajendra Bahadur Singh was driving the vehicle. All of a sudden a Neelgai appeared on the road. While trying to save the Neelgai, the car collided against the divider and all the passengers in the vehicle were injured. Sri Suraj Pratap Singh was taken to King George Medical College, Lucknow but he succumbed to his injuries on 10.03.2016.

4. The claimants-appellants filed a claim petition before the Tribunal seeking compensation for Rs.90,78,000/- on 11.04.2016 alleging inter alia that Suraj Pratap Singh died as a result of injuries suffered in the abovementioned accident of 10.03.2016, which occurred due to negligent driving of Gajendra Bahadur Singh, who was the driver of the vehicle, in which the deceased was travelling. The insurer of the vehicle-United India Insurance Company Limited as well as owner and driver of the vehicle were impleaded as party respondent nos. 1, 2 and 3 respectively.

5. The respondent no. 1- insurance company filed its written statement and denied the accident and the involvement of the vehicle. The insurance company asserted that the claim petition was based on incorrect facts and was liable to be rejected.

6. Following issues were framed by the Tribunal on 27.10.2016:

"1) Whether on 10-03-2016 at about 05.00 A.M. near Sursanda Petrol Pump, P.S. Masauli, district Barabanki, an accident took place due to rash and negligent driving by the driver of vehicle Scorpio No. UP60X/2715 as a result of which, Suraj Pratap Singh @ Ravi Singh sustained injuries and died? If so, its' effect?

2) Whether the driver of the offending vehicle No. UP60X/2715 was not having a valid and effective driving licence at the time of accident? If so, its' effect?

3) Whether the offending vehicle No. UP60X/2715 was not validly and effectively insured with opposite party No. 1 United India Insurance Co. Ltd.? If so, its' effect?

4) Whether the offending vehicle No. UP60X/2715 was plied according to the provisions of insurance policy?

5) To what amount of compensation, are the petitioners entitled? And from whom?"

7. Subsequently, the Tribunal vide its judgment dated 20.03.2018 considered the following points:

"1. Whether the petitioners have cause of action in the matter?

2. To what relief the petitioners are entitled for?"

8. The Tribunal while considering the aforesaid points referred to the statement of P.W.-1 Smt. Poonam Devi, who is the mother of the deceased. She deposed that the deceased was on his way to Lucknow for medical treatment when the accident occurred. During cross-examination she stated that she is not an eye witness of the occurrence and the respondent nos. 2 and 3 were present at the time of accident and the entire story was narrated by them to her. Thereafter, the Tribunal considered the cross-examination of P.W.-2 Sri Satendra Nath. It was stated by P.W.-2 Sri Satendra Nath that he along with the deceased and other friends were going to Lucknow as Suraj Pratap Singh, Nilesh and Brijesh had to purchase land at Lucknow. He deposed that he admitted the injured persons. He further stated that he did not inform the police regarding the incident.

9. The Tribunal relying upon the inconsistencies in the statements of P.W.-1 and P.W.-2 and further taking into consideration that P.W.-2 having failed to adduce any evidence that he himself was injured and further being an eye witness having not informed the police regarding the incident, discarded his evidence and came to the conclusion that the assertions of the appellants are false and consequently, rejected the claim petition.

10. Sri S.D. Ojha, learned counsel for the appellants, submits that the Tribunal vide impugned judgment rejected the claim petition of the claimants in a cryptic manner without dealing with the issues framed on 27.10.2016. He further submitted that the Tribunal was required to decide the claim petition on the touchstone of preponderance of the probabilities and not on the basis of the proof beyond reasonable doubt. In support of his submissions, Sri Ojha has placed reliance on a judgment of the Supreme Court in the case of **Anita Sharma and others v. The New India Assurance Co. Ltd. and another, 2020 0 Supreme (SC) 704.**

11. On the other hand, learned counsel appearing for the respondents submitted that there is no legal evidence, much less sufficient to record a finding that the vehicle was involved in the accident. The judgment of the Tribunal does not call for any interference by this Court.

12. The moot question which arises for consideration in this appeal is about the correctness of the Tribunal in discarding the evidence of P.W.-2 on the ground that he failed to inform the police regarding the incident.

13. It is not in dispute that the deceased was taken to hospital. The police must have reached the hospital as it was mentioned in the inquest report that the deceased was brought by Constable Deepak Kumar. The finding recorded by the Tribunal cannot be sustained for two reasons. Firstly, P.W.-1 was admittedly not an eye witness, her version is hearsay and cannot be relied upon; and secondly, if PW.-2 had himself received injuries, he could not have simultaneously gone to police station to lodge the first information report. The Tribunal ought not to have drawn any adverse inference against him for his failure to report the matter to the police.

14. Further, the Tribunal in a highly technical and cryptic manner arrived at the conclusion that the claim of the appellants is false. It needs to be emphasized that there may be some discrepancies in the evidence of the claimants/witnesses, but the Tribunal has to bear in mind that the motor accidents claims are summary proceedings so as to adjudicate amount of compensation in case of an accident and that a claim under the Motor Vehicles Act has to be decided on the touchstone of preponderance of probabilities and not on the basis of proof beyond reasonable doubt.

15. The evidence on record shows that the father of the deceased submitted an application on 06.04.2016 to the police authorities for registration of the first information report. The Tribunal ought to have taken into consideration the police report filed under Section 173 Cr.P.C. also while arriving at a conclusion regarding the genuineness of the claim set up by the claimants-appellants.

16. It also needs to be emphasized here that the driver of the vehicle P.W-3 was also not examined by the Tribunal and as such, the approach of the Tribunal cannot be justified.

17. The claim petition ought not to have been rejected solely on the ground that P.W.-2 did not produce any evidence that he himself was injured and having failed to inform the police regarding the accident.

18. The Hon'ble Supreme Court in the case of **Anita Sharma and others v. The New India Assurance Co. Ltd. and another, 2020 0 Supreme (SC) 704**, has observed as follows:

"17. It is quite natural that such a person who had accompanied the injured to the hospital for immediate medical aid, could not have simultaneously gone to the police station to lodge the FIR. The High Court ought not to have drawn any adverse inference against the witness for his failure to report the matter to Police. Further, as the police had themselves reached the hospital upon having received information about the accident, there was perhaps no

occasion for AW-3 to lodge a report once again to the police at a later stage either.

18. Unfortunately, the approach of the High Court was not sensitive enough to appreciate the turn of events at the spot, or the appellants-claimants' hardship in tracing witnesses and collecting information for an accident which took place many hundreds of kilometers away in an altogether different State. Close to the facts of the case in hand, this Court in Parmeshwari vs. Amir Chand, (2011) 11 SCC 635, viewed that:

"12. The other ground on which the High Court dismissed the case was by way of disbelieving the testimony of Umed Singh, PW-1. **Such disbelief of the High Court is totally conjectural. Umed Singh is not related to the appellant but as a good citizen, Umed Singh extended his help to the appellant by helping her to reach the doctor's chamber in order to ensure that an injured woman gets medical treatment. The evidence of Umed Singh cannot be disbelieved just because he did not file a complaint himself. We are constrained to repeat our observation that the total approach of the High Court, unfortunately, was not sensitised enough to appreciate the plight of the victim.**

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15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. **It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants.** The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied." (emphasis supplied)

19. The failure of the respondents to cross examine the solitary eye witness or confront him with their version, despite adequate opportunity, must lead to an inference of tacit admission on their part. They did not even suggest the witness that he was siding with the claimants. The High Court has failed to appreciate the legal effect of this absence of cross-examination of a crucial witness.

20. The importance of cross-examination has been elucidated on several occasions by this Court, including by a Constitution Bench in Kartar Singh vs. State of Punjab, (1994) 3 SCC 569 which laid down as follows:

"278. Section 137 of the Evidence Act defines what cross-examination means and Sections 139 and 145 speak of the mode of cross-examination with reference to the documents as well as oral evidence. I**t is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief**, the objects of which are:

(1) to destroy or weaken the evidentiary value of the witness of his adversary;

(2) to elicit facts in favour of the cross-examining lawyer's client from the mouth of the witness of the adversary party;

(3) to show that the witness is unworthy of belief by impeaching the credit of the said witness;

**and the questions to be addressed in the course of cross-examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character.**

279. The identity of the witness is necessary in the normal trial of cases to achieve the above objects and the right of confrontation is one of the fundamental guarantees so that he could guard himself from being victimised by any false and invented evidence that may be tendered by the adversary party." (emphasis supplied)

21. Relying upon Kartar Singh (supra), in a MACT case this Court in Sunita v. Rajasthan State Road Transport Corporation, (2019) SCC Online SC 195 considered the effect of non-examination of the pillion rider as a witness in a claim petition filed by the deceased of the motorcyclist and held as follows:

"30. Clearly, the evidence given by Bhagchand withstood the respondents' scrutiny and the respondents were unable to shake his evidence. In turn, the High Court has failed to take note of the absence of cross examination of this witness by the respondents, leave alone the Tribunal's finding on the same, and instead, deliberated on the reliability of Bhagchand's (A.D.2) evidence from the viewpoint of him not being named in the list of eye witnesses in the criminal proceedings, without even mentioning as to why such absence from the list is fatal to the case of the appellants. This approach of the High Court is mystifying, especially in light of this Court's observation [as set out in Parmeshwari (supra) and reiterated in Mangla Ram (supra)] that the strict principles of proof in a criminal case will not be applicable in a claim for compensation under the Act and further, that the standard to be followed in such claims is one of preponderance of probability rather than one of proof beyond reasonable doubt. There is nothing in the Act to preclude citing of a witness in motor accident claim who has not been named in the list of witnesses in the criminal case. **What is essential is that the opposite party should get a fair opportunity to cross examine the concerned witness. Once that is done, it will not be open to them to complain about any prejudice caused to them. If there was any doubt to be cast on the veracity of the witness, the same should have come out in cross examination, for which opportunity was granted to the respondents by the Tribunal.**

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32. The High Court has not held that the respondents were successful in challenging the witnesses' version of events, despite being given the opportunity to do so. The High Court accepts that the said witness (A.D.2) was cross examined by the respondents but nevertheless reaches a conclusion different from that of the Tribunal, by selectively overlooking the deficiencies in the respondent's case, without any proper reasoning." (emphasis supplied)

22. Equally, we are concerned over the failure of the High Court to be cognizant of the fact that strict principles of evidence and standards of proof like in a criminal trial are inapplicable in MACT claim cases. The standard of proof in such like matters is one of preponderance of probabilities, rather than beyond reasonable doubt. One needs to be mindful that the

approach and role of Courts while examining evidence in accident claim cases ought not to be to find fault with non-examination of some best eye-witnesses, as may happen in a criminal trial; but, instead should be only to analyze the material placed on record by the parties to ascertain whether the claimant's version is more likely than not true. A somewhat similar situation arose in Dulcina Fernandes vs. Joaquim Xavier Cruz, (2013) 10 SCC 646 wherein this Court reiterated that:

"7. It would hardly need a mention that the plea of negligence on the part of the first respondent who was driving the pick-up van as set up by the claimants was **required to be decided by the learned Tribunal on the touchstone of preponderance of probabilities and certainly not on the basis of proof beyond reasonable doubt. (Bimla Devi vs. Himachal RTC [(2009) 13 SCC 530 : (2009) 5 SCC (Civ) 189 : (2010) 1 SCC (Cri) 1101])" (emphasis supplied)**

23. The observation of the High Court that the author of the FIR (as per its judgment, the owner-cum-driver) had not been examined as a witness, and hence adverse inference ought to be drawn against the appellant-claimants, is wholly misconceived and misdirected. Not only is the owner-cum-driver not the author of the FIR, but instead he is one of the contesting respondents in the Claim Petition who, along with insurance company, is an interested party with a pecuniary stake in the result of the case. If the owner-cum-driver of the car were setting up a defence plea that the accident was a result of not his but the truck driver's carelessness or rashness, then the onus was on him to step into the witness box and explain as to how the accident had taken place. The fact that Sanjeev Kapoor chose not to depose in support of what he has pleaded in his written statement, further suggests that he was himself at fault. The High Court, therefore, ought not to have shifted the burden of proof.

24. Further, little reliance can be placed on the contents of the FIR (Exh.-1), and it is liable to be discarded for more than one reasons. First, the author of the FIR, that is, Praveen Kumar Aggarwal does not claim to have witnessed the accident himself. His version is hearsay and cannot be relied upon. Second, it appears from the illegible part of the FIR that the informant had some closeness with the owner-cum-driver of the car and there is thus a strong possibility that his version was influenced or at the behest of Sanjeev Kapoor. Third, the FIR was lodged two days after the accident, on 27.03.2009. The FIR recites that some of the injured including Sandeep Sharma were referred to BHU, Varanasi for treatment, even though as per the medical report this took place only on 26.03.2009, the day after the accident. Therefore the belated FIR appears to be an afterthought attempt to absolve Sanjeev Kapoor from his criminal or civil liabilities. Contrarily, the statement of AW-3 does not suffer from any evil of suspicion and is worthy of reliance. The Tribunal rightly relied upon his statement and decided issue No. 1 in favour of the claimants. The reasoning given by the High Court to disbelieve Ritesh Pandey AW-3, on the other hand, cannot sustain and is liable to be overturned. We hold accordingly."

19. The Apex Court in **Vimla Devi and others v. National Insurance Company Limited and another, (2019) 2 SCC 186, Mangla Ram v. Oriental Insurance Company Ltd., (2018) 5 SCC**

**656**, as well as the judgments referred to in **Anita Sharma (supra)** has held that strict principles of evidence and standards of proof like in a criminal trial are inapplicable in motor accident claim cases. It has further been held that it is commonplace for most people to be hesitant about being involved in legal proceedings and they do not volunteer to become witnesses. Therefore, also we cannot concur with the view of the Tribunal. The Tribunal while dismissing the claim petition has held that there is false assertion made by the claimants. The judgments in **Munna Lal Jain v. Vipin Kumar Sharma, 2016 (2) ACCD 1094, Smt. Sarla Verma v. Delhi Transport Corporation and Another, 2009 (2) ACCD 924, Vinod Shankar Shukla v. Bhoruka Logistic Pvt. Ltd., 2017 (1) DMP 232, Sumitra Kaur v. New India Assurance Co. Ltd., 2013 (1) ACCD 60, and Reliance General Insurance Co. Ltd. v. Rekha Devi, 2018 (1) ACCD 301,** have been misread by the Tribunal. Just because Smt. Poonam Devi, who was not an eye witness, deposed that her son was going for medical treatment, cannot be a ground of disbelieving the case. It is an admitted position of fact that she was not an eye witness. The statements of P.W.-2 and P.W.-3 are not contradicted and they have withstood the cross-examination by the insurance company. The only difference in the statements of P.W.-1 and P.W.-2 is that P.W.-2 stated that they were going to purchase land.

20. Just because the accident was not reported by P.W.-2 cannot be a ground for dismissing the claim petition. The Tribunal ought to have considered the judgments of the Apex Court which have made it obligatory on the police officials to forward to the Claims Tribunal the accident information report. In the case of **Jai Prakash v. National Insurance Company Limited, 2010 (2) GLR 1787 (SC),** detailed guidelines are given and, therefore, the Tribunal ought to have considered this aspect also before rejecting the claim petition on the basis of only one minor contradiction, even though the evidence of the eye witness was unshaken. The post-mortem report, G.D. entry and the Panchanama of the place of occurrence, where the accident occurred, also showed that the death was because of involvement of a vehicle. One more aspect which required attention of the Tribunal was when the deceased was taken to hospital, there is a mention about the accidental injuries and, therefore, just because the mother, who is not an eye witness and is a rustic lady, deposed that her son was going for medical treatment, cannot be the sole ground of rejection of the claim petition. The accident occurred on 10.03.2016 and the deceased was taken to the Government Hospital by an ambulance, this fact is also proved from the evidence of P.W.-1 and 2. The respondents have not examined anybody on oath, who would shake the evidence led before the Tribunal. The number of the vehicle is mentioned. The factum that it had collided against the divider has also been mentioned. All these facts go to show that the accident occurred when the deceased was in the vehicle and the use of the vehicle is proved. The Tribunal on the basis of the surmises and conjectures without there being any concurrent evidence to disbelieve the witnesses, has dismissed the claim petition. Our view is fortified by the recent decision of the Apex Court in the case of **Vimla Devi (supra)** and we rely on the judgment of the Division Bench of this Court in **First Appeal From Order No. 3481 of 2012 (Smt. Saroj and another v. Rajendra**

**Singh and another),** decided on 13.08.2021. Thus, the appeal has to be allowed.

21. Applying the said principles of law as laid down by the Hon'ble Supreme Court in the decisions relied upon herein-above, we find that the approach of the Tribunal in deciding the aforesaid claim petition was not correct and was based on surmises and conjectures and misreading of the evidence on record as well as the judgments, which were meant for deciding the quantum of compensation.

22. Hence, the impugned judgment and award dated 20.03.2018 passed by the Tribunal is set aside. The matter is remitted to the Tribunal to consider the compensation awardable to the claimants-appellants in accordance with law as the deceased was a non-tort feaser and the accident occurred on account of the negligence of the driver of the vehicle, for which we have given our findings. As the evidence is already over and the pay-slips are before the Tribunal, the compensation as awardable in the light of the decisions of the Apex Court be granted within six weeks of receipt of the record by the Tribunal.

23. Accordingly, the appeal is allowed.

24. Let the lower court record be sent back to the Tribunal.

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**(2021)10ILR A275**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:ALLAHABAD 05.10.2021**

**BEFORE**

**THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.**

**THE HON'BLE SUBHASH CHAND, J.**

FAFO No. 2688 of 2011

**Smt. Kamal Marwah & Ors. ...Appellants**
**Versus**
**M/s Owens Bilt Ltd. & Anr. ...Respondents**

**Counsel for the Appellant:**
Sri Swetashwa Agarwal

**Counsel for the Respondents:**
Sri Tarun Agarwal, Sri Akhilesh Mishra,Sri R.D. Singh, Sri S.S. Nigam, Sri Prakhra Srivastava, Sri R.K.Shukla

**(A) Practice & Procedure -** First Appellate Court can also decide the appeal for quantum if the records are available. Therefore, the Court on observing that the appeal remained pending for a period of 15 years before this Court and it being a case of sole bread winner who was not a tort feasor has passed away, the Court proceeded to decide just and fair compensation. (Para 7)

**Appeal Allowed.** (E-10)

**List of Cases cited:**

1. Jai Prakash Vs National Insurance Co. Ltd. (2010) 2 SCC 607

2. Vimla Devi & ors. Vs National Insurance Co. Ltd. & anr. 2019 (2) SCC 186

3. Sunita Sharma & ors. Vs Rajasthan State Road Transport Corporation & anr. 2019 LawSuit (SC) 190

4. Anita Sharma Vs New India Assurance Co. Ltd. (2021) 1 Supreme Court Cases 171

5. Archit Saini Vs Oriental Insurance Co. Ltd. & ors. 2018 0 AIR (SC) 1143

6. Bithika Mazumdar & anr. Vs Sagar Pal & ors. AIR 2017 SC 965 *(followed)*

7. New India Assurance Co. Ltd. Vs Urmila Shukla 2021 SCC online SC 82 *(followed)*

8. National Insurance Co. Ltd. Vs Pranay Sethi & ors. 2017 0 Supreme (SC) 1050 *(followed)*

9. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd. 2007 (2) GLH 291

10. Smt. Sudesna & ors. Vs Hari Singh & ors. Review Application No. 1 of 2020 in First Appeal From Order No. 23 of 2001

11. Tej Kumari Sharma Vs Chola Mandlam M.S. General Insurance Co. Ltd. First Appeal From Order no. 2871 of 2016

12. AIR 2021 SC 3301

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard Sri Swetashwa Agarwal, learned counsel for the appellant. None appears for respondent no. 1 as Shri S.S.Nigam, learned counsel for the respondent conveys that client has already taken back the file. For a period of fifteen years none has appeared for Insurance Company, though duly served. We take up this appeal for final disposal as the claim petition filed was contending involvement of truck no. U.P. 08-3024. The claim petition was dismissed as the Tribunal answered issue no. 1 against the appellants, who have lost the only bread winner of the family.

2. This appeal, at the behest of the claimants, challenges the judgment/award dated 4.3.2006 passed by Additional District Judge (Court No.4), Meerut/Motor Accident Claims Tribunal, Meerut (hereinafter referred to as 'Tribunal') rejecting the M.A.C. No. 91 of 1998 preferred by the claimants.

3. Brief facts as culled out from the record are that the deceased was travelling in a taxi from Delhi to Dehradun with his colleague on 28.08.1997. At that point of time the truck bearing no. U.P. 08-3024 came from the opposite side dashed with the car in which deceased was travelling. The driver of the taxi and two other people received several injuries, unfortunately the driver of the said vehicle died on the spot. Of the two the deceased Luv Kumar Marwah also received several injuries and was rushed to the hospital where he succumbed to injuries. The claimants filed claim petition and examined P.W.-1 and he died out of the injuries on 06.09.1997. He was taken to Sir Ganga Ram Hospital, New Delhi where he was in coma and on 06.09.1997 at the age of 51 years he died. He was Deputy General Manager in Oil And Natural Gas Corporation and was earning Rs. 30,000/- p.m plus L.T.C. and other allowances were also made available to him. Respondent no. 2 appeared before the Tribunal and filed his reply of denial contending that the claim petition could not proceed as the driver, the owner and the Insurance Company of taxi bearing no. D.L.1 Y-1879 was not a party and contended that the accident occurred due to negligence of the driver of the car and not that of the truck. It was further contended that the driver of the taxi was also negligent and that the driver of the truck was not driving the truck in a rash and negligent manner and the truck was been driven against the Motor Vehicle rules in breach of policy condition. The owner of the truck M/s Owens Bilt Limited did not appear, did not file their reply.

4. As far as the issue no. 1 is concerned, the claimants examined P.W.-1-A.G. Pramanik, P.W.-2- Smt. Kamal Marwa, P.W.-3-V.K. Verma and P.W.-4-Vineet Kumar and filed documentary evidence the F.I.R, charge-sheet, postmortem report, medical report, his

salary certificate, death certificate given by Sir Ganga Ram Hospital, New Delhi, his income tax reports, his date of birth also.

5. The Tribunal after hearing the parties held that it was not proved that the vehicle was involved in the accident. If we go by the written statement filed by the Insurance Company, it was even not their case that the vehicle insured by them was not involved in the accident. They have pleaded that the driver of the car was negligent and not the driver of the truck. We are conveyed by the learned counsel for the appellant that the deceased was not driver of the taxi he was an occupant of the taxi and for him it was case of composite negligence. The evidence of passenger is not believed as when he was in the vehicle he had gone to sleep when the accident occurred and he become unconscious. This is one reason why the learned Tribunal did not accept his version. The evidence on record goes to show that he was eye witness, he was present in the car and has narrated the incident. There is no point for not believing the said witness. The learned Tribunal has unfortunately fallen in error in ignoring the charge-sheet and ignoring the other evidence on record. The Tribunal has fallen in error in holding that the other witnesses did not see the accident. The other witnesses were examined for proving the income of the deceased and not the factum of the incident.

6. The learned Tribunal has in our view grossly erred by not accepting the version of P.W.-1. The judgement of the Apex Court in **Jai Prakash Vs National Insurance Company Ltd., (2010) 2 SCC 607** cited by the learned counsel for the appellant and the judgement in **Vimla Devi & Ors. Vs. National Insurance Company Limited & Anr., reported in 2019 (2) SCC 186** vehmently applies on the facts of this case. In our case the documents are already there on record. There was sufficient evidence adduced and the documents established the identity of the offending vehicle and vehicles involved in that view of the matter also the Tribunal has fallen in error. We are further fortified in our view by the recent judgments of Apex Court titled **Sunita Sharma and others Vs. Rajasthan State Road Transport Corporation and another [2019 LawSuit (SC) 190]** dealing with similar issues. The decision in **Anita Sharma Vs. New India Assurance Co. Ltd. (2021) 1 Supreme Court Cases 171** were also aid the appellants. This takes us to the next point namely that as it was of composite negligence qua the deceased the way the accident occurred, the driver of the truck has not even stepped into the witness box. The driver of the car succumbed to the injuries. The principle of res-ipsa-loqitur will apply to the facts of this case. We hold driver of the truck to be solely negligent as the charge-sheet is laid against him, he was named as offender in the F.I.R and we are convinced by the submission of Shri Swetashwa Agarwal, learned counsel for the appellants that the accident occurred due to sole negligence of the driver of the truck. We are even fortified our view by the judgment of **Archit Saini Vs. Oriental Insurance Company Limited and others 2018 0 AIR (SC) 1143,** hence issue no. 1 as decided by the Tribunal is out turn, we hold driver of the truck negligent.

7. This takes us to the next question whether we should remand the matter or decide quantum here. The Apex Court in **Bithika Mazumdar and another Vs. Sagar Pal & Ors., AIR 2017 SC 965.** The Apex Court in the said decision has held that the first appellate court can decide the appeal for

quantum also if the record is available. The appeal has remained pending before this Court for a period of 15 years. The record is before this Court and it is case where sole bread winner was non tort feasor has passed away. We would decide what is known as just and fair compensation. On the facts we hold that quantum also can be decided here in light of the said decision which we venture to decide. The Apex Court in **Bithika (Supra)** has held that when the matter is pending since long the appellate can decide compensation as the accident occurred in the year 1997. The petition was dismissed in the year 2006. The petition remained pending for five years on the defective board and thereafter it was taken up and numbered, we also therefore, venture to decide the quantum as the record is before us. The age of the deceased was 51 years which is proved by the evidence of the officers of O.N.G.C, he was Deputy General Manager of O.N.G.C, his monthly salary as culled out from the record and as per the evidence would be Rs. 30,000/- per month which is proved by document at Annexure-39 on G, his revised and re-revised salary the chart is given. The salary was received from 01.01.1997 namely from the date he was in service but the effect was given only in the month of March, 2020. We hold his income to be Rs. 30,000/-p.m out of which we deduct 15% as income tax, hence Rs. 25,000/- p.m is his income plus as he was 51 years of age as per the U.P. Motor Vehicle Rules, 1998 and the judgment of the Apex Court in **New India Assurance Company Ltd. Vs. Urmila Shukla 2021 SCC online SC 822,** we grant future loss of income at 15% which is in consonance with the judgment of **National Insurance Co. Ltd. Vs. Pranay Shetty and Others, 2017 0 Supreme (SC) 1050,** hence Rs. 25,000/- plus 15% as he was survived by his wife and two minor daughters, one -third is to be deducted for personal expenses. The deceased was in the age bracket of 51 years we grant multiplier of 11 plus Rs. 70,000/- under the head of non- pecuniary head.

8. Hence, the total compensation payable to the appellants is computed herein below:

i. Income Rs.25,000/-

ii. Percentage towards future prospects : (15%) Rs.3750/-

iii.Total income : Rs. 25,000 + 3,750= Rs.28,750/-

iv. Income after deduction of 1/3 : Rs. 19,166/-

v. Annual income : Rs. 19,166 x 12 = Rs.2,30,000/-

vi. Multiplier applicable : 11

vii. Loss of dependency: Rs.2,30,000 x 11 = Rs.25,30,000/-

viii. Amount under non-pecuniary head= 70,000/-

ix. Total compensation :RS: 26,00,000/-

9. As far as issue of rate of interest is concerned, it would be 6% but for period when delay occurred namely of one month in filing appeal as per the judgment of Apex Court reported in **AIR 2021 SC 3301,** the appellants should not be entitled to interest as it is a matter of the year 1998 which remained pending to this Court. Special case we grant interest at 6% through out.

10. In view of the above, the appeal is allowed. Judgment and award passed by the

Tribunal is set aside. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 6% from the date of filing of the claim petition till the amount is deposited. The Insurance Company will deposit the entire amount can have their right to recover the amount from owner and the Insurance Company of the other vehicle.

11. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagori P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291** and this High Court in , total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) and in First Appeal From Order No.2871 of 2016 (Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.) decided on 19.3.2021 while disbursing the amount.

12. Record be sent back to tribunal forthwith.

13. This Court is thankful to the young counsel who has ably assisted us for getting this old matter disposed of during this pandemic.

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**(2021)10ILR A279**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:ALLAHABAD 15.09.2021**

**BEFORE**

**THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.**
**THE HON'BLE SUBHASH CHAND, J.**

FAFO No. 2895 of 2008
(Ref: Civil Misc. Delay Condonation & Substitution Application)

**Desh Kumar @ Desh Raj Nagariya & Anr. ...Appellants**

**Versus**

**Vinod Khatri & Anr. ...Respondents**

**Counsel for the Appellants:**
Sri Ramanand Gupta,Sri Maithali Sharan Pipersenia,Sri P.N. Gupta

**Counsel for the Respondents:**
Sri Archana Singh

**(A) Composite/ Contributory Negligence -** The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care. In this case, the deceased was not the author or the co-author of the accident. (Para 12)

**Appeal Partly Allowed.** (E-10)

**List of Cases cited:**

1. Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. First Appeal From Order No. 1818 of 2012

2. Khenyei Vs New India Assurance Co. Ltd. & ors 2015 LawSuit (SC) 469

3. Malarvizhi & ors. Vs United India Insurance Co. Ltd. & anr. 2020 (4) SCC 228 *(followed)*

4. United India Insurance Co. Ltd. Vs Indiro0 Devi & ors. 2018 (7) SCC 715 *(followed)*

5. The Oriental Insurance Co. Ltd. Vs Mangey Ram & ors. 20019 0 Supreme (All) 1067 *(followed)*

6. New India Assurance Co. Vs Urmila Shukla MANU/SCOR/24098/2021 *(followed)*

7. Kriti & ors. Vs Oriental Insurance Co. Ltd. 2021 (1) TAC 1 *(followed)*

8. AIR 2021 SC 3301

9. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd. 2007 (2) GLH 291 *followed)*

10. Smt. Sudesna & ors. Vs Hari Singh & ors. Review Application No. 1 of 2020 in First Appeal From Order No. 23 of 2001 *(followed)*

11. Tej Kumari Sharma Vs Chola Mandlam M.S. General Insurance Co. Ltd. First Appeal From Order no. 2871 of 2016 *(followed)*

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard Sri Maithali Sharan Pipersenia, learned counsel for the appellant and Ms Majima Singh holding brief of Ms Archana Singh, learned counsel for the respondents.

2. This appeal, at the behest of the claimants, challenges the judgment/award dated 25.01.2005 passed by Motor Accident Claims Tribunal/Special Judge (E.C. Act), Jhansi (hereinafter referred to as 'Tribunal') in M.A.C. No. 433 of 2003.

3. Brief facts as culled out from the record are that on 27.04.2003 Dr. Himanshu Nagaria had gone to Hotel Isha Garden situated at Bhedaghat road, Jabalpur for dinner with his friends. When he was returning to Medical College where he was living, near Krishi Upaj Mandi Naka Balsagar a Metador bearing no. M.P. 20 G-1248 was negligently all of sudden stopped by his driver and back light was also switched off due to which motor-cycle of Dr. Himanshu Nagaria bearing No. U.P.-93 D-2391 dashed with the standing Metador causing grievous injuries to Dr. Himanshu Nagaria and on the way to Medical College he succumbed to his injuries.

4. The deceased was 25 years of age at the time of accident. He was a doctor by profession and was pursuing M.D in pediatric and was getting Rs.10,600/- as a stipend. He was survived by his father (since deceased) and in his place his another son namely 1/1. Navnit Nagaria has been substituted vide Court's order dated 15.09.2021 and the mother (who is appellant no. 2). The Tribunal has considered his income to be Rs. 15,000/- p.m, deducted 1/3rd towards personal expenses of the deceased, granted multiplier of 12, granted Rs.10,000/- towards compensation for loss of love and affection, granted Rs,. 15,000/- for compensation for loss of estate, granted Rs. 2,000/- towards funeral expenses and ultimately assessed the total compensation to be Rs.14,72,000/-.

5. Learned counsel for the appellant has submitted that the deceased Himanshu Nagaria was 25 years was a doctor and doing his M.D in pediatrics and getting Rs. 10,600/- p.m as stipend. The learned counsel for the appellant contends that he

was below the age of 40 years, the tribunal should have added 50% to his income which is erroneous as it has not added any amount. He has further submitted that he was survived by his father and mother and therefore, the deduction as per the judgements of **Sarla Verma** and **Pranay Shetty** and even in those days should be 1/4th and not 1/3rd. It is submitted by him that amount of non pecuniary of Rs. 27,000/- requires to be enhanced.

6. As against this, Ms Majima Singh, advocate appearing for Ms. Archana Singh, learned counsel for the respondents contends that deduction of 1/3rd from personal expenses is not just and proper, it should be 1/2nd.

7. Having heard the learned counsel for the parties, income of the deceased considered by tribunal is Rs. 15,000/- per month as it has been rightly pointed out by Ms Majima Singh, counsel appearing for Ms Archana Singh, counsel for the respondents that record shows that the Tribunal has been more lenient in deciding the income of the deceased as the stipend paid to the deceased was Rs. 10,600/- p.m. We are convinced that the deceased was in his second year of M.D in pediatrics and therefore his personal income can be considered to be Rs. 20,000/- p.m in light of recent decisions. Let us consider the negligence from the perspective of the law laid down.

8. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply.

9. The principle of contributory negligence has been discussed time and again. A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place.

10. The Division Bench of this Court in **First Appeal From Order No. 1818 of 2012 ( Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 has held as under: :

*"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends*

*upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.*

*17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.*

*18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.*

*19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in Rylands V/s. Fletcher, (1868) 3 HL (LR) 330. From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.*

*22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side."*

*emphasis added*

11. The Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469** has held as under:

*"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasors. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court.*

*However, in case all the joint tort feasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.*

*14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence;whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748] has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :*

*"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.*

*7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been*

*assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."*

*18. This Court in Challa Bharathamma &Nanjappan (supra) has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.*

*What emerges from the aforesaid discussion is as follows :*

*(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.*

*(ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.*

*(iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.*

*(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."*

*emphasis added*

12. The latest decision of the Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 Law Suit (SC) 469** has laid down one further aspect about considering the negligence more particularly composite/contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care. In this case the deceased was not the author or the co-author of the accident. Hence, the oral prayer that deduction of 50% from the compensation be made is rejected.

13. This takes this Court to the issue of compensation. We would place reliance on the Apex court decision in **Malarvizhi & Ors Vs. United India Insurance Company Limited and Another, 2020 (4) SCC 228 and United India Insurance Co. Ltd. Vs. Indiro0 Devi & Ors, 2018 (7) SCC 715. and in The Oriental Insurance Company Ltd. Vs. Mangey Ram and others, 2019 0 Supreme (All) 1067** and the recent judgment of the Apex Court in New India Assurance Company Vs. Urmila Shukla decided by the Apex Court on 6.8.2021 reported in MANU/SCOR/24098/2021 and Kirti and others vs oriental insurance company ltd reported in 2021(1) TAC 1It could not be culled out from record that on what basis, the Tribunal has deducted the pecuniary benefits from the income cannot be fathomed. The income of the deceased in the year of accident and looking to his profession can be considered to be Rs.20,000/- per month as the deceased is below 50 years, 40% as future loss of income requires to be added in view of the decision of the Apex Court in **Pranay Sethi (Supra).** As far as amount under the head of non-pecuniary damages are concerned, it should be Rs.70,000/- + 10% increase as per the decision of the Apex Court in Pranay Sethi (Supra) as three years have elapsed hence, the lump sum amount under this head would be Rs.1,00,000/-. As far as multiplier is concerned, it is 18 as the deceased was in the age bracket of 21 to 25..

14. Hence, the total compensation payable to the appellants is computed herein below:

i. Income Rs.20,000/-

ii. Percentage towards future prospects : (40%) Rs.8000/-

iii.Total income : Rs. 20,000 + 8,000= Rs.28,000/-

iv. Income after deduction of 1/2 : Rs. 14,000/-

v. Annual income : Rs. 14,000 x 12 = Rs.1,68,000/-

vi. Multiplier applicable : 18

vii. Loss of dependency: Rs.1,68,000 x 18 = Rs.30,24,000/-

viii. Amount under non-pecuniary head= 70,000/-Plus Rs 30,000/as per pranay sethi (supra) = 1,00,000/-

ix. Total compensation :RS: 31,24,000/-

15. As far as issue of rate of interest is concerned, we are convinced that though the delay was only of 62 days, the matter remain pending for three years . In light of the judgment of Apex Court reported in

**AIR 2021 SC 3301,** we restrain the interest of these three years to 4 %, rest it will remain 6% enhanced to 7% from the date of filing of the petition till the judgment.

16. In view of the above, the appeal is partly allowed. Oral cross objections are allowed and compensation is recalculated. Judgment and award 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% 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. The Insurance Company will deposit the entire amount can have their right to recover the amount from owner and the Insurance Company of the other vehicle. As far as deceased is concerned, it is a case of composite negligence, hence, the amount cannot be deducted from the compensation awarded to the claimants who are the heirs of a non tort-feasor.

17. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagori P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291** and this High Court in , total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 **(Smt. Sudesna and others Vs. Hari Singh and another) and in First Appeal From Order No.2871 of 2016 (Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.)** decided on 19.3.2021 while disbursing the amount.

18. Record be sent back to tribunal forthwith.

19. This Court is thankful to both the learned Advocates for getting this matter disposed of during this pandemic.

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**(2021)10ILR A286**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:ALLAHABAD 14.09.2021**

**BEFORE**

**THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.**
**THE HON'BLE SUBHASH CHAND, J.**

FAFO No. 3203 of 2018
with
FAFO No. 3254 of 2018

**Smt. Islamunnisa ...Appellant**
**Versus**
**Smt. Manni Devi & Ors. ...Respondents**

**Counsel for the Appellant:**
Sri Mohd.Asim Zulfiquar

**Counsel for the Respondents:**
Sri Sushil Kumar Mehrotra

**(A) Quantum of Compensation -** House rent Allowance received by deceased could not have

been deducted by the tribunal in calculating compensation. (Para 15)

**Appeal Partly Allowed.** (E-10)

**List of Cases cited:**

1. Khenyei Vs New India Assurance Co. Ltd. & ors. 2015 LawSuit (SC) 469

2. Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. First Appeal From Order No. 1818 of 2012

3. Meera Devi & anr. Vs HRTC & ors. 2014 (2) T.A.C. 1 (S.C.)

4. National Insurance Co. Ltd. Vs Jai Deo Singh 2010 (80) ALR 52

5. Oriental Insurance Co. Ltd. Through Branch Manager Vs Smt. Rehana Begham & ors. 2009 (2) TAC 227 (All.)

6. Rajendra Singh & ors. Vs National Insurance Co. Ltd. 2020 (3) TAC 25 (SC)

7. Sunil Sharma & ors. Vs Bachitar Singh & ors. (2011) 11 SC 425

8. Vimal Kanwar & ors. Vs Kishore Dan & ors. 2013 (3) T.A.C. 6 (S.C.) *(followed)*

9. Sarla Verma Vs Delhi Transport Corp. (2009) 6 SCC 121 *(followed)*

10. National Insurance Co. Ltd. Vs Pranay Sethi & ors. 2017 0 Supreme (SC) 1050 *(followed)*

11. A.V. Padma Vs Venugopal 2012 (1) GLH (SC) 442 *(followed)*

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard Mohd Asim Zulfiquar, learned counsel for the appellant, Sri Sushil Kumar Mehrotra, learned counsel for the respondent in both the appeals.

2. Both these appeals are preferred by legal heirs of the deceased which challenge the judgment and award dated 9.5.2018 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.2, Kaushambi (hereinafter referred to as 'Tribunal') in M.A.C.P. No.57 of 2014 awarding a sum of Rs.50,29,968/- as compensation with interest at the rate of 7% for the death of Dr. Mohd. Asif, who is son of the claimant-appellant and the award dated 9.5.2018 passed by the Tribunal in M.A.C.P. No. 56 of 2014 awarding a sum of Rs.3,70,200/- as compensation with interest at the rate of 7% for the death of one Smt. Kaniza Begum, who is the daughter-in-law of claimant-appellant and wife of the deceased Dr. Mohd Asif. The appeals challenge the quantum and finding of negligence returned by the Tribunal holding the deceased doctor also a tort feasor.

3. Facts as per the claim petition are that on 10.8.2013 at about 12.00 noon when the deceased reached near Kakora, Police Station Kokhraj, District Kaushambi, one Mahendra Yadav, driver of Vehicle Trailer No. R J 14 J F 4210 rashly and negligently drove his vehicle and dashed the Figo Car (bearing Registration No. UP 70 BZ 6881) of claimant's son who along with his wife Kaniza Begum @ Zeenat Mumtaz was coming from Locality G.T.B. Nagar, Kareily City, Allahabad to his home Kajiyana Kara, Police Station Saini, District Kaushambi. On account of the accident, both of them, namely, Dr. Mohd. Asif and Kaneejz Begum succumbed to their injuries on the spot.

4. The deceased Dr. Mohd. Asif was a resident doctor in Guru Teg Bahadur Hospital and his income was Rs.41070/-

+Rs.7875/-=Rs. 48,945/-. The accident is not in dispute which occurred on 10.8.2013 between two vehicles-one driven by Dr. Mohd. Asif which proved to be fatal to him and his wife who were 29 and 27 years of age respectively. Mother of Mohd. Asif and mother-in-law of Kaniza Begum @ Zeenat Mumtaz had filed the claim petitions.

5. The issue to be decided is who is to be considered to be legal representative. No one except class two heir, that is, mother-in-law has come before this Court and her claim has been accepted by the Tribunal. The Insurance Company or the owner of the other vehicle has not challenged the compensation awarded by Tribunal.

6. The counsel for appellant has contended that deduction of the amount, which was to be paid to the mother-in-law could not have been deducted as the deceased wife was not a tort feasor. It is submitted that even if this court accepts the findings of the Tribunal that deceased, who was driving the car was co-author of accident and negligent, the amount awardable to legal heir could not be deducted, this finding is error apparent on the face of the record, in view of the Judgment of Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469** and that proportionate amount could not have been deducted from the amount admissible to the claimant in the said MACT.

**Negligence and Compensation**

7. The issue of negligence will have to be considered from the facts as adduced as one of the deceased was a non tort feasor and qua the legal heir it would be case of composite negligence and, hence, whether the Tribunal was right in deducting compensation admissible to heir/legal representative of non tort feasor has to be considered. The Apex Court in Khenyei **(supra)** has held as under:-

*"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasors. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.*

*14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence;whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons.*

*This Court in **T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748]** has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :*

*"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.*

*7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."*

*18. This Court in **Challa Bharathamma &Nanjappan (supra)** has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the*

*vehicle - trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.*

*What emerges from the aforesaid discussion is as follows :*

*(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.*

*(ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.*

*(iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.*

*(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."*

*[Emphasis added]*

8. This Court in these appeal has to decide the issue of contributory negligence also as the Tribunal has held one of the deceased to be co-author of the accident having taken place. As far as the issue of negligence is concerned, the term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of *"res ipsa loquitur"* meaning thereby "the things speak for itself" would apply.

9. The principle of negligence has been discussed time and again. A person

who either contributes or is author of the accident would be liable for his contribution to the accident having taken place.

10. The Division Bench of this Court in **First Appeal From Order No. 1818 of 2012 ( Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 has held as under :

*"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.*

*17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.*

*18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.*

*19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in **Rylands V/s. Fletcher, (1868) 3 HL (LR) 330**. From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without*

*negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.*

*20. These provisions (sec.110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.*

*21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits* ***(per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).***

*22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side."*

***[Emphasis added]***

11. No doubt F.I.R. is not a substantive piece of evidence but it has to be proved by leading cogent evidence. The learned counsel for the appellant has relied on the decisions of the Apex Court titled (a) **Meera Devi and another vs. HRTC and others, 2014 (2) T.A.C. 1 (S.C.); (b) National Insurance Com. Ltd. Vs. Jai Deo Singh, 2010 (80) ALR 52; (c) Oriental Insruance Compnmay Ltd. through Branch Manager Vs. Smt. Rehana Begham and others, 2009 (2) TAC 227 (All.); (d) Rajendra Singh and others Vs. National Insurance Company Limited, 2020 (3) TAC 25 (SC); and (e) Sunil Sharma and others Vs. Bachitar Singh and others, (2011) 11 SCC 425 t**o submit that deceased was not a tort feassor and the finding needs to be reversed. These decisions are also relied to contend that compensation requires revaluation.

12. The vehicles involved are trailer and the car. Site plan goes to show that the vehicle of unequivocal magnitude dashed with each other. The Tribunal came to the conclusion and based its decision on the basis of site plan that the accident occurred in the middle road. Unfortunately, the driver of the trailer has not examined himself. The charge sheet was laid against him. The F.I.R., site plan and other facts have been considered by us. While considering the totality of the facts and circumstances, the driver of Trailer RJ 14 GF 4210 can be said to be negligent and we hold him to be negligent to the tune of 75%

as the accident occurred at about 12 noon just because in the F.I.R., it was mentioned that the trailer was coming from the opposite side, the Tribunal believed this aspect. There is no rebuttal to the F.I.R. Relevant part of the Judgment reads as under:-

"यहॉ यह भी उल्लेखनीय है कि प्रस्तुत मामला मोटर दुर्घटना प्रतिकर से सम्बन्धित है और ऐसे मामले में संदेह से परे साबित करने का सिद्धान्त लागू नहीं होता है, बल्कि केवल वाहन के चालक के तेजी व लापरवाही के परिणाम के फलस्वरूप दुर्घटना में मृत्यु होने के सम्बन्ध में युक्ति – युक्त सम्भावनाओं को ही साबित करना होता है। इस सम्बन्ध में विमला देवी बनाम हिमाचल रोड ट्रांसपोर्ट कारपोरेशन 2009 2 टी.ए.सी. 693 व परमेश्वरी देवी बनाम अमीर चन्द्र 2011 2 टी.ए.सी. 848 के निर्णय विधि उल्लेखनीय है जिसमें कि माननीय सर्वोच्च न्यायालय के द्वारा यह सिद्धान्त लागू नहीं होते हैं, बल्कि युक्ति–युक्त संगत सम्भावना को ही साबित करना होता है।''

13. brothers of the deceased, who are the claimants in F.A.F.O. No. 3203 of 2018.

**Compensation in both appeals**

14. Submission of the counsel for the appellant that the Tribunal has deducted several amounts from income of the deceased and has deducted amount which could not have been deducted, namely, HRA and other benefits. The Tribunal , unfortunately, did not grant any amount under the head of future loss of income though the deceased was in service.

15. The House Rent Allowance received by deceased could not have been deducted. We are supported in view of the **Vimal Kanwar and others Vs. Kishore Dan and Others, 2013 (3) T.A.C. 6 (S.C.)**. Though the Tribunal has referred to the decision of **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** for granting multiplier. It has not granted future loss. The income of deceased Dr. Mohd. Asif is considered to be Rs.60,885 per month as per Tribunal but his income would be Rs.41,070/- + Rs.7,875/- (HRA) = Rs.48,945/-. The Tribunal deducted income tax, HRA and other allowances which could not be done. The Tribunal has not added any amount of future loss of income through deceased was in Government Job. As the deceased was below 40 years, 50% will have to be added towards future prospect. Deducted towards his personal expenses would be 1/3rd. Further as he was aged 29 years at the time of accident, multiplier applicable would be 17. Deduction of 25% would be towards negligence attributed to him. The amount awarded under the head of non pecuniary damages for fililal consortium is also on lower side which requires ehnancement.

Hence, the total compensation payable to the appellant in view of the Judgment of Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050** for death of Dr. Mohd. Asif is computed herein below:

i. Income Rs.48,945/- (after deduction Income Tax and Transport Allowance)

ii. Percentage towards future prospects : 50% namely Rs.24472/-

iii. Total income : Rs. 48945 + 24472 = Rs.73,417/-

iv. Income after deduction of 1/2 : Rs.36,708/-

v. Annual income : Rs.36,708 x 12 = Rs.4,40,496/-

vi. Multiplier applicable : 17

vii. Loss of dependency: Rs.4,40,496 x 17 = Rs.74,88,432/-

viii. Amount under non-pecuniary head : Rs.40,000/-

ix. Total compensation : Rs.75,28,432/-

Total compensation payable to the appellant after deduction 25% would be **Rs.56,46,324/-**

16. As far as the second appeal for enhancement of compensation for death of daughter-in-law is concerned, income of Kaniza Begum @ Zeenat Mumtaz can be considered to be Rs.5,000/- to which as she was aged 27 years, 40% will have to be added under the head of future prospect as she was home maker. Further 1/2 has to be deducted towards personal expenses as she had no liability to maintain her husband who was doctor by profession. Multiplier applicable would be 17. Rs.30,000/- is gratned towards non-pecuniary damages to the appellant.

Hence, the total compensation payable to the appellant in view of Pranay Sethi **(supra)** for death of Kaniz Begum @ Zeenat Mumtaz is computed herein below:

i. Income Rs.5,000/-

ii. Percentage towards future prospects : 40% namely Rs.2000/-

iii. Total income : Rs. 5,000 + 2,000 = Rs.7,000/-

iv. Income after deduction of 1/2 : Rs. 3,500/-

v. Annual income : Rs.3,500 x 12 = Rs.42,000/-

vi. Multiplier applicable : 17

vii. Loss of dependency: Rs.42,000 x 17 = Rs.7,14,000/-

viii. Amount under non-pecuniary head : Rs.30,000/-

ix. Total compensation : Rs.7,44,000/-

Total compensation payable to the appellant after deduction 25% would be **Rs.5,58,000/-**.

**Reason why 25% is deducted**

17. In fact the deceased was not a tort feasor. The heirs can claim from any of the tort feasors. The mother-in-law is the legal heir rather mother of the deceased who is held to be negligent to the tune of 25% and as recovery rights would have to be granted to the owner driver and Insurance Company of trailer. It would be practical to deduct. The amount as recovery has to be from the petitioner as the deceased was owner and driver of other vehicle involved.

18. As far as issue of rate of interest is concerned, rate of interest as granted by the Tribunal is maintained.

19. Looking to the old age of the claimaint-appellant amounts not to be kept in fixed deposit as accident occurred in the year 2013 and we are now in the year 2021.

20. In view of the above, the appeals are 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% 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.

21. On depositing the amount in the Registry of Tribunal is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442,** the order of investment be made or not made as applicant is aged lady of 70 years.

22. Record and proceedings be sent to the Tribunal.

23. We are thankful to both the counsels for getting the old matter disposed of.

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**(2021)10ILR A295**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:ALLAHABAD 12.08.2021**

**BEFORE**

**THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.**
**THE HON'BLE SUBHASH CHAND, J.**

FAFO No. 3288 of 2007
and
FAFO NO, 3442 of 2007

**The Oriental Insurance Comp. Ltd.**
**...Appellant**
**Versus**
**Smt. Gitanjali Sharma & Ors.**
**...Respondents**

**Counsel for the Appellant:**
Sri Arvind Kumar

**Counsel for the Respondents:**
Sri Ram Singh, Sri Amit Kumar Sinha, Deepali Srivastava Sinha

**(A) Motor Vehicle Act, 1988 : Section 2(16), (17), (47) - "goods vehicle", "heavy goods vehicle" or "public service vehicle" can be commonly called as "transport vehicle". (Para 17)**

The Court opined that the distinction is of nature of use of the vehicle which makes no difference as the driver of the offending vehicle having a driving license of heavy passenger vehicle was driving a heavy goods vehicle and same falls within the definition of transport vehicle; consequently the driver of the offending vehicle was having a valid and effective driving license at the time of accident and Insurance Company-appellant cannot avoid from its liability to pay compensation. (Para 23)

**Appeals are Partly Allowed.** (E-10)

**List of Cases cited:**

1. National Insurance Co. Ltd. Vs Swaran Singh & ors. 2004 (3) SCC 297

2. Oriental Insurance Co. Ltd. Vs Shiv Narain Sahani & ors. 2007 ACJ 1640

3. Mukund Dewangan Vs Oriental Insurance Co. Ltd. & anr. (2016) 4 SC 298

4. Kusumlata Vs Lalaram & ors. 2003 ACJ 1966

5. National Insurance Co. Ltd. Vs Smt. Anurandha Kejriwal & 4 ors. First Appeal From Order No. 2103 of 2017

6. Nirmala Kothari Vs United India Insurance Co. Ltd. (2020) 4 SCC 49

7. Oriental Insurance Co. Ltd. Vs Poonam Kesarwani & ors. 2008 LawSuit (All) 1557

8. Khenyei Vs New India Assurance Co. Ltd. & ors. 2015 LawSuit (SC) 469 *(followed)*

9. New India Insurance Co. Ltd. Vs Smt. Kalpana & ors. 2007 TAC 795

10. Asha & ors. Vs United India Insurance Co. Ltd. 2004 ACJ 448

11. Vimla Kanwar & ors. Vs Kishor Dan & ors. (2013) 7 SCC 476

12. Helen C. Rebello Vs Maharashtra SRTC 3 (1999) 1 SCC 90

13. Malarivizhi & ors. Vs United India Insurance Co. Ltd. & anr. 2020 (4) SCC 228 *(followed)*

14. United India Insurance Co. Ltd. Vs Indiro Devi & ors. 2018 (7) SCC 715 *(followed)*

15. Manasvi Jain Vs Delhi Transport Corporation & ors. (2014) 13 SCC 22 *(followed)*

16. The Oriental Insurance Co. Ltd. Vs Mangey Ram & ors. 2019 0 Supreme (All) 1067

17. New India Assurance Co. Vs Urmila Shukla MANU/SCOR/24098/2021

18. Kriti & ors. Vs Orientall Insurance Co. Ltd. 2021 (1) TAC 1

19. General Manager, Kerala S.RT.C., Trivandrum Vs Susamma Thomas & ors. (1994) 2 SCC 176 *(followed)*

20. U.P.S.R.T.C. & prs. Vs Trilok Chandra & ors. (1996) 4 SCC 362 *(followed)*

21. Sarla Dixit Vs Balwant Yadav AIR 1996SC 1274 *(followed)*

22. Hardeo Kaur Vs Rajasthan State Transport Corp 1992 2 SCC 567 *(followed)*

23. Puttamma Vs K.L. Narayana Reddy AIR 2014 SC 706 *(followed)*

24. Raman Vs Uttar Haryana Bijli Vitran Nigam Limited *(followed)*

25. Bijoy kumar Dugar Vs Bidyadhar Dutta 2006 (3) SCC 242 *(followed)*

26. R.K. Malik Vs Kiran Pal AIR 2009 SC 2506 *(followed)*

27. National Insurance Co. Ltd. Vs Pranay Sethi AIR 2017 SC 5157 *(followed)*

28. Raj Rani Vs Oriental Co. Ltd. 2009 (13) SCC 654*(followed)*

29. Ritaben alias Vanitaben Wd/o Dipakbhai Hariram & anr. Vs Ahmedabad Municipal Transport Service & Anr. 1998 (2) G.L.H. 670 *(followed)*

30. A.V. PAdma Vs Venugopal 2012 (1) GLH (SC) 442 *(followed)*

(Delivered by Hon'ble Subhash Chand, J.)

1. These appeals arise out of same accident and hence decided by this common judgment .

2. F.A.F.O. No. 3288 of 2007 is preferred at the instance of Oriental Insurance Company. The F.A.F.O. No. 3442 of 2007 is preferred at the instance of claimants, who are dissatisfied with the compensation awarded by the Tribunal in impugned award dated 20.08.2007 of Motor Accident Claims Tribunal/Additional District Judge, Court Room No.2, Allahabad in M.A.C.P. No. 564 of 2000 (Smt. Gitanjali Sharma and others Vs. Sant Kumar and others).

3. The brief facts as narrated in the Claim Petition No. 564 of 2000 are that Swami Nath Sharma (deceased) S/o Late Sri Salig Ram Sharma resident of 98/1-H, Himmatganj, Allahabad was traveling along with Vijay Shyam (Ardali) by the Jeep No. UGP/7448, driven by Sri Ramesh Kumar from Pratapgarh to Bhopiamau for government work on 13.02.2000 when at 7.30 PM. a truck bearing no. UP 42B 0251, driven by its driver rashly and negligently was plied ahead of the Jeep and all of sudden the driver stopped the Truck in the middle of the road whereby the jeep

'collided' with truck resulting in the death of Swami Nath on the spot. Swami Nath Sharma was 46 years 8 months and 12 days old. He was government servant posted as district non-formal education officer at Pratapgarh and he was getting monthly salary of Rs. 18879/-. after his death he left his widow, his mother, two brothers and two sons of brother.The fir of accident was lodged with the police station Kotwali Nagar, which was registered on Case Crime No. 85 of 2000, under Sections 279, 338, 304A IPC against the unknown truck driver of Truck No. UP 42B 0251. The owner of the truck was Sant Kumar and Ram Babu i.e. opposite party nos. 1 and 2; while the jeep was driven by Ram Phakirey opposite party no.3. The offending truck and jeep were insured by the Oriental Insurance Company Limited, that is opposite party nos.4 & 5. Hence, compensation of Rs. 88,06,139/- was claimed by the claimants.

4. On behalf of opposite parties nos.4 and 5, joint written statement was filed with the averments that driver of the offending truck was not holding a valid and effective driving license and the alleged accident was not caused due to negligence of truck driver. Hence, the Insurance Company denied its liability to pay compensation.

5. On behalf of opposite party no.3, the driver of the jeep, averments made in the claim petition were supported in the written statement to certain extent. No written statement was filed on behalf of opposite party nos. 1 and 2.

6. The Tribunal passed the award on 20.08.2007 granting compensation of Rs. 15,38,452/- and Oriental Insurance Company insurance company of Truck was directed to pay the amount of the award to claimants widow and mother.

7. Heard learned counsels for the parties and perused the evidence on record.Parties are refereed as appellant insurance company or Insurance company and respondent claimants as claimants .

8. The **F.A.F.O. No. 3288 of 2007** is preferred at the instance of Oriental Insurance Company, who are aggrieved by fastening of the liability to pay the amount of award though there is a finding that there is breach of policy.

9. Learned counsel for the appellant/Insurance Company has contended that the driver of the offending truck was having the driving license for heavy passenger vehicle and he was driving heavy goods vehicle for which he was not authorized to drive. As such the driver of the vehicle was not having a valid and effective driving license at the time of accident, therefore, the liability to pay the compensation cannot be fastened on the appellant/Oriental Insurance Company.It is submitted by learned counsel for Insurance Company that the Tribunal itself has held that drivers of both the vehicles were not possessing valid driving license, therefore, the liability can not be set up on the Insurance Company and the award is bad in the eye of law. It is further submitted by counsel for Insurance company that the accident occurred in the year 2000. The quantum awarded is on higher side. Learned counsel for the appellants Insurance company of truck has submitted that the finding of fact as far as the driver of the truck being sole negligent is bad in the eye of law as the facts reveal that the driver of the Jeep was solely negligent as he rammed in the truck and had contributed to the accident taking place. It is submitted by learned counsel Sri Arvind Kumar for insurance company that as far as

negligence is concerned from the factual data the Jeep has collided with the Truck from behind. The Truck though is said to be stationary. The driver of the Jeep has ramped into the truck. It is submitted that even if we accept the submissions of learned counsel for the claimants that the Jeep was at moderate speed and the Truck was not stationary, but was being plied and abruptly stopped at the place. It is the duty of the vehicle driver who drives the vehicle on rear side to drive should take care. It is submitted that in our case, the impact of the accident was such that some of the persons sitting in Jeep collapsed and breathed to last. This shows that finding of the Tribunal about absolute negligence of truck driver is bad and the fact the site plan will demonstrate that both the vehicle drivers were negligent.

10. Learned counsel for the respondent-claimants vehemently opposed and contended that the driver of the offending truck was having a valid and effective driving license and the Tribunal has rightly fastened liability to pay the compensation on the appellant/Insurance Company. It is submitted by learned counsel for claimants that the liability of insurers cannot be absolved just because the driver of the vehicle had license to drive heavy vehicle, but was driving what is known as truck. It is submitted that the judgment in case of **National Insurance Company Limited Vs. Swarn Singh and others 2004 (3) SCC 297 and Oriental Insurance Company Limited Vs. Shiv Narain Sahani and others 2007 ACJ 1640 and the recent judgment in the case of Mukund Dewangan Vs. Oriental Insurance Company Limited and another (2016) 4 SC 298** would apply as far as the submission of insurance company assailing the finding of fact by the Tribunal that the driver of the truck was authorized to drive heavy vehicle, but he was driving truck and, therefore, he was not having license, is not asserted and the later reasoning has to be accepted. It is submitted that despite the fact that the drivers did not have proper driving license, the Tribunal relied on the judgment of Swarn Singh (supra) and has come to the conclusion that main basis of accident was not lack of endorsement, as the driver had license to drive heavy vehicle and, therefore, the tribunal held that on the facts that this was not fundamental breach of policy condition and this finding is not perverse. It is further submitted that that the issue of negligence qua the claimants is of composite negligence and that we should decide proportionate negligence of each driver and that the charge-sheet was laid against the truck driver may be considered.

**BREACH OF POLICY AND OUR FINDINGS ON THE SAME** :

11. Having heard the ld advocates as far as breach of policy is concerned the judgment of Apex Court in case of **Mukund Dewangan (supra)** will apply we are even fortified in our view that the breach cannot be said to be such, which would give right of recovery to the Insurance Company. The decision of Madhya Pradesh High Court in case of **Kusumlata Vs. Lalaram and others 2003 ACJ 1966** will also not permit us to take a different view then that which has been taken by the Tribunal. Thus, it cannot be said that the driver of the truck was not having valid driving license. As far as the driving license of the Jeep driver is concerned, it is finding of fact that he had license to drive and the owner has admitted the ownership of the Jeep. The Jeep was sent for repairs in Mamta Auto Garrage at Pratapgarh near supply office and when it got repaired and the driver was standing near the road at about 7.00 P.M., Sri Sharma (deceased) who had been

Non Formal Education Officer at Pratapgarh, met the driver along with his peon and requested to give free-lift towards Bhopiamau area for performance of his duty and requested by saying that as it was evening there is would be no other means to reach destination. As Sharma (deceased) was well acquainted and was knew the driver hence paying respect to a officer, he gave free lift and Sri Sharma (deceased) occupied the seat in the Jeep and his peon also accompanied him.. The license issued by M.V. Dutt issuing authority, Pratapgarh U.P. is unreadable whether it is for car, Jeep or other vehicle . However, it can be said that the driver of the Jeep had got license to drive motorcycle and LMV and jeep was a light motor vehicle as its laden weight was such which would be seen that jeep was a light motor vehicle. In F.A.F.O. No. 617 of 1996 (The New India Insurance Company Limited Vs. Ganga Singh and others), learned single Judge view's is based on the judgment in case of **Mukund Dewangan Vs. Oriental Insurance Company Limited and another (2016) 4 SC 298** has elaborately discussed the issue of types of vehicles. We concur with the Tribunal on two aspects as far as liability of the Insurance Company is concerned that license to drive goods vehicle would part take within it license to drive heavy public vehicle as per the decision in case of **Oriental Insurance Company Limited Vs. Shiv Narain Sahani and others 2007 ACJ 1640** and therefore, it cannot be held that offending Truck driver did not possess valid license to drive heavy vehicle. The decisions cited herein-above will not permit us to take different view then that taken by the Tribunal as far as the liability of Insurance Company is concerned.

12. Giving serious consideration to the submissions advanced by learned counsels of parties, the relevant provisions of the Motor Vehicle Act, 1988 are as under:-

***Section 2(16)*** *"'heavy goods vehicle' means any goods carriage the gross vehicle weight of which, or a tractor or a road-roller the unladen weight of either of which, exceeds 12,000 kilograms;"*

***Section 2(17)*** *"'heavy passenger motor vehicle' means any public service vehicle or private service vehicle or educational institution bus or omnibus the gross vehicle weight of any of which, or a motor car the unladen weight of which, exceeds 12,000 kilograms;"*

***Section 2(47)*** *"'transport vehicle' means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle;"*

***Section 3. Necessity for driving license.*** *(1) No person shall drive a motor vehicle in any public place unless he holds an effective driving license issued to him authorizing him to drive the vehicle; and no person shall so drive a transport vehicle other than a motor cab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of section 75 unless his driving license specifically entitles him so to do.*

***Section 10. Form and contents of licences to drive.*** *(1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.*

***Section 149. Settlement by insurance company and procedure***

***therefor.*** *(1) The insurance company shall, upon receiving information of the accident, either from claimant or through accident information report or otherwise, designate an officer to settle the claims relating to such accident.*

*(2) An officer designated by the insurance company for processing the settlement of claim of compensation may make an offer to the claimant for settlement before the Claims Tribunal giving such details, within thirty days and after following such procedure as may be prescribed by the Central Government.*

*(3) If, the claimant to whom the offer is made under sub-section (2),-*

*(a) accepts such offer,-*

*(i) the Claims Tribunal shall make a record of such settlement, and such claim shall be deemed to be settled by consent; and*

*(ii) the payment shall be made by the insurance company within a maximum period of thirty days from the date of receipt of such record of settlement;*

*(b) rejects such offer, a date of hearing shall be fixed by the Claims Tribunal to adjudicate such claim on merits.*

13. The conjoint reading of these provisions enumerated in Section 2(16) & 2(17) shows that heavy good vehicle as well as heavy passenger motor vehicle of which gross vehicle weight exceeds 12000 Kg., both come within the definition of transport vehicle under section 2(47) of Motor Vehicle Act, 1988.

14. Chapter II of Motor Vehicle Act, 1988 inter-alia provides for compulsory insurance for vehicle in relation to matters specified therefor. The provisions for compulsory insurance indisputably has been made with a view to protect the right of third party.

15. The Hon'ble Apex Court in case of **National Insurance Company Limited Vs. Swaran Singh and others (2004) 3 Supreme Court Cases 297** has held:-

*"42. We may also take note of the fact that whereas in Section 3 the words used are "effective license", it has been differently worded in Section 149(2) i.e. "duly licensed". If a person does not hold an effective licence as on the date of the accident, he may be liable for prosecution in terms of Section 141 of the Act; but Section 149 pertains to insurance as regards third-party risks.*

*43. A provision of a statute which is penal in nature vis-a-vis a provision which is beneficent to a third party must be interpreted differently. It is also well known that the provisions contained in different expression are ordinarily construed differently.*

*44. The words "effective licence" used in Section 3, therefore, in our opinion, cannot be imported for sub-section (2) of Section 149 of the Motor Vehicles Act. We must also notice that the words "duly licensed" used in sub-section (2) of Section 149 are used in the past tense.*

*47. If a person has been given a licence for a particular type of vehicle as specified therein, he cannot be said to have no licence for driving another type of vehicle which is of the same category but of different type. As for example, when a person is granted a licence for driving a*

*light motor vehicle, he can drive either a car or a jeep and it is not necessary that he must have driving licence both for car and jeep separately.*

*51. It is trite that where the insurers, relying upon the provisions of violation of law by the assured, take an exception to pay the assured or a third party, they must prove a wilful violation of the law by the assured. In some cases violation of criminal law, particularly, violation of the provisions of the Motor Vehicles Act may result in absolving the insurers but, the same may not necessarily hold good in the case of a third party. In any event, the exception applies only to acts done intentionally or "so recklessly as to denote that the assured did not care what the consequences of his act might be."*

*90. We have construed and determined the scope of sub-clause (ii) of sub-section (2) of Section 149 of the Act. Minor breaches of licence conditions, such as want of medical fitness certificate, requirement about age of the driver and the like not found to have been the direct cause of the accident, would be treated as minor breaches of inconsequential deviations with regard to licensing conditions would not constitute sufficient ground to deny the benefit of coverage of insurance to the third parties."*

16. It shall be noted that the said term did not specify the type of license i.e., the license to drive "heavy goods vehicle" or "transport vehicle". The "transport vehicle" is defined in clause 33 of Section 2 of the Act to mean, "a public service vehicle or a goods vehicle". "Public Service Vehicle" is defined in clause 25 of Section 2 of the Act to mean, "any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a motor cab, contract carriage, and stage carriage." "Goods vehicle" is defined in clause 8 of the said Section 2 to mean, "any motor vehicle constructed or adapted for use for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods solely or in addition to passengers". "Heavy goods vehicle" has been defined in clause 9 of Section 2 of the Act to mean, "any goods vehicle the registered laden weight of which or a tractor the unladen weight of which, exceeds 11,000 kilo grams."

17. Considering the aforesaid definitions, we are of the opinion that any "goods vehicle", "heavy goods vehicle" or "public service vehicle" can be commonly called as "transport vehicle". In other words, the heavy goods vehicle is not different from a transport vehicle. Any person possessing a driving license for a transport vehicle can be said to hold a valid license to drive either a goods vehicle or a public service vehicle. The offending truck was necessarily a heavy goods vehicle within the meaning of clause 9 of section 2 of the Act. The driver of the offending truck thus possessed a valid license to drive the offending truck. In my opinion, the Tribunal has erred in distinguishing the "transport vehicle" from a "heavy goods vehicle" without considering the above referred statutory definitions appearing in the Act. The Tribunal has thus erred in absolving the Insurance Company from its liability in respect of the compensation awarded to the claimants who are heirs of non tort fessor .

18. On behalf of the owner of the offending truck, neither the written statement was filed and nor the driver of the offending truck was produced in the

witness box. The driving license of the offending truck driver Mool Chand is produced at paper no.44A on record, from which it transpires that the driving license of Mool Chand, was originally of light motor vehicle and same was endorsed as a heavy passenger vehicle on 20.07.1999 by the licensing Authority which was valid from 20.07.1999 to 19.07.2002. As the accident was caused on 13.02.2000, therefore, this license of offending truck driver Mool Chand was valid and effective on the date of accident. Reference to decision of the division bench in FIRST APPEAL FROM ORDER No. - 2103 of 2017 between **National Insurance Co. Ltd. Vs. Smt. Anuradha Kejriwal And 4 others** wherein this court has held as follows:

"The submission of Insurance companies is rejected and we uphold the finding of the tribunal. While considering the case of the Insurance Company, can it be said that the driver did not have valid driving licence? This question has to be answered in favour of the claimants. We are fortified in our view by the latest decision of the Apex Court in **Nirmala Kothari Vs. United India Insurance Co. Ltd., (2020) 4 SCC 49.**

19. Further, this issue also is answered against the Insurance Company as the Insurance Company has not examined any person so as to prove that the report of the R.T.O. is vitiated. We are even supported in our view by the decision of this Court in **Oriental Insurance Company Limited Vs. Poonam Kesarwani and others, 2008 LawSuit (All) 1557,** where in a similar situation converse view then that contended by Sri K.S. Amist is taken. Reliance can also be placed on the finding of the Tribunal which unless proved to the contrary should not be easily interfered with. Further, the owner of the vehicle was satisfied and it was proved that he has taken all care and caution that vehicle was being driven by a person who was authorised to drive the same which is even apparent from the fact that the owner has gone to the extent of producing evidence so as to bring home the fact that there was no breach of policy condition.

20. In that view of the matter, on the facts and the law, it cannot be said that the owner has committed breach of policy conditions. Thus the submission of counsel for insurance company regarding breach of policy has to be rejected and is rejected

21. This takes us to the issue of negligence and compensation awarded which has aggrieved the claimants and the Insurance Company.

**ISSUE OF NEGLIGENCE RAISED AND OUR FINDINGS FOR THE SAME;**

22. As far as the question of Negligence is concerned we reiterate the submissions of learned counsel for insurance company of truck Sri Arvind Kumar that as far as negligence is concerned from the factual data the Jeep has collided with the Truck from behind. The Truck though is said to be stationary. The deceased was not a tort fessor the driver of the Jeep has ramped into the truck. It is submitted that even if we accept the submissions of learned counsel for the claimants that the Jeep was at moderate speed and the Truck was not stationary, but was being plied and abruptly stopped at the place. It is the duty of the vehicle driver who drives the vehicle on rear side to drive the vehicle after taking care. In our case,

the impact of the accident was such that people sitting in Jeep collapsed and breathed to last.

23. We are of the view that the distinction is of nature of use of the vehicle which makes no difference as the driver of the offending vehicle having a driving license of heavy passenger vehicle was driving a heavy goods vehicle and same falls within the definition of transport vehicle; consequently he was having a valid and effective driving license at the time of accident and Insurance Company-appellant cannot avoid from its liability to pay compensation. Therefore, the Tribunal has rightly fastened the liability to pay the compensation to the appellant and same needs no interference. We would have decided proportionate negligence of each driver and that the charge-sheet was laid against the truck driver as raised by the insurance company of truck will have to discussed and will have to be decided on the touch stone of principles for deciding the issue relating to negligence. The Jeep dashed the truck from behind. The Jeep must be driven with such speed that after dashing the truck on its right side it dashed with a cyclist just because charge-sheet was laid against driver of the truck it could not be absolved, the driver of the Jeep had also to maintain safe distance, which he had not maintained.

24. he Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469** has held as under:

*"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasors. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.*

*14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence;whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in* ***T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748]*** *has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is*

*required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :*

*"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.*

*7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."*

*18. This Court in* ***Challa Bharathamma &Nanjappan (supra)*** *has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feasor had not been impleaded, it was not open to*

*settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.*

*What emerges from the aforesaid discussion is as follows :*

*(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.*

*(ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.*

*(iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.*

*(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."*

*emphasis added*

25. The latest decision of the Apex Court in **Khenyei (Supra)** has laid down one further aspect about considering the negligence more particularly composite/contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care. The judgment in case of **New India Insurance Company Limited Vs. Smt. Kalpana and others 2007 TAC 79**5 will not permit us to concur with the finding of the Tribunal. As far as it relates to negligence, we hold that both the drivers were negligent.

26. As far as the case of claimants is concerned, it would be a case of composite negligence as the claimants are heirs of the person, who has died in the accident and was not contributory to accident. The evidence led will permit us to up turn the finding of the Tribunal as far as it relates to negligence. It is not known whether the Truck was in middle of the road or was on right side or not, as the accident occurred on 13.02.20000 at 7.30 P.M. in the dark and darkness would have settled at the point of time. Thus, even from the site plan just because charge-sheet was laid against the driver of the Truck he cannot be held to be solely negligent. It has not been proved from evidence led that the Truck driver had dragged the Truck in reckless manner or driven his vehicle, the Jeep driver ramped into stationary truck or truck going ahead.

Truck driver is also to be held negligent in our view. PW-2 in his evidence opined that both the drivers were negligent. The Tribunal has held that issue no.1 is decided in favour of the claimants. We hold both the vehicle drivers to be equally negligent. Hence, the reasoning of the Tribunal is modified to the said effect.

**Compensation:-**

27. As far as the submission of the claimants and Insurance Company regarding compensation awarded is concerned is considered in view of settled legal principles . The Tribunal has considered the income of the deceased Rs. 14725/- per month. The documentary evidence shows that the deceased was a government employee and his pay packet was Rs. 19879/- and Rs. 4153 was deducted towards various heads. He was in the age bracket of 45-49. The Tribunal has deducted the amount which could not have been done and, therefore, the deduction which is permissible would be Income tax .The Tribunal unfortunately did not grant any amount under the head of future loss of income on the ground that till what age he live and he can also die due to other reasons so the family was held not entitled for addition of future loss of income this finding is perverse. The Tribunal unfortunately misread and has relied on the judgment in case of **Asha and others Vs. United India Insurance Company Limited 2004 ACJ 448**. This finding on the basis of the said decision is nothing but misreading of the said judgment. On what basis the Tribunal has not granted any amount under future loss of income for a salaried person is also perverse. The Tribunal has considered several judgments cited before it relating to future loss of income but with the perversity has rejected the same just because he was survived by widow and mother only and as the deceased has no children future loss is not granted as widow is serving.

28. **F.A.F.O. No. 3442 of 2007** is preferred by the claimants, who are aggrieved by computation of compensation, the learned counsel for the appellants contended that the Tribunal had deducted the GPF, GIS, house loan and other items out of the gross salary of the deceased while such deductions are not permissible in view of law laid down by the Hon'ble Apex Court. On behalf of Insurance Company, learned counsel conceded that the GPF, GIS, Gratuity etc. should be deducted from the salary.

29. The submission of the counsel for the claimants that family pension and amount under insurance policy, amount of gratuity, PF, Bonus, Death-cum-retirement benefit are not deductible from the income of the deceased since it would be available to the claimants even if death has not arisen out of the accident. The relience on the decisions of the Hon'ble Apex Court in case of **Vimal Kanwar and others Vs. Kishor Dan and others (2013) 7 SCC 476** will permit us to uphold the submission of the counsel for claimants as the decision of the tribunal is against settled legal position and case titled **Helen C. Rebello Vs. Maharashtra SRTC 3 (1999) 1 SCC 90** will also enure for the benefit of claimants . In the said cases, the Court held that provident fund, pension, insurance and similarly any cash, bank balance, shares, fixed deposits, etc. are all a "pecuniary advantage" receivable by the heirs on account of one's death but all these have no correlation with the amount receivable under a statute occasioned only on account of accidental death. Such an amount will

not come within the periphery of the Motor Vehicles Act to be termed as "pecuniary advantage" liable for deduction.

30. In support of of our findings we have relied on the decisions titled **Malarvizhi & Ors Vs. United India Insurance Company Limited and Another, 2020 (4) SCC 228 and United India Insurance Co. Ltd. Vs. Indiro Devi & Ors, 2018 (7) SCC 715.and The Hon'ble Apex Court in case of Manasvi Jain Vs. Delhi Transport Corporation and others (2014) 13 SCC 22** held that this Court in Shyamwati Sharma Vs. Karam Singh, while considering the issues of deduction of taxes, contributions, etc., for arriving at the figure of net monthly income, held that:

*"9....while ascertaining the income of the deceased, any deductions shown in the salary certificate as deductions towards GPF, life insurance premium, repayments of loans, etc. should not be excluded from the income. The deduction towards income tax/surcharge alone should be considered to arrive at the net income of the deceased."*

31. The deductions of GPF, GIS and other items except income tax made by the Tribunal out of gross salary are erroneous. Hence, the monthly salary of the deceased is fixed at Rs. 17879/-.

32. This takes this Court to the computation of compensation. On what basis, the Tribunal has disregarded grant of future loss is perverse this finding cannot be fathomed as a man's income would increase unless proved otherwise. Even in the earlier days, the factors to be considered for deciding quantum of compensation reads as follows:

i. To give present value, a reasonable deduction or reduction is required as lump sum amount is given at a stretch under the head of prospective economic loss;

ii. The tax element is also required to be considered as observed in the Gourley's case (1956 AC 185).

iii. The resultant impairment/death on the earning capcity of the claimant/claimants .

iv. That the amount of interest is awarded also on the prospective loss of income.

v. That the amount of compensation is not exemplary or punitive but is compensatory. We would place reliance on the Apex court decisions in **Malarvizhi & Ors Vs. United India Insurance Company Limited and Another, 2020 (4) SCC 228 and United India Insurance Co. Ltd. Vs. Indiro0 Devi & Ors, 2018 (7) SCC 715. and in The Oriental Insurance Company Ltd. Vs. Mangey Ram and others, 2019 0 Supreme (All) 1067** and the recent judgment of the Apex Court in **New India Assurance Company Vs. Urmila Shukla** decided by the Apex Court on 6.8.2021 reported in MANU/SCOR/24098/2021 and **Kirti and others vs oriental insurance company Ltd. reported in 2021(1) TAC 1** On what basis, the Tribunal has disregarded the income cannot be fathomed as a man's income would increase unless proved otherwise.

33. Hence we now propose to calculate the compensation payable to the legal heirs of the deceased. The income of the deceased in the year of accident and

looking to his profession namely that he had government job can be considered to be Rs.17879/- per month to which as he was 48years, 30% as future loss of income requires to be added in view of the decision of the Apex Court. The submission that the Tribunal has not granted any amount towards future loss of income in the year of decision and will have to be traced back and judgements in **General Manager, Kerala S.R.T.C., Trivandrum v. Susamma Thomas & Ors.,(1994) 2 SCC 176** wherein in paragraph 13 addition of future prospects is also calculated referred in and **U.P.S.R.T.C. & Ors. v. Trilok Chandra & Ors.(1996) 4 SCC 362** which have been considered by the Apex Court in **Sarla Dixit Versus Balwant Yadav AIR 1996 SC 1274** and has considered decision in **Hardeo Kaur V/s. Rajasthan State Transport Corporation, 1992 2 SCC 567** also the decision in Sarla Dixit (supra) has been considered to be good law in (1) **Puttamma Vs. K.L.Narayana Reddy, AIR 2014 SC 706 (2) Raman Vs. Uttar Haryana Bijli Vitran Nigam Limited,Bijoy Kumar Dugar Vs. Bidyadhar Dutta, 2006 (3) SCC 242 : (3) Sarla Verma (supra) (4) R.K.Malik Vs. Kiran Pal, AIR 2009 SC 2506 (5) National Insurance Company Limited Vs. Pranay Sethi, AIR 2017 SC 5157 Raj Rani Vs. Oriental Insurance Company Limited, 2009 (13) SCC 654** in those days referred to herein above and we have gone through the judgment of Gujarat high court in **Ritaben alias Vanitaben Wd/o. Dipakbhai Hariram and Anr. v/s. Ahmedabad Municipal Transport Service & another reported in 1998(2) G.L.H. 670".,** wherein, it has been observed in para-7:-

"It is settled proposition of that the main anxiety of the Tribunal in such case should be to see that the heirs and legal representatives of the deceased are placed, as far as possible, in the same financial position, as they would have been, had there been no accident. It is therefore, an action based on the doctrine of compensation.

"para-8 "It may also be mentioned that perfect determination of compensation in such tortuous liability is, hardly, obtainable. However, the Tribunal is required to take an overall view of the facts and the relevant circumstances together with the relevant proposition of law and is obliged to award an amount of compensation which is just and reasonable in the circumstances of the case.

"para-10 "Even in absence of any other evidence an able bodied young man of 25 years, otherwise also presumed to earn an amount of Rs.1000/- or more per month, on that basis the prospective income could be calculated by doubling the one prevalent on the date of the accident, which is required be divided by half, so as to reach the correct datum figure which is required to be multiplied by appropriate multiplier. "Even taking a conservative view in the matter, the deceased would be earning not less than an amount of Rs.1000/- per month and considering the prospective average income of Rs.2000/- and divided by half, would, obviously come to Rs.1500/" Thus even in year 1990 to 2007 the addition of future prospects was not ruled out just because tribunals in Uttar Pradesh were not granting future loss it cannot hold field where the decision of Apex court is otherwise as demonstrated with decision though of persuasive value of Gujarat high court referred herein above wherefore, the submission of Sri Arvind Kumar that no amount under the head of

future loss of income was admissible in those days, will have to be considered. The judgments referred by us will have to be considered in the light of the recent decisions as well as the decisions of the Apex Court prevailing, and also in view of the decision of apex court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050**.The amount of deduction for personal expenses of deceased would also be as per settled legal provision namely one third.The pecuniary damages are awarded likewise relying on decision in Pranay Sethi (supra)with addition of ten percent for every three years

34. Hence, the total compensation payable to the appellants in view of the decision of the Apex Court in Pranay Sethi (Supra) is computed herein below:

i. Income Rs.17879 /-per month

ii. Percentage towards future prospects : 30% namely Rs.5363/-

iii. Total income : Rs. 17879+5363 = Rs. 23242/-

iv. Income after deduction of 1/3 : Rs. 15495/- (rounded up)

v. Annual income : Rs.15495 x 12 = Rs. 1,85,940/-

vi. Multiplier applicable : 13

vii. Loss of dependency: Rs. 1,85,940 x 13 = Rs.24,17,220/-

viii. Amount under non pecuniary heads : Rs.70,000/- + 30,000/- (additional of 10% for every three years rounded up to Rs. 30,000/-)

x. Total compensation : 25,17,220/-

35. As far as issue of rate of interest is concerned, it should be 7% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

*"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."*

36. In view of above, the **F.A.F.O. No. 3288 of 2007** is hereby **partly allowed**. In view of the above, the FAFO No. 3442 of 2007 is also partly allowed. The impugned award 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. The insurance company of the truck would be entitled to recover the proportionate amount from insurance company of jeep if it deposits the entire amount

37. On depositing the amount in the Registry of Tribunal, Registry is directed to

first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma Vs. Venugopal reported in 2012 (1) GLH (SC) 442,** the order of investment is not passed because applicants/claimants are neither illiterate nor rustic villagers.

38. Record be sent back to the Tribunal.

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**(2021)10ILR A310**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:ALLAHABAD 12.08.2021**

**BEFORE**

**THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.**
**THE HON'BLE SUBHASH CHAND, J.**

FAFO No. 3364 of 2014

**Smt. Suchi Sharma & Anr. ...Appellant**
**Versus**
**U.P. State Road Transport Corp., Meerut & Ors. ...Respondents**

**Counsel for the Appellant:**
Sri Vidya Shukla, Sri R.S. Yadav

**Counsel for the Respondents:**
Sri Rahul Sahai, Sri Jagram Singh

**(A) Quantum of Compensation -** The total compensation payable was calculated in view of the decision of the Apex Court in National Insurance Company Limited Vs Pranay Sethi. (Para 9)

**Appeal Partly Allowed.** (E-10)

**List of Cases cited:**

1. National Insurance Co. Ltd. Vs Pranay Sethi & ors. 2017 0 Supreme (SC) 1050

2. Sarla Verma Vs Delhi Transport Corp. (2009) 6 SCC 121

3. National Insurance Co. Ltd. Vs Mannat Johal & ors. 2019 (2) T.A.C. 705 (S.C.)

4. A.V. Padma Vs Venugopal 2012 (1) GLH (SC) 442 *(followed)*

5. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd. 2007 (2) GLH 291 *(followed)*

6. Smt. Sudesna & Ors. Vs Hari Singh & ors. Review Application No. 1 of 2020 in First Appeal From Order No. 23 of 2001 *(followed)*

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard learned counsel for the appellants and learned counsel for the respondents and perused the judgment and order impugned and documents annexed and record of Tribunal.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 3.9.2014 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No. 11, Muzaffarnagar (hereinafter referred to as 'Tribunal') in M.A.C.P. No. 511 of 2011 awarding a sum of Rs.3,93,500/- with interest at the rate of 7% from the date of filing the claim petition till date of award as compensation.

3. Facts in brevity are that on 27.4.2011 at about 3.30 pm deceased Durga Shankar Dwivedi was going to Meerut from Delhi boarding in a Bus having registration no. UP 11 T 2698. When the bus reached in front of Modi Nagar Tehsil, driver of truck having registration no. UP 12 T 4503, coming from Meerut side, being driven rashly and negligently dashed the bus on account of which the persons in bus were injured badly. Deceased also got

injured badly. He was got admitted in Jaswant Rai Hospital, Meerut where he died on 28.4.2011 at about 12.15 pm during treatment.

4. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The respondents have not challenged the liability imposed on them. Only issue to be decided is the quantum of compensation awarded.

5. It is submitted by learned counsel for the appellant that the deceased was 45 years of age at the time of accident. He was working in Emerald Jwellers Industry India Ltd. as Sales Associate from where he used to earn Rs.20,000/- per mensem, but, the Tribunal assessed his income to be Rs.3,000/- arbitrarily. It is further submitted that no amount was granted towards future loss of income of the deceased which should be granted in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.** It is further submitted that the amount granted under non-pecuniary damages are on the lower side and it should be as per the decision in Pranay Sethi (Supra). Hence, award of the Tribunal may be enhanced.

6. As against this, Sri Rahul Sahai, Advocate ably assisted by Sri Parihar, submitted that the income considered by the court below to be Rs.3,000/- is just and proper. It is submitted that future prospect could not have been granted as Judgment of Apex Court in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** was a binding precedent when the award was pronounced as deceased was not in permanent employment silent on it. Loss of dependency is just and proper. It is further submitted that non pecuniary damages granted are as per Rule 220 A of the U.P.S.R.T.C. Rate of interest should be 6 percent or as granted by Tribunal.

7. Sri Jag Ram Singh, learned counsel for the U.P.S.R.T.C. submitted that bus of the U.P.S.R.T.C. has been exonerated as driver of the vehicle was held to be not negligent.

8. It is submitted by counsel for appellants that the finding of fact that the evidence of P.W. is not trustworthy and is fallacious and strict proof of civil pleadings could not be applied so as to hold otherwise tthough salary slip is produced which is corroborated by the bank account of the deceased just to hold that whether the officer had authoritty to sign or not is bad in view of the precedents, i.e., amount of salary or not has gone too for in negating the evidence on record by misreading the same, this finding is bad.

9. We have considered the factual data and submissions. We have perused Ext. 50/G, 10G, 54 G, 10 C 54C/4 and the evidence of P.W. 2. We are satisfied that deceased was officer and was in employment. His income can be considered at least to be Rs.10,000/- in the year of accident to which as he was 35 years of age, 40% will have to be added under the head of future prospect as he was in private job. Rs.70,000/- is awarded under the head of non pecuniary damages with increase of 10 per cent for three years from the Judgment of Pranay Sethi (supra).

10. The total compensation payable is recalculated and is computed herein below:

i. Income Rs.10,000/-

ii. Percentage towards future prospects : 40% namely Rs.4,000/-

iii. Total income : Rs.10,000 +4,000 = Rs.14,000/-

iv. Income after deduction of 1/3: Rs.9,334/-

v. Annual income : Rs.9,334 x 12 = Rs.1,12,008/-

vi. Multiplier applicable : 16

vii. Loss of dependency: Rs.1,12,008 x 16 = Rs.1792128/-

viii. Amount under non-pecuniary head : Rs.70,000/-+Rs.30,000/-=1,00,000/-

ix. Total compensation :Rs.18,92,128/-

11. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :-

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

12. No other grounds are urged orally when the matter was heard.

13. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442,** the order of investment be passed looking to the status of applicants.

14. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291,** total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/- then only insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, Registry of this Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in **Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another)** while disbursing the amount.

15. 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.

16. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and not blindly apply the judgment of A.V. Padma **(supra)**. The same is to be applied looking to the facts of each case.

17. Record be sent back to the Tribunal forthwith.

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**(2021)10ILR A313**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 1.10.2021**

**BEFORE**

**THE HON'BLE KARUNESH SINGH PAWAR, J.**

Application U/S 482 Cr.P.C. No. 2342 of 2009

**Vijay Kumar Srivastava ...Applicant**
**Versus**
**State of U.P. ...Opposite Party**

**Counsel for the Applicant:**
K.K. Singh, Ambrish Singh Yadav, Amit Jaiswal- Ojus Law, Nisar Ahmad, Parnendu Chakravarty

**Counsel for the Opposite Party:**
Govt. Advocate, Pradeep Kr. Tripathi

**A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Section 420, 467, 468,471- Prevention of Corruption Act,1988-Section 13(2)-challenge to-order of cognizance without sanction-petitioner was serving as public servant u/s 2(c) of the Act,1988-section 19 mandates for obtaining previous sanction before passing of the cognizance order-learned special judge committed a fundamental error which invalidates the cognizance as without jurisdiction.(Para 1 to 10)**

**The petition is disposed of.** (E-6)

**List of Cases cited:**

1. St. of Goa Vs Babu Thomas (2005) SCC (Cri) 1995

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Heard learned counsel for the petitioner and learned A.G.A for the State. None appears for respondent no.2. I have perused the record.

2. It has been informed at bar that Shri Pradeep Kumar Tiwari, learned counsel for respondent no.2 has not appeared in this case for the last several dates.

3. The petitioner has confined his prayer for quashing of the order dated 27.3.2008 by which the cognizance against the petitioner has been taken by the learned court below in Case Crime No.2 of 2008 so also order dated 11.1.2009 by which non-bailable warrant have been issued against the petitioner.

4. Learned counsel for the petitioner submits that at the time of taking cognizance the petitioner was functioning as Secretary/General Manager of the Northern Railway, Primary Cooperative Bank, Lucknow since 2003. It is submitted that after registration of the First Information Report the investigation was conducted and police report was filed under Section 420, 467,468,471 Indian Penal

Code read with Section 13(2) CDE Prevention of Corruption Act on 24.2.2008. The charge-sheet was filed under Section 13(2) Prevention of Corruption Act without obtaining sanction from the Appointing Authority. Upon filing of the charge-sheet learned Session Judge has taken cognizance in the matter on 27.3.2008 ignoring the fact that there is no sanction order which authorizing him to take cognizance.

5. It is submitted that at the time of offence, as alleged in the F.I.R, the petitioner was a public servant under Section 2(c) of the Prevention of corruption Act 1988. Specific pleading has been made in this regard in para 5 of the petition that the petitioner was serving as Secretary/General Manager of Northern Railway, Primary Cooperative Bank, Lucknow. This fact has not been disputed by the State in the counter affidavit.

6. It is next submitted that Section 19 of the Act mandates for obtaining previous sanction before passing of the cognizance order. The relevant Section 19 of the Prevention of corruption Act 1988 is extracted below:-

*"19. Previous sanction necessary for prosecution. ? (1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction, ?*

*(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;*

*(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;*

*(c) in the case of any other person, of the authority competent to remove him from his office.*

*(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.*

*(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 ?*

*(a) no finding, sentence or order passed by a Special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission, irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has, in fact, been occasioned thereby;*

*(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;*

*(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the*

*powers of revision in relation to any inter-locutory order passed in inquiry, trial, appeal or other proceedings.*

*(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the Court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings."*

7. It is admitted case of the party that no sanction has been taken by the prosecuting agency while filing the charge-sheet and consequently the cognizance has been taken without there being any sanction order under the law. It is, thus, submitted that this is a fundamental error committed by learned Session Judge while taking cognizance which invalidated the cognizance as without jurisdiction.

8. In support of his arguments learned counsel for the petitioner has relied upon the judgement of Hon'ble Supreme Court reported in **2005 SCC (Cri) 1995, State of Goa vs. Babu Thomas.** The emphasis is on paragraphs 11 and 12. Relevant portion of paragraphs 11 and 12 are extracted below:-

*"11. .....The present is not the case where there has been mere irregularity, error or omission in the order of sanction as required under sub- section (1) of Section 19 of the Act. It goes to the root of the prosecution case. Sub-section (1) of Section 19 clearly prohibits that the Court shall not take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction as stated in clauses (a), (b) and (c).*

*12. .....Therefore, when the Special Judge took cognizance on 29.5.95, there was no sanction order under the law authorizing him to take cognizance. This is a fundamental error which invalidates the cognizance as without jurisdiction."*

9. Learned A.G.A., on the other hand, though has opposed the prayer, however, could not dispute the fact that there is no sanction at all in this case and the cognizance order has been passed without there being any valid sanction or sanction as per law.

10. On due consideration to the arguments advanced and perusal of the record it appears that learned Session Judge has taken the cognizance without there being any sanction under law. The previous sanction is mandatory in view of law laid down by Hon'ble Supreme Court in the case of ***Babu Thomas*** (supra). The sanction has been held to be mandatory and any order passed without sanction has been held fundamental error which invalidated the cognizance as being without jurisdiction. In this case also the impugned cognizance order has been passed without there being any sanction, therefore, the cognizance order has been invalidated and consequently the impugned order 11.1.2009 and other consequential order have also become invalidate.

11. Thus, in view of the discussion made hereinabove and in view of the specific provisions under the Prevention of corruption Act 1988 as well as law laid down by Hon'ble Supreme court in the case of ***Babu Thomas*** (supra), the impugned cognizance order dated 27.3.2008 is set aside along with order dated 11.1.2009 by which non bailable warrant issued against the petitioner.

12. Considering the gravity of the offence, learned trial court is directed to take fresh cognizance only after the valid sanction has been obtained by the prosecution from the competent authority.

13. With these observations, the petition is ***disposed of.***

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**(2021)10ILR A316**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 24.09.2021**

**BEFORE**

**THE HON'BLE MOHD. FAIZ ALAM KHAN, J.**

U/S 482/378/407 No. 3372 of 2021

**Lalmani & Anr. ...Applicants**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicants:**
Mohd. Raziullah, Gayasuddin

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

**A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Section 323,504,506-quashing of summoning order-Chargesheet filed u/s 323,504,506-Section 506 IPC is cognizable and non-bailable in view of the law laid down in Mata Sewak case followed in Praveen Kumar and Bhagwan Singh case, it has to be tried as a State case not as complaint case-Learned trial court committed no illegality while taking cognizance u/s 190(1)(b) Cr.P.C. and in adopting the procedure of trial provided for the cases instituted on police report u/s 173(2) and provision of section 2(d) of Cr.P.C. do not apply to the present case.(Para 1 to17)**

**The application is disposed of.** (E-6)

**List of Cases cited:**

1. Virendra Singh & ors. Vs St. of U.P. & ors., (2002) 45 ACC 609 , MANU/UP/0455/2000

2. Mata Sewak Upadhyay & anr. Vs St. of U.P. & ors. (1995) JIC 1168 (All) FB

3. Aires Rodrigues Vs Vishwajeet P.Rane & ors. MANU/SC/0078/2017

4. Taiyab Khan & ors. Vs St. of U.P. & ors. MANU/UP/ 5347/2018

5. Hussain & ors. Vs U.O.I. & ors. MANU/SC/0274/2017 In Re : to issue certain Guidelines Regarding inadequacies & deficiencies in Criminal Trials Vs St. of A.P. & ors. MANU/SC/0292/2021

(Delivered by Hon'ble Mohd. Faiz Alam Khan, J.)

1. Heard Shri Farhan Alam Osmany holding brief for Mohd. Raziullah, learned counsel for the applicants as well as Shri Rajesh Kumar, learned AGA for the State.

2.The instant application has been filed by the applicants- **Lalmani and Jitendra** with the prayer to quash the summoning order dated 3.8.2021 passed in Criminal Case No. 7349 of 202, arisen out of Case Crime No. 23/2021 under Sections 323, 504, 506 IPC, Police Station Sammanpur, District Ambedkar Nagar, pending in the court of Additional Chief Judicial Magistrate, Ambedkar Nagar and also to quash the charge sheet and entire proceedings of the above mentioned case.

3. Learned counsel for the applicants submits that a non-cognizable report was lodged by the opposite party no.2 in the instant case under Sections 323, 504 IPC. However under the orders of the Magistrate the said non-cognizable report was directed to be investigated and after the

investigation charge sheet under Sections 323, 504, 506 IPC has been filed.

4. While referring to Section 2(d) of Cr.P.C. and also drawing the attention of this Court on an order passed by a Coordinate Bench of this Court dated 10.2.2020 in Application under Section 482 Cr.P.C. No. 5575 of 2020, it is vehemently submitted that it was the duty of the trial court to have adopted the procedure as prescribed for trial of the complaint cases and the Magistrate has taken the cognizance under Section 190(1) (b) of the Cr.P.C. and the proceedings of the case is going like a case instituted on a police report and material illegality has been committed by the trial court, requires intervention by this Court and thus all the proceedings pending before the trial court are nothing but the abuse of the process of law and be quashed.

5. Learned AGA on the other hand submits that vide U.P. Govt. Notification No. 777/VIII 9-4 (2)-87 dated July 31, 1989 published in the U.P. Gazette, Extra, Part-4, Section (Kha) dated 2nd August, 1989 the offence of Section 506 IPC in the territory of Uttar Pradesh has been declared as cognizable and non-bailable and when the charge sheet has been filed under Section323,504,506 IPC and and the cognizance has been taken by the Magistrate treating Section 506 IPC as cognizable,under section 190(1)(b) of Crpc no illegality appears to have been committed by the trial court.

6. Having heard learned counsel for the parties and having perused the record issuance of notice to opposite party no.2 is hereby dispensed with as the instant case is being disposed of purely on the question of law settled by a Full Bench of this Court as well as on the basis of decision of the Hon'ble Supreme Court and the order intended to be passed will not affect the rights of opposite No. 2 in any way.

7. In nutshell the issue before this Court is that as to whether Section 506 IPC is either cognizable or is non-cognizable offence so as to adjudicate whether the trial Court should have adopted the procedure of complaint case or that of the case instituted on police report. Ld. Counsel for the applicants has cited **Virendra Singh and others Vs. State of U.P. and others, 2002 (45) ACC 609, MANU/ UP/ 0455/ 2000**, in support of his contentions whereby the notification dated 31.7.1989 declaring Section 506 IPC as cognizable and non-bailable, was held to be illegal.

8. Having given my considered thought to the dispute under consideration it is evident that the issue whether Section 506 IPC, in pursuance of the notification dated 31.07.1989 mentioned herein above issued by the State Government published in U.P.Gazette dated 02.08.1989, is either cognizable or is non-cognizable is now no more 'res integra'. A Full Bench of this Court in **Mata Sewak Upadhyay and Anr. v. State of U.P. and Ors.. 1995 JIC 1168 (All) (FB),** after considering the notification issued by the State Government referred to herein above has held the notification issued by the state Government as valid in following words;-

*"91. There are two notifications of December 29, 1932 and August 2, 1989 which came to be issued in exercise of the powers conferred by Section 10 of the Act of 1932. Whereas, the first notification was made applicable only to a few districts, mentioned therein, the second notification of August 2, 1989 which was issued in*

*super session of the notifications earlier issued in this behalf, states that the Governor is pleased to declare that any offence punishable under Section 506 of the Indian Penal Code (IPC) when committed in any district of Uttar Pradesh, shall notwithstanding anything contained in the Criminal Procedure Code, 1973, be cognizable and non-bailable. From the second notification it is, therefore, clear that that was issued in super session of the notification of December 29, 1932 and the effect of this notification is that the offence punishable under Section 506, IPC when committed at any place through, out the Uttar Pradesh, shall notwithstanding anything contained in the Criminal Procedure Code, be cognizable and non-bailable. In the first Schedule to the Criminal Procedure Code, 1973, the offence under Section 506 IPC is described as non-cognizable and bailable, but by virtue of Sec. 10 of the Act of 1932, the same has been declared for the entire Uttar Pradesh as cognizable and non-bailable by the notification of August 2, 1989. Sec. 10 of the Act of 1932 confers powers of the State Government to declare by notification in the official Gazette that an offence punishable under Section 506 IPC inter alia when committed in any area specified in the notification, shall notwithstanding anything contained in the Code of Criminal Procedure, 1898, be cognizable and non-bailable and thereupon the Code of Criminal Procedure, 1898 shall while such notification remain in force, be deemed to be amended accordingly. The submission is that by the Act of 1932, an amendment was made in the Code of Criminal Procedure, 1898, which stood repealed by virtue of Section 484 of Code of Criminal Procedure, 1973, which was assented by the President of April 1, 1974. The Act of 1932 having been passed simply to amend the Cr. P.C. of 1889, the argument of Sri Misra is that the former could not survive beyond the life of the Cr. P.C. of 1898, which came to an end after being repealed in April, 1974. In short, he submits that the life of the Amending Act cannot be more that the principal act and that the amending act is co-extensive and co-terminus with the Principal Act and that Cr. P.C. of 1898 which was amended by the Act of 1932, having been repealed in April, 1974, the Act of 1932 could not have survived thereafter. Sri Tulsi argues that it is a misnomer to say that the Act of 1932 is simply an Amending Act. He submits that the Act of 1932 is named as "The Criminal Law Amendment Act, 1932", because that has made some amendment in the general body of criminal law and, in fact, the Act of 1932 is not only an Amending Act but a unique blend of substantive law as well as of the provisions making an amendment in the Cr. P.C., 1898 and that it having contained substantive provisions as well, cannot be said to be co-terminus with the Cr. P.C. of 1898 in which certain amendments were made, says Sri Tulsi. From perusal of the Act of 1932, the submission of Sri Tulsi appears to be correct that the said enactment is not merely an Amending Act but that is a blend of substantive provisions as well as the provisions amending Cr. P.C. of 1898. So the Act of 1932 is still on the statute book, notwithstanding the repeal of Cr. P.C. 1898.*

*92. Therefore, the contention of Sri Misra that impugned notification of August 2, 1989, having been issued under a dead enactment is invalid, has to be rejected.*

*94 At the very outset, it is pointed out that the Division Bench while making*

*reference, did not refer any question relating to the validity of Section 10 of the Act of 1932, but it has been argued before us in connection with the validity of the notification of August 2, l989. Sri tulsi candidly of Section 10 being decidcd by the Full Bench, inasmuch as the respondents are duly out to notice. It is also made clear that while making reference, the Division Bench was not aware of Section 10 notification of August 2, 1989, which refers to the entire Uttar Pradesh and at that stage, the Division Bench simply referred to the earlier notification of December 29, 1932 notifying only a few districts. By notification of December 29, 1932, Section 506, IPC was made cognizable and non-bailable only for a few districts but by subsequent notification of August 2, 1989, Section 506, IPC has been declared cognizable and non-bailable for all district of Uttar Pradesh, i.e.,for the entire Uttar Pradesh.*

*95 In these circumstances, the Full Bench proceeds to decide the validity of Section 10 and that of the notification of August 2, 1989.*

*110. In the premises, Sections 3,4,7,8 and 14 of the Act of 1989 and Section Kha 10 of the Act of 1932 and notification No. 777/VIII-9-4 (2) (87), dated July 31 1989 published in the U. P. Gazette (Extraordinary) Part IV, Section 2nd August, 1989, are held valid.*

*195. In view of the above discussion, in my opinion, the answers to the questions referred to the Full Bench or permitted to be raised before it, are as follows :-*

*(6) Section 10 of the Criminal Laws Amendment Act, 1932 is valid.*

*(7) U, P. Government Notification dated 31-7-1989, making-offence under Section 506, IPC cognizance and non-bailable is valid."*

9. Hon'ble Supreme Court has also had an opportunity to consider the similar notification issued by the State of Maharashtra, wherein similar amendments were made in **Aires Rodrigues Vs. Vishwajeet P. Rane and Ors., MANU/SC/0078/2017** and after considering the above mentioned Full Bench decision of this Court in **Mata Sewak Upadhyay (supra)** has upheld the Notification issued by the Maharashtra Government in the light of ratio laid down in Mata Sewak Upadhyay (supra) in following words:-

*"10. It is pointed out by learned Counsel for the Appellant that a contra view has been taken by the High Courts of Gujarat, Delhi, Allahabad and Madras in Vinod Rao v. The State of Gujarat and Anr. MANU/GJ/0160/1980 : (1980) 2 GLR 926, Sant Ram v. Delhi State and Anr. MANU/DE/0250/1980 : 17 (1980) Delhi Law Times 490, Mata Sewak Upadhyay and Anr. v. State of U.P. and Ors. 1995 JIC 1168 (All) (FB), P. Ramakrishnan v. State rep. by the Inspector of Police MANU/TN/3760/2010 : 2010-1- LW (Crl.) 848 respectively. He also pointed out that a different view has been taken by the High Court of Allahabad in Pankaj Shukla v. Anirudh Singh MANU/UP/1084/2011 : 2011 (2) ADJ 472 without noticing the Full-Bench decision of the High Court of Allahabad in Mata Sewak Upadhyay (supra).*

*11. It is not necessary to refer to all the above judgments. View taken in support of the notification remaining valid*

*and operative in Vinod Rao (supra) is, inter alia, as follows:*

*Therefore, applying the rule of construction laid down in Section 8 of the General Clauses Act, we must read in Section 10 of the Criminal Law Amendment Act, 1932. Code of Criminal Procedure, 1973 in place of the expression of "Code of Criminal Procedure, 1898". When we so read it, it becomes clear that the notification issued Under Section 10 with reference to Code of Criminal Procedure, 1898 should be read as having been issued with reference to the Code of Criminal Procedure, 1973. So far as the impugned notification is concerned, it also refers to the Code of Criminal Procedure, 1898. The Rule of construction laid down in Section 8 of the General Clauses Act, 1897 also requires us to construe reference to the repealed enactment made in any "instrument" as reference to the repealing enactment or the new enactment which has been brought into force. The expression 'instrument' used in Section 8 of the General Clause Act, 1897, in our opinion, necessarily includes a notification such as the impugned notification. Therefore, applying the rule of construction laid down in Section 8 of the General Clauses Act, 1897, we read both in Section 10 of the Criminal Law Amendment Act, 1932 and in the impugned notification reference to Code of Criminal Procedure, 1898, as a reference to Code of Criminal Procedure, 1973. Therefore, the effect of the notification issued Under Section 10 in 1937 is to modify the relevant provisions in the Code of Criminal Procedure, 1973. Therefore, the notification of 1937 as well as the subsequent notification issued in 1970 are relevant to the instant case.*

*12. Contra view is on lines of the impugned order relevant part of which has been reproduced above.*

*13. We approve the view taken by the High Courts of Gujarat, Delhi, Allahabad and Madras in Vinod Rao, Sant Ram, Mata Sewak Upadhyay & Anr., and P. Ramakrishnan (supra) and disapprove the view taken by High Court of Allahabad in Pankaj Shukla (Supra). "*

10. Thus there is no confusion with regard to the validity of the above notification dated 31.07.1989, published in Gazette of date 02.08.1989 issued by the State Government and the same has been up held by the Full Bench of this Court in **Mata Sewak Upadhayay (Supra)**, ratio of which has also been upheld by Hon'ble Supreme Court in **Aires Rodrigues (Supra)**.

11. The confusion, with regard to the above notification appears to have surfaced due to the decision of a Division Bench of this Court passed in **Virendra Singh v. State of U.P. and others, MANU/UP/0455/2000.**

12. A coordinate Bench of this Court in **Taiyab Khan and Ors. Vs. State of U.P. and Ors. MANU/UP/5347/201**8 while considering the view of Division Bench in Virendra (supra) has opined as under;-

*"8. In Virendra Singh (supra) the court was not called upon to adjudicate upon the validity of the notification dated July 31, 1989. The petition was filed*

*against a first information report under Section 506, I.P.C, however, the court proceeded to make observations on the validity of the notification thereby declaring Section 506 as non- cognizable and non-bailable offence. The court made the following observation in paragraph 8, which reads thus:*

*"It is surprising that while Sections 323, 324 and 325, I.P.C. are bailable offences the State Government has chosen to declare by this illegal notification of 1989 that Section 506, I.P.C. is a non-bailable and cognizable offence. This means that if person breaks someone's hand, or attacks him with a knife on his leg or hand he will be granted bail by the police on his mere request, but if he gives a threat he will be arrested and will have to apply for bail to the court. This is an anomalous situation. At any event, we are of the opinion that the notification dated 31.7.1989 issued under Section 10 of the Criminal Law Amendment Act, 1932 making Section 506, I.P.C. cognizable and non-bailable is illegal."*

*9. The Division Bench, however, did not take notice of Mata Sewak (supra) upholding the validity of the notification.....*

*11. Full Bench unanimously upheld the validity of the Government Notification making Section 506, I.P.C. cognizable and non-bailable. Decisions relied upon by the learned counsel for the applicant including Virendra Singh (supra) have not noticed the Full Bench decision rendered in Mata Sewak (supra), it appears that the decision was not placed nor brought to the notice of the court. The decision of the Division Bench and the subsequent decisions following Virendra Singh (supra) in my opinion is a per incuriam and does not lay down the correct legal position. The decisions rendered in Praveen Kumar (supra) and Bhagwan Singh (supra) following Mata Sewak (supra) lays down the correct law.*

*12 . In Narmada Bachao Andolan v. State of Madhya Pradesh and another. MANU/SC/0599/2011 : AIR 2011 SC 1989, the Supreme Court considered the doctrine of "Per Incuriam", paragraph 60, reads thus:*

*"PER INCURIAM - Doctrine:*

'60. 'Incuria' literally means carelessness'. In practice per incuriam is taken to mean per ignoratium. The courts have developed this principle in relaxation of the rule of stare decisis. Thus, the 'quotable in law' is avoided and ignored if it is rendered, in ignorance of a statute or other binding authority. While dealing with observations made by a seven Judges-Bench in India Cement Ltd. etc. etc. v. State of Tamil Nadu etc. etc., MANU/SC/0226/1989 : AIR 1990 SC 85, the five Judges-Bench in State of West Bengal v. Kesoram Industries Ltd. and others, MANU/SC/0038/2004 : (2004) 10 SCC 201 : (AIR 2005 SC 1646 : 2004 AIR SCW 5998), observed as under:

'A doubtful expression occurring in a judgment, apparently

by mistake or inadvertence, ought to be read by assuming

that the court had intended to say only that which is correct

according to the settled position of law, and the apparent

error should be ignored, far from making any capital out of

it, giving way to the correct expression which ought to be

implied or necessarily read in the context.....A statement

caused by an apparent typographical or inadvertent error in

a judgment of the court should not be misunderstood as

declaration of such law by the court.'

*1 3 . Thus, 'per incuriam' are those decisions which are given in ignorance or forgetfulness of some statutory provision or authority binding on the court concerned, or a statement of law caused by inadvertence or conclusions that have been arrived at without application of mind or proceeded without any reason so that in such a case some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. It is also well-settled, if intricacies of relevant provisions are either not noticed or brought to the notice of the court or if the view is expressed without analysing the said provision or the settled position of law, such a view cannot be treated as binding precedent. The Division Bench in Virendra Singh (supra) did not notice the judgment of a larger Bench in Mata Sewak (supra) upholding the validity of the notification making offence under Section 506 cognizable and non-bailable.*

*14. In view of the law laid down in Mata Sewak (supra) followed in Praveen Kumar (supra) and Bhagwan Singh (supra), Section 506 is cognizable and non-bailable and has to be tried as a State case not as complaint case."*

13. I am also in agreement with the reasoning of Ld. single judge opined in **Taiyab Khan (supra)** and unfortunately the Full Bench decision of this Court passed in **Mata Sewak Upadhyay (supra)** was not brought in the knowledge of the division bench of this Court in **Virendra Singh (supra)** and thus in the considered opinion of this Court in presence of Full Bench decision of this Court, ratio of which has already been upheld by the Hon'ble Supreme Court in the case of **Aires Rodrigues (Supra)** there could not be any doubt that the view which has been opined by the Division Bench of this Court in Virendra Singh (supra) was not the correct view and thus for all the purposes having regard to the law laid down by the Hon'ble Full Bench decision of this Court in Mata Sewak Upadhyay (supra) Section 506 IPC is a cognizable and non-bailable offence.

14. Coming to the facts of the present case, the charge sheet has been filed under Sections 323, 504, 506 IPC and as has been held herein above Section 506 IPC is cognizable, in the considered opinion of this Court no illegality has been committed by the trial court while taking cognizance of the offences under Section 190 (1) (b) Cr.P.C.and in adopting the procedure of trial provided for the cases instituted on police report submitted under Section 173(2) Cr.P.C. and the provisions of Section 2(d) of Cr. P.C. do not apply to the present case. Thus the prayer of the applicant with regard to the quashing of proceedings and summoning order as well as charge sheet could not be accepted and the same is hereby refused.

15. At this juncture learned counsel for the applicants submits that the instant dispute is between the close relatives and there is a chance that the same may be resolved through settlement, however, applicants are having apprehension that when they will appear before the trial court the disposal of their bail application may take some time and they may be forced to remain in prison and having regard to the spread of Covid-19 pandemic situation, the same would be detrimental to their health and may further the strained relations between the parties.

16. So far as apprehension of the applicants is concerned the same do not appear to be founded on sound reasoning as Hon'ble Apex Court in **Hussain and Ors. Vs. Union of India (UOI) and Ors., MANU/SC/0274/2017** and In Re: **To issue certainn Guidelines Regarding inadequacies and deficiencies in Criminal Trials v. State of Andhra Pradesh and others, MANU/SC/0292/2021**,have given various directions to criminal Courts for expeditious disposal of Bail applications of under trials. The ratio of above mentioned decisions is quite clear that, in the backdrop of Article 21 of the Constitution of India, as the personal liberty of a person is at stake, the bail applications should be decided, expeditiously.

17. In the backdrop of aforesaid decisions and keeping in view the entirety of facts and circumstances of the case and having regard to the submissions of learned counsel for the applicants, the application is **disposed of** with a direction to the trial Court that if the applicants appear and surrender before the Court below within 20 days from today and apply for bail, their prayer for bail may be considered and decided expeditiously in accordance with law.

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**(2021)10ILR A323**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 07.09.2021**

**BEFORE**

**THE HON'BLE VIVEK AGARWAL, J.**

Application U/S 482 Cr.P.C. No. 6319 of 2021

**Tarun Kumar Mittal ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Sri Virendra Singh

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

**(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Protection of Women From Domestic Violence Act, 2005 - Section 31 - Penalty for breach of protection order by respondent - provisions of Section 31 of Domestic Violence Act can be invoked for execution of grant of maintenance order under Section 12 of D.V. Act. (Para -11)**

Interim maintenance was granted in favour of wife - court below invoked the provisions of Section 31 of the Domestic Violence Act - for getting its earlier orders passed under section 12 to be executed - aggrieved by order - hence application under section 482.(Para - 3)

**HELD:-** Provisions of Section 31 of Protection of Women From Domestic Violence Act, 2005 can be invoked to penalize even breach of orders passed under Section 12 of the said Act. (Para - 17 )

**Application u/s 482 Cr.P.C. dismissed.** (E-7)

**List of Cases cited:-**

1. Kanaka Raj son of Kunjan Nadar Vs St. of Kerala & anr. , Criminal Misc. No.1322 of 2009

2. Vikram Shah Vs St. of U.P. & anr., in Application U/S 482 No.23048 of 2018

3. Surya Prakash Vs Smt. Rachna , M.C.R.C. No.16718 of 2015

4. Sunil @ Sonu Vs Sarita Chawla (Smt.), 2009 (5) MPHT 319

5. Manoj Anand Vs St. of U.P. & anr., Criminal Revision No.635 of 2011

6. Hiral P. Harsora & ors. Vs Kusum Narottamdas Harsora & ors., (2016) 10 SCC 165

7. Abhiram Singh Vs C.D. Commachen (dead) by Lrs. & ors., (2017) 2 SCC 629

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

1. Heard Sri Virendra Singh, learned counsel for the applicant and Sri Janardan Prakash, learned AGA for the State.

2. This Application U/S 482 Cr.P.C. has been filed seeking quashing of the entire proceedings of Misc. Case No.326 of 2019 pending in the court of Judicial Magistrate-Ist, Bulandshahar (Sonia Agarwal Vs. Tarun Kumar Mittal) under Section 31 of Domestic Violence Act, Police Station-Kotwali Nagar, District-Bulandshahar.

3. Learned counsel for the applicant submits that the only question raised in this Application is, whether court below was justified in invoking the provisions of Section 31 of the Domestic Violence Act for getting its earlier orders executed vide which, interim maintenance was granted in favour of wife.

4. Sri Virendra Singh, learned counsel for the applicant submits that said provisions of Section 31 can be invoked only to penalize breach of protection order as defined under Section 18 of the Act of 2005 and not to enforce provisions contained in Section 12 of the Domestic Violence Act.

5. Reliance is placed on the judgment of High Court of Kerala at Ernakulam in ***Criminal Misc. No.1322 of 2009 (Kanaka Raj son of Kunjan Nadar Vs. State of Kerala and another)*** decided on 24.06.2009 by a Single Judge of the said High Court, wherein, the question which was raised and decided is "whether a Magistrate is competent to direct registration of a case and investigate an offence under Section 31 of Protection of Women from Domestic Violence Act, 2005 in the absence of a protection order or an interim protection order".

6. Reliance is also placed on the judgment of a co-ordinate Bench decided on 10.08.2018 ***(Vikram Shah Vs. State of U.P. and another) in Application U/S 482 No.23048 of 2018,*** wherein, similar issue was raised and it is submitted that the co-ordinate Bench has decided that provisions of Section 31 of the Domestic Violence Act will not be applicable for recovery of the amount payable under the orders passed in exercise of jurisdiction under Section 12 and 23 of the Act of 2005.

7. However, perusal of the order cited in case of Vikram Shah **(supra)** reveals that matter was remitted to the court below to decide the question of maintainability of the proceedings under Section 31 of the Act of 2005 initiated by the opposite party no.2 and only, thereafter, proceed with the complaint case pending before the court below.

8. Recently High Court of Madhya Pradesh, Jabalpur had an occasion to decide

similar issue wherein, Division Bench of the High Court in case of ***Surya Prakash Vs. Smt. Rachna*** decided in M.C.R.C. No.16718 of 2015, held that non-payment of maintenance allowance is also a breach of protection order and, therefore, provisions of Section 31 of the Act can be invoked. It confirmed its earlier order in case of ***Sunil @ Sonu Vs. Sarita Chawla (Smt.); 2009 (5) MPHT 319.***

9. While answering the issue Hon'ble Division Bench in case of Surya Prakash (supra) formulated first question namely, "(i) whether non-payment of maintenance allowance can be treated to be a breach of 'protection order' or 'interim protection order' ? If it is a breach of said orders, whether Section 31 of the D.V. Act can be invoked ?

10. The aforesaid decision makes a reference to a decision of Allahabad High Court also in case of ***Manoj Anand Vs. State of U.P. and another*** (Criminal Revision No.635 of 2011) decided on 10.02.2012 placing reliance on which, learned counsel for the petitioner Surya Prakash had contended that for non-payment of maintenance, the proceedings under Section 31 of the Act cannot be initiated.

11. However, Division Bench of Madhya Pradesh High Court considered the provisions of the 'Domestic Violence Act' and referring to the definition of "domestic violence" as provided under Section 2(g) and other relevant provisions has held that provisions of Section 31 of Domestic Violence Act can be invoked for execution of grant of maintenance order under Section 12 of D.V. Act.

12. Under Section 2(g) term 'domestic violence' has the same meaning as assigned to it in Section 3, which reads as under:-

*9. "It is advantageous to extract the relevant provisions of the Act, which read as under:-*

*"2. Definitions.- In this Act, unless the context otherwise requires, -*

*** *** ***

*(g) "domestic violencee" has the same meaning as assigned to it in Section 3;*

*** *** ***

*"3. Definition of domestic violence.- For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it -*

*(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or *** *** *** Explanation I.--For the purposes of this section,--*

*(i) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;*

*(ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;*

*(iii) "verbal and emotional abuse" includes--*

*(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and*

*(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.*

*(iv) "economic abuse" includes--*

*(a) 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 and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;*

*(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and*

*(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.*

*Explanation II.--For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration." (Emphasis supplied) "18. Protection orders.-- The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person and prohibit the respondent from--*

*(a) committing any act of domestic violence;*

*(b) aiding or abetting in the commission of acts of domestic violence;*

**** *** ****

*(g) committing any other act as specified in the protection order." (Emphasis Supplied) "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 the 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 the 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.*

*** *** ***"

13. For ready reference, Section 31 reads as under:-

*"31. Penalty for breach of protection order by*

*respondent - (1) A breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.*

*(2) The offence under sub-section (1) shall as far as practicable be tried by the Magistrate who has passed the order, the breach of which has been alleged to have been caused by the accused.*

*(3) While framing charges under sub-section (1), the Magistrate may also frame charges under Section 498A of the Indian Penal Code (45 of 1860) or any other provision of that Code or the Dowry Prohibition Act, 1961 (28 of 1961), as the case may be, if the facts disclose the commission of an offence under those provisions."*

14. Supreme Court in case of ***Hiral P. Harsora and others Vs. Kusum Narottamdas Harsora and others); (2016) 10 SCC 165***, in para nos.16 and 18 held as under:-

*"16. A cursory reading of the Statement of Objects and Reasons makes it clear that the phenomenon of domestic violence against women is widely prevalent and needs redressal. Whereas criminal law does offer some redressal, civil law does not address this phenomenon in its entirety. The idea therefore is to provide various innovative remedies in favour of women who suffer from domestic violence, against the perpetrators of such violence.*

*18. What is of great significance is that the 2005 Act is to provide for effective protection of the rights of women who are victims of violence of any kind occurring within the family. The Preamble also makes it clear that the reach of the Act is that violence, whether physical, sexual, verbal, emotional or economic, are all to be redressed by the statute. That the perpetrators and abettors of such violence can, in given situations, be women themselves, is obvious. With this object in mind, let us now examine the provisions of the statute itself."*

15. Judgment in case of Surya Prakash **(supra)** also considered the Seven Judge Bench judgment in case of ***Abhiram Singh Vs. C.D. Commachen (dead) by Lrs. and others; (2017) 2 SCC 629***, wherein majority judgment is that in case of conflict between giving a literal interpretation or a purposive interpretation to a statute or a provision in a statute is perennial. It can be settled only if the draftsman gives a long-wined explanation in drafting the law, but this would result in an awkward draft that might well turn out to be unintelligible. The Supreme Court held as under:-

*36. The conflict between giving a literal interpretation or a purposive interpretation to a statute or a provision in a statute is perennial. It can be settled only if the draftsman gives a long-winded explanation in drafting the law but this would result in an awkward draft that might well turn out to be unintelligible. The interpreter has, therefore, to consider not only the text of the law but the context in which the law was enacted and the social context in which the law should be interpreted. This was articulated rather felicitously by Lord Bingham of Cornhill in R.(Quintavalle) Vs. Secy. of State for Health19 when it was said: (AC p. 695 C-H, paras 8-9) "8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment".*

*9. There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now. The meaning of "cruel and unusual punishments" has not changed over the years since 1689, but many punishments which were not then thought to fall within that category would now be held to do so. The courts have frequently had to grapple with the question whether a modern invention or activity falls within old statutory language: see Bennion, Statutory Interpretation, 4th Edn. (2002) Part XVIII, Section 288. A revealing example is found in Grant v. Southwestern and Country Properties Ltd., 1975 Ch 185 : (1974) 3 WLR 221, where Walton, J. had to decide whether a tape recording fell within the expression "document" in the Rules of the Supreme Court. Pointing out (at p. 190) that the furnishing of information had been treated as one of the main functions of a document, the Judge concluded that the tape recording was a document."*

*44. Another facet of purposive interpretation of a statute is that of social context adjudication. This has been the subject matter of consideration and encouragement by the Constitution Bench of this Court in Union of India Vs. Raghuvir Singh (Dead) by Lrs. (1989) 2 SCC 754. In that decision, this Court noted with approval the view propounded by*

*Justice Holmes, Julius Stone and Dean Roscoe Pound to the effect that law must not remain static but move ahead with the times keeping in mind the social context. It was said:*

*"10. But like all principles evolved by man for the regulation of the social order, the doctrine of binding precedent is circumscribed in its governance by perceptible limitations, limitations arising by reference to the need for readjustment in a changing society, a readjustment of legal norms demanded by a changed social context. This need for adapting the law to new urges in society brings home the truth of the Holmesian aphorism that "the life of the law has not been logic it has been experience" (Oliver Wendell Holmes), and again when he declared in another study (Oliver Wendell Holmes, Common Carriers and the Common Law) (1943) 9 Curr LT 387 at p. 388), that "the law is forever adopting new principles from life at one end", and "sloughing off" old ones at the other. Explaining the conceptual import of what Holmes had said, Julius Stone elaborated that it is by the introduction of new extra-legal propositions emerging from experience to serve as premises, or by experience-guided choice between competing legal propositions, rather than by the operation of logic upon existing legal propositions, that the growth of law tends to be determined (Julius Stone, Legal Systems & Lawyers Reasoning, pp. 58-59)."*

*(emphasis supplied) A little later in the decision it was said: (SCC pp. 767-68, para 13) "13. Not infrequently, in the nature of things there is a gravity-heavy inclination to follow the groove set by precedential law. Yet a sensitive judicial conscience often persuades the mind to search for a different set of norms more responsive to the changed social context. The dilemma before the Judge poses the task of finding a new equilibrium prompted not seldom by the desire to reconcile opposing mobilities. The competing goals, according to Dean Roscoe Pound, invest the Judge with the responsibility "of proving to mankind that the law was something fixed and settled, whose authority was beyond question, while at the same time enabling it to make constant readjustments and occasional radical changes under the pressure of infinite and variable human desires" (Roscoe Pound, An Introduction to the Philosophy of Law, p. 19. The reconciliation suggested by Lord Reid in The Judge as Law Maker (1972) The Journal of Public Teachers of Law 22 at pp. 25-26, lies in keeping both objectives in view, 'that the law shall be certain, and that it shall be just and shall move with the times'."*

16. Judgment of Madhya Pradesh High Court in case of Surya Prakash Vs. Smt. Rachna **(supra)**, in paragraph Nos.14, 15 and 16 reads as under:-

*14. Section 18 of the Act empowers the Magistrate to pass a protection order in affirmative in favour of an aggrieved person when he is satisfied that domestic violence has taken place or is likely to take place. The Magistrate is also competent to prohibit the respondent from committing any act of domestic violence or such other acts as mentioned in the said section. The domestic violence has been defined in Section 3 of the Act which includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse. The "economic abuse" has been explained in clause (iv) of Explanation I of Section 3 of the Act*

*wherein 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 is an expression of "domestic violence".*

*15. The amount of maintenance awarded by the Magistrate is an amount which an aggrieved person requires to meet necessities of life and for survival. Such amount is not limited to household necessities but also includes payment of rental related to the shared household. It includes maintenance as well. Therefore, the order passed by the Magistrate granting maintenance is an affirmative order of protection in relation to domestic violence as defined in Section 3 of the Act. For such violation, the penalty is provided in Section 31 of the Act.*

*16. Section 20 of the Act deals with grant of monetary relief to meet the expenses incurred and the losses suffered by aggrieved person and any child of the aggrieved person as a result of domestic violence. Such provision enlarges the scope of domestic violence as defined in Section 3 of the Act. In terms of Section 3 of the Act, the "economic abuse" includes deprivation of all or any economic or financial resources, payment of rental related to shared household and maintenance. Whereas Section 20 includes a loss of earnings, medical expenses, loss caused due to destruction, damage or removal of any property as also the maintenance. The grant of monetary relief under Section 20 does not exclude the amount of maintenance which can be awarded in terms of Section 18 of the Act as part of affirmative order in respect of the domestic violence as defined in Section 3 of the Act. Therefore, we find that non-payment of maintenance is a breach of protection order; therefore, Section 31 of the Act can be invoked. Therefore, in respect of first question, it is held that non-payment of maintenance allowance is a breach of protection order for which proceedings under Section 31 of the Act can be invoked.*

17. Thus, in the light of the above discussion so also in view of a Division Bench decision of Madhya Pradesh High Court passed after relying on the judgments of Supreme Court in regard to purposive interpretation and keeping in mind the aim and object of a special statute namely, Protection of Women From Domestic Violence Act, 2005, I am of the opinion that provisions of Section 31 can be invoked to penalize even breach of orders passed under Section 12 of the said Act. Therefore, Application deserves to fail and is **dismissed.**

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**(2021)10ILR A330**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 16.09.2021**

**BEFORE**

**THE HON'BLE VIVEK AGARWAL, J.**

Application U/S 482 Cr.P.C. No. 7352 of 2021
With
Application U/S 482 Cr.P.C. No. 7572 of 2021

**Anjana Agarwal @ Anjani Agarwal ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Sri Swapnil Kumar, Sri Sudhanshu Kumar, Sri Devesh Mohan

**Counsel for the Opposite Parties:**

A.G.A., Sri Swetashwa Agarwal

**(A) Criminal Law - The Code of criminal procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 – Sections 415, 420, 463, 464, 467, 468, 469, 471, 120-B - Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 169 - Bequest by a bhumidhar - acquiescence - Silent acquiescence amounts to admission - Admission may also be implied from the acquiescence of the party, but acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary de-manner or conduct of the party - if party having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain.(Para -17,19)**

Supplementary charge-sheet quashing of - sale transaction - applicant is neither a seller nor has any share in the property - only marginal witness to the transaction of sale deed - falsely implicated - Plea of the applicants - Will was incapable of being acted - property devolved upon five persons against the narration in the Will - 5th person alienated her share in favour her grandson - no element of criminality in transferring joint share .

**HELD:-**Applicants (Anjana Agarwal) is only a marginal witness to the sale deed and, therefore, it cannot be said that she understood the import and meaning of the transaction and had constructive knowledge of cheating and forgery being committed by the beneficiaries of the transaction ( Om Prakash and Gaurav Mittal) and, therefore, her case deserves to be allowed and proceedings are hereby **quashed.**

Applicant (Om Prakash Mittal) is a signatory to the family settlement, which accepted execution of the Will. Once, execution of Will was accepted and it is mentioned that partition will be made in terms of the Will, subsequent contention of applicant that he was not having any knowledge of the execution deed , prima facie reflects their guilty mind and dis-honest intention, which has been rightly inferred by the court below while taking cognizance of the charge-sheet., no indulgence is required for quashing the proceedings, qua Om Prakash Mittal and Gaurav Mittal, Application fails and is **dismissed.** (Para -22,23,24)

**Application u/s 482 Cr.P.C. partly allowed.** (E-7)

**List of Cases cited:-**

1. Ramesh Dutt & ors. Vs St.of Pun. & ors., (2009) 15 SCC 429

2. Kamal Shivaji Pokarnekar Vs. St. of Mah. & ors., (2019) 14 SCC 350

3. Priti Saraf Vs. St. of NCT of Delhi & anr. , Criminal Appeal No(s).296 of 2021 arising out of S.L.P. (Criminal) No(s).6364 of 2019,

4. Duke of Leeds Vs Amherst; 1846, 78 RR. 47 : 2 Philips 117;

5. Cairncross Vs. Lorrimer; 3 LT 130

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

1. Heard Sri Swapnil Kumar, learned counsel for the applicants, Sri Janardan Prakash, learned AGA for the State and Sri Swetashwa Agarwal, learned counsel for the opposite party no.2.

2. This Application U/S 482 Cr.P.C. has been filed by the applicant for quashing of supplementary charge-sheet dated 25.07.2020, under Sections 420, 467, 468, 471, 120-B arising out Case Crime No.556 of 2009, Police Station-Sadar Bazar, District-Mathura and order dated 24.09.2020 passed by the court of Judicial Magistrate, Mathura taking cognizance of the charge-sheet and the entire criminal proceedings of Criminal Case No.809/12/20.

3. Sri Swapnil Kumar, learned counsel for the applicant submits that brief

facts of the present case are that, a sale transaction was made between Sri Om Prakash Mittal son of late Sri Ramji Das Mittal, Sri Gaurav Mittal son of Om Prakash Mittal (sellers) and Paras Garg son of Anil Kumar Gupta (purchasers) in regard to plot no.B-11 measuring 679.35 sq. yards = 568.00 sq. meters situated at Mauja Jaisinghpura Bangar Tehsil and District-Mathura.

4. It is submitted that sellers represented themselves to have 40% share in the property of Ramji Das Mittal on the strength of 20% share being devolved on Om Prakash Mittal upon death of Sri Ramji Das Mittal and 20% share being transferred to Gaurav Mittal by his grandmother, Smt. Pushpa Devi, thus, totaling 40% of the total plot area and accordingly sale deed was executed on 04.07.2013.

5. Case of the complainant is that, Pushpa Devi died on 24.12.2016 and when complainant reached the plot in question, he was informed that Sri Ramji Das Mittal had executed a Will bequeathing his property in favour of his four sons and, therefore, Pushpa Devi had no share in the property as a result, the gift deed executed by Pushpa Devi in favour of Gaurav Mittal is null and void, therefore, cheating and fraud was alleged to have been committed qua the complainant.

6. Sri Swapnil Kumar, learned counsel for the applicant submits that in terms of the provisions contained in Section 169 of the U.P.Z.A. & L.R. Act, no Will could have been executed in regard to agriculture property unless said Will is registered. It is therefore, submitted that since Will was null and void and could not have been acted upon in terms of the provisions contained in U.P.Z.A. & L.R. Act, therefore, property had devolved in favour of all the five legal heirs namely, four sons and wife of late Sri Ram Ji Das Mittal and on the basis of such legal position, entry was made in the revenue record, land was transferred by Smt. Pushpa Devi in favour of her grandson Gaurav Mittal through a gift deed. It is submitted that there is no element of cheating and applicants have been falsely implicated.

7. Sri Swapnil Kumar, learned counsel for the applicants further submits that in Application under Section 482 No.7352 of 2021, applicant is neither a seller, nor has any share in the property and is only a marginal witness to the transaction of sale deed, therefore, she has been falsely implicated.

8. Similarly, it is submitted that once property had devolved upon the son and grandson of Ramji Das Mittal, then there is no element of cheating in selling the property in favour of the complainant. It is further submitted that complainant is still in possession of the property and no cause of action has accrued in his favour.

9. Sri Swapnil Kumar, learned counsel for the applicant has placed reliance on the judgment of Supreme Court in case of ***Ramesh Dutt and others Vs. State of Punjab and others; (2009) 15 SCC 429,*** wherein in para-14 it is mentioned that "Title in or over an immovable property has many facets. Possession is one of them. Unless there exists a statutory interdict, a person in possession may transfer his right, tile and interest in favour of third party."

10. It is further held that only because the appellants transferred a portion of the

property without having complete ownership over it by itself do not satisfy the ingredients of Sections 467 and 468 and 469 IPC.

11. In para-19, it is held that institution of a criminal case must be held to be an Act of mala fide on the part of the respondents in the aforementioned backdrop of units and, therefore, quash the proceedings.

12. Sri Swetashwa Agarwal, learned counsel for the opposite party no.2, in his turn, submits that element of cheating is evident from the fact that on the date of 'Uthavna' of Ramji Das Mittal who had died on 28.08.2005 and 'Uthavna' had taken place on 30.08.2005, a document namely, 'Will Execution Deed' was drawn through which, it was decided that Om Prakash Mittal being the eldest son of HUF, Sri Girrajmal Ramji Das will be appointed as 'Karta'. His brothers Vinod, Govind and Anil were accepted to be joint owners. Smt. Pushpa Devi will continue to be member of the HUF. It was further decided that after giving Rs.71,000/-(seventy one thousand) to daughter of Ramji Das Mittal, namely, Beena or 10 'tolas' of gold, remaining property and shares etc. be equally distributed between the four sons of Ramji Das Mittal, whereas, furniture of Sri Ramji Das Mittal be given to Smt. Pushpa Devi. It is submitted that Smt. Pushpa Devi, Om Prakash, Anjana Garg are signatories to this family settlement drawn in execution of the Will, therefore, once they have acted on the Will by entering into a family settlement for execution of the Will, it is not open to the applicants to blow hot and cold and submit that Will was incapable of being executed as it was not registered and, therefore, Smt. Pushpa Devi became co-sharer and property was divided in five shares, out of which, Pushpa Devi gifted her share in favour of son of Om Prakash Mittal, which was transferred in favour of the complainant by way of registered sale deed. It is submitted that element of cheating is writ large and needs to be taken cognizance of and no interference is required at this stage.

13. Sri Swetashu Agarwal, in his turn, has placed reliance on judgment of Supreme Court in case of ***Kamal Shivaji Pokarnekar Vs. State of Maharashtra and others; (2019) 14 SCC 350,*** wherein, it is held that defenses that may be available, or facts/aspects which when established during the trial, may lead to acquittal, are not grounds for quashing the complaint at the threshold. At that stage, the only question relevant is whether the averments in the complaint spell out the ingredients of a criminal offence or not.

14. Similarly, reliance is placed on decision of Supreme Court in case of ***Priti Saraf Vs. State of NCT of Delhi and another*** decided on March, 2021 in Criminal Appeal No(s).296 of 2021 arising out of S.L.P. (Criminal) No(s).6364 of 2019, wherein, again in para-32 it is held that "whether the allegations in the complaint are otherwise correct or not, has to be decided on the basis of the evidence to be led during the course of trial. Simply because there is a remedy provided for breach of contract or arbitral proceedings initiated at the instance of the appellants, that does not by itself clothe the court to come to a conclusion that civil remedy is the only remedy, and the initiation of criminal proceedings, in any manner, will be an abuse of the process of the court for exercising inherent powers of the High Court under Section 482 Cr.P.C. for quashing such proceedings".

15. After hearing learned counsel for the parties and going through the judgment rendered in case of Ramesh Dutt and others ***(supra)***, it is evident that to come out of the rigous of the provisions contained in Section 467, 468, 469, the transferor must be in possession of the land and that possession should not be symbolic but actual. In the present case, facts of the case are different. Plea of the applicants is that, Will was incapable of being acted and, therefore, property devolved upon five persons against the narration in the Will and 5th person namely, Pushpa Devi alienated her share in favour of Gaurav Mittal who is her grandson. Therefore, there is no element of criminality in transferring joint share of Gaurav Mittal and Om Prakash Mittal.

16. This argument is too technical. The aim and object of amendment in Section 169 of U.P.Z.A. & L.R. Act is to save poor agriculturists from alienation of their property in favour of unscrupulous elements. In the present case, once all the brothers and wife of late Ramji Das Mittal decided to honour of his Will and there was no dispute as to the authenticity of the Will, then act of Om Prakash Mittal and Gaurav Mittal in getting her share carved out for themselves on the basis of some mutation proceedings which does not prima facie confer any title constitutes elements of cheating as defined under Section 415 of IPC punishable under Section 420 IPC. There is also an element of forgery and making of a false document as provided under Section 463, 464 IPC capable of being punished under Section 467, 468 and 471 IPC and, therefore, law laid down in case of Ramesh Dutt and others (supra) will be of no aid to the present applicants.

17. In fact, the act of the applicants Om Prakash Mittal and Gaurav Mittal amounted to acquiescence. Silent acquiescence amounts to admission Admission may also be implied from the acquiescence of the party, but acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary de-manner or conduct of the party.

18. In the present case, once applicants decided to be a signatory to the family settlement in terms of the Will, then principle of acquiescence i.e. doctrine "standing by" will come into play.

19. It is settled principle of law as has been laid down in ***Duke of Leeds Vs Amherst; 1846, 78 RR. 47 : 2 Philips 117;*** when Lord Chancellor, Cottenham observed that "if party having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence".

20. Similarly, Lord Campbell in ***Cairncross Vs. Lorrimer; 3 LT 130*** observed that "generally speaking if a party having an interest to prevent an act being done as full notice of its being done, an acquiesce in it, so as to induce a reasonable belief that he consents to it and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license"

21. Similarly, Halsbury's Law of England describes the expression "Acquiescence" in Volume-I of 4th Edition "The term is, however, properly used where a person having a right, and seeing another

person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complaint of the act".

22. Thus, Om Prakash Mittal and Gaurav Mittal after consented to abide by the Will are estopped from taking a plea that under provisions of Section 169, U.P.Z.A. & L.R. Act, Will, could not have been acted upon. This plea prima facie reflects their guilty mind and dis-honest intention, which has been rightly inferred by the court below while taking cognizance of the charge-sheet.

23. However, I would like to add that case of Anjana Agarwal is on a different footing than that of applicants in Application under Section 482 No.7572 of 2021, inasmuch as, Anjana Agarwal is only a marginal witness to the sale deed and, therefore, it cannot be said that she understood the import and meaning of the transaction and had constructive knowledge of cheating and forgery being committed by the beneficiaries of the transaction, namely, Om Prakash and Gaurav Mittal and, therefore, her case being different on facts deserves to be allowed and proceedings qua her deserves to be quashed and are hereby quashed.

24.. However, case of Om Prakash Mittal and Gaurav Mittal are on different footing. Om Prakash Mittal is a signatory to the family settlement, which accepted execution of the Will. Once, execution of Will was accepted on the date of 'Uthavana' of Sri Ramji Das Mittal and it is mentioned that partition will be made in terms of the Will of Shri Ramji Das Mittal, subsequent contention of Om Prakash that he was not having any knowledge of the execution deed drawn on the advice of their chartered accountant and auditor, prima facie, depicts that revenue documents were prepared in a fraudulent manner so to corner extra share in the property of Ramji Das Mittal, then what was admissible to Om Prakash Mittal and, therefore, in the light of the law laid down in case of Priti Saraf **(supra)** and Kamal Shivaji Pokarnekar **(supra)**, since prima facie offence appears to have been made out, no indulgence is required for quashing the proceedings, qua Om Prakash Mittal and Gaurav Mittal, Application fails and is **dismissed**.

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**(2021)10ILR A335**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 29.09.2021**

**BEFORE**

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

Application U/S 482 Cr.P.C. No. 8723 of 2021

**Rajitram Shukla & Ors. ...Applicants**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicants:**
Sri Pradeep Kumar Mishra

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

**(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Section 468 - Bar to taking cognizance after lapse of the period of limitation - Indian Penal Code, 1860 - Section 323, 504, 506 - The Schedule Castes And The Schedule Tribes**

**(Prevention of Atrocities ) Act , 1989 - Section 3(1)10 - nullum tempus aut locus occurrit regi - vigilantibus et non dormientibus - jura subveniunt - actus curiae neminem gravabit - computation of period of limitation under Section 468 CrPC - relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance. (Para - 20)**

Incident occurred on 13.05.2015 - FIR lodged on 13.05.2015 - police report submitted on 31.12.2015 - whereupon cognizance was taken - order passed by the Magistrate summoning the applicant-accused is 18.11.2020 - preliminary point and contention - bar under Section 468 would become operative - proceedings would be barred by limitation.

**HELD:-**The challenge therefore sought to be raised to the criminal proceedings, including the challenge to the charge-sheet and summoning order, on the point of limitation, by seeking to urge that the proceedings would be barred by limitation under Section 468 Cr.P.C. thus cannot be accepted and is therefore rejected. (Para - 21 )

**Application u/s 482 Cr.P.C. pending.** (E-7)

**List of Cases cited:-**

1. Sarah Mathew Vs The Institute of Cardio Vascular Diseases & ors., (2014) 2 SCC 62

2. Bharat Damodar Kale Vs St. of A.P., (2003) 8 SCC 559

3. Japani Sahoo Vs Chandra Sekhar Mohanty, (2007) 7 SCC 394

4. Krishna Pillai Vs T.A.Rajendran, 1990 (Supp) SCC 121

5. Jamuna Singh Vs Bhadai Shah, AIR 1964 SC 1541

6. R.R.Chari Vs St. of U.P., AIR 1951 SC 207

7. Gopal Das Sindhi Vs St. of Assam, AIR 1961 SC 986

8. Chief Enforcement Officer Vs Videocon International Ltd., (2008) 2 SCC 492

9. Darshan Singh Saini Vs Sohan Singh & anr., (2015) 14 SCC 570

10. Johnson Alexander Vs St. by C.B.I., 2015 0 Supreme (SC) 567

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

1. Heard Sri Pradeep Mishra, learned counsel for the applicants and Sri Pankaj Saxena, learned Additional Government Advocate-I appearing for the State-opposite party.

2. The present application under Section 482 of the Code of Criminal Procedure1 has been filed seeking to quash the charge sheet dated 31.12.2015 as well as summoning order dated 18.11.2020 passed by Special Judge S.C./S.T. Act, Jaunpur as well as entire proceedings of S.S.T. No. 284/2020, arising out of Case Crime No. 249/2015, under Section 323, 504, 506 I.P.C. and 3 (1) 10 S.C./S.T. Act, Police Station Barsathi District Jaunpur.

3. A challenge is sought to be raised to the proceedings of S.S.T. No. 284/2020, arising out of Case Crime No. 249/2015, and also to the charge-sheet dated 31.12.2015 as well as summoning order dated 18.11.2020, by raising a preliminary point and contending that the proceedings would be barred by limitation in view of the provisions contained under Section 468 CrPC.

4. Learned counsel for the applicants has submitted that in the instant case, the incident in question is stated to have occurred on 13.05.2015 regarding which an

FIR was lodged on the same day i.e. 13.05.2015, and after investigation the police report was submitted on 31.12.2015 whereupon cognizance was taken. However, since the order passed by the Magistrate summoning the applicant-accused is dated 18.11.2020, the bar under Section 468 would become operative and the proceedings would be barred by limitation.

5. In response to the aforesaid contention, learned Additional Government Advocate-I points out that the question as to what would be the relevant date for the purposes of computing the period of limitation under Section 468 CrPC is no longer res integra. He has placed reliance upon the Constitution Bench judgment in the case of **Sarah Mathew Vs. The Institute of Cardio Vascular Diseases and Ors.2,** wherein noticing a conflict between a two Judge Bench decision of the Supreme Court in the case of **Bharat Damodar Kale Vs. State of A.P.3**, which had been followed in another two Judge Bench decision in **Japani Sahoo Vs. Chandra Sekhar Mohanty4**, and a three Judge Bench decision in **Krishna Pillai Vs. T.A.Rajendran5**, the case was placed before a three Judge Bench for an authoritative pronouncement and thereafter it was referred to a five Judge Constitution Bench to examine the issue.

6. The questions which were considered by the Constitution Bench in the case of Sarah Mathew (supra) are as follows :-

"3.1.(i) Whether for the purposes of computing the period of limitation under Section 468 CrPC the relevant date is the date of filing of the complaint or the date of institution of the prosecution or whether the relevant date is the date on which a Magistrate takes cognizance of the offence?

3.2.(ii) Which of the two cases i.e. Krishna Pillai or Bharat Kale (which is followed in *Japani Sahoo*) lays down the correct law?"

7. Referring to the legislative history of Chapter XXXVI of the Code, it was observed as follows :-

"19. To address the questions which arise in this reference, it is necessary to have a look at the legislative history of Chapter XXXVI CrPC. The Criminal Procedure Code, 1898 contained no general provision for limitation. Though under certain special laws like the Negotiable Instruments Act, 1881, the Trade and Merchandise Marks Act, 1958, the Police Act, 1861, The Factories Act, 1948 and the Army Act, 1950, there are provisions prescribing period of limitation for prosecution of offences, there was no general law of limitation for prosecution of other offences. The approach of this Court while dealing with the argument that there was delay in launching prosecution, when in the Criminal Procedure Code (1898), there was no general provision prescribing limitation, could be ascertained from its judgment in Collector of Customs v. L.R. Melwani. It was urged before the High Court in that case that there was delay in launching prosecution. The High Court held that the delay was satisfactorily explained. While dealing with this question, this Court held that in any case prosecution could not have been quashed on the ground of delay because it was not the case of the accused that any period of limitation was prescribed for filing the complaint. Hence the complaint could not have been thrown out on the sole ground

that there was delay in filing the same. This Court further observed that the question of delay in filing complaint may be a circumstance to be taken into consideration in arriving at the final verdict and by itself it affords no ground for dismissing the complaint. This position underwent a change to some extent when Chapter XXXVI was introduced in the Criminal Procedure Code as we shall soon see.

20. It is pertinent to note that the Limitation Act, 1963 does not apply to criminal proceedings except for appeals or revisions for which express provision is made in Articles 114, 115, 131 and 132 thereof. After conducting extensive study of criminal laws of various countries, the Law Commission of India appears to have realized that providing provision of limitation for prosecution of criminal offences of certain type in general law would, in fact, be good for the criminal justice system. The Law Commission noted that the reasons to justify introduction of provisions prescribing limitation in general law for criminal cases are similar to those which justify such provisions in civil law such as likelihood of evidence being curtailed, failing memories of witnesses and disappearance of witnesses. Such a provision, in the opinion of the Law Commission, will quicken diligence, prevent oppression and in the general public interest would bring an end to litigation. The Law Commission also felt that the court would be relieved of the burden of adjudicating inconsequential claims."

8. The recommendations made by Forty-second Law Commission Report, and in particular those in respect of extending the provision relating to limitation to original prosecutions, and also the report of the Joint Parliamentary Committee accepting the recommendations of the Law Commission, were taken note of, and it was stated as follows :-

"21. Paragraph 24.3 of the Forty-second Law Commission Report is material. It reads thus:

*"24.3.* ***Reasons for time-limits in civil cases-*** *I*n civil cases, the law of limitation in almost all countries where the rule of law prevails, jurists have given several convincing reasons to justify the provision of such a law; some of those which are equally applicable to criminal prosecutions may be referred to here:

(1) The defendant ought not to be called on to resist a claim when 'evidence has been lost, memories have faded, and witnesses have disappeared.'

(2) The law of limitation is also a means of suppressing fraud, and perjury, and quickening diligence and preventing oppression.

(3) It is in the general public interest that there should be an end to litigation. The statute of limitation is a statute of repose.

(4) A party who is insensible to the value of civil remedies and who does not assert his own claim with promptitude has little or no right to require the aid of the State in enforcing it.

(5) The court should be relieved of the burden of adjudicating inconsequential or tenuous claims."

The Law Commission stated its case for extending limitation to original prosecutions as under:

*"**24.11- Case for extending limitation to original prosecutions.-*** It seems to us that there is a strong case for having a period of limitation for offences which are not very serious. For such offences, considerations of fairness to the accused and the need for ensuring freedom from prosecution after a lapse of time should outweigh other considerations. Moreover, after the expiry of a certain period the sense of social retribution loses its edge and the punishment does not serve the purpose of social retribution. The deterrent effect of punishment which is one of the most important objectives of penal law is very much impaired if the punishment is not inflicted promptly and if it is inflicted at a time when it has been wiped off the memory of the offender and of other persons who had knowledge of the crime."

22. Paragraphs 24.13, 24.14, 24.20, 24.22, 24.23, 24.24, 24.25 and 24.26 of the Forty-second Law Commission Report could also be advantageously quoted:

*"**24.13.- Delay by itself no ground for dismissing complaint-*** At present no court can throw out a complaint solely on the ground of delay, because, as pointed out by the Supreme Court, 'the question of delay in filing a complaint may be a circumstance to be taken into consideration in arriving at the final verdict. But by itself, it affords no grounds for dismissing the complaint.'

It is true that unconscionable delay is a good ground for entertaining grave doubts about the truth of the complainant's story unless he can explain it to the satisfaction of the court. But it would be illegal for a court to dismiss a complaint merely because there was inordinate delay.

***24.14.- Recommendation to introduce principle of limitation.***- We, therefore, recommend that the principle of limitation should be introduced for less serious offences under the Code. We suggest that, for the present, offences punishable with fine only or with imprisonment upto three years should be made subject to the law of limitation. The question of extending the law to graver offences may be taken up later on in the light of the experience actually gained.

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***24.20.- Prosecution commences when court takes cognizance***.-The question whether prosecution commences on the date on which the court takes cognizance of the offence or only on the date on which process is issued against the accused, has been settled by the Supreme Court with reference to Section 15 of the Merchandise Marks Act, 1889. Where the complaint was filed within one year of the discovery of offence, it cannot be thrown out merely because process was not issued within one year of such discovery. The complainant is required by Section 15 of the Act to 'commence prosecution' within this period, which means that if the complaint is presented within one year of such discovery, the requirements of Section 15 are satisfied. The period of limitation is intended to operate against complainant and to ensure diligence on his part in prosecuting his rights, and not against the court. It will defeat the object of the enactment, deprive traders of the protection which the law intended to give them, to hold that unless process is issued on their

complaint within one year of the discovery of the offence, it should be thrown out.

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***24.22- Infructuous proceedings.-*** Secondly, as in civil cases, in computing the period of limitation for taking cognizance of offence, the time during which any person has been prosecuting with due diligence another prosecution whether in a court of first instance or in a court of appeal or revision, against the offender, should be excluded, where the prosecution relates to the same facts and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

***24.23- Continuing offences.-*** Thirdly, in the case of a continuing offence, a fresh period of limitation should begin to run at every moment of the time during which the offence continues; and we recommend the insertion of a provision to that effect.

***24.24- Impediments to prosecution.-*** Impediments to the institution of a prosecution have also to be provided for. Such impediments could be (a) legal, or (b) due to conduct of the accused, or (c) due to the court being closed on the last day.

As regards legal impediments, two aspects may be considered, first, the time for which institution of prosecution is stayed under a legal provision, and secondly, prosecutions for which previous sanction is required, or notice has to be given, under legal provision. Both are appropriate cases for a special provision for extending the period of limitation. We recommend that, where the institution of the prosecution in respect of an offence has been stayed by an injunction or order, then, in computing the period of limitation for taking cognizance of that offence, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

***24.25- Notice of prosecution***.- We also recommend that where notice of prosecution for an offence has been given, or where for prosecution for an offence the previous consent or sanction of the Government or any other authority is required, in accordance with the requirements of any law for the time being in force, then in computing the period of limitation for taking cognizance of the offence, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction, shall be excluded.

***24.26- Absence of accused and absconding***- As illustrations of impediments caused by the conduct of the accused, we may refer to his being out of India, and his absconding or concealing himself. Running of the period of limitation should be excluded in both cases."

23. The Joint Parliamentary Committee ("the JPC") accepted the recommendations of the Law Commission for prescribing period of limitation for certain offences. The relevant paragraphs of its report dated 30-11-1972 read as under:

***"Clauses 467 to 473 (new clauses***).- These are new clauses prescribing periods of limitation on a graded scale for launching a criminal prosecution in certain cases. At present,

there is no period of limitation for criminal prosecution and a court cannot throw out complaint or a police report solely on the ground of delay although inordinate delay may be a good ground for entertaining doubts about the truth of the prosecution story. Periods of limitation have been prescribed for criminal prosecution in the laws of many countries and the Committee feels that it will be desirable to prescribe such periods in the Code as recommended by the Law Commission.

Among the grounds in favour of prescribing the limitation may be mentioned as the following:

1. As time passes the testimony of witnesses becomes weaker and weaker because of lapse of memory and evidence becomes more and more uncertain with the result that the danger of error becomes greater.

2. For the purpose of peace and repose it is necessary that an offender should not be kept under continuous apprehension that he may be prosecuted at any time particularly because with the multifarious laws creating new offences many persons at some time or the other commit some crime or the other. People will have no peace of mind if there is no period of limitation even for petty offences.

3. The deterrent effect of punishment is impaired if prosecution is not launched and punishment is not inflicted before the offence has been wiped off the memory of the persons concerned.

4. The sense of social retribution which is one of the purposes of criminal law loses its edge after the expiry of a long period.

5. The period of limitation would put pressure on the organs of criminal prosecution to make every effort to ensure the detection and punishment of the crime quickly.

The actual periods of limitation provided for in the new clauses would, in the Committee's opinion be appropriate having regard to the gravity of the offences and other relevant factors.

As regards the date from which the period is to be counted the Committee considered (sic the same and) has fixed the date as the date of the offence. As, however this may create practical difficulties and may also facilitate an accused person to escape punishment by simply absconding himself for the prescribed period, the Committee has also provided that when the commission of the offence was not known to the person aggrieved by the offence or to any police officer, the period of limitation would commence from the day on which the participation of the offender in the offence first comes to the knowledge of a person aggrieved by the offence or of any police officer, whichever is earlier. Further, when it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the police officer making investigation into the offence.

The Committee has considered it necessary to make a specific provision for extension of time whenever the court is satisfied on the materials that the delay has been properly explained or that the accused had absconded. This provision would be particularly useful because limitation for criminal prosecution is being prescribed for the first time in this country."

24. Read in the background of the Law Commission's Report and the Report of the JPC, it is clear that the object of Chapter XXXVI inserted in the Criminal Procedure Code was to quicken the prosecutions of complaints and to rid the criminal justice system of inconsequential cases displaying extreme lethargy, inertia or indolence. The effort was to make the criminal justice system more orderly, efficient and just by providing period of limitation for certain offences. In Sarwan Singh, this Court stated the object of the Criminal Procedure Code in putting a bar of limitation as follows: (SCC p.36,para 3)

"3...The object of the Criminal Procedure Code in putting a bar of limitation on prosecutions was clearly to prevent the parties from filing cases after a long time, as a result of which material evidence may disappear and also to prevent abuse of the process of the court by filing vexatious and belated prosecutions long after the date of the offence. The object which the statutes seek to sub-serve is clearly in consonance with the concept of fairness of trial as enshrined in Article 21 of the Constitution of India. It is, therefore, of the utmost importance that any prosecution, whether by the State or a private complainant must abide by the letter of law or take the risk of the prosecution failing on the ground of limitation."

25. It is equally clear however that the law-makers did not want cause of justice to suffer in genuine cases. The Law Commission recommended provisions for exclusion of time and those provisions were made part of Chapter XXXVI. We, therefore, find in Chapter XXXVI provisions for exclusion of time in certain cases (Section 470), for exclusion of date on which the court is closed (Section 471), for continuing offences (Section 472) and for extension of period of limitation in certain cases (Section 473). Section 473 is crucial. It empowers the court to take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary to do so in the interest of justice. Therefore, Chapter XXXVI is not loaded against the complainant. It is true that the accused has a right to have a speedy trial and this right is a facet of Article 21 of the Constitution. Chapter XXXVI CrPC does not undermine this right of the accused. While it encourages diligence by providing for limitation it does not want all prosecutions to be thrown overboard on the ground of delay. It strikes a balance between the interest of the complainant and the interest of the accused. It must be mentioned here that where the legislature wanted to treat certain offences differently, it provided for limitation in the section itself, for instance, Section 198(6) and 199(5) CrPC. However, it chose to make general provisions for limitation for certain types of offences for the first time and incorporated them in Chapter XXXVI CrPC."

9. The scheme under Chapter XXXVI of the Code was adverted to by referring to Sections 467, 468, 469, 470, 471 and 473 and it was observed as follows :-

"30.1 Section 467 defines the phrase "period of limitation" to mean the period specified in Section 468 for taking cognizance of certain offences.

30.2 Section 468 stipulates the bar of limitation. Sub-section (1) of Section 468 makes it clear that a fetter is put on the

court's power to take cognizance of an offence of the category mentioned in sub-section (2) after the expiry of period of limitation. Sub-section (2) lays down the period of limitation for certain offences.

30.3 Section 469 states when the period of limitation commences. It is dexterously drafted so as to prevent advantage of bar of limitation being taken by the accused. It states that period of limitation in relation to an offence shall commence either from the date of offence or from the date when the offence is detected.

30.4 Section 470 provides for exclusion of time in certain cases. It inter alia states that while computing the period of limitation in relation to an offence, time taken during which the case was being diligently prosecuted in another court or in appeal or in revision against the offender, should be excluded. The Explanation to this section states that in computing limitation, the time required for obtaining the consent or sanction of the Government or any other authority should be excluded. Similarly time during which the accused is absconding or is absent from India shall also be excluded.

30.5 Section 471 provides for exclusion of date on which court is closed and Section 472 provides for continuing offence.

30.6 Section 473 is an overriding provision which enables courts to condone delay where such delay has been properly explained or where the interest of justice demands extension of period of limitation.

30.7 An analysis of these provisions indicates that Chapter XXXVI is a Code by itself so far as limitation is concerned. All the provisions of this Chapter will have to be read cumulatively. Sections 468 and 469 will have to be read with Section 473."

10. The term 'cognizance' in the context of the provisions of the Code and the earlier decisions in the case of **Jamuna Singh Vs. Bhadai Shah6, R.R.Chari Vs. State of U.P.7, Gopal Das Sindhi Vs. State of Assam8, and Chief Enforcement Officer Vs. Videocon International Ltd.9,** was discussed and it was observed that 'taking cognizance' is entirely an act of the Magistrate and that the same may be delayed because of several reasons including systematic reasons. The conflicting view points as to whether the date of taking cognizance or the date of filing complaint is material for computing limitation was considered and it was observed as follows:-

"34. Thus, a Magistrate takes cognizance when he applies his mind or takes judicial notice of an offence with a view to initiating proceedings in respect of offence which is said to have been committed. This is the special connotation acquired by the term "cognizance" and it has to be given the same meaning wherever it appears in Chapter XXXVI. It bears repetition to state that taking cognizance is entirely an act of the Magistrate. Taking cognizance may be delayed because of several reasons. It may be delayed because of systemic reasons. It may be delayed because of the Magistrate's personal reasons.

35. In this connection, our attention is drawn to the judgment of this Court in Sharadchandra Dongre. It is urged on the basis of this judgment that by condoning the

delay, the court takes away a valuable right which accrues to the accused. Hence, the accused has a right to be heard when an application for condonation of delay under Section 473 CrPC is presented before the court. Keeping this argument in mind, let us examine both the view points i.e. whether the date of taking cognizance or the date of filing complaint is material for computing limitation. If the date on which complaint is filed is taken to be material, then if the complaint is filed within the period of limitation, there is no question of it being time-barred. If it is filed after the period of limitation, the complainant can make an application for condonation of delay under Section 473 CrPC. The court will have to issue notice to the accused and after hearing the accused and the complainant decide whether to condone the delay or not. If the date of taking cognizance is considered to be relevant then, if the court takes cognizance within the period of limitation, there is no question of the complaint being time barred. If the Court takes cognizance after the period of limitation then, the question is how will Section 473 CrPC work. The complainant will be interested in having the delay condoned. If the delay is caused by the Magistrate by not taking cognizance in time, it is absurd to expect the complainant to make an application for condonation of delay. The complainant surely cannot explain that delay. Then in such a situation, the question is whether the Magistrate has to issue notice to the accused, explain to the accused the reason why delay was caused and then hear the accused and decide whether to condone the delay or not. This would also mean that the Magistrate can decide whether to condone delay or not, caused by him. Such a situation will be anomalous and such a procedure is not known to law...

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37. We are inclined to take this view also because there has to be some amount of certainty or definiteness in matters of limitation relating to criminal offences. If, as stated by this Court, taking cognizance is application of mind by the Magistrate to the suspected offence, the subjective element comes in. Whether a Magistrate has taken cognizance or not will depend on facts and circumstances of each case. A diligent complainant or the prosecuting agency which promptly files the complaint or initiates prosecution would be severely prejudiced if it is held that the relevant point for computing limitation would be the date on which the Magistrate takes cognizance. The complainant or the prosecuting agency would be entirely left at the mercy of the Magistrate, who may take cognizance after the limitation period because of several reasons; systemic or otherwise. It cannot be the intention of the legislature to throw a diligent complainant out of the court in this manner. Besides it must be noted that the complainant approaches the court for redressal of his grievance. He wants action to be taken against the perpetrators of crime. The courts functioning under the criminal justice system are created for this purpose. It would be unreasonable to take a view that delay caused by the court in taking cognizance of a case would deny justice to a diligent complainant. Such an interpretation of Section 468 CrPC would be unsustainable and would render it unconstitutional. It is well settled that a court of law would interpret a provision which would help sustaining the validity of the law by applying the doctrine of reasonable construction rather than applying a doctrine which would make the provision unsustainable and ultra vires the Constitution. *(U.P. Power Corporation Ltd. v. Ayodhaya Prasad Mishra)."*

(emphasis supplied)

11. Referring to the legal maxim 'nullum tempus aut locus occurrit regi', *'vigilantibus et non dormientibus, jura subveniunt' and actus curiae neminem gravabit'*, it was observed as follows :-

"39. As we have already noted in reaching this conclusion, light can be drawn from legal maxims. Legal maxims are referred to in Bharat Kale, Japani Sahoo and Vanka Radhamanohari. The object of the criminal law is to punish perpetrators of crime. This is in tune with the well- known legal maxim '*nullum tempus aut locus occurrit regi'*, which means that a crime never dies. At the same time, it is also the policy of law to assist the vigilant and not the sleepy. This is expressed in the Latin maxim 'vigilantibus et non dormientibus, jura subveniunt'. Chapter XXXVI CrPC which provides limitation period for certain types of offences for which lesser sentence is provided draws support from this maxim. But, even certain offences such as Section 384 or 465 IPC, which have lesser punishment may have serious social consequences. The provision is, therefore, made for condonation of delay.Treating date of filing of complaint or date of initiation of proceedings as the relevant date for computing limitation under Section 468 of the Code is supported by the legal maxim 'actus curiae neminem gravabit' which means that the act of court shall prejudice no man. It bears repetition to state that the court's inaction in taking cognizance i.e. court's inaction in applying mind to the suspected offence should not be allowed to cause prejudice to a diligent complainant. Chapter XXXVI thus presents the interplay of these three legal maxims. The provisions of this Chapter, however, are not interpreted solely on the basis of these maxims. They only serve as guiding principles." (emphasis supplied)

12. The question as to what would be the relevant date for the purpose of computing the period of limitation under Section 468 was answered by the Constitution Bench judgment in the case of **Sarah Mathew**, as follows :-

"51. In view of the above, we hold that for the purpose of computing the period of limitation under Section 468 CrPC the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance. We further hold that Bharat Kale which is followed in Japani Sahoo lays down the correct law. Krishna Pillai will have to be restricted to its own facts and it is not the authority for deciding the question as to what is the relevant date for the purpose of computing the period of limitation under Section 468 CrPC." (emphasis supplied)

13. It would also be apposite to refer to the decisions in the case of **Bharat Damodar Kale Vs. State of A.P.3,** and also in the case of **Japani Sahoo Vs. Chandra Sekhar Mohanty4**, which were held to have laid down the correct law in the aforementioned decision of the Constitution Bench in the case of **Sarah Mathew**.

14. The observations made in the case of **Bharat Damodar Kale**, (supra) that the limitation prescribed under Chapter XXXVI of the Code is only for filing of the complaint or initiation of prosecution and not for taking cognizance, are as follows :-

"10. On facts of this case and based on the arguments advanced before

us, we consider it appropriate to decide the question whether the provisions of Chapter XXXVI of the Code apply to the delay in instituting the prosecution or to the delay in taking cognizance. As noted above, according to the learned counsel for the appellants, the limitation prescribed under the above Chapter applies to taking of cognizance by the court concerned, therefore even if a complaint is filed within the period of limitation mentioned in the said Chapter of the Code, if the cognizance is not taken within the period of limitation the same gets barred by limitation. This argument seems to be inspired by the chapter-heading of Chapter XXXVI of the Code which reads thus: "Limitation for taking cognizance of certain offences". It is primarily based on the above language of the heading of the Chapter, the argument is addressed on behalf of the appellants that the limitation prescribed by the said Chapter applies to taking of cognizance and not filing of complaint or initiation of the prosecution. We cannot accept such argument because a cumulative reading of various provisions of the said Chapter clearly indicates that the limitation prescribed therein is only for the filing of the complaint or initiation of the prosecution and not for taking cognizance. It of course prohibits the court from taking cognizance of an offence where the complaint is filed before the court after the expiry of the period mentioned in the said Chapter. This is clear from Section 469 of the Code found in the said Chapter which specifically says that the period of limitation in relation to an offence shall commence either from the date of the offence or from the date when the offence is detected. Section 470 indicates that while computing the period of limitation, time taken during which the case was being diligently prosecuted in another court or in appeal or in revision against the offender should be excluded. The said section also provides in the Explanation that in computing the time required for obtaining the consent or sanction of the Government or any other authority should be excluded. Similarly, the period during which the court was closed will also have to be excluded. All these provisions indicate that the court taking cognizance can take cognizance of an offence the complaint of which is filed before it within the period of limitation prescribed and if need be after excluding such time which is legally excludable. This in our opinion clearly indicates that the limitation prescribed is not for taking cognizance within the period of limitation, but for taking cognizance of an offence in regard to which a complaint is filed or prosecution is initiated beyond the period of limitation prescribed under the Code. Apart from the statutory indication of this view of ours, we find support for this view from the fact that taking of cognizance is an act of the court over which the prosecuting agency or the complainant has no control. Therefore, a complaint filed within the period of limitation under the Code cannot be made infructuous by an act of court. The legal phrase "actus curiae neminem gravabit" which means an act of the court shall prejudice no man, or by a delay on the part of the court neither party should suffer, also supports the view that the legislature could not have intended to put a period of limitation on the act of the court of taking cognizance of an offence so as to defeat the case of the complainant..."

(emphasis supplied)

15. The aforementioned view in the case of **Bharat Kale** was affirmed and followed in the case of **Japani Sahoo** and it was held that the date relevant for computation of period of limitation under

Section 468 is the date when the complaint is filed or criminal proceedings are initiated and not the date when the Court/Magistrate takes cognizance or issues process. Applying the doctrine of "actus curiae neminem gravabit", it was held that taking a contrary view would lead to injustice and defeat the primary object of procedural law. The observations made in the judgment in this regard are as follows :-

"47. We are in agreement with the law laid down in Bharat Damodar. In our judgment, the High Court of Bombay was also right in taking into account certain circumstances, such as, filing of complaint by the complainant on the last date of limitation, non availability of Magistrate, or he being busy with other work, paucity of time on the part of the Magistrate/court in applying mind to the allegations levelled in the complaint, postponement of issuance of process by ordering investigation under sub-section (3) of Section 156 or Section 202 of the Code, no control of complainant or prosecuting agency on taking cognizance or issuing process, etc. To us, two things, namely, (1) filing of complaint or initiation of criminal proceedings; and (2) taking cognizance or issuing process are totally different, distinct and independent.

48. So far as complainant is concerned, as soon as he files a complaint in a competent court of law, he has done everything which is required to be done by him at that stage. Thereafter, it is for the Magistrate to consider the matter, to apply his mind and to take an appropriate decision of taking cognizance, issuing process or any other action which the law contemplates. The complainant has no control over those proceedings.

49. Because of several reasons (some of them have been referred to in the aforesaid decisions, which are merely illustrative cases and not exhaustive in nature), it may not be possible for the court or the Magistrate to issue process or take cognizance. But a complainant cannot be penalized for such delay on the part of the court nor can he be non-suited because of failure or omission by the Magistrate in taking appropriate action under the Code. No criminal proceeding can be abruptly terminated when a complainant approaches the court well within the time prescribed by law. In such cases, the doctrine "actus curiae neminem gravabit" (an act of court shall prejudice none) would indeed apply. (Vide Alexander Rodger v. Comptoir D'Escompte.) One of the first and highest duties of all courts is to take care that an act of court does no harm to suitors.

50. The Code imposes an obligation on the aggrieved party to take recourse to appropriate forum within the period provided by law and once he takes such action, it would be wholly unreasonable and inequitable if he is told that his grievance would not be ventilated as the court had not taken an action within the period of limitation. Such interpretation of law, instead of promoting justice would lead to perpetuate injustice and defeat the primary object of procedural law.

51. The matter can be looked at from different angle also. Once it is accepted (and there is no dispute about it) that it is not within the domain of the complainant or prosecuting agency to take cognizance of an offence or to issue process and the only thing the former can do is to file a complaint or initiate proceedings in accordance with law, if that action of initiation of proceedings has been taken within the period of limitation, the complainant is not responsible for any

delay on the part of the court or Magistrate in issuing process or taking cognizance of an offence. Now, if he is sought to be penalized because of the omission, default or inaction on the part of the court or Magistrate, the provision of law may have to be tested on the touchstone of Article 14 of the Constitution. It can possibly be urged that such a provision is totally arbitrary, irrational and unreasonable. It is settled law that a court of law would interpret a provision which would help sustaining the validity of law by applying the doctrine of reasonable construction rather than making it vulnerable and unconstitutional by adopting rule of litera legis. Connecting the provision of limitation in Section 468 of the Code with issuing of process or taking of cognizance by the court may make it unsustainable and ultra vires Article 14 of the Constitution.

52. In view of the above, we hold that for the purpose of computing the period of limitation, the relevant date must be considered as the date of filing of complaint or initiating criminal proceedings and not the date of taking cognizance by a Magistrate or issuance of process by a court. We, therefore, overrule all decisions in which it has been held that the crucial date for computing the period of limitation is taking of cognizance by the Magistrate/court and not of filing of complaint or initiation of criminal proceedings." (emphasis supplied)

16. Learned counsel for the applicant though not disputing the law laid down in the aforesaid authoritative pronouncements on the question of limitation has tried to carve out a distinction by pointing out that in the case at hand the proceedings have been initiated with the lodging of an FIR and not by way of a criminal complaint. The aforesaid contention cannot be accepted for the reason that the view taken in the Constitution Bench decision is that for the purpose of computing the period of limitation under Section 468 Cr.PC. the relevant date is the date of filing of the complaint or the date of institution of prosecution. The expression 'institution of prosecution' would be wide enough to include within its ambit institution of prosecution - either by filing of a complaint or by lodging of an FIR.

17. The 'institution of prosecution' under the Code can be by giving of information relating to commission of a cognizable offence under Section 154, or by lodging a written complaint before the Magistrate. In this regard reference may be had to the decision in the case of **Darshan Singh Saini Vs. Sohan Singh and another10,** wherein following the law laid down in the case of **Sarah Mathew**, and noticing the fact that the complainant after repeatedly visiting the police station to lodge his complaint, when the police did not interfere, lodged a written complaint before the Magistrate, within the period of limitation under Section 468, it was held that the bar under the said section would not apply on the basis of cognizance having been taken on a date beyond the prescribed period. The observations made in the judgment, in this regard are as follows :-

"4. It is also apparent from the pleadings of this case, that according to the respondent, the police did not interfere, when the respondent repeatedly visited the police station, to lodge his complaint. It is therefore, that the respondent-Sohan Singh lodged a written complaint on 24-01-2008, before the Learned Additional Chief Judicial Magistrate, Nalagarh, District Solan, Himachal Pradesh.

5. The appellant-Darshan Singh Saini, approached the High Court under Section 482 of the Criminal Procedure Code, when he was summoned by the Judicial Magistrate, First Class, Nalagarh, District Solan, Himachal Pradesh through an order dated 06-02-2009. A perusal of the order dated 06-02-2009 reveals, that the appellant was summoned under Sections 341 and 506, read with Section 34 of the Penal Code, 1860.

6. The High Court, by the impugned order dated 08-04-2010, while partly accepting the prayer of the appellant, quashed the proceedings initiated against the appellant under Sections 341 and 506 of the Penal Code, but arrived at the conclusion, that there was reasonable ground to proceed against the appellant under Section 323 of the Penal Code.

7. It was the vehement contention of the learned counsel for the appellant, that the impugned order passed by the High Court is not acceptable in law, on account of the fact, that cognizance in the matter could not have been taken against the appellant, on account of the period of limitation depicted under Section 468 of the Code of Criminal Procedure. In this behalf, it was the pointed contention of the learned counsel for the appellant, that whilst the instant incident was of 15-01-2008, cognizance thereof was taken on 06.02.2009. This contention of the learned counsel for the appellant was premised on the fact, that though the complaint had been made on 24-01-2008, cognizance thereof was taken beyond a period of limitation of one year(on 06-02-2009).

8. We have considered the aforesaid contention advanced at the hands of the learned counsel for the appellant. It is apparent from the submissions advanced by the learned counsel for the appellant, that he is calculating limitation by extending the same to the order passed by the Judicial Magistrate, First Class, Nalagarh, on 06.02.2009. The instant contention is wholly misconceived on account of the legal position declared by a Constitution Bench of this Court in *Sarah Mathew vs. Institute of Cardio Vascular Diseases,* wherein in para 51, this Court has held as under : (SCC p.102)

"51. In view of the above, we hold that for the purpose of computing the period of limitation under Section 468 CrPC the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance. We further hold that Bharat Kale which is followed in Japani Sahoo lays down the correct law. Krishna Pillai will have to be restricted to its own facts and it is not the authority for deciding the question as to what is the relevant date for the purpose of computing the period of limitation under Section 468 CrPC."

9. In the above view of the matter, we are satisfied, that keeping in mind the allegations levelled against the appellant by the respondent, the date of limitation had to be determined with reference to the date of incident and the date when the complaint was filed by the respondent. Since the complaint was filed by the respondent on 24-01-2008, with reference to an incident of 15.01.2008, we are of the view, that Section 468 of the Criminal Procedure Code would not stand in the way of the respondent, in prosecuting the complaint filed by him."

18. Reference may also be had to the case of J**ohnson Alexander Vs. State by C.B.I.11** where the proceedings were held to be vitiated, in view of the bar under

Section 468 for the reason that there was no application by the prosecution explaining the delay from the date of the alleged occurrence till the date of filing the complaint and registering the FIR.

19. The aforementioned authorities in the case of **Darshan Singh Saini** and **Johnson Alexander,** would go to show that 'institution of prosecution' would refer to the date of filing of the complaint or registering of the FIR, and in a case where the same is within the period of limitation, proceedings cannot be held to be barred by Section 468 merely for the reason that the order of cognizance or issuance of process is made on a subsequent date.

20. The view taken in the judgments in the case of **Bharat Damodar Kale, Japani Sahoo** and **Sarah Mathew** that for the purpose of computing the period of limitation under Section 468 of the Code the relevant date is the date of 'institution of prosecution' and not the date on which the Magistrate takes cognizance, is primarily for the reason that so far as the complainant/informant is concerned, as soon as he files a complaint, he has done everything which is required to be done by him and thereafter he has no control over the proceedings or the delay in taking cognizance which may be for reasons which are systemic or otherwise cannot be a ground to non-suit a diligent complainant. The aforesaid reason, would also be applicable where the case is instituted with the lodging of an FIR by the informant/complainant diligently and within the period of limitation. In this situation also the complainant/informant cannot be non-suited for any subsequent delay in taking cognizance, issuing process or any other action contemplated under law, for which the informant/complainant has no control.

21. The challenge therefore sought to be raised to the criminal proceedings, including the challenge to the charge-sheet and summoning order, on the point of limitation, by seeking to urge that the proceedings would be barred by limitation under Section 468 Cr.P.C. thus cannot be accepted and is therefore rejected.

22. At this stage, learned counsel for the applicant states that he may be permitted to address on other points in support of the application, and to sustain the challenge to the criminal proceedings.

23. As prayed, let the matter appear in the additional cause list on 4th October, 2021.

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**(2021)10ILR A350**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 13.09.2021**

**BEFORE**

**THE HON'BLE SHAMIM AHMED, J.**

Application U/S 482 Cr.P.C. No. 9069 of 2021

**Rajeev Mohan Saxena & Ors. ...Applicants**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicants:**
Sri Raghubir Singh

**Counsel for the Opposite Parties:**
A.G.A., Sri Ashutosh Pandey

**(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent**

**power - The Negotiable instruments Act, 1981 - Section 138 - legal position for quashing of the proceedings at the initial stage - test to be applied by the court is to whether uncontroverted allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue - quashing of the criminal proceedings is an exception than a rule - power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.(Para -11)**

Compliance of order - applicants brought draft in favour of opposite party no.2 - ready to accept draft - not interested to pursue case filed under Section 138 Negotiable Instrument Act - proceedings may be quashed - parties have entered into compromise - cheque amount has been paid by way of bank draft - no useful purpose would be served if the proceedings of case go on further .

**HELD:-**In view of the statement/compromise made by the applicants as well as opposite party no.2 , the entire proceedings under Section 138 Negotiable Instrument Act pending in the court of Additional Judicial Magistrate, is hereby quashed. (Para - 13)

**Application u/s 482 Cr.P.C. allowed.** (E-7)

**List of Cases cited:-**

1. B.S. Joshi Vs St. of Har. & ors., 2003 (4) ACC 675

2. Gian Singh Vs St. of Pun., 2012 (10) SCC 303

3. Dimpey Gujral & ors. Vs Union Territory Through Administrator, 2013 (11) SCC 697

4. Narendra Singh & ors. Vs St. of Pun. & Ors., 2014 (6) SCC 466

5. Yogendra Yadav & ors. Vs St. of Jhark., 2014 (9) SCC 653

6. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs St. of Gujarat & Anr,(2017) 9 SCC 641

7. R.P. Kapoor Vs St. of Pun., AIR 1960 S.C. 866

8. St. of Har. Vs Bhajanlal, 1992 SCC (Crl.)426

9. St. of Bihar Vs P.P. Sharma, 1992 SCC (Crl.)192

10. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr., (Para-10) 2005 SCC (Cri.) 283

11. S.W. Palankattkar & ors. Vs St. of Bihar, 2002 (44) ACC 168

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri Raghubir Singh, learned counsel for the applicants, Sri Ashutosh Pandey, learned counsel for the opposite party no. 2 as well as learned A.G.A. for the State and perused the record.

2. This application u/s 482 Cr.P.C. has been filed with the prayer to quash the entire proceedings in Complaint Case No.11639 of 2019 (Smt. Sweta Agrawal vs J.R. Associate and others), under Section 138 Negotiable Instrument Act P.S. Shahganj District Agra pending in the court of Additional Judicial Magistrate, Court No.3, Agra.

3. This Court vide order dated 3.9.2021 passed the following order:-

*"Shri Raghubir Singh, learned counsel for the applicants submits that his client is ready to pay the cheque amount of Rs.1.5 lacs to opposite party no.2 by way of bank draft before this Court. Shri Ashutosh Pandey, learned counsel for opposite party no.2 has no objection to accept the cheque*

*amount of Rs.1,50,000/- by way of bank draft before this Court.*

*Learned AGA has also no objection if the parties enter into a settlement and matter is finally decided by this Court.*

*As jointly prayed by the learned counsel for the parties, put up this case as fresh on 9.9.2021 to enable the learned counsel for the applicants to bring a draft of Rs.1.50 lacs before this Court so that the same may be handed over to the counsel for opposite party no.2."*

4. In compliance of the order dated 3.9.2021 passed by this Court, Sri Raghubir Singh learned counsel for the applicants has brought a draft of Rs.1,50,000/- issued on 8.9.2021 in favour of Sweta Agarwal bearing No. 010987 today before this Court.

5. Sri Ashutosh Pandey, learned counsel for opposite party no.2 has submitted that opposite party no.2 Smt. Sweta Agrawal is ready to accept the draft of Rs.1,50,000/- which is also the cheque amount and now she is not interested to pursue the case i.e. Complaint Case No.11639 of 2019 filed under Section 138 Negotiable Instrument Act P.S. Shahganj District Agra pending in the court of Additional Judicial Magistrate, Court No.3, Agra and therefore, the proceedings of the aforesaid case may be quashed by this Court.

6. Considering the arguments as advanced by learned counsel for the parties and the statement given by learned counsel for opposite party no.2, a draft of Rs.1,50,000/- is being handed over to the learned counsel for opposite party no.2 today by the learned counsel for the applicants in Court and a photostat copy of the same is being kept in the file of this case as well as in the file of learned AGA.

7. Learned AGA has submitted that since the parties have entered into compromise and the cheque amount has been paid by way of bank draft, therefore, no useful purpose would be served if the proceedings of the aforesaid case go on further.

8. Learned counsel for the parties has drawn the attention of this Court and placed reliance on the judgment of the Hon'ble Apex Court in support of their case.

**(i) B.S. Joshi Vs. State of Haryana & Others 2003 (4) ACC 675.**

**(ii) Gian Ssingh Vs. State of Punjab 2012 (10) SCC 303.**

**(iii) Dimpey Gujral And Others Vs. Union Territory Through Administrator 2013 (11) SCC 697.**

**(iv) Narendra Singh And Others Vs. State of Punjab And Others 2014 (6) SCC 466.**

**(v) Yogendra Yadav And Others Vs. State of Jharkhand 2014 (9) SCC 653.**

9. Summarizing the ratio of all the above cases the latest judgment pronounced by Hon'ble Apex Court in the case of **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & Ors. Vs. State of Gujarat & Anr,; reported in (2017) 9 SCC 641** and in paragraph no.16, the Hon'ble Apex Court has summarized the broad principles with regard to exercise of

powers under Section 482 Cr.P.C. in the case of compromise/settlement between the parties which emerges from precedent of the subjects as follows:-

i. "Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court.

ii.The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

iii. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

iv. While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

v. The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are truly speaking not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

vii. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

viii. Criminal cases involving offences which arises from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

ix. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

x. There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

10. The Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:-**(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Haryana Vs. Bhajanlal, 1992 SCC (Crl.)426, (iii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192 and (iv) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283.**

11. From the aforesaid decisions the Apex Court has settled the legal position for quashing of the proceedings at the initial stage. The test to be applied by the court is to whether uncontroverted allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue. In **S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168,** it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court under Section 482 Cr.P.C itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

12. With the assistance of the aforesaid guidelines, keeping in view the nature and gravity and the severity of the offence which are more particularly is private dispute and differences it is deem proper and meet to the ends of justice. The proceeding of the aforementioned case be quashed.

13. The present 482 Cr.P.C. application stands **allowed.** Keeping in view the law laid down by the Hon'ble Apex Court in the above referred judgment and in view of the statement/compromise made by the applicants as well as opposite party no.2 and the observation made above, the entire proceedings of Complaint Case No.11639 of 2019 (Smt. Sweta Agrawal vs J.R. Associate and others), under Section 138 Negotiable Instrument Act P.S. Shahganj District Agra pending in the court of Additional Judicial Magistrate, Court No.3, Agra is hereby quashed.

14. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

15. 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.

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**(2021)10ILR A355**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 06.09.2021**

**BEFORE**

**THE HON'BLE GAUTAM CHOWDHARY, J.**

Application U/S 482 Cr.P.C. No. 9189 of 2021

**Gaurav Gulati @ Dipesh Gulati ...Applicant**
**Versus**
**State of U.P. ...Opposite Party**

**Counsel for the Applicant:**
Sri Awadesh Kumar Shukla

**Counsel for the Opposite Party:**
A.G.A., Sri Kamlesh Kumar Dwivedi

**(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Section 311 - power to summon material witness, or examine person present - Indian Penal Code, 1860 - Sections 394, 302, 201, 411 - court is competent to exercise power even suo motu if no application under section 311 CrPC has been filed by either of the parties - Court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.(Para - 6)**

Applicant filed an application under section 311 Cr.P.C. - for summoning Dr. Sunil Yadav, as a court witness, who had conducted medical examination - trial Judge vide order dated 12.02.2021 rejected the application .

**HELD:-**The Court shall summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case, the impugned order dated 12.02.2021 is hereby quashed and matter is remitted back to the court concerned.(Para - 9)

**Application u/s 482 Cr.P.C. partly allowed.** (E-7)

**List of Cases cited:-**

Natasa Singh Vs Cbi (State)

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. Learned counsel for the applicant files rejoinder affidavit today, taken on record.

2. Heard learned counsel for applicant, learned A.G.A. for the State, Sri Kamlesh Kumar Dwivedi, learned counsel for O.P. No. 2 perused the record.

3. This application has been filed with a prayer to set aside the order dated 12.02.2021 passed in the application moved by the counsel for the accused/applicant rejecting the application paper No. 100 Kha in S.S.T. No. 447 of 2015 (State Vs. Gaurav Gulati @ Dipesh) arising out of case crime No. 607 of 2015, under sections 394, 302, 201, 411 IPC, P.S. Hariparwat, District Agra and further may be pleased to direct the learned court below to summon the Dr. Sunil Yadav, under section 311 Cr.P.C. as a court witness to get him examine on oath for just decision of the case.

4. It is contended by learned counsel for the applicant that the FIR of the present against the unknown person has been lodged on 23.06.2015 with case crime no. 607 of 2015, under sections 394, 302 IPC, P.S. Hariparwat, District Agra. After lodging the FIR the inquest report of both the deceased namely Km. Diksha nd Smt.

Rama Gulati were prepared and doctor opinion the cause of death due to shock and hemorrhage as a result of anti mortem injury. Thereafter the I.O. claims to have recorded the statement of Nidhi Gulati, who is the married daughter of informant on 25.06.2015 on the basis of suspicion because after murder of her sister and mother the applicant has not came into the house of her parent. Thereafter I.O. further claims that when the applicant was arrested he told his name and father's name and on seeing his hands carefully, there were some injuries on his palm and fingers caused by sharp edge weapon and showed false recovery from his possession on 28.06.2015 and after making arrest of the applicant he was sent to medical examination in the clinic of Dr. Sunil Yadav posted as Emergency medical Officer, district Hospital, Agra wherein the medical examination report of the applicant was conducted and doctor noted Nil injury. After completing the investigation, the I.O has submitted the charge sheet against the applicant, on which the learned Magistrate has taken the cognizance and case was committed to the court of sessions as SST No. 447 of 2015.

5. It is further contended by learned counsel for the applicant during pendency of trial the applicant has filed an application under section 311 Cr.P.C. for summoning of the Dr. Sunil Yadav, as a court witness, who had conducted his medical examination for just decision of the case but the learned trial Judge vide order dated 12.02.2021 had rejected the application filed under section 311 Cr.P.C. filed by the applicant without considering the facts and circumstances of the case.

6. Learned counsel for the applicant has also placed the reliance of Hon'ble Supreme Court in the case of **Natasa Singh Vs. Cbi (State) on 8.3.2019** wherein it has been stated that,

*"The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.*

*8. In Mir Mohd. Omar & Ors. v. State of West Bengal, AIR 1989 SC 1785, this Court examined an issue wherein, after the statement of the accused under Section 313 Cr.P.C. had been recorded, the prosecution had filed an application to further examine a witness and the High Court had allowed the same. This Court then held, that once the accused has been examined under Section 313 Cr.P.C., in the event that liberty is given to the prosecution to recall a witness, the same may amount to filling up a lacuna existing in the case of the prosecution and therefore, that such an order was uncalled for."*

*Learned counsel for the applicant has again placed the reliance of this Court in the case of Manju Devi Vs. State of Rajasthan, which is quoted below:*

*On the other hand, Mr Senthil Jagadeesan has drawn the attention of the Court to the depositions of PW-1 and PW-11. Adverting also to the purported Board Minutes at Annexure P-2 (a photocopy of which has been filed at Annexure R-2 of the counter-affidavit), it has been submitted that the document, as a matter of fact, does not have the signatures of the members of the Board. Moreover, it has been urged that PW-1, who is the Chairman of*

*TANGEDCO, during the course of his deposition, submitted that he had granted sanction for the prosecution of the respondent and the co-accused without reference to the Board, and that he was entitled to do so in accordance with the provisions of the PC Act.*

*It needs hardly any emphasis that the discretionary powers like those under Section 311 CrPC are essentially intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity in so far as the evidence is concerned as also to ensure that no prejudice is caused to anyone. The principles underlying Section 311 CrPC and amplitude of the powers of the Court thereunder have been explained by this Court in several decisions 1. In Natasha Singh v. CBI (State) : (2013) 5 SCC 741, though the application for examination of witnesses was filed by the accused but, on the principles relating to the exercise of powers under Section 311, this Court observed, inter alia, as under:-*

*" 8. Section 311 CrPC empowers the court to summon a material witness, or to examine a person present at ?any stage? of ?any enquiry?, or ?trial?, or ?any other proceedings? under CrPC, or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, the CrPC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.*

7. Learned counsel has again drawn the attention of the section 311 Cr.P.C. which is as under,

*"that the object underlying Section 311 CrPC 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 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 the discretionary power conferred under Section 311 CrPC has to be exercised judiciously, as it is always said ?wider the power, greater is the necessity of caution while exercise of judicious discretion.?*

8. In reply of the above contention, learned A.G.A. as well as learned counsel for O.P.No. 2 placed the reliance in the case of Sri Asha Vs. State of U.P. decided on 18.11.2020 in Crl. Misc. Application No. 13126 of 2020, which is quoted below:

*"17. The powers under Section 311 Cr.P.C. is the discretion or the obligation of the Court to summon or recall a witness, but this discretion of the Court cannot be forced to be used by the accused or the prosecution. While considering the*

*present case it is clear that on behalf of the deceased sister an application under Section 311 Cr.P.C. had been moved in which no ground at all were brought forward as to why the witness needs to be summoned for examination whereas P.W.1 who is eye witness has been examined and cross examined. Applicant here is sister of deceased, who is not the informant nor the witness in the case and prosecution has examined P.W.1, who is real brother and eye witness of the deceased. There are 36 witnesses whose statements have been recorded by Investigating Officer. All are not required to be examined. Prosecution has to consider which witness has to be produced and to be examined. Out of 36 witness, 11 prosecution witnesses have been examined and prosecution evidence have been closed. The Hon'ble High Court while rejecting bail application of accused, directed the court below to conclude the trial expeditiously within a period of two months from the date of production of certified copy of this order. In application, no reason has been given as to why earlier, application for examination of witness has not been moved and what is relevancy of his examination. The prosecution was given much opportunity to produce evidence and prosecution examined all the witness to whom he wanted to be examined but when Hon'ble High Court passed the order for expedite the trial then to linger on the case, moved present application under Section 311 Cr.P.C. It is well settled law that under Section 311 Cr.P.C. cannot be invoked mere to fill up lacuna of the case but to fair and just decision of the case.*

*18. In the end, I do not find any illegality in the impugned order requiring any interference by this Court in exercise of inherent power under Section 482 Cr.P.C. and consequently, the prayer for quashing the impugned order dated 24.02.2020 passed by Additional Sessions Judge, Court No.3, Saharanpur in S.T. No.605 of 2015, Crime No.169 of 2014 filed under Sections 147, 148, 149, 302, 120-B I.P.C., Police Station Kotwali, District Saharanpur is refused."*

9. From the perusal of the application filed under section 311 Cr.P.C. as well as the order passed therein and submissions made by learned counsel for the both the parties and the case law cited by both the parties, as well as the provision itself permits that the Court shall summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case, the impugned order dated 12.02.2021 is hereby quashed and matter is remitted back to the court concerned to pass an appropriate order after hearing both the parties within a period of two weeks from the date of production of computer generated copy of this order.

10. Accordingly this application is partly allowed.

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**(2021)10ILR A358**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 29.09.2021**

**BEFORE**

**THE HON'BLE UMESH KUMAR, J.**

Application U/S 482 Cr.P.C. No. 9469 of 2020

**Rishipal @ Rishipal Singh ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Sri Abhitab Kumar Tiwari

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

**(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - The Bonded Labour System (Abolition) Act, 1976 - Sections 10,13(3),16, 17, 18, 19, 20, Section 21 - Offences to be tried by Executive Magistrates - Notification issued in exercise of the power under Section 21 (10 of Act No. 19 of 1976) (then Ordinance) - confer on the Sub-Divisional Magistrate in Uttar Pradesh the power of Judicial Magistrate of the First class for the trial of offences under the Act - The act bars the jurisdiction of the Judicial Magistrate of Civil Court (under the said Act) the case considering the provisions of Section 21 of the Special Act . (Para - 6)**

Application before National Human Commission - allegation - owner of Shree Ram Bricks Field is taking work from some labour without payment as Bonded Labours - direction of National Human Commissioner - Sub- Divisional Magistrate issued release order of 39 persons from the brick-klin - Magistrate passed cognizance order - non-speaking order and against the law. (Para - 3,8)

**HELD:-**In view of Section 21 (1) of the Act, Notification of Uttar Pradesh Government and Section 5 of Cr.P.C., Additional Chief Judicial Magistrate has no power to take cognizance and trial of the case and proceedings initiated against the applicant is without jurisdiction.(Para - 7)

**Application u/s 482 Cr.P.C. allowed.** (E-7)

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

1. Heard learned counsel for the applicant, learned counsel for the opposite party no.2 and learned A.G.A.

2. This application under Section 482 Cr.P.C. has been filed with the prayer to quash the entire criminal proceeding initiated against the applicant as Criminal Case No. 4478 of 2019 under Section 16, 17, 18, 19, 20 of The Bonded Labour System (Abolition) Act, 1976, Police Station- Hastinapur, District- Meerut, pending in the court of Additional Chief Judicial Magistrate, Court no. 7, Meerut including charge sheet no. 183 of 2017 dated 27.8.2017 in case crime no. 141 of 2017 and cognizance order dated 22.8.2019 and all its consequential orders and proceedings in respect of the present applicant with an alternative prayer to stay the further proceedings of the above mentioned case.

3. The main allegation of FIR is that one Sri Jaypal son of Sri Mohan R/o village Laharartu, P.S.- Rajpura, Tehsil Gannaur District-Sambhal moved an application before the National Human Commission New Delhi with the allegation that owner of Shree Ram Bricks Field village Dayalpur, Meerut is taking work from some labour without payment as Bonded Labours and on the direction of National Human Commissioner Sub- Divisional Magistrate Mawana District-Meerut issued release order of 39 persons from the brick-klin on 16.11.2016.

4. In this reference provisions of Section 13 (3) of the Bonded Labour System (Abolition) Act 1976 (herein after will be referred as "the Act" ) is relevant that appears as under:

"Section 13 (3) in the Bonded Labour System (Abolition) Act 1976:

(3) Each Vigilance Committee, constituted for a Sub-Division, shall consist of the following members, namely:?

(a) the Sub-Divisional Magistrate, or person nominated by him, who shall be the Chairman;

(b) three persons belonging to the Scheduled Castes or Scheduled Tribes and residing in the Sub-Division, to be nominated by the Sub-Divisional Magistrate;

(c) two social workers, resident in the Sub-Division, to be nominated by the Sub-Divisional Magistrate;

(d) not more than three persons to represent the official or non-official agencies in the Sub-Division connected with rural development to be nominated by the District Magistrate;

(e) one person to represent the financial and credit institutions in the Sub-Division, to be nominated by the Sub-Divisional Magistrate;

(f) one officer specified under section 10 functioning in the Sub-Division".

5. Learned counsel for the applicant submits that the Act is a special law and Section 21 of the Act power of trial of offences has been given to the Executive Magistrate, are being quoted as under:

*"21. Offences to be tried by Executive Magistrates.?*

*(1) The State Government may confer, on an Executive Magistrate, the powers of a Judicial Magistrate of the first class or of the second class for the trial of offences under this Act; and, on such conferment of powers, the Executive Magistrate on whom the powers are so conferred, shall be deemed, for the purposes of the Code of Criminal Procedure, 1973 (2 of 1974), to be a Judicial Magistrate of the first class, or of the second class, as the case may be.*

*(2) An offence under this Act may be tried summarily by a Magistrate".*

6. He further submits that State of Utter Pradesh issued a notification on 12.12.1975 and in exercise of the power under Section 21 (10 of Act No. 19 of 1976) (then Ordinance) confer on the Sub-Divisional Magistrate in Utter Pradesh the power of Judicial Magistrate of the First class for the trial of offences under the Act.

7. Therefore, in view of Section 21 (1) of the Act, Notification of Utter Pradesh Government and Section 5 of Cr.P.C., learned Additional Chief Judicial Magistrate, Court No.7, Meerut has no power to take cognizance and trial of the case and proceedings initiated against the applicant is without jurisdiction.

8. Learned counsel for the applicant further submitted that the Magistrate has passed cognizance order only by fill-up the blank of a printed Proforma without examining the evidence, which is non-speaking order and against the law.

9. Learned counsel for the opposite party no.2 submits that the FIR of the present case has been lodged by the opposite party no.2 on the basis of true and correct incident under the directions of the higher officers and National human Right Commission, New Delhi and that too after conducting spot inspection by the Joint Team of Labour Enforcement Officer and Naib Tehsildar; that after submission of the charge sheet learned Additional Chief Judicial Magistrate after perusing the entire evidence contained in the case diary has

rightly taken cognizance of the offence in accordance with law having its jurisdiction.

10. I have heard learned counsel for the applicant, learned counsel for the opposite party no.2, learned AGA. and have gone through the materials available on record carefully.

11. The act clearly bars the jurisdiction of the Judicial Magistrate of Civil Court (under the said Act) the case considering the provisions of Section 21 of the Special Act.

12. The present FIR has been lodged by the SDM, who is the head of the vigilence committee under the provisions of Section 13 (3), it clearly indicates that the SDM is the head of the Vigilance Committee whereas the case in hand he has lodged the FIR himself. Considering the said facts and circumstances in the light of Section 21 of the said Act, the case will be filed by the S.D.M. or nominated by him whereas the trial shall also be made by the Executive Magistrate himself. The case in hand the (Muddai) informant and the Judge (Munsif) will be the same person (Authority) it is nothing but the clear violation of natural justice, considering the above discussion Legislative is advised to move appropriate amendment in the Act to avoid the said violation of natural justice, so that this Act may be properly implemented to achieve their objective.

13. Under the Act the notification has been issued and Executive Magistrate has been nominated to try the cases for the offences under the Act. Hence, A.C.J.M., Court No.7, Meerut has no jurisdiction to take the cognizance and try the case under the Act.

14. Hence, cognizance order and trial by the Additional Chief Judicial Magistrate, Court no. 7, Meerut is itself illegal and against the provisions of the said Special Act.

15. In view of the facts and circumstances, the present Criminal Misc. Application U/S 482 Cr.P.C succeeds and is allowed. The order dated 22.8.2019 passed by Additional Chief Judicial Magistrate, Court no. 7, Meerut is quashed arising out of Criminal Case No. 4478 of 2019 under Section 16, 17, 18, 19, 20 of The Bonded Labour System (Abolition) Act, 1976, Police Station- Hastinapur, District- Meerut.

16. Copy of the order be supplied to the learned A.G.A. to communicate the order to government to take appropriate action to rectify/ amendment in the Act itself to remove the ambiguity in such cases.

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**(2021)10ILR A361**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 23.09.2021**

**BEFORE**

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

Application U/S 482 Cr.P.C. No. 14192 of 2021

**Srikant ...Applicant**
**Versus**
**State of U.P. ...Opposite Party**

**Counsel for the Applicant:**
Sri Muktesh Kumar Singh

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

**(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - The Prevention of Damage to Public Property Act, 1894 - Section 3/4, 5, 6 - The Uttar Pradesh Revenue Code, 2006 - Section 67 - Power to prevent damage, misappropriation and wrongful occupation of Gram Panchayat property , Section 145 - suits for declaration of rights - U.P. Zamindari Abolition & Land Reforms Act, 1950 (now repealed) - Section 122B - The Uttar Pradesh Revenue Code Rules, 2016 - Rules 66 and 67 - the Specific Relief Act, 1963 - Section 34 - The Indian Penal Code, 1860 - Section 425 - Mischief - Provisions under the Revenue Code, the Act, 2020 and the PDPP Act - operate in different fields - no bar in respect of the institution of proceedings - under the aforesaid enactments - separately or simultaneously in respect of matters covered there under.(Para - 32)**

Criminal proceedings initiated against applicant - ground for quashment of proceedings - allegation in FIR - encroachment over Gram Sabha land - provisions of PDPP Act could not have been invoked to initiate criminal proceedings - Uttar Pradesh Revenue Code, 2006 provides complete procedure for eviction of an unauthorized occupation from Gram Sabha land - abuse of process of court - liable to be quashed.(Para - 4)

**HELD:-**Criminal proceedings, which have been initiated in the present case pursuant to FIR lodged under the provisions of the PDPP Act, thus cannot be held to be vitiated for the reason that in respect of the allegations relating to encroachment/damage to Gaon Sabha land, only proceedings for eviction and recovery of damages can be initiated under the provisions of the Revenue Code and no criminal proceedings for causing damage or destruction of public property can be initiated under the PDPP Act.(Para - 33)

**Application u/s 482 Cr.P.C. dismissed.** (E-7)

**List of Cases cited:-**

1. Munshi Lal & anr. Vs St. of U.P. & anr., (2020) 113 ACC 455

2. Devnath Yadav Vs St. of U.P. & 3 ors., Criminal Misc. Writ Petition No. 1131 of 2021

3. Destruction of Public & Private Properties Vs St. of A.P. & ors.,(2009) 5 SCC 212

4. Kodungallur Film Society & anr. Vs U.O.I. & ors., (2018) 1 SCC 713

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

1. Heard Sri Muktesh Kumar Singh, learned counsel for the applicant and Sri Vinod Kant, learned Additional Advocate General alongwith Sri Pankaj Saxena, learned Additional Government Advocate-I and Ms. Akansha Gaur, learned State Law Officer for the State opposite party.

2. The present application under Section 482 of the Code of Criminal Procedure, 19731 has been filed seeking to quash the charge sheet dated 14.05.2015 as well as the cognizance order dated 06.04.2016 and also the entire proceedings of Case No.210 of 2016 (State vs. Srikant and Others), arising out of Case Crime No.149 of 2015, under Section 3/4 of the Prevention of Damage to Public Property Act, 18942, Police Station Jigna, District Mirzapur pending before the 4th Additional Civil Judge (Junior Division), Mirzapur.

3. The records of the case indicate that the criminal proceedings were initiated pursuant to an FIR dated 26.03.2015 lodged against the applicant, which was registered as Case Crime No.149 of 2015, under Section 3/4 of the PDPP Act, Police Station Jigna, District Mirzapur. The case was investigated and a charge sheet dated

14.05.2015 was placed whereupon cognizance was taken by the Magistrate on 06.04.2016 and the case was registered as Criminal Case No.210 of 2016.

4. The principal ground, which has been sought to be urged to seek quashment of the proceedings, is that the allegation in the FIR being in regard to the encroachment over Gram Sabha land, the provisions of the PDPP Act could not have been invoked to initiate criminal proceedings. It is also submitted that the Uttar Pradesh Revenue Code, 20063 provides complete procedure for eviction of an unauthorized occupation from Gram Sabha land and in view of the same, criminal proceedings which have been initiated, are an abuse of process of court and are liable to be quashed. In support of his submission learned counsel has placed reliance upon the judgment in the case of **Munshi Lal and Another Vs. State of U.P. and Another4.**

5. Controverting the aforesaid submissions, learned Additional Advocate General submitted that the proceedings for eviction of unauthorized occupation, as provided under Section 67 of the Revenue Code, are of a summary nature and there is no bar in initiating of criminal proceedings under the PDPP Act in case of damage to public property which would include within its purview Gram Sabha property also. It is submitted that the scope of criminal proceedings and the proceedings for eviction under the Revenue Code are entirely different and there is no bar in the same being simultaneously proceeded with.

6. Based on the rival contentions the question which falls for consideration is as to whether in respect of allegations relating to damage to Gram Sabha properties, only proceedings for eviction under Section 67 of the Revenue Code can be initiated, or criminal proceedings under the provisions of the PDPP Act can also be proceeded with.

7. The PDPP Act (3 of 1984) was enacted to provide for prevention of damage to public properties and the matters connected therewith. For ease of reference the aforesaid Act i.e. The Prevention of Damage to Public Property Act, 1984 (3 of 1984) is being reproduced in its entirety:-

**"1. Short title, extent and commencement.**-- (1) This Act maybe called the Prevention of Damage to Public Property Act, 1984.

(2) It extends to the whole of India.

(3) It shall be deemed to have come into force on the 28th day of January, 1984.

2. **Definitions.**--In this Act, unless the context otherwise requires,--

(a) "mischief" shall have the same meaning as in section 425 of the Indian Penal Code (45 of 1860);

(b) "public property" means any property, whether immovable or movable (including any machinery) which is owned by, or in the possession of, or under the control of--

(i) the Central Government; or

(ii) any State Government; or

(iii) any local authority; or

(iv) any corporation established by, or under, a Central, Provincial or State Act; or

(v) any company as defined in section 617 of the Companies Act, 1956 (1 of 1956); or

(vi) any institution, concern or undertaking which the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided that the Central Government shall not specify any institution, concern or undertaking under this sub-clause unless such institution, concern or undertaking is financed wholly or substantially by funds provided directly or indirectly by the Central Government or by one or more State Governments, or partly by the Central Government and partly by one or more State Governments.

**3. Mischief causing damage to public property.** (1) Whoever commits mischief by doing any act in respect of any public property, other than public property of the nature referred to in sub-section (2), shall be punished with imprisonment for a term which may extend to five years and with fine.

(2) Whoever commits mischief by doing any act in respect of any public property being--

(a) any building, installation or other property used in connection with the production, distribution or supply of water, light, power or energy;

(b) any oil installations;

(c) any sewage works;

(d) any mine or factory;

(e) any means of public transportation or of tele-communications, or any building, installation or other property used in connection therewith, shall be punished with rigorous imprisonment for a term which shall not be less than six months, but which may extend to five years and with fine:

Provided that the court may, for reasons to be recorded in its judgment, award a sentence of imprisonment for a term of less than six months.

**4. Mischief causing damage to public property by fire or explosive substance.--** Whoever commits an offence under sub-section (1) or sub-section (2) of section 3 by fire or explosive substance shall be punished with rigorousimprisonment for a term which shall not be less than one year, but which may extend to ten years and with fine:

Provided that the court may, for special reasons to be recorded in its judgment, award a sentence of imprisonment for a term of less than one year.

**5. Special provisions regarding bail**. --No person accused or convicted of an offence punishable under section 3 or section 4 shall, if in custody, be released on bail or on his own bond unless the prosecution has been given an opportunity to oppose the application for such release.

**6. Saving. T**he provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force, and nothing contained in this Act shall exempt any person from any proceeding (whether by way of investigation or otherwise) which might apart from this Act, be instituted or taken against him.

**7. Repeal and saving**.-- (1) The Prevention of Damage to Public Property Ordinance, 1984 (Ord. 3 of 1984), is hereby repealed.

Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act."

8. Section 3 of the PDPP Act provides for imposition of punishment with imprisonment for a term which may extend to five years and with fine, in respect of mischief causing damage to public property.

9. The word "mischief" has been defined under Section 2 (a) as having the same meaning as in the Section 425 of the Indian Penal Code, 18605. For ready reference Section 425 of the Penal Code is being extracted below:-

**"425. Mischief.**-- Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, cause the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief"."

10. The expression "public property" has been defined under Section 2(b) to mean any property, whether immovable or movable (including any machinery) which is owned by, or in the possession of, or under the control of--

(i) the Central Government; or

(ii) any State Government; or

(iii) any local authority; or

(iv) any corporation established by, or under, a Central, Provincial or State Act; or

(v) any company as defined in Section 617 of the Companies Act, 1956 (1 of 1956); or

(vi) any institution, concern or undertaking which the Central Government may, by notification in the Official Gazette, specify in this behalf:

11. The expression "public property", as defined under Section 2(b) of the PDPP Act, would therefore include within its ambit any property, movable or immovable, owned by or in possession or under the control of any local authority, which would include a Gram Sabha. The Gram Sabha land would therefore be covered within the definition of the expression "public property" under the Act 3 of 1984.

12. The term "mischief" has been defined under Section 2(a) of the Act 3 of 1984 as having the same meaning as defined under Section 425 of the Penal Code. For ready reference, the term "mischief" as defined under Section 425 of the Penal Code, is as under:-

**425. Mischief.**-- Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, cause the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief"."

13. A conjoint reading of the aforesaid provisions would go to show that the Gram Sabha property would be covered within

the meaning of the term "public property" and any damage to the same would be within the ambit of the expression "mischief causing damage to public property" which would constitute a punishable offence under Section 3 of the PDPP Act.

14. The Revenue Code is an Act to consolidate and amend the law relating to land tenures and land revenue in the State of Uttar Pradesh, and to provide for matters connected therewith and incidental thereto.

15. Section 67 of the Revenue Code which corresponds to Section 122B of the U.P. Zamindari Abolition & Land Reforms Act, 1950 (now repealed), provides the power to prevent damage, misappropriation and wrongful occupation of Gram Panchayat property. Section 67 of the Revenue Code, reads as follows:

**"67. Power to prevent damage, misappropriation and wrongful occupation of Gram Panchayat property.**--(1) Where any property entrusted or deemed to be entrusted under the provisions of this Code to a Gram Panchayat or other local authority is damaged or misappropriated, or where any Gram Panchayat or other authority is entitled to take possession of any land under the provisions of this Code and such land is occupied otherwise than in accordance with the said provisions, the Bhumi Prabandhak Samiti or other authority or the Lekhpal concerned, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed.

(2) Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated, or any person is in occupation of any land referred to in that sub-section in contravention of the provisions of this Code, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land.

(3) If the person to whom a notice has been issued under sub-section (2) fails to show cause within the time specified in the notice or within such extended time as the Assistant Collector may allow in this behalf, or if the cause shown is found to be insufficient, the Assistant Collector may direct that such person shall be evicted from the land, and may, for that purpose, use or cause to be used such force as may be necessary, and may direct that the amount of compensation for damage or misappropriation of the property or for wrongful occupation, as the case may be, be recovered from such person as arrears of land revenue.

(4) If the Assistant Collector is of opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (2), he shall discharge the notice.

(5) Any person aggrieved by an order of the Assistant Collector under Sub-section (3) or Sub-Section (4), may within thirty days from the date of such order, prefer an appeal to the Collector.

(6) Notwithstanding anything contained in any other provisions of this

Code, and subject to the provisions of this section every order of the Sub-Divisional Officer under this section shall, subject to the provisions of sub-section (5) be final.

(7) The procedure to be followed in any action taken under this section shall be such as may be prescribed.

*Explanation.* - For the purposes of this section, the word "land" shall include the trees and building standing thereon."

16. The procedure to be followed in respect of any action to be taken under the aforesaid section is described under Rules 66 and 67 of the Uttar Pradesh Revenue Code Rules, 20166. Rules 66 and 67 read as follows:-

***"R.66. Information to Assistant Collector (Section 67).***-- The information to Assistant Collector required by Section 67(1) shall be submitted by the Chairman or any member or the Secretary of the Land Management Committee, or any officer of the Local Authority concerned in R.C. Form-19.

***R.67. Further inquiry by Assistant Collector (Section 67)***.-- (1) On receipt of the information under Rule 66, or on facts otherwise coming to his knowledge, the Assistant Collector may make such inquiry as he deems proper and may obtain further information regarding the following points --

(a) full description of damage or misappropriation caused or the wrongful occupation made with details of village, plot number, area, boundary, property damaged or misappropriated and market value thereof;

(b) full address along with parentage of the person responsible for such damage, misappropriation or wrongful occupation;

(c) period of wrongful occupation, damage or misappropriation and class of soil of the plots involved;

(d) value of the property damaged or misappropriated calculated at the circle rate fixed by the Collector and the amount sought to be recovered as damages.

(2) The Assistant Collector shall thereafter proceed to take action under section 67(2) and for that purpose issue a notice to the person concerned in R.C. Form-20 to show cause as to why compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land.

(3) If the notice referred to in section 67(2) remains uncomplied with or if the cause shown by the person concerned is found to be insufficient, the Assistant Collector may direct by order that --

(a) such person be evicted by using such force as may be necessary; or

(b) the amount of compensation for damage or wrongful occupation ordered by the Assistant Collector, if not paid in specified time, may be recovered as arrears of land revenue, including the amount of expenses referred to in sub-rule (3).

(4) The amount of damages sought to be recovered and the expenses of execution of the order shall be specified in

such notice, which shall be determined in the following manner:-

(a) In the case of damage or misappropriation, the amount of damages shall be assessed at the prevailing market rate.

(b) In the case of unauthorized occupation of any land, the amount of damages shall be the amount equal to the five percent of the market value of the land calculated at the circle rate fixed by the Collector for each year of unauthorized occupation.

(c) The expenses of execution of the order shall be assessed on the basis of one day's pay and allowances payable to the staff deputed.

(5) If the person wrongfully occupying the land has done cultivation therein, he may be allowed to retain possession thereof until he has harvested the crops subject to the payment by him of the amount equal to the five percent of the market value of the land calculated as per the circle rate which shall be credited to the Consolidated Gaon Fund or the Fund of the local authority other than the Gram Panchayat as the case may be. If the person concerned does not make the payment of the aforesaid amount within the period specified in the notice in R.C. Form-20, the possession of the land shall be delivered to the Land Management Committee or the local authority, as the case may be, together with the crop:

Provided that where such person again wrongfully occupies the same land or any other land within the jurisdiction of the Gram Panchayat or the local authority as the case may be, he shall be evicted therefrom forthwith and possession of the land vacant or together with the crop thereon shall be delivered to the Land Management Committee or the local authority as the case may be.

(6) The Assistant Collector shall make an endeavour to conclude the proceeding under section 67 of the Code within the period of ninety days from the date of issuance of the show cause notice and if the proceeding is not concluded within such period the reasons for the same shall be recorded.

(7) Nothing in sub-rule (5) shall debar the Land Management Committee or the local authority as the case may be from prosecuting the person who encroaches upon the same land second time in spite of having been evicted under the Code or the rules, under section 447 of the Indian Penal Code, 1860.

(8) There shall be maintained in the office of each Collector a register in R.C. Form-21 showing details of the amount ordered to be realized on account of damages and compensation awarded in proceedings under section 67.

(9) A similar register shall also be maintained by each tahsildar showing realization of damages and compensation awarded in such proceeding. The entries made in the register maintained at tahsil shall be compared with the register maintained by the Collector to ensure accuracy of the entries made therein.

(10) A progress report showing realization of damages and compensation awarded in proceedings under section 67 shall be sent to Board of Revenue, U.P., Lucknow by the fifteenth day of April and

October every year. The Board after consolidating the report so received from the districts shall send it to the Government.

(11) Nothing in Rules 66 and 67 shall debar any person from establishment of his right, title or interest in a court of competent jurisdiction in accordance with the law for the time being in force in respect of any matter for which any order has been made under Section 67 of the Code."

17. The provisions contained under Section 67 of the Revenue Code and the Rules 66 and 67 of the Rules, 2016, provide a summary procedure for proceeding in respect of damage, misappropriation and wrongful occupation of Gram Panchayat properties and includes the powers to prevent such damage, misappropriation or wrongful occupation. The procedure prescribed includes giving information to the Assistant Collector, whereupon inquiry is to be made and after issuance of notice to the person concerned, a direction for eviction and recovery of compensation for damage or misappropriation of the property or wrongful occupation may be made. The order to be passed in this regard is subject to a statutory appeal, which may be preferred to the Collector.

18. The Revenue Code also contains provisions for institution of regular suits for declaration of rights. Section 145 pertains to declaratory suits by Gram Panchayat and it provides that notwithstanding anything contained in Section 34 of the Specific Relief Act, 1963, the Gram Panchayat may institute a suit against any person claiming to be entitled to any right in any land for the declaration of the right of such person in such land, then the court may, in its discretion, make a declaration of right of such person, and the Gram Panchayat need not in such suit ask for any further relief.

19. The PDPP Act, on the other hand, has been enacted to curb acts of vandalism and damage to public property, and in terms thereof any act of mischief i.e. causing destruction of any property, or any change in any property or in the situation thereof which destroys or diminishes its value or utility, or affects it injuriously, would constitute a punishable offence, as per Section 3 thereof.

20. Section 5 of the PDPP Act contains special provisions regarding bail and it mandates that no person accused or convicted of an offence punishable under Section 3 or Section 4 shall, if in custody, be released on bail or on his own bond unless the prosecution has been given an opportunity to oppose the application for such release.

21. Section 6 is a saving clause and in terms thereof the provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force, and nothing contained in the Act shall exempt any person from any proceeding (whether by way of investigation or otherwise) which might apart from this Act, be instituted or taken against him.

22. The aforestated provisions are indicative of the object and purpose of the PDPP Act, which is an enactment to curb acts of vandalism and damage to public property and to provide punishment in respect thereof.

23. The scope of proceedings under the PDPP Act is, therefore entirely different from that of proceedings of eviction, which might be initiated in respect of wrongful

occupation of Gram Panchayat properties under Section 67 of the Revenue Code. The saving clause under Section 6 of the PDPP Act makes it clear that the provisions of the Act are in addition to, and not in derogation of, the provisions of any other law for the time being in force, and that the proceedings under any other enactment may also be instituted or taken without there being any bar in respect of the same.

24. In the instant case, criminal proceedings have been initiated pursuant to lodging of an FIR by the Lekhpal of the village containing allegations that the accused applicant had constructed a house over the Goan Sabha land which is recorded as a pond in the revenue records. As per the FIR version, the land in question bearing Araji No.52, area 1.211 hectares is recorded as a pond and it is stated that despite being repeatedly asked the accused applicant has constructed a house over the pond land thereby causing damage to public property and in view thereof criminal proceedings under Section 3/4 of the PDPP Act were being initiated against him for the said act.

25. Pursuant to FIR the case was investigated and the material collected during the course of investigation supported the FIR allegations and accordingly a charge sheet dated 14.05.2015 was submitted whereupon cognizance was taken by the Magistrate on 06.04.2016 and a criminal case was instituted.

26. The judgment in the case of **Munshi Lal and Another (supra**), relied upon by learned counsel for the applicant, after noticing the provisions of the PDPP Act, has taken the view that as far as criminal proceedings for illegal encroachment, damage or trespass over the land belonging to Gram Sabha is concerned, the same can be undertaken but it would be subject to the adjudication of rights of the parties over the land in dispute as the said determination can be done only by the revenue court. In so far as the observation made in the decision that the Act covers the specific area relating to any act of vandalism including the destruction or damage during any riots or public demonstration in the name of agitations, bandhs, hartals and the like, is concerned, reference may be had to a recent decision by a Division Bench of this Court in **Devnath Yadav vs. State of U.P. and three Others7,** which was a case where an FIR under Section 2/3/5 of the PDPP Act, in respect of encroachment over the Gaon Sabha land, had been sought to be challenged. The Division Bench upon considering the legal position held that the judgment in the case of Munshi Lal and Another was distinguishable and made the following observations :-

"Coming to the judgement in the case of **Munshi Lal (supra)**, we find that the learned Single Judge, proceeded on the premise that Prevention of Damage to Public Property Act, 1984 was enacted to curb vandalism and damage to pubic property. The first sentence of its Statement of Objects and Reasons reads as follows-

"*With a view to curb acts of vandalism and damage to public property, including destruction and damage caused during riots and public commotion, a need was felt to strengthen the law to enable the authorities to deal effectively with cases of damage to public property."*

The use of the word "including" has been given a restrictive interpretation in

the judgment cited. We are of the opinion that the said word is illustrative rather that bringing also within its ambit, "destruction and damage caused during riots and public commotion" as stated in the Statement of Objects and Reasons. The use of word "including" therefore, cannot be read to mean that the Prevention of Damage to Public Property Act can be invoked only where damage to public property is occasioned by vandalism, riots or public commotion.

In our considered opinion, the learned Single Judge has taken a narrow view of Section 3(1) of the Act and has primarily relied upon Sections 3(2) of the Act as also upon Section 4 of the Act for arriving at the final conclusion, in the judgement cited.

However, we find that in view of Section 425 of IPC and Section 3(1) of the Prevention of Damage to Public Property Act, 1984, the action of the petitioner clearly falls within the purview of these two sections, especially when construction of a boundary wall over public property is clearly admitted by petitioner.

Under the circumstances, therefore, the petitioner is not entitled to any benefit of the judgement in the case of Munshi Lal cited by him, as in the foregoing part of the judgement, we have come to the conclusion that the provision of Section 3(1) of the Prevention of Damage to Public Property Act, 1984 is clearly attracted in the facts and circumstances of the case. Also, the judgement in the case of Munshi Lal is distinguishable on facts."

27. It may be relevant to note that in so far as damage to public or private properties by acts of violence during hartals, bandhs, riots, public commotion and protests, certain observations were made by the Supreme Court in **Re: Destruction of Public and Private Properties vs. State of Andhra Pradesh and Others8,** and taking a serious note of various instances where there was large scale destruction of public and private properties in the name of agitations, bandhs, hartals and the like and also considering certain suggestions given by the committees appointed by the Court, recommended amendment to the PDPP Act, Criminal Procedure Code, 1973 and other criminal laws, statutes; and also set out guidelines to assess damages to property in the absence of a statutory framework.

28. The aforementioned issues were subsequently taken up in the case of **Kodungallur Film Society and Another vs. Union of India and Others9**, and taking note of the recommendations/directions in **Re: Destruction of Public and Private Properties (supra),** certain further recommendations/directions were made.

29. The subject matter relating to acts of violence at public places, to control its persistence and escalation, and to provides for recovery of damage to public or private property during hartals, bands, riots, public commotion and protests in respect of property and constitution of claims tribunals to investigate and determine the damages caused and to award compensation in relation thereto have been provided for under the aforementioned U.P. Act No.11 of 2020.

30. The scope and the subject matter of the PDPP Act is different from the subject matter covered under the Act, 2020,

which deals with all acts of violence at public places and to provide for measures to control its persistence and escalation and also provides for recovery of damage by constitution of claims tribunals.

31. The proceedings under the PDPP Act are also distinct from matters which are covered under the Revenue Code, and in particular Section 67 thereof, which provides procedure for eviction and recovery of damages on account of unauthorized occupation and use of land belonging to the State under the management of Gaon Sabha. The procedure provided there-under is summary in nature and is purely a civil remedy with no criminality attached. On the other hand, any act which constitutes a "mischief" within the meaning of Section 2(a) of the PDPP Act, wherein the definition of the word "mischief" has been assigned the same meaning as in Section 425 of Penal Code, and would relate to any act which causes destruction of any property, or any change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, and the property is a "public property" as described under Section 2(b) of the PDPP Act, the same would constitute a criminal offence under Section 3 and would be visited by penal consequences, namely, imprisonment and fine.

32. The provisions under the Revenue Code, the Act, 2020 and the PDPP Act would, therefore be seen to operate in different fields with there being no bar in respect of the institution of proceedings under the aforesaid enactments separately or simultaneously in respect of matters covered thereunder.

33. The criminal proceedings, which have been initiated in the present case pursuant to FIR lodged under the provisions of the PDPP Act, thus cannot be held to be vitiated for the reason that in respect of the allegations relating to encroachment/damage to Gaon Sabha land, only proceedings for eviction and recovery of damages can be initiated under the provisions of the Revenue Code and no criminal proceedings for causing damage or destruction of public property can be initiated under the PDPP Act.

34. No other ground was urged.

35. The application under Section 482 of the Code accordingly stands **dismissed.**

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**(2021)10ILR A372**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 13.09.2021**

**BEFORE**

**THE HON'BLE SHAMIM AHMED, J.**

Application U/S 482 Cr.P.C. No. 14524 of 2021

**Narendra @ Narendra Kumar Rajauriya ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Sri Ajay Srivastava

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

**(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Section 200 - Examination of complainant - The Negotiable instruments Act, 1981 - Section 138 - legal position for quashing of the proceedings at the initial stage - Test to be applied by the court - whether uncontroverted allegation as made prima facie establishes the offence**

**and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue - Power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists - quashing of the criminal proceedings is an exception than a rule. (Para - 9)**

Two cheques issued in favour of opposite party no.2 - signed by applicant - nowhere applicant denied about his signatures or signature is forged - applicant mentioned two cheques lost - question of fact - cannot be interfered by this Court at this stage - Magistrate summoned the applicant under Section 138 N.I. A/C

**HELD:-** High Court would not embark upon an inquiry as it is the function of the Trial Judge/Court. Interference at the threshold of quashing of the criminal proceedings in case in hand cannot be said to be exceptional as it discloses prima facie commission of an offence. No illegality in the summoning order. Applicant was rightly summoned by the Court below. (Para - 10,11)

**Application u/s 482 Cr.P.C. dismissed.** (E-7)

**List of Cases cited:-**

1. Hari Ram & ors. Vs St. of U.P. & ors. ,2016(6) ADJ (NOC)27

2. R.P. Kapoor Vs St. of Pun., AIR 1960 S.C. 866

3. State of Haryana Vs Bhajanlal, 1992 SCC (Crl.)426

4. St. of Bihar Vs P.P. Sharma, 1992 SCC (Crl.)192

5. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr., (Para-10) 2005 SCC (Cri.) 283

6. S.W. Palankattkar & ors. Vs St. of Bihar, 2002 (44) ACC 168

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri Ajay Srivastava, learned counsel for the applicant and learned AGA for the State and perused the record.

2. This application U/S 482 CrPC has been filed for quashing the summoning order dated 9.4.2019 as well as proceedings of Case No.3311 of 2018 (Sachin Sharma Vs. Narendra) under Section 138 Negotiable Instrument Act, Police Station Nawabad, District Jhansi pending before the Court of Additional Chief Judicial Magistrate, Court No.2, Jhansi.

3. The brief facts of the case is that opposite party no.2 has filed a complaint case, under section 138 of Negotiable Instrument Act bearing Case No.3311 of 2018 (Sachin Sharma Vs. Narendra Kumar Rajauriya), P.S. Nawabad District Jhansi before the Court of Additional Chief Judicial Magistrate-I, Jhansi against the applicant on 24.12.2018 alleging that the applicant is a neighbour of opposite party no.2 and opposite party no.2 has given Rs.7,70,000/- for the construction of the house to the applicant and when he requested to return the said amount, the applicant refused. Thereafter on several requests were made by opposite party no.2, the applicant under pressure of some relatives has given a cheque of Rs.3 lacs bearing cheque No.365164 and another cheque of Rs.4,70 lacs bearing cheque No.365165 both cheques are dated 13.11.2018 of State Bank of India, Branch Railway Station, Jhansi. A copy of the aforesaid two cheques are annexed at page no.24 of the affidavit filed in support of the application U/S 482 Cr.P.C. Thereafter, the statement of opposite party no.2, under section 200 Cr.P.C was recorded and the applicant was summoned by the Court below vide order dated 09.04.2019. It was

also submitted by the learned counsel for the applicant that he was granted bail on 17.01.2020 by the Court below.

4. Learned counsel for the applicant further submits that the applicant has neither issued any cheque nor any amount for opposite party no.2 is due against the applicant and six cheques were lost including the present two cheques and opposite party no.2 with malafide intention presented two cheques before the bank for its withdrawal. No amount, as such, is due against the applicant and the summoning order is bad in the eyes of law. He has also placed reliance of the judgment of this Court in the case of ***Hari Ram and others Vs. State of U.P. and others reported in 2016(6) ADJ (NOC)27.***

5. Per contra, learned AGA has submitted that the summoning order was rightly passed by the Court below. There was no averment made in the affidavit filed in support of the application U/S 482 Cr.P.C that the applicant has not signed the aforesaid two cheques, which were given in the name of opposite party no.2. The only story carved out by the applicant is that the above two cheques were lost along with other four cheques that story cannot be believed. As per averments made in the complaint case, the opposite party no.2 has given the amount to the applicant for construction of his house and this fact was never disputed by the applicant. The summoning order is rightly passed by the Court below.

6. Considering the arguments advanced by the learned counsel for the parties and after perusal of the record, this Court finds that the two cheques issued in favour of the opposite party no.2 for a sum of Rs.3 lacs and Rs.4.70 lacs (total amount of Rs.7.70 lacs) were signed by the applicant and nowhere the applicant has denied about his signatures that he has not issued these cheques or that the signature is forged. The story, as mentioned by the applicant, that the aforesaid two cheques were lost along with other four cheques cannot be believed and it is totally question of fact which cannot be interfered by this Court at this stage. The learned Magistrate has rightly summoned the applicant under Section 138 N.I. Act vide order dated 9.4.2019 and there is no illegality in the order.

7. From the perusal of the materials on record and looking into the facts of the case and after considering the arguments made at the bar, it does not appear that no offence has been made out against the applicant.

8. At the stage of issuing process the court below is not expected to examine and assess in detail the material placed on record, only this has to be seen whether prima facie offence is disclosed or not. The Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:-***(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Haryana Vs. Bhajanlal, 1992 SCC (Crl.)426, (iii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192 and (iv) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283.***

9. From the aforesaid decisions the Apex Court has settled the legal position for quashing of the proceedings at the initial stage. The test to be applied by the court is to whether uncontroverted

allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue. In ***S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168,*** it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court under Section 482 Cr.P.C itself envisages three circumstances under which the inherent jurisdiction may be exercised:- (i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

10. The High Court would not embark upon an inquiry as it is the function of the Trial Judge/Court. The interference at the threshold of quashing of the criminal proceedings in case in hand cannot be said to be exceptional as it discloses prima facie commission of an offence. In the result, the prayer for quashing of summoning order as well as proceeding is refused. There is no merit in this application filed under Section 482 Cr.P.C. The applicant has ample opportunity to raise all the objections at the appropriate stage.

11. The judgement cited by the applicant is distinguishable on the facts of the present case. No other ground has been taken by the learned counsel for the applicant except the cheques were lost. The Court does not find any illegality in the summoning order. The applicant was rightly summoned by the Court below.

12. Accordingly, this application U/S 482 Cr.P.C. lacks merit and is **dismissed**.

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**(2021)10ILR A375**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 28.09.2021**

**BEFORE**

**THE HON'BLE PANKAJ BHATIA, J.**

Writ A No. 3151 of 2021

**Smt. Harvati & Ors. ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Chandranshu Gour

**Counsel for the Respondents:**
C.S.C., Sri Suresh Singh

**A. Service Law – Dying-in-Harness Rules, 1974 – Section 2(a) – Compassionate Appointment – More than 10 years in service – Dismissal on the ground that their services are no more required – Validity challenged – Held, the State Government in discharge of its constitutional obligations is bound to act as a model employer – It do not have any license to continue to irregularly employ for years together without granting them any benefits and security – High Court set aside dismissal order holding it wholly arbitrary and illegal. (Para 14 and 16)**

**Writ petition allowed.** (E-1)

**Cases relied on :-**

1. U.O.I. & ors. Vs K.P. Tiwari; (2003) 9 SCC 129

2. Rajya Krishi Utpadan Mandi Parishad, U.P. Lucknow & ors. Vs Smt. Suman Singh & anr.; 2011 (2), AWC 2043

3. Ravi Karan Singh Vs St. of U.P. & ors.; 1999 (2) AWC 976

4. Saroj Kumar Vs St. of U.P.; LAWS (ALL) 2019, 11 267

5. Pawan Kumar Yadav Vs St. of U.P. & ors.; 2010 (8) ADJ 664 (FB)

6. St. of U.P. Vs Munni Devi

7. Secretary, St. of Karn.Vs Umadevi (3); (2006) 4 SCC 1

8. Narendra Kumar Tiwari & ors. Vs St. of Jharkhand & ors.; (2018) 8 SCC 238

9. Nihal Singh & ors. Vs S. of Pun. & ors.; (2013) 14 SCC 65

10. Sheo Narain Nagar & ors. Vs St. of U.P. & anr.; (2018) 13 SCC 432

11. Civil Misc. Writ Petition No. 15505 of 2005; Pawan Kumar Yadav Vs St. of U.P. & ors.

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. The present petition has been filed alleging that the husband of all the three petitioners were working as Work Charged Employee with the respondent-Corporation from 1990 to 1994 and continued to work for more than 10 years. Unfortunately, the husband of all the three petitioners died on 30.06.2004, 28.01.2005 and 04.11.2005 respectively during their employment. After the death of the husband of the petitioners, on an application moved by the petitioners, they were granted appointment as is indicated in Annexure No. 2, 4 and 6 of various dates from the year 2004 onwards. The petitioners were subsequently directed to be paid consolidated salary at the rate of Rs. 18,000/- per month and the Petitioners No. 1 & 2 continued to work since 2004 onwards and since 2005 in respect of third petitioner. The payments made to the petitioners are exhibited to the document subjected as Annexure Nos. 2, 3 and 5 to the writ petition.

2. The grievance of the petitioners is that after more than 10 years of the service by the husbands of the petitioners and more than 15 years of service by the petitioners, all of sudden, an order dated 9.11.2020 has been passed to the effect that there is no need for the service of the petitioners and, thus, the petitioners were not allowed to continue to

3. Learned counsel for the petitioner argues that the State being model employer cannot exploit persons like the petitioners in the manner in which they have been exploited. Petitioners' poor financial condition never permitted them to protest their exploitation at the hands of the respondents and they continued to discharge their duties. He further argues that the petitioners' husbands were work charged employees and would fall within the definition of government servant, as defined under Section 2(a) of Dying-in-Harness Rules, 1974 and thus, appointment of the petitioner has to be treated as compassionate appointment. He further argues that compassionate appointments are never temporary in nature. He further argues that the husband of the petitioners were entitled for regularization as is clear from the note dated 11.6.2019 (Annexure No. 9, Page 41 of the Writ Petition). However, all these rights, whichever accrued in favour of the petitioners, were not agitated by the petitioners looking into their poor financial condition. Petitioners, admittedly, are a Class-IV employee and are uneducated.

4. This Court had called for a counter affidavit.

5. Counsel for the respondent, placing reliance upon the averment made in the counter affidavit, argues that the petitioners were never appointed on compassionate ground, as is clear from the appointment orders, which are written in hand. He further argues that the husbands of the

petitioners were also on work charged basis and, thus, no right accrued in favour of the petitioners for being granted appointment under the Dying-in-Harness Rules. He argues that the petitioners were given the work only looking to the poor financial status and only on the ground of mercy and they were paid for years together, only on the ground of their working in the department, no right accrued in favour of the petitioners. He further argues that the petitioners' husbands were working as worked charged employee, they were not covered within the definition of government servant as defined under Section 2(a) of the Dying-in-Harness Rules and, thus, the appointment of the petitioners cannot be said to be under the said rules.

6. At this stage, counsel for the petitioners has relied upon the judgments of this Court in the cases of **Union of India and others Vs. K.P. Tiwari, (2003) 9 SCC 129, Rajya Krishi Utpadan Mandi Parishad, U.P. Lucknow and others Vs. Smt. Suman Singh and another, 2011 (2), AWC 2043, Ravi Karan Singh Vs. State of U.P. and others, 1999 (2) AWC 976 as well as Saroj Kumar Vs. State of U.P., LAWS (ALL) 2019, 11 267** and the counsel for the respondents have relied upon the Full Bench Judgments of this Court in the case of **Pawan Kumar Yadav vs. State of U.P. and others, 2010 (8) ADJ 664 (FB) and State of U.P. vs. Munni Devi.**

7. From the facts, as pleaded and argued by the parties, this Court has to decide whether the dismissal of the petitioners vide order dated 9.11.2020 is justified or not.

8. The facts that are admitted to the parties are that the husband of the petitioners had worked continuously for more than 10 years before they, unfortunately, passed away in the year 2004-2005 and on the request so made by the petitioners, the petitioners were employed and kept on an ad hoc basis, and continued to serve on a fixed salary for more than 15 years and now, have been removed on the ground that there is no requirement.

9. Before the law can be discussed, it is essential to note that in the note dated 11.6.2019 (Annexure No. 9), it was clearly stated that if the husbands of the petitioners, who were enrolled with the respondents from 1990 to 1994 were alive, they would have been entitled for regularization and thus, it was recommended that the petitioners be continued to be paid in terms of the earlier decisions taken for payment of the wages to the petitioners. The question of employing on casual, temporary, contractual, daily wages or ad hoc basis and their status came up for consideration before the Supreme Court in the case of **Secretary, State of Karnataka Vs. Umadevi (3), (2006) 4 SCC 1** wherein the Constitutional Bench discussed the nature of their employment; discussed the difference between irregular appointments and illegal appointments, and as a one time measure, directed the State Governments and their instrumentalities to take steps to regularise the services of such irregularly appointed workers, who had worked for more than 10 years. It appears that after the judgment of the Constitution Bench in the case of **Uma Devi (3) (supra)**, the Governments and its instrumentalities have interpreted the same to mean that only the employees, who were given the benefit of regularization, would be enough for the States and the States can continue to place under employment

persons on ad hoc, contractual, temporary, casual or daily wage basis. In the present case, it is clearly demonstrated that the petitioners were permitted to continue for, as long as, 15 years and have now been thrown out of employment.

10. The Supreme Court in the case of **Narendra Kumar Tiwari and others Vs. State of Jharkhand and others, (2018) 8 Supreme Court Cases 238**, had the the occasion to interpret the judgment of the Supreme Court in the case of Uma Devi (3) and deprecated the practice of irregular appointment of daily wage workers and continuing with them indefinitely, it noticed that the rule of law requires that the appointments should be made in a constitutional manner and the State or its instrumentalities should not be permitted to perpetuate irregularity in the matter of public employment. The observations made by the Supreme Court are recorded as under:

**"5. The decision in Umadevi (3) was intended to put a full stop to the somewhat pernicious practice of irregularly or illegally appointing daily-wage workers and continuing with them indefinitely. In fact, in para 49 of the Report, it was pointed out that the rule of law requires appointments to be made in a constitutional manner and the State cannot be permitted to perpetuate an irregularity in the matter of public employment which would adversely affect those who could be employed in terms of the constitutional scheme. It is for this reason that the concept of a one-time measure and a cut-off date was introduced in the hope and expectation that the State would cease and desist from making irregular or illegal appointments and instead make appointments on a regular basis.**

**6. The concept of a one-time measure was further explained in Kesari [State of Karnataka v. M.L. Kesari, (2010) 9 SCC 247 in paras 9, 10 and 11 of the Report which read as follows: (SCC pp. 250-51, paras 9-11)**

**"9. The term "one-time measure" has to be understood in its proper perspective. This would normally mean that after the decision in Umadevi (3), each department or each instrumentality should undertake a one-time exercise and prepare a list of all casual, daily-wage or ad hoc employees who have been working for more than ten years without the intervention of courts and tribunals and subject them to a process verification as to whether they are working against vacant posts and possess the requisite qualification for the post and if so, regularise their services.**

**10. At the end of six months from the date of decision in Umadevi (3), cases of several daily-wage/ad hoc/casual employees were still pending before courts. Consequently, several departments and instrumentalities did not commence the one-time regularisation process. On the other hand, some government departments or instrumentalities undertook the one-time exercise excluding several employees from consideration either on the ground that their cases were pending in courts or due to sheer oversight. In such circumstances, the employees who were entitled to be considered in terms of para 53 of the decision in Umadevi (3), will not lose their right to be considered for regularisation, merely because the one-time exercise was completed without considering their cases, or because the six-month period mentioned in para 53**

**of Umadevi (3) has expired. The one-time exercise should consider all daily-wage/ad hoc/casual employees who had put in 10 years of continuous service as on 10-4-2006 without availing the protection of any interim orders of courts or tribunals. If any employer had held the one-time exercise in terms of para 53 of Umadevi (3), but did not consider the cases of some employees who were entitled to the benefit of para 53 of Umadevi (3), the employer concerned should consider their cases also, as a continuation of the one-time exercise. The one-time exercise will be concluded only when all the employees who are entitled to be considered in terms of para 53 of Umadevi (3), are so considered.**

**11. The object behind the said direction in para 53 of Umadevi (3) is twofold. First is to ensure that those who have put in more than ten years of continuous service without the protection of any interim orders of courts or tribunals, before the date of decision in Umadevi (3) was rendered, are considered for regularisation in view of their long service. Second is to ensure that the departments/instrumentalities do not perpetuate the practice of employing persons on daily-wage/ad hoc/casual basis for long periods and then periodically regularise them on the ground that they have served for more than ten years, thereby defeating the constitutional or statutory provisions relating to recruitment and appointment. The true effect of the direction is that all persons who have worked for more than ten years as on 10-4-2006 [the date of decision in Umadevi (3) without the protection of any interim order of any court or tribunal, in vacant posts, possessing the requisite qualification, are entitled to be considered for regularisation. The fact that the employer has not undertaken such exercise of regularisation within six months of the decision in Umadevi (3) or that such exercise was undertaken only in regard to a limited few, will not disentitle such employees, the right to be considered for regularisation in terms of the above directions in Umadevi (3) as a one-time measure."**

11. After discussion the intent and mandate of the Constitution of India, the judgment in the case of Uma Devi (3) case, the Supreme Court observed as under:

**"10. Under the circumstances, we are of the view that the Regularisation Rules must be given a pragmatic interpretation and the appellants, if they have completed 10 years of service on the date of promulgation of the Regularisation Rules, ought to be given the benefit of the service rendered by them. If they have completed 10 years of service they should be regularised unless there is some valid objection to their regularisation like misconduct, etc."**

12. The Supreme Court in another judgment in the case of **Nihal Singh and others Vs. State of Punjab and others, (2013) 14 Supreme Court Cases 65** considering the entitlement of regularization observed as under:

**"34. This Court in S.S. Dhanoa v. Union of India , (1991) 3 SCC 567 did examine the correctness of the assessment made by the executive government. It was a case where the Union of India appointed two Election**

**Commissioners in addition to the Chief Election Commissioner just before the general elections to the Lok Sabha. Subsequent to the elections, the new Government abolished those posts. While examining the legality of such abolition, this Court had to deal with an argument whether the need to have additional Commissioners ceased subsequent to the election. It was the case of the Union of India that on the date posts were created there was a need to have additional Commissioners in view of certain factors such as the reduction of the lower age-limit of the voters, etc. This Court categorically held that: (SCC p. 585, para 27)**

**"27. ... The truth of the matter as is apparent from the record is that ... there was no need for the said appointments...."**

**35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.**

**37. We are of the opinion that neither the Government of Punjab nor these public sector banks can continue such a practice consistent with their obligation to function in accordance with the Constitution. Umadevi (3) judgment cannot become a licence for exploitation by the State and its instrumentalities.**

**38. For all the abovementioned reasons, we are of the opinion that the appellants are entitled to be absorbed in the services of the State. The appeals are accordingly allowed. The judgments under appeal are set aside.**

**39. We direct the State of Punjab to regularise the services of the appellants by creating necessary posts within a period of three months from today. Upon such regularisation, the appellants would be entitled to all the benefits of services attached to the post which are similar in nature already in the cadre of the police services of the State. We are of the opinion that the appellants are entitled to the costs throughout. In the circums**tances, we quantify the costs to Rs 10,000 to be paid to each of the appellants.

13. In another case of **Sheo Narain Nagar and others Vs. State of Uttar Pradesh and another, (2018) 13 Supreme Court Cases 432**, while considering the claim of regularization which was rejected by the High Court placing reliance on Umadevi (3) case, the Supreme Coourt observed as under:

**"7. When we consider the prevailing scenario, it is painful to note that the decision in Umadevi (3) has not been properly understood and rather wrongly applied by various State Governments. We have called for the data in the instant case to ensure as to how many employees were working on contract basis or ad hoc basis or daily-wage basis in different State**

**departments. We can take judicial notice that widely aforesaid practice is being continued. Though this Court has emphasised that incumbents should be appointed on regular basis as per rules but new devise of making appointment on contract basis has been adopted, employment is offered on daily-wage basis, etc. in exploitative forms. This situation was not envisaged by Umadevi (3). The prime intendment of the decision was that the employment process should be by fair means and not by back door entry and in the available pay scale. That spirit of the Umadevi (3) has been ignored and conveniently overlooked by various State Governments/authorities. We regretfully make the observation that Umadevi (3) has not been implemented in its true spirit and has not been followed in its pith and substance. It is being used only as a tool for not regularising the services of incumbents. They are being continued in service without payment of due salary for which they are entitled on the basis of Articles 14, 16 read with Article 34(1)(d) of the Constitution of India as if they have no constitutional protection as envisaged in D.S. Nakara v. Union of India (1983) 1 SCC 305, from cradle to grave. In heydays of life they are serving on exploitative terms with no guarantee of livelihood to be continued and in old age they are going to be destituted, there being no provision for pension, retiral benefits, etc. There is clear contravention of constitutional provisions and aspiration of downtrodden class. They do have equal rights and to make them equals they require protection and cannot be dealt with arbitrarily. The kind of treatment meted out is not only bad but equally unconstitutional and is denial of rights. We have to strike a balance to really implement the ideology of Umadevi (3). Thus, the time has come to stop the situation where Umadevi (3) can be permitted to be flouted, whereas, this Court has interdicted such employment way back in the year 2006. The employment cannot be on exploitative terms, whereas Umadevi (3) laid down that there should not be back door entry and every post should be filled by regular employment, but a new device has been adopted for making appointment on payment of paltry system on contract/ad hoc basis or otherwise. This kind of action is not permissible when we consider the pith and substance of true spirit in Umadevi (3).**

**9. The High Court dismissed the writ application relying on the decision in Umadevi (3). But the appellants were employed basically in the year 1993; they had rendered service for three years, when they were offered the service on contract basis; it was not the case of back door entry; and there were no Rules in place for offering such kind of appointment. Thus, the appointment could not be said to be illegal and in contravention of Rules, as there were no such Rules available at the relevant point of time, when their temporary status was conferred w.e.f. 2-10-2002. The appellants were required to be appointed on regular basis as a one-time measure, as laid down in para 53 of Umadevi (3). Since the appellants had completed 10 years of service and temporary status had been given by the respondents with retrospective effect from 2-10-2002, we direct that the services of the appellants be regularised from the said date i.e. 2-10-2002, consequential benefits and the arrears of**

**pay also to be paid to the appellants within a period of three months from today."**

14. In the light of the law as laid down, it is clear that the State Government or State instrumentalities do not have any license to continue to irregularly employ for years together without granting them any benefits and security as has been done in the present case by the respondents. Needless to add that it is well settled that the State Government in discharge of its constitutional obligations is bound to act as a model employer whereas the actions of the respondents in the present case are outrightly exploitative in nature and militate against the constitutional philosophy of fairness in public actions.

15. The counsel for the respondents has argued that the husbands of the petitioners were on work charge basis. Thus, they would not fall within the definition of Government employee and thus, the petitioners could not have been given appointment on compassionate grounds and in support of the said contention, has placed reliance on the Full Bench judgment of this Court in the case of **Pawan Kumar Yadav Vs. State of UP and others passed in Civil Misc. Writ Petition No. 15505 of 2005** where the Full Bench while interpreting the provisions of Dying-in-Harness Rules, 1974, (the said rules have been adopted by the Corporations and are applicable to the Corporations including the respondent-Corporation herein). It is no doubt true that husbands of the petitioners were on work charge basis, however, it is equally important to note that even as per the own resolution of the respondent-Corporation, the said employees having worked for more than 12 to 15 years, if alive, would have been entitled for regularization. Without going into the said question, in the present case, there is no dispute that the petitioners have continued for more than 15 years after their appointments and have been paid consolidated wages, as such, on their own right also, they cannot be treated in the manner, in which their services have been dismissed with, and would be entitled for regularization having served for more than 10 years as in terms of the directions issued by the Supreme Court in the case of **Nihal Singh and others Vs. State of Punjab and others (supra) Sheo Narain Nagar and others Vs. State of Uttar Pradesh and another (supra).**

16. In the light of the law, as discussed above, I am of the firm view that the dismissal of the petitioners vide order dated 9.11.2020 on the ground that their services are no more required is wholly arbitrary and illegal, and is liable to be set aside and is accordingly quashed. A mandamus is issued to the Respondent No. 2 to absorb the petitioners in the services on which they were working and to take steps to consider the case of the petitioners for regularisation in terms of the prevalent policies for regularization. It is, however, provided that the Respondent No. 2 shall have all the authority to take work from the petitioners in any other department, which are to be performed by the Class-IV employees.

17. The writ petition stands allowed in terms of the said order.

18. Copy of the order downloaded from the official website of this Court shall be treated as certified copy of the order.

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**(2021)10ILR A383**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 24.08.2021**

**BEFORE**

**THE HON'BLE ASHWANI KUMAR MISHRA, J.**

Writ A No. 4924 of 2021
connected with other cases

**Sushil Kumar Singh & Ors. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Sri Prashant Mishra, Sri Tarun Agarwal

**Counsel for the Respondents:**
C.S.C., Sri Vikram Bahadur Yadav, Mrs. Akansha Sharma

**A. Service Law – Post of Sub-Inspector, Police – Recruitment – No advertisement for the Recruitment years 2017-18, 2018-19 and 2019-20 – Age relaxation, claimed – Held, only because advertisements were not issued to fill up the vacancies arising in respective recruitment years 2017-18, 2018-19 and 2019-20 would not mean that petitioners acquire an unfeasible right of relaxation in maximum age prescribed for appointment to the posts, contrary to what is provided under the relevant rules. (Para 34)**

**B. Service Law – UP Sub-Inspector and Inspector (Civil Police) Service Rules, 2015 – R. 3(o) – Recruitment years – Meaning – Year of recruitment is defined to mean a period of twelve months commencing the first day of July of a calendar year. (Para 21)**

**C. Service Law – Policy matter – Judicial review – Scope of interference – Fixation of minimum and maximum age is a matter of policy and lies within the domain of executive – Held, unless the policy is found to be contrary to law or otherwise irrational or perverse no interference would be warranted. (Para 72)**

**D. Service Jurisprudence – Right and relief – Accrual of vacancy – Right to apply – Grant of relief is directly linked to the nature of right possessed by one and not on the basis of declaration of right – Held, an eligible candidate has no right to apply against a post on accrual of vacancy. When a candidate has no right to apply on a post on accrual of vacancy, therefore, no right shall accrue to a prospective candidate for consideration of his claim regarding age relaxation. (Para 26 and 27)**

**E. Jurisprudence – Doctrine of Impossibility – Maxim *'lex non cogit ad impossibilia'* – Court shall not expect the State authorities to do what cannot possibly be performed by it. (Para 50)**

**F. Civil Law – State's undertaking before the Court – Justifiability – Non-observation of undertaking – It's effect – Held, the petitioners cannot assert that non observance of undertaking before the Supreme Court by holding annual recruitment would either create a right in them to claim relaxation in upper age of recruitment. (Para 66)**

**G. Service Jurisprudence – Right to employment – Principle of legitimate expectation – Ambit and Scope – Substantive legitimate expectation and procedural legitimate expectation – Distinction – Change in policy – It's effect – Overriding public interest which was the reason for change in policy has to be given due weight while considering the claim of the respondents regarding legitimate expectation – In order to make out a case for substantive legitimate expectation, it will have to be shown that change in policy is not on account of changed circumstances or in public interest and that the action is otherwise arbitrary and unreasonable. (Para 67 and 68)**

**Writ petition dismissed.** (E-1)

**Cases relied on :-**

1. Y.V. Rangaiah Vs J. Srinivas Rao; (1983) 3 SCC 284

2. D.D.A. Vs Skipper Construction Co.; (1996) 4 SCC 622

3. Noorali Babul Thanewala Vs K.M.M. Shetty & ors.; (1990) 1 SCC 259

4. SLP (Civil) No. 846 of 1987; R.K. Rama Rao Vs St. of A.P. decided on 8.5.1087

5. Ram Pravesh Singh & ors. Vs St. of Bihar & ors.; (2006) 8 SCC 381

6. State of Jharkhand Vs Brahmaputra Metallics Ltd. & anr.; 2020 SCC Online SC 968

7. Rama Narang Vs Ramesh Narang & anr.; (2009) 16 SCC 126

8. Sabarimala Review case, (2020) 2 SCC 1

9. Spencer & Co. Vs Vishwadarshan Distt. Pvt. Ltd.; (1995) 1 SCC 259

10. Civil Appeal No. 52 of 1993; Rajasthan Public Service Commission Vs Smt. Anand Kanwar & ors. decided on 8.2.1995

11. Shankarsan Dash Vs U.O.I.; 1991(3) SCC 47

12. Dinesh Pratap Singh Vs St. of U.P. & ors.; 2005 SCC online (All) 1020

13. Hirandra Kumar Vs High Court of Judicature at Allahabad & anr.; 2019 SCC online SC 254

14. Sanjay Agarwal Vs St. of U.P. & ors.; 2007 (6) ADJ 272

15. Writ petition no. 65189 of 2006; Sanjay Kumar Pathak Vs St. of U.P. & ors. decided on 25.052007

16. Chandra Kishore Jha Vs Mahavir Prasad & ors.; 1999 (8) SCC 266

17. Kerala State Beverages (M and M) Corp. Ltd. Vs P.P. Suresh & ors.; (2019) 9 SCC 710

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Recruitment to 9534 posts of Sub-Inspector, Civil Police (Male and Female), Platoon Commander PAC, and Second Officer in Fire Brigade came to be initiated by the Government of Uttar Pradesh, in furtherance of which an advertisement was issued by U.P. Police Recruitment Board, Lucknow (hereinafter referred to as the "Board') on 24.2.2021. The advertised vacancies were of the recruitment years 2017-18, 2018-19 and 2019-20, respectively. Clause 3.4 of the advertisement required the age of applicant to be not below 21 years and not above 28 years as on 1.7.2021. Age relaxation was permissible for SC/ST candidates in terms of the State policy. The recruitment is regulated by the provisions of the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service Rules, 2015 (hereinafter referred to as the "Rules of 2015').

2. On the relevant date i.e. 1.7.2021 all the writ petitioners were above 28 years of age and therefore ineligible to apply against aforesaid advertisement. Petitioners, however, assert that since advertised vacancies are of the years 2017-18, 2018-19 and 2019-20 and therefore, they be permitted to apply against the advertisement inasmuch as they were eligible when the vacancies arose, being below 28 years of age on the date vacancies occurred. It is also contended that respondents failed to advertise the vacancies in respective years despite an assurance having been given before the Supreme Court. As such the maximum age specified in Clause 3.4 of the advertisement be relaxed for them, as a one time measure, to enable them to apply for the recruitment in question.

3. Since prayer is made in this bunch of writ petitions is substantially the same, Writ Petition No.4924 of 2021 (Sushil Kumar Singh And 127 Others Vs. State Of U.P. And 2 Others) is treated as leading writ petition, wherein following prayer has been made:-

"I) Issue a writ, order or direction in the nature of mandamus commanding the respondent no.1 to exercise powers under Section 46(2)(c) and 46(3) of the Police Act, 1861 and relax the upper age limit as provided in Rule 10 of the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service Rules, 2015 (hereinafter referred to as "Rules, 2015").

II) Issue a writ, order or direction in the nature of mandamus commanding the respondent no.1 to grant age relaxation to the petitioners and permit them to apply in pursuance of the advertisement dated 24.2.2021 by suitably amending the terms of the advertisement thereof;"

4. Petitioners have claimed above relief primarily on the basis of the orders passed by Supreme Court of India in Writ Petition (C) No. 183 of 2013 (Manish Kumar Vs. Union of India and others). According to them the State is bound by its undertaking given before the Court to fill up the vacancies caused in the respective recruitment years, annually, and their failure to honour such commitment has denied an opportunity to petitioners to apply for recruitment made to the posts of Sub-Inspector, Civil Police (Male and Female), Platoon Commander PAC, and Second Officer in Fire Brigade under advertisement dated 24.2.2021.

5. Before proceeding to examine the claim of petitioners, it would be appropriate to refer to the relevant provisions of Rules of 2015, which shall regulate recruitment, selection and appointment etc. on the posts so advertised. The Rules of 2015 have been framed by the Governor in exercise of powers under Clause (c) of Sub-section (2) of Section 46 read with Sub-section (3) of the said section and Section 2 of the Police Act, 1861 with a view to regulate selection, promotion, training, appointment, determination of seniority and confirmation etc. of Sub-Inspectors and Inspectors of Civil Police in Uttar Pradesh Police Force.

6. Rule 3(b) specifies appointing authority to mean the Deputy Inspector General of Police, while Sub-rule (c) defines Board i.e. Uttar Pradesh Police Service Recruitment and Promotion Board. Rule 3(b), (c), (i), (m), (n) & (o) of the Rules of 2015 have bearing on the issues involved herein and are accordingly reproduced hereinunder:-

"3. In these rules unless there is anything repugnant in the subject or context,

(b) "appointing authority' means the Deputy Inspector General of Police;

(c) "Board' means the Uttar Pradesh Police Service Recruitment and Promotion Board, established in accordance with Government Orders issued from time to time in this regard;

(i) "Member of services' means a person appointed to a post in service under these rules or any previous rules before the commencement of these rules.

(m) "Service' means the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service;

(n) "Substantive appointment' means an appointment, not being an adhoc appointment, on a post in the cadre of the service, made after selection in accordance with the rules and, if there were no rules, in

accordance with the procedure prescribed for the time being by executive instructions issued by the Government;

(o) "Year of recruitment' means a period of twelve months commencing on the first day of July of a calendar year."

7. Rule 5 of Rules of 2015 provides for source of recruitment. By virtue of Sub-rule 1, 50% of appointment on the post of Sub-Inspector has to be made by direct recruitment through the Board. Rule 10 prescribes the age and is, therefore, relevant for our purposes, which reads as under:-

"10. A candidate for direct recruitment must have attained the age of 21 years and must not have attained the age of more than 28 years on the first day of July of a calendar year in which vacancies for direct recruitment are advertised:

Provided that the upper age limit in the case of candidate belonging to the Scheduled Caste, Scheduled Tribes and such other categories may be greater by such number of years as may be specified in the Act and prevalent Government Orders applicable at the time of the notification of the vacancies by the Board."

8. Rule 14 of Rules of 2015 provides for determination of vacancies and is quoted hereinafter:-

"14. The appointing authority shall determine and intimate to the Head of the Department the number of vacancies to be filled during the course of the year of recruitment as also the number of vacancies reserved for candidates belonging to Scheduled Castes, Scheduled Tribes and other categories under rule 6. The Head of the Department shall intimate the number of vacancies for both male and female candidates separately, to the Board and also to the Government. Subsequently the Board shall notify the vacancies for both male and female candidates separately in the following manner:-

(i) by issuing advertisement in daily Hindi and English newspapers having wide circulation;

(ii) by pasting the notice on the notice board of the office or by advertising through Radio/Television and other Employment newspapers;

(iii) by notifying vacancies to the Employment Exchange; and

(iv) by other means of mass communication."

9. Rule 19 provides for training which is to be imparted to Sub-Inspectors selected under Rule 15 and 16 of the Rules of 2015. Rule 19 is also extracted hereinafter:-

"19. (1)(a) The candidates finally selected to the post of sub inspector under rules 15 and 16 shall be required to pass the training prescribed by the Head of the Department. Provisions of Police Training College Manual shall be effective on the cadets during the basic training. If the candidate finally selected for basic training does not report for training within the stipulated time limit then his selection/candidature shall be cancelled.

(b) Re-examination of the cadets failing in basic training shall be organized by the Head of the Department after their supplementary training. The proceeding for termination of service of candidates failing

in examination of training after supplementary training shall be done by the Appointing Authority.

2. The candidates appointed by promotion under rule 17 shall be required to complete the training prescribed by the Head of the Department."

10. Writ Petition (C) No.183 of 2013 (supra) which was in the nature of public interest litigation (PIL) was entertained by Supreme Court of India wherein one of the grievances raised was with regard to non-recruitment of police personnels in different States and Union Territories of India. On 24.4.2017 the Court passed following order:-

"State of Uttar Pradesh

1. 11,376 vacant posts of Sub-Inspector of Police, are to be filled up by way of direct recruitment. Mr. Debasish Panda, Principal Secretary (Home), Government of Uttar Pradesh, who is present in Court in person, affirms, that 3200 vacancies of the posts of Sub-Inspector of Police, will be filled up each year over four years commencing from the year 2018. The advertisement notifying the vacancies for 2018 will be issued in the month of January, 2018, the result of the selection process will be declared in October, 2018, the training of the selected candidates will commence in February, 2019, and will conclude in January, 2020. The schedule for the next three years, we are assured, will remain the same, as for the year 2018.

2. Insofar as the posts of Constables of Police are concerned, which are also to be filled up by direct recruitment, it was submitted, that 30000 Constables will be recruited annually for four years, i.e., during the years 2017, 2018, 2019 and 2020. The annual process of issuing the advertisement, notifying the vacancies will be published in August every year. The results thereof will be declared in June of the following year. For each process of selection, training will commence in the month of October in the year of the declaration of the result, and the training process will conclude in the month of September of the next following year.

3. We hereby approve the recruitment process for selection of direct recruits, at the level of Sub-Inspector of Police, as also, that of Constables of Police.

4. We also further direct, that promotions to the various ranks shall be made from time to time as may be feasible, depending on the cadre strength.

5. Mr. Debasish Panda, Principal Secretary (Home), Government of Uttar Pradesh, who is present in Court in person, shall ensure that the selection, recruitment and training is conducted in the manner indicated hereinabove (which is truly the proposal submitted by the State Government itself). For ensuring that the submission made to this Court is not breached, we direct the Principal Secretary (Home), Government of Uttar Pradesh to ensure, that the Chairman of the Police Recruitment and Selection Board shall not be changed midstream, i.e., during the period intervening the issuance of the advertisement notification(for filling up the vacancies of different cadres) till the process of selection is completed.

6. In case of breach of the time lines indicated hereinabove, the officer mentioned hereinabove, shall be personally responsible."

Aforesaid writ petition has since been disposed of, finally, vide following order passed on 11.3.2019:-

"The prayers made in the writ petition as amended in terms of the Interlocutory Application No. 2 of 2013 read as follows:

"A. Direction to all the States & Union Territories to constitute Police Commission to deal with allegation of police action, redressal of grievances of police and to make recommendations for the welfare of police force.

B. Directions to the States to formulate and implement the guidelines for prevention and control of violent mass agitations and destruction of life & property, in terms of the guidelines suggested by this Hon'ble Court in the decision reported as 2009(5)SCC 212.

C. Directions to the States and Union Territories to fill up the vacant posts in the Police and State Armed forces so that the police forces does not remain overburdened.

D. Directions to all the States and Union Territories to provide for periodic training and upgradation of police force and to fix the working hours for the police personnel.

E. Direction to the Union of India to prescribe guidelines for the Media Reporting of the violent mass agitation and police action for prevention and control thereof.

F. Order or Direction restraining the States from drawing a presumption against the action of police acting under the constitutional and statutory obligations."

From the material on record and the Orders passed by this Court from time to time it appears that one of the central issues canvassed till date is the filling up of the large number of vacancies in the different posts in the police forces in the States. In this regard detailed affidavits have been filed by a large number of States. In view of the factual matrix at some point of time it was in the contemplation of the Court that the matter be sent to High Court(s) for effective monitoring instead of this Court continuing with the present writ petition. Issue and problems are State specific and can be appropriately dealt with by the respective High Courts.

Having considered the matter, we are of the view that the records pertaining to each of the States including affidavits etc. be sent by the Supreme Court Registry to the Registry of the concerned High Courts with a request to Hon'ble the Chief Justice of the High Court to entertain the matter on the Judicial Side as suo motu Public Interest Litigation and monitor the prayers made from time to time.

With the aforesaid directions and observations, this Writ Petition shall stand disposed of."

11. Petitioners contend that while abovenoted writ petition was pending consideration before Supreme Court, a similar controversy arose regarding appointments for the posts of Constable on account of delayed issuance of advertisement, in Special Leave to Appeal (C) No.12569 of 2018, arising out of a judgment of this Court dated 16.2.2018 in

Writ Petition No.6128 of 2018. Advertisement to fill up vacancies for the year 2017 was published on 14.1.2018 in the above matter. On account of above large number of applicants were deprived from applying since they became overage between 1.7.2017 to 30.6.2018. It was thus urged on behalf of aspiring candidates that in case vacancies of the year 2017 were advertised in calendar year 2017 itself then such candidates would have had a chance to compete. For Constables the required age was 18 to 22 years as on 1.7.2018. The State Government in above scenario took a benevolent decision to allow age relaxation which is recorded in the following order passed by the Supreme Court on 13.6.2018 in above mentioned special leave to appeal:-

"1. Order dated 24th April, 2017 passed by this Court in Writ Petition (Civil) No.183 of 2013, as regards State of Uttar Pradesh recorded as under:-

"2. Insofar as the posts of Constables of Police are concerned, which are also to be filled up by direct recruitment, it was submitted, that 30000 Constables will be recruited annually for four years, i.e., during the years 2017, 2018, 2019 and 2020. The annual process of issuing the advertisement, notifying the vacancies will be published in August every year. The results thereof will be declared in June of the following year. For each process of selection, training will commence in the month of October in the year of the declaration of the result, and the training process will conclude in the month of September of the next following year.

3. We hereby approve the recruitment process for selection of direct recruits, at the level of SubInspector of Police, as also, that of Constables of Police."

2. It has been stated at the bar that the last selection for the posts of Constables of Police in State of Uttar Pradesh through the Selection Board was undertaken in the year 2015. In spite of the statement so recorded in the aforesaid order, no selection was undertaken in the year 2017. Apparently, the process for making appropriate modifications in the Rules was underway. The advertisement was thereafter issued on 14.01.2018 which is annexed at Page No.65 of the paper-book.

3. Rule 10 of the Uttar Pradesh Police Constable and Head Constable Services Rules, 2015 stipulates that for direct recruitment for the post of constable, male candidates must have attained the age of 18 years and must not have attained the age of 22 years on the day of 1st July of the calender year in which the vacancies for direct recruitment are advertised. Since the advertisement in question was issued on 14.01.2018, the reckonable date for the purpose of Rule 10 is to be 01.07.2018.

4. The grievance raised by the petitioners is - that the prescribed age limit of not less than 18 years and not more than 22 years is such a short period that if the selections are not undertaken on year to year basis the concerned candidates are bound to be prejudiced. It is their submission that since a representation was made, which was duly recorded in the order quoted hereinabove that selection would be undertaken in the year 2017, an advertisement ought to have been issued in that year itself. However, since the advertisement was issued in January, 2018, going by the text of the Rules the reckoning date would be 01.07.2018. Since the last

selection was in the year 2015 and if the reckoning date today is taken to be 01.07.2018 large body of candidates including the petitioners stand deprived of chance to compete. It is, therefore, submitted that since the selection was to be undertaken in the year 2017, in the fitness of things the reckoning date should be 01.07.2017. Resultantly, candidates including the petitioners would not become age barred for the purpose of being considered for selection. We see force in the submission and find that the grievance so raised merits consideration.

5. We, therefore, put to Mr. V. Shekhar, learned senior counsel representing State of Uttar Pradesh and asked him to take appropriate instructions in the matter so that the grievance raised by the petitioners could be appropriately addressed.

6. Mr. V. Shekhar, learned senior counsel after seeking instructions from Principal Secretary (Home), made following statement:-

- In the ensuing examination after the present selection, an exception shall be made in favour of such candidates who missed out merely because the date of reckoning for the present selection happens to be 01.07.2018 instead of 01.07.2017 and at least one more chance shall be given to such candidates to compete.

7. We record the statement and direct the State through its Principal Secretary (Home), to file an appropriate affidavit detailing out the facility to be afforded to such candidates. Said affidavit shall be filed within seven days from today and shall form part of the record. On the strength of the statement of Mr. V. Shekhar, learned senior counsel, we dispose of this special leave petition.

No further order is called for in the impleadment application.

Pending applications, if any, shall also stand disposed of. "

12. Petitioners herein by drawing a parallel with above order contend that they are identically placed, and therefore State Government cannot be allowed to discriminate against them. The argument is that State Government cannot act differently, in similar circumstances, and that State action in denying age relaxation to the petitioners is discriminatory and violative of Article 14 of the Constitution of India. In short it is pleaded on behalf of petitioners that there should be similar treatment in similar circumstances as different treatment in equal/similar circumstances amounts to discrimination. In the garb of classification, discrimination cannot be allowed. It is also urged that petitioners legitimately expected that State Government shall honour the undertaking given before the Supreme Court and this Court must compel/bind the State Government to act upon its undertaking given to the Supreme Court. In furtherance of aforesaid it is urged that a party which gives an undertaking before the Court cannot be permitted to resile from the undertaking/promise so given. To lend support to aforesaid, reliance is placed upon judgments of Supreme Court in Y.V. Rangaiah Vs. J. Srinivas Rao, (1983) 3 SCC 284; D.D.A. Vs. Skipper Construction Company, (1996) 4 SCC 622; Noorali Babul Thanewala Vs. K.M.M. Shetty and others, (1990) 1 SCC 259, and also an order of the Supreme Court in SLP (Civil) No.846 of 1987 (R.K. Rama Rao Vs. State

of A.P.), decided on 8.5.1087. The plea of legitimate expectation is also pressed with reference to the judgments of Supreme Court in Ram Pravesh Singh and others Vs. State of Bihar and others, (2006) 8 SCC 381; State of Jharkhand Vs. Brahmaputra Metallics Ltd. and another, 2020 SCC Online SC 968. Further reliance is placed upon Rama Narang Vs. Ramesh Narang and another, (2009) 16 SCC 126 on the import of term "undertaking'. Reference is also placed upon Sabarimala Review case, (2020) 2 SCC 1 and Spencer & Co. Vs. Vishwadarshan Distt. Pvt. Ltd., (1995) 1 SCC 259 to contend that this Court is a judicial authority in terms of Article 144 of the Constitution of India and therefore must act in aid of Supreme Court, so as to compel the State of U.P. to act upon its undertaking, so given before Supreme Court itself.

13. On behalf of State respondent and the Board, it is urged that petitioners do not have any right to claim age relaxation and the writ petition merits rejection. It is sought to be contended that vacancies occasioned in the years 2017-18, 2018-19 and 2019-20 could not be advertised in the respective years in which they occurred on account of pendency of dispute regarding recruitment for the posts of Sub-Inspector, Civil Police (Male and Female), Platoon Commander PAC, and Second Officer in Fire Brigade undertaken in the year 2016 before this Court, and later before the Supreme Court of India. It is thus sought to be contended that the recruitment in the aforesaid years could not be undertaken for reasons beyond control of the State/Board and that the State otherwise has acted fairly. The case of Constables is attempted to be differentiated on the ground that only limited relaxation was allowed, on a timely challenge, which is not the case here. Submission is that no right otherwise accrues to a prospective applicant to claim age relaxation merely because posts have not been advertised in a particular recruitment year. The respondents further contend that more than 12 lac applicants have already applied against the advertisement and the process would be further delayed if any age relaxation is allowed to the writ petitioners since similar plea would then be raised by lacs of candidates who have become overage between 2017 to 2021.

14. Affidavits have been exchanged in the leading writ petition. With the consent of learned counsel for the parties all the writ petitions are being disposed of finally as at the admission stage. Writ Petition No.4924 of 2021 is taken as the lead case.

15. I have heard Sri Tarun Agrawal and Sri Prashant Mishra for the petitioners in the leading writ petition and Sri Manish Goel, learned Additional Advocate General assisted by Sri Vikram Bahadur Yadav and Mrs. Akanksha Sharma for the respondents. Sri L.M. Singh, Sri R.K. Singh, Sri M.I. Farooqui and Sri M.H. Qadeer have also argued for the petitioners in different writ petitions.

16. Undisputed facts may be summarized in a nutshell. Last recruitment for the vacant posts of Sub-Inspector was initiated by the State in the year 2016 with issuance of advertisement on 17.6.2016. Written examination was held from 12.12.2017 to 23.12.2017 and the final result was declared on 28.2.2019. Large number of writ petitions were filed before this Court and also before Lucknow Bench challenging the select list. Ultimately leading Writ Petition No.23733 of 2018 (Atul Kumar Dwivedi and 108 others Vs.

State of U.P. and others) came to be allowed on 11.9.2019 and the select list dated 28.2.2019 was quashed. The Lucknow Bench has also followed aforesaid judgment in Service Single No.6540 of 2019 (Manish Kumar Yadav and 49 others Vs. State of U.P. and others), which has been decided vide order dated 18.10.2019. The above judgments were challenged by State of U.P. in S.L.P. (Civil) Nos.29972 of 2019 as well as 3157 of 2020. The matter was heard finally on 5.2.2021 and the judgment was reserved.

17. According to the State respondents unless the recruitment cycle in a given year is complete, it would not be possible for the State to initiate the next recruitment cycle. This primarily is the reason for not undertaking recruitment exercise in the subsequent years despite undertaking having been given before Supreme Court. Submission on behalf of State of U.P. is that due to unavoidable circumstances it has not been possible to conduct recruitment for the years 2017 to 2020. It is thus vehemently urged that on account of above no right accrues to the petitioners to claim relaxation in maximum age prescribed under the rules. Petitioners have strongly refuted such stand and contend that State was bound to act as per its undertaking given before Supreme Court that yearly recruitment for the posts of Sub-Inspector, Civil Police (Male and Female), Platoon Commander PAC, and Second Officer in Fire Brigade shall be made.

18. On the rival contentions urged by counsel for the parties the question that arises for consideration is whether State had justifiable reasons, for not initiating yearly recruitment on the post of Sub-Inspector despite its undertaking given to Supreme Court in the case of Manish Kumar (supra)? As a corollary to above an issue would also arise as to whether the writ petitioners are entitled to claim relaxation in maximum age as a consequence of non-adherence of the above undertaking?

19. Merits of the explanation offered by the State for not holding yearly recruitment for the posts of Sub-Inspector in respective years will have to be examined with reference to the rights of petitioners, if any, to claim age relaxation on account of non-holding of yearly recruitment.

20. Another issue that falls for determination is as to whether petitioners are entitled to parity in the matter of relaxation of maximum age at par with Constables, in view of the stand taken by State of U.P. before Supreme Court in permitting age relaxation, as is noticed in the order of the Court dated 13.6.2018 in Special Leave to Appeal (C) No.12569 of 2018?

21. Process of recruitment to the post of Sub-Inspector commences with determination of vacancies by the appointing authority to be filled during the course of year of recruitment. Year of recruitment is defined in Rule 3(o) of the "Rules of 2015" to mean a period of twelve months commencing the first day of July of a calendar year. Appointing authority i.e. Deputy Inspector General of police is required to determine the vacancies to be filled during the period of twelve months commencing the first day of July of a calendar year. For illustration we may take Ist of July, 2017 in order to understand the scheme of recruitment to the service. All vacancies that are to be filled between Ist of July 2017 to 30th June, 2018 will have

to be worked out by the appointing authority and intimated to the head of the department i.e. the Director General of Police, Uttar Pradesh by virtue of Rule 3(h) of the Rules of 2015. The appointing authority is also under an obligation to determine the number of vacancies to be filled by candidates belonging to the Scheduled Caste, Scheduled Tribes and other reserved categories in accordance with the provisions of the Acts specified in rule 6. Appointing authority is thereafter required to intimate the same to the Director General of Police U.P. The Director General of Police shall in turn then intimate the number of vacancies for male and female candidates separately to the Board and also to the Government. The Board shall then notify the vacancies for both male and female candidates, separately in the manner specified in Rule-14.

22. The recruitment process, as indicated above, is supposed to be a yearly exercise in the Rules. Rule 15 contemplates filling up of application form in the manner prescribed. Requisite details as required are to be specified by the Board on its own website. The process of recruitment commences with the issuance of advertisement and is followed by uploading of call letters; scrutiny of documents; physical efficiency test, which is qualifying in nature. A candidate who qualifies this stage is to appear in the written examination. Based upon the performance in the written examination the Board shall prepare, as per the vacancies, a select list of each category of candidates and send it to the head of department. The head of department shall thereafter accord his approval and send the list to appointing authority. The candidates recommended for appointment by appointing authority will be required to undergo medical examination at Police Lines of concerned district. A candidate declared medically unfit will not be appointed and the vacancy shall be carried forward for next selection. A candidate who is found medically fit shall then be subjected to character verification.

23. Rule-19 of the Rules of 2015 provides that the candidate selected finally to the post of Sub Inspector shall be required to pass the training prescribed by the head of the department. The provisions of Police Training College Manual shall form the basis of training. If a candidate fails in examination for training or after supplementary training shall have to face termination. It is only after passing the examination for training that a candidate is appointed substantively and placed on a probation period of two years.

24. Process of yearly recruitment as detailed above is clearly contemplated in the Rules and is expected to be followed so that vacancies occurring in a calendar year starting from Ist of July be filled by 30th June of the subsequent calendar year. It is in this context that age of candidates assumes significance.

25. Rule-10 of the Rules of 2015 prescribes that permissible age of applicant for recruitment is to be not below 21 years and not above 28 years on Ist of July of the calendar year. It is this date on the basis of which age of applicants is to be determined as per Rule 10 of the Rules of 2015. In the event recruitment exercise is not undertaken in the year of recruitment and is held in a subsequent year then an applicant who may be fulfilling the age criteria as per rule 10 in the year of recruitment may become overage in the subsequent year

when recruitment is held. It is in aforesaid context that this Court has to examine as to what relief can be granted to such an applicant, who looses an opportunity to apply for recruitment only because no recruitment was held in the year of recruitment in which he was otherwise eligible.

26. Grant of relief is directly linked to the nature of right possessed by one and not on the basis of declaration of right. Ordinarily, it is always open for an employer to fill up a post or to leave it vacant. When the employer is State or its agency or instrumentality the only departure is that its action cannot be arbitrary or discriminatory as it is otherwise expected to be a model employer. But for such exception, the State is at liberty whether or not to fill up the vacancy. As such no right accrues to a prospective candidate for consideration of his claim nor any relief in the form of age relaxation can be granted only because recruitment was not undertaken in a recruitment year.

27. Law regarding rights of a prospective candidate as well as a selected candidate stands fairly settled by now. It is apposite to mention here that an eligible candidate has no right to apply against a post on accrual of vacancy. When a candidate has no right to apply on a post on accrual of vacancy, therefore, no right shall accrue to a prospective candidate for consideration of his claim regarding age relaxation. The conflicting claims of the parties have to be examined in the context noted above. The law in this regard stands fairly settled and only requires to be noted for the sake of clarity.

28. In Rajasthan Public Service Commission Vs. Smt. Anand Kanwar and others in Civil Appeal No. 52 of 1993, decided on 8.2.1995, the Supreme Court has crystallized the law on the subject in following words:-

"3. ..... It is settled proposition of law that the eligibility of a candidate has to be determined on the basis of the terms and conditions of the advertisement in response to which the candidate applies. There is nothing on the record to show that the State Government was in any manner negligent or at fault in not making the direct recruitment during the period 1983-89. Be that as it may, the High Court was not justified in taking the clock back to the period when unfilled vacancies were existing and holding that since the respondent was eligible on the date when vacancies fell vacant, she continues to be so till the time the vacancies are filled. Due to inaction on the part of the State Government in not filling the posts year-wise, the respondent cannot get a right to participate in the selection despite being over-aged."

29. Constitution Bench of Supreme Court in Shankarsan Dash Vs. Union of India, 1991(3) SCC 47 has observed as under in para 7:-

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies.

However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha and Others, [1974] 1 SCR 165; Miss Neelima Shangla v. State of Haryana and Others, [1986] 4 SCC 268 and Jitendra Kumar and Others v. State of Punjab and Others, [1985] 1 SCR 899."

30. This Court in Dinesh Pratap Singh Vs. State of U.P. and others, 2005 SCC online (All) 1020 in para 43 has observed as under:-

"43. Further as suggested from the respondent' side, where the Appointing Authority does not deem it expedient to initiate recruitment process, the candidates who were eligible but who have lost eligibility subsequently cannot allege deprivation of any vested right to compete for a particular service. ....."

31. I n Hirandra Kumar Vs. High Court of Judicature at Allahabad and another, 2019 SCC online SC 254, Supreme Court considered the claim of age relaxation of petitioner in larger prospect and observed as follows in paragraphs 19, 34, 35 and 37:-

"19. The real issue is as to whether the decision in Malik Mazhar Sultan (supra) can be construed as leading to a vested right in a candidate who applies for recruitment to the HJS to assert that they may be granted an age relaxation by virtue of the fact that between the last date of recruitment and the current, the candidate has crossed the prescribed age limit.

34. In the alternative, it has been urged on behalf of the petitioners that since they have been granted permission to appear at the examinations in pursuance of the interim directions that were issued during the pendency of these proceedings, the Court may exercise its jurisdiction under Article 142 of the Constitution of India to direct that the results be declared.

35. We are unable to accede to that request. For one thing, there would be other candidates who have not approached this Court and who would have been in the same position of not meeting the age criterion. Moreover, allowing a group of candidates to breach the age criterion by taking recourse to the power under Article 142 of the Constitution of India would, in our view not be appropriate inviting, as it does, a breach of the governing Rules for the UP Higher Judicial Service.

37. In the facts and circumstances of the present batch of cases, we see no reason or justification to interfere. The petitioners had sufficient opportunities in the past to appear for the HJS examinations at a time when they were within the age limit. Having not succeeded in that, their attempt at moving this Court to seek a relaxation of the Rules or through a challenge to the Rules, is misconceived."

32. Reference may also be made to a Division Bench judgment of this Court in Sanjay Agarwal Vs. State of U.P. and others, 2007 (6) ADJ 272 in which

following observations have been made in paragraph 41:-

"(41) Further a person if fulfils requisite educational and other qualifications does not possess a fundamental or legal right to be considered for appointment against any post or vacancy as soon as it is available irrespective of whether the employer has decided to fill in the vacancy or not. The right of consideration does not emanate or flow from existence of the vacancy but commences only when the employer decides to fill in the vacancy and the process of recruitment commences when the notification or advertisement of the vacancy is issued. So long as the vacancy is not made available for recruitment, no person can claim that he has a right of consideration since the vacancy exists and therefore, he must be considered. We have not been confronted with any statutory provision or authority in support of this contention that the petitioners have a right of consideration on mere existence of vacancy. On the contrary, we are of considered view that the right of consideration would come in picture only when the vacancy is put for recruitment, i.e., when the advertisement is published. That being so, the right of consideration commences when the recruitment process starts. The incumbent would obviously have right of consideration in accordance with the provisions as they are applicable when the advertisement is made and in accordance with conditions provided in the advertisement read with relevant rules. It is also obvious that if there is any inconsistency between the advertisement and Rules, the statutory rules shall prevail. In Malik Mazhar Sultan (supra), the Apex Court has clearly held that recruitment to the service could only be made in accordance with the Rules and not otherwise." (emphasis supplied by me)

33. A Full Bench of this Court in Sanjay Kumar Pathak Vs. State of U.P. and others, writ petition no. 65189 of 2006, decided on 25th May, 2007, has reiterated as under:-

"Nobody can claim as a matter of right that recruitment on any post should be made every year."

34. In light of law as crystallized by above-noted judgments it can now safely be concluded that only because advertisements were not issued to fill up the vacancies arising in respective recruitment years 2017-18, 2018-19 and 2019-20 would not mean that petitioners acquire an unfeasible right of relaxation in maximum age prescribed for appointment to the posts, contrary to what is provided under the relevant rules.

35. Sri Tarun Agrawal, learned counsel for petitioner was alive to the above proposition and therefore rightly did not claim any right to age relaxation on the general proposition of law on the subject. He has based his arguments mainly on the undertaking given by State before the Supreme Court to submit that State be directed to act upon its own undertaking.

36. In order to appreciate aforesaid argument it would be necessary to refer to the order of the Supreme Court itself which notices the undertaking given by the State. Order of the Supreme Court dated 24.4.2017 has already been extracted in para 10 of the judgment. The Apex Court noticed the stand of the State of Uttar Pradesh as per which 11376 vacancies for the post of Sub-Inspector were in existence.

The Principal Secretary (Home), Government of Uttar Pradesh affirmed that 3200 vacancies will be filled up, each year, for four continuous years commencing from the year 2017. The schedule was also quoted in the order as per which the advertisement was to be issued in January, 2018 and the result of the selection process was to be declared in 2018, to be followed with commencement of training in February, 2019 and its conclusion in January, 2020. Same schedule was to be followed for the next four recruitment process. The court also issued directions not to change the Chairman of the Board midstream, and further recorded that schedule fixed for the purpose was based upon the proposal submitted by State of U.P. itself.

37. The above undertaking of the State is substantially in conformity with the scheme of recruitment contemplated in the Rules of 2015 itself. The Supreme Court while addressing the public concern of not filling up of large vacancies in Police Department of different States and union territories reminded the State of its obligations to fill up vacant posts in Police Department, in the manner undertaken by them. The State of Uttar Pradesh was expected to carry out its undertaking by holding selections, annually, as per the schedule indicated by the State so that vacancies could be filled within the period specified in the order of the Supreme Court itself.

38. The events unfolded, however, are at complete variance with what was expected in the Rules of 2015 as also the order of the Supreme Court. No recruitment was held in the years 2017-18, 2018-19 and 2019-20. It is after four years that the process of recruitment has commenced with issuance of the advertisement dated 24.2.2021.

39. The petitioner's contention that undertaking given by State of U.P. before Supreme Court is not being honoured is clearly apparent on record.

40. As per the undertaking given to the Court the process of recruitment ought to have started with issuance of advertisement in the month of January, 2018 itself. No such advertisement was actually issued. The apparent violation of undertaking was repeated in January, 2019 and again in January, 2020. No grievance was raised by anyone, including the writ petitioners. Neither any application was moved before the Supreme Court highlighting failure on part of State of U.P. in honouring its undertaking given to the Supreme Court nor any writ petition was filed even before this Court for enforcement of right which accrued under the order of the Supreme Court dated 24.4.2017 which is the basis for present bunch of writ petitions.

41. It appears that neither the State nor the petitioners had any objection to what was actually happening. In the event any grievance was raised before the appropriate forum the Supreme Court or the High Court, as the case may be, could have examined the scenario and issued needful directions for observance of State's undertakings. This, however, has not happened. The grievance in this regard has been raised for the first time, now, in the year 2021. No explanation regarding silence on the part of petitioners for a period of four years is conspicuous by it's absence.

42. The compliance of the undertaking given to the Supreme Court is now not possible. The power of writ court, whosoever wide it may be, does not

empower this Court to put the clock back in point of time. This Court cannot loose sight of the fact that there may be many more candidates like petitioners and in equity their claim cannot be ignored. Accepting the claim of petitioners would be opening a Pandora's box. No direction can, therefore, now be issued to complete the recruitment as per the undertaking given to the Court.

43. The petition of Manish Kumar (supra) remained pending for nearly two years before the Supreme Court but no attempt was made before the Supreme Court to highlight the apparent default on part of State in honouring its undertaking. The writ petition of Manish Kumar (Supra) was finally decided on March 11, 2019. The Supreme Court took note of the materials placed on record of the writ petition and the orders pass, therein, from time to time. The Court categorically observed that issues and problems are State specific and can be appropriately dealt with by the respective High Courts. The proceedings were concluded by the Supreme Court and records pertaining to each of the States including affidavits were sent to each of the States with a request to the Chief Justice to entertain the matter on judicial side as suo-moto Public Interest Litigation and monitor the prayers made from time to time.

44. The last order of the Court is specific inasmuch as the issues and problems being State specific were to be examined by the respective High Courts by registering a suo-moto PIL writ. It does not appear that any application was even filed before the High Court raising a grievance about non holding of recruitment in the year 2019 or even in the year 2020. No reasons are disclosed in the writ petition as to why a timely challenge was not laid to the inaction on part of State in failing to honour its undertaking given in the case of Manish Kumar (supra).

45. The proposition canvassed on behalf of the petitioners that the High Court being a judicial authority in terms of Article 144 of the Constitution of India must act in aid of the orders passed by the Supreme Court is too well accepted and does not require any detailed deliberations. It has only to be seen as to what orders are required to be passed in the factual scenario of the present case. In the event a timely plea was raised by the petitioners this Court could have scrutinized the matter and issued necessary directions for honouring the undertaking given by the State before the Court. However, at such a belated stage and after expiry of several years from the date of order dated 24.4.2017 any direction by this Court for compliance of Supreme Court's order in Manish Kumar's case (supra) would itself delay the process of selection which shall be contrary to the order of Apex Court. The clock cannot be put back. Delay and latches in raising the grievance has made it impossible for this Court to entertain these petitions. Petitioners must suffer the consequences for the delay and latches in not raising their grievance at the first opportunity.

46. Regarding the issue of State's culpability in not honouring its own undertaking given in Manish Kumar's case (supra) it is apparent that time period which has expired since then has rendered compliance of the undertaking given by State of U.P. before Supreme Court now impossible. The doctrine of impossibility would thus clearly be attracted in present scenario.

47. As a matter of fact the writ petitioners neither had nor have any serious

grievance in not holding of yearly recruitment, annually, despite the assurance given by State of U.P. to the Court in Manish Kumar's case (supra). The petitioners actually want a concession from the State in the form of the relaxation, only because it has failed to honour its undertaking given to the Court.

48. Petitioners assume that age relaxation would be a natural consequence of non-holding of recruitment, annually, in terms of the undertaking given to the Court, and the writ petition is primarily based on such an assumption, which is wholly misplaced.

49. Supreme Court in the order dated 24.4.2017 directed the State of U.P. to honour its undertaking of holding annual recruitment for the posts of Sub-Inspector. The order is absolutely silent about the consequences of its non compliance. There is no direction nor an undertaking given before the Court that in the event recruitment is not held annually the State shall allow age relaxation to the proposed applicants. Responsibility for honouring the undertaking of annual recruitment is upon the Principal Secretary of the department concerned. In normal circumstances, any violation of undertaking given to Court would require inquiry into facts as to ascertain whether the violation is willful/deliberate or was occasioned for justifiable reasons. In the event default is willful/deliberate, the Court shall impose appropriate punishment depending upon the gravity of breach or the proceedings would be dropped if justification exists for not honouring the undertaking.

50. Law is settled that Court shall not expect the State authorities to do what cannot possibly be performed by it. The doctrine of impossibility is based on the maxim *"lex non cogit ad impossibilia"*. In Chandra Kishore Jha Vs. Mahavir Prasad and others, 1999 (8) SCC 266, the Supreme Court considered above-noted doctrine and observed as under in paragraph 17:-

"17. In our opinion insofar as an election petition is concerned, proper presentation of an election petition in the Patna High Court can only be made in the manner prescribed by Rule 6 of Chapter XXI-E. No other mode of presentation of an election petition is envisaged under the Act or the rules thereunder and, therefore, an election petition could, under no circumstances, be presented to the Registrar to save the period of limitation. It is a well-settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. (See with advantage: Nazir Ahmad v. King Emperor [(1935-36) 63 IA 372 : AIR 1936 PC 253 (II)] , Rao Shiv Bahadur Singh v. State of V.P. [AIR 1954 SC 322 : 1954 SCR 1098] , State of U.P. v. Singhara Singh [AIR 1964 SC 358 : (1964) 1 SCWR 57] .) An election petition under the rules could only have been presented in the open court up to 16-5-1995 till 4.15 p.m. (working hours of the Court) in the manner prescribed by Rule 6 (supra) either to the Judge or the Bench as the case may be to save the period of limitation. That, however, was not done. However, we cannot ignore that the situation in the present case was not of the making of the appellant. Neither the Designated Election Judge before whom the election petition could be formally presented in the open court nor the Bench hearing civil applications and motions was admittedly available on 16-5-1995 after 3.15 p.m., after the obituary reference since

admittedly the Chief Justice of the High Court had declared that "the Court shall not sit for the rest of the day" after 3.15 p.m. Law does not expect a party to do the impossible -- impossibilium nulla obligatio est -- as in the instant case, the election petition could not be filed on 16-5-1995 during the court hours, as for all intents and purposes, the Court was closed on 16-5-1995 after 3.15 p.m."

51. Yet another maxim of Roaman Law i.e. "*Nemo Tenetur ad impossibilia"* is equally recognized in law and is to the effect that "no one is bound to do an impossibility".

52. This takes the Court to the question whether failure on part of State in honouring its undertaking was for justifiable reasons or not?

53. Sri Manish Goel, learned Addl. Advocate General for the State has referred to different passages from the counter affidavit which refers to pending litigation in respect of recruitment held in the year 2016-17 for the posts of Sub Inspector. Bunch of writ petitions were filed in the year 2018 challenging the recruitment proceedings on various grounds. The writ petitions have been allowed by this Court only in the year 2019 and thereafter by the Lucknow Bench whereby and whereunder the select list dated 19.2.2019 was quashed. A fresh select list has been drawn in terms of this Court's order whereafter selected candidates have been sent on training. The State has challenged aforesaid judgments before Supreme Court, wherein hearing has concluded and the judgment is awaited.

54. A specific question was posed to Sri Manish Goel, Additional Advocate General appearing for the State as to what prevented the State Government from proceeding with next recruitment cycle even if the previous cycle was disrupted on account of pending litigation.

55. The scheme for recruitment as per Rules of 2015 has already been noticed above. The process of recruitment starts with determination of vacancy, to be followed with issuance of advertisement and making of application by the candidates and concludes with publication of select list. The process, however, does not end here since the selected candidate must undergo training and pass the training examination before the selected candidate can be posted for active duty.

56. According to the respondents it has limited capacity of imparting training to the selected candidates. In para-6 of the supplementary counter affidavit filed by State it is stated that there are only seven training centres for imparting training to Sub-Inspectors in U.P. The total capacity of trainee personnel is 5050 and on account of Covid-19 its capacity stands reduced to 2530 trainees.

57. In para-7 of the supplementary counter affidavit it is stated that selected sub-inspectors of 2016-17 recruitment could be sent for training only after a fresh select list was drawn in compliance of the Division Bench judgment in the case of Atul Kumar Dwivedi (supra) and their training is yet incomplete.

58. Petitioners have not disputed the averments made in supplementary counter affidavit filed by State. Learned counsel for petitioners stated before the Court that they do not propose to file any reply to the supplementary counter affidavit which fact is clearly noticed in the order of the Court dated 3.8.2021.

59. Considering the limited capacity available with the State in offering training to selected candidates, the decision of the State Government to await the conclusion of one recruitment cycle before commencing the next recruitment exercise cannot be termed as imprudent.

60. In addition to above it is also sought to be urged that 50% of the posts in cadre of Sub-Inspector are to be filled by way of promotion and the promotees also have to be imparted training which is at the same centre.

61. Aforesaid facts are clearly admitted to the writ petitioners also. Raising of grievance in the matter of recruitment or pendency of dispute before the Courts are an aspect on which State cannot be expected to have any control. Delays in resolution of such issues are common and the State or the Board alone cannot be held responsible for it.

62. Deferment of recruitment cycle on account of pendency of dispute relating to previous recruitment cycle as also due to limited availability of training facility, which does not permit simultaneous batches of different recruits to undergo training at the same time, cannot be said to be unreasonable or arbitrary.

63. Having given its undertaking before Supreme Court to conduct recruitment, annually, the State ought to have apprised the Supreme Court about the compelling circumstances to defer recruitment but the failure to do so by itself would not render the State action arbitrary or unreasonable. This is particularly so, as the proceedings before Supreme Court have otherwise been concluded with the cause being remitted to this Court. None of the petitioners immediately or later came forward to espouse their cause.

64. In view of the decisions made hereinabove and the conclusions arrived at in preceding paragraphs, this Court has no hesitation in holding that justification does exists on record for the State in not conducting annual recruitment for the posts of Sub-Inspector in spite of the undertaking given before Supreme Court.

65. As already noted above the directions issued for conducting recruitment continuously during the years 2017-18, 2018-19 and 2019-20 cannot be directed to be carried out now, as the clock cannot be put back. Moreover, the failure to comply with the undertaking given before Supreme Court is not found to be willful or deliberate as such no further directions are required.

66. The petitioners cannot assert that non observance of undertaking before the Supreme Court by holding annual recruitment would either create a right in them to claim relaxation in upper age of recruitment or to assert such right on the principle of legitimate expectation.

67. The ambit and scope of the principle of legitimate expectation has been examined recently by Supreme Court in the context of right to employment in Kerala State Beverages (M and M) Corporation Ltd. Vs. P.P. Suresh and others, (2019) 9 SCC 710. In the context of a vested right of employment claimed on the basis of Government Order dated 20.2.2002 which allowed 25% reservation for displaced excise workers the Court observed as under in paragraphs 14 to 18:-

"B. **Legitimate expectation**

14. The main argument on behalf of the respondents was that the Government was bound by its promise and could not have resiled from it. They had an indefeasible legitimate expectation of continued employment, stemming from the Government Order dated 20-2-2002 which could not have been withdrawn. It was further submitted on behalf of the respondents that they were not given an opportunity before the benefit that was promised, was taken away. To appreciate this contention of the respondents, it is necessary to understand the concept of legitimate expectation.

15. The principle of legitimate expectation has been recognised by this Court in Union of India v. Hindustan Development Corpn. [Union of India v. Hindustan Development Corpn., (1993) 3 SCC 499] If the promise made by an authority is clear, unequivocal and unambiguous, a person can claim that the authority in all fairness should not act contrary to the promise.

16. M. Jagannadha Rao, J. elaborately elucidated on legitimate expectation in Punjab Communications Ltd. v. Union of India [Punjab Communications Ltd. v. Union of India, (1999) 4 SCC 727]. He referred (at SCC pp. 741-42, para 27) to the judgment in Council of Civil Service Unions v. Minister for the Civil Service [Council of Civil Service Unions v. Minister for the Civil Service, 1985 AC 374 : (1984) 3 WLR 1174 : (1984) 3 All ER 935 (HL)] in which Lord Diplock had observed that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which,

"27. ... (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there have been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or

(ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn." (AC p. 408)

17. Rao, J. observed in this case, that the procedural part of legitimate expectation relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. The substantive part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit, that it will be continued and not be substantially varied, then the same could be enforced.

18. It has been held by R.V. Raveendran, J. in Ram Pravesh Singh v. State of Bihar [Ram Pravesh Singh v. State of Bihar, (2006) 8 SCC 381 : 2006 SCC (L&S) 1986] that legitimate expectation is not a legal right. Not being a right, it is not enforceable as such. It may entitle an expectant: (SCC p. 391, para 15)

"(a) to an opportunity to show cause before the expectation is dashed; or

(b) to an explanation as to the cause for denial. In appropriate cases, the courts may grant a direction requiring the authority to follow the promised procedure or established practice.""

Subjective legitimate expectation has been specifically dealt with in paras 19 to 21 which are reproduced hereinafter:-

**"Substantive Legitimate Expectation**

19. An expectation entertained by a person may not be found to be legitimate due to the existence of some countervailing consideration of policy or law. [ H.W.R. Wade & C.F. Forsyth, Administrative Law (Eleventh Edn., Oxford University Press, 2014).] Administrative policies may change with changing circumstances, including changes in the political complexion of Governments. The liberty to make such changes is something that is inherent in our constitutional form of Government. [Hughes v. Department of Health and Social Security, 1985 AC 776, 788 : (1985) 2 WLR 866 (HL)]

20. The decision-makers' freedom to change the policy in public interest cannot be fettered by applying the principle of substantive legitimate expectation. [Findlay, In re, 1985 AC 318 : (1984) 3 WLR 1159 : (1984) 3 All ER 801 (HL)] So long as the Government does not act in an arbitrary or in an unreasonable manner, the change in policy does not call for interference by judicial review on the ground of a legitimate expectation of an individual or a group of individuals being defeated.

21. The assurance given to the respondents that they would be considered for appointment in the future vacancies of daily wage workers, according to the respondents, gives rise to a claim of legitimate expectation. The respondents contend that there is no valid reason for the Government to resile from the promise made to them. We are in agreement with the explanation given by the State Government that the change in policy due was to the difficulty in implementation of the Government Order dated 20-2-2002. Due deference has to be given to the discretion exercised by the State Government. As the decision of the Government to change the policy was to balance the interests of the displaced abkari workers and a large number of unemployed youth in the State of Kerala, the decision taken on 7-8-2004 cannot be said to be contrary to public interest. We are convinced that the overriding public interest which was the reason for change in policy has to be given due weight while considering the claim of the respondents regarding legitimate expectation. We hold that the expectation of the respondents for consideration against the 25% of the future vacancies in daily wage workers in the Corporation is not legitimate."

68. Distinction has been drawn between substantive legitimate expectation and procedural legitimate expectation. In order to make out a case for substantive legitimate expectation, it will have to be shown that change in policy is not on account of changed circumstances or in public interest and that the action is otherwise arbitrary and unreasonable. In the facts of the present case it has already been found that State had not acted arbitrarily and justification exists for not holding annual recruitment on the post of Sub-Inspector despite the undertaking given by State of U.P. before Supreme Court.

69. Sri Tarun Agrawal for the petitioners has laid much emphasis on the contention that the State having given the undertaking before the Supreme Court for conducting recruitment, annually, a legitimate expectation did arise in favour of petitioners to be able to apply for recruitment against posts of the previous

years when petitioners were within the age of eligibility.

70. The contention has force. Had the petitioners approached this Court, in time, the Court could have issued necessary directions for holding the recruitment annually. However, by the time cause has been brought before this Court the time period for compliance has already elapsed and as already observed above, the clock cannot be put back. As the justification for not holding of recruitment annually is found to have substance the plea of legitimate expectation would not come to the aid of petitioners so as to make them entitled for any relief.

71. Even otherwise, there are no pleadings in the writ petition to the effect that petitioners have altered their position based on the undertaking before the Court, even if it is accepted that undertaking of State amounted to a promise. In order to make out a case of legitimate expectation it will have to be shown that the petitioners have acted upon the promise made. Sri Goel is therefore right in contending that factual foundation has not been laid by the petitioners to claim substantive legitimate expectation.

72. There is yet an another aspect which needs to be emphasized at this stage. It has to be borne in mind that fixation of minimum and maximum age of recruitment is essentially a matter of policy governing the recruitment and unless the policy is found to be contrary to law or otherwise irrational or perverse no interference would be warranted. The fixation of minimum and maximum age i.e. 21 years and 28 years is a matter of policy and lies within the domain of executive. Nothing has been brought on record to demonstrate that there is perversity in the decision or it is biased.

73. In the event petitioners' contention for relaxation in age is accepted on the grounds urged, then all such candidates who are eligible to apply in the recruitment years 2017-18 onwards will have to be allowed age relaxation. The maximum age otherwise fixed as 28 years would stand extended upto 32 years.

74. The process of recruitment has already been delayed by nearly four years and any interference at the asking of petitioners, at this stage, will require further extension in cut off date for accommodating similarly placed persons. This course will clearly cause further delay in complying with the orders of Supreme Court and hence is not permissible. Only permitting the writ petitioners to age relaxation will be causing injustice to all those who are similarly placed but have not approached this Court. While granting relief this Court is expected to keep in mind the interest of similarly placed other persons also.

75. Rule 10 of the Rules of 2015 otherwise specifies the maximum age for recruitment and the petitioners have already crossed it. Rule 10 is not under challenge and therefore no direction can be issued contrary to it. It is now an accepted rule that law is harsh, but it is the law and courts are there to uphold the majesty of law.

76. A writ in the nature of mandamus has been prayed by the petitioners to command the State to exercise powers under Section 46 (2)(c) and 46(3) of the Police Act, 1861 and relax the upper age

limit provided in Rule 10 of the Rules of 2015. Section 46 of the Police Act, 1861 provides for the scope of Act. Sub-section (2) of Section 46 is reproduced hereinafter:-

"46. Scope of Act.- (1) .....

(2) When the whole or any part of this Act shall have been so extended, the State Government may, from time to time, by notification in the Official Gazette, make rules consistent with this Act-

(a) to regulate the procedure to be followed by Magistrates and police-officers in the discharge of any duty imposed upon them by or under this Act;

(b) to prescribe the time, manner and conditions within and under which claims for compensation under section 15A arc to be made, the particulars to be stated in such claims, the manner in which the same are to be verified, and the proceedings (including local inquiries, if necessary) which are to be taken consequent thereon; and

(c) generally, for giving effect to the provisions of this Act."

77. The State Government has already made Rules of 2015 in exercise of powers under Clause (c) of Sub-section (2) read with Sub-section (3) and Section 2 of the Police Act, 1861 which specifies the age of recruitment and is otherwise not under challenge. The Writ Court, therefore, cannot issue any mandamus to the State to relax the upper age limit provided in Rule 10 in the manner it is prayed by the petitioners. A writ of mandamus can be issued only when there is in existence a legal right with corresponding legal duty. Prayer so made has, therefore, to be rejected. No provision otherwise exists in the Police Act, 1861 or the Rules of 2015 which empowers the State to relax the maximum age of recruitment specified in Rule 10.

78. The petitioners have also sought parity with the Constables who have been allowed age relaxation allegedly in similar circumstances. It is urged that vide orders passed on 13.6.2018 the Supreme Court has accepted plea of age relaxation only because the advertisement was delayed. The observations contained in para 3 and 4 are reproduced hereinafter:-

"3. Rule 10 of the Uttar Pradesh Police Constable and Head Constable Services Rules, 2015 stipulates that for direct recruitment for the post of constable, male candidates must have attained the age of 18 years and must not have attained the age of 22 years on the day of 1st July of the calender year in which the vacancies for direct recruitment are advertised. Since the advertisement in question was issued on 14.01.2018, the reckonable date for the purpose of Rule 10 is to be 01.07.2018.

4. The grievance raised by the petitioners is - that the prescribed age limit of not less than 18 years and not more than 22 years is such a short period that if the selections are not undertaken on year to year basis the concerned candidates are bound to be prejudiced. It is their submission that since a representation was made, which was duly recorded in the order quoted hereinabove that selection would be undertaken in the year 2017, an advertisement ought to have been issued in that year itself. However, since the advertisement was issued in January, 2018, going by the text of the Rules the reckoning

date would be 01.07.2018. Since the last selection was in the year 2015 and if the reckoning date today is taken to be 01.07.2018 large body of candidates including the petitioners stand deprived of chance to compete. It is, therefore, submitted that since the selection was to be undertaken in the year 2017, in the fitness of things the reckoning date should be 01.07.2017. Resultantly, candidates including the petitioners would not become age barred for the purpose of being considered for selection. We see force in the submission and find that the grievance so raised merits consideration."

79. The State apparently accepted aforesaid plea and allowed one more chance by counting the maximum age as on 1.7.2017 instead of 1.7.2018. Paragraphs 6 and 7 of the Supreme Court order dated 13.6.2018, wherein above aspect has been dealt with, is reproduced hereinunder:-

"6. Mr. V. Shekhar, learned senior counsel after seeking instructions from Principal Secretary (Home), made following statement:-

In the ensuing examination after the present selection, an exception shall be made in favour of such candidates who missed out merely because the date of reckoning for the present selection happens to be 01.07.2018 instead of 01.07.2017 and at least one more chance shall be given to such candidates to compete.

7. We record the statement and direct the State through its Principal Secretary (Home), to file an appropriate affidavit detailing out the facility to be afforded to such candidates. Said affidavit shall be filed within seven days from today and shall form part of the record. On the strength of the statement of Mr. V. Shekhar, learned senior counsel, we dispose of this special leave petition."

80. The above order of the Court was passed in Special Leave to Appeal (C) No.12569 of 2018 which arose out of a final judgment of this Court in Special Appeal No.6128 of 2018. The context in which the aforesaid order was passed needs to be noticed in order to correctly appreciate the petitioners' claim for age relaxation.

81. The recruitment rules for Constables specify the minimum and maximum age of recruitment as 18 and 22 years, respectively. The applicant at best gets four chances to compete for the post. Last recruitment was held in the year 2015. Fresh recruitment in terms of order dated 24.4.2017 in the case of Manish Kumar (supra) required the State to issue advertisement in the year 2017 but the same was issued only on 14.1.2018 rendering the maximum age of recruitment of 22 years reckonable as on 1.7.2018. The plea for age relaxation was raised promptly before the High Court and thereafter before the Supreme Court.

82. The Supreme Court took note of the fact that no recruitment was held after 2015 and in the event age relaxation was not allowed large number of applicants would be denied of a chance to appear against the posts advertised. There was otherwise delay of only 14 days or else the age of 22 years would have been counted w.e.f. 1.7.2018 instead of 1.7.2017. It was in this context that the State undertook to grant age relaxation by counting the age of 22 years as on 1.7.2017 instead of 1.7.2018.

83. Facts in the present case, however, are distinct. The minimum and maximum age of recruitment is 21 and 28 years. Last recruitment was held in the year 2016. It cannot be said that those who loose out due to non-holding of annual recruitment would have no chance of appearing for recruitment, unlike the Constables. The relaxation sought in this case is four years if the basis of petitioners' claim is accepted unlike one year for the Constables. The process of recruitment, already stands delayed by several years and would be further delayed in case prayer made by petitioners is accepted. Thus the very object of Supreme Court's order dated 24.4.2017 of early appointment shall stand frustrated.

84. In view of the facts and reasons noted hereinabove this Court comes to the inescapable conclusion that despite assurance given by State of U.P. before Supreme Court no ground exists to accept petitioners' claim for grant of age relaxation on the ground of parity with Constables for the purpose of recruitment.

85. As a result all the writ petitions fail and are therefore liable to be dismissed.

86. They are accordingly dismissed.

87. Costs made easy.

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**(2021)10ILR A407**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 20.09.2021**

**BEFORE**

**THE HON'BLE SUNEET KUMAR, J.**

Writ A No. 8117 of 2021
With other cases

**Subhash Chandra Maurya ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Suresh Chandra Shukla, Sri Radha Kant Ojha (Senior Adv.)

**Counsel for the Respondents:**
C.S.C., Sri Shashi Kant Verma

**A. Service Law – Termination – Appointment on the strength of BTC course completed under Physically Handicapped Quota – Allegation of obtaining forged document of P.H. certificate – After 14 years, the Medical Board declared that petitioner is having merely 6% hearing disability – P.H. certificate, which is the basis of appointment, has not been declared to be a forged or manufactured document – No regular enquiry – Termination after issuing show cause notice – Validity challenged – Held, services of the petitioner could not have been terminated outright on mere show cause notice – Medical report, the report, per se, would not be sufficient to terminate the service of the petitioners outright, without returning a further finding that the disability of the petitioners was irreversible and not liable of improvement/cured. (Para 19 and 22)**

**Writ petition allowed.** (E-1)

**Cases relied on :-**

1. Chairman & Managing Director, FCI & ors. Vs Jagdish Balaram Bahira & ors.; AIR 2017 SC 3271

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

1. Heard learned counsels appearing for the petitioners in the batch of connected writ petitions, learned counsels appearing for the respondents and learned standing

counsel for the State-respondents and perused the material placed on record.

2. Learned counsels appearing for the petitioners in the instant writ petition and the other batch of writ petitions submit that the facts, inter se, parties are similar and can be decided by a common judgment.

3. For the sake of convenience, the facts stated in the Writ Petition No. 8117 of 2021 is being referred to for deciding the writ petitions.

4. Petitioner was admitted to Basic Training Course under Physically Handicapped Quota (in short 'P.H.') on the strength of P.H. certificate dated 12.09.2006, issued by the office of the Chief Medical Officer, Sonbhadra, wherein, it is noted that petitioner is having 60% hearing problem (deafness). The petitioner came to be appointed as Assistant Teacher in Primary School, run and managed by second respondent-Basic Shiksha Parishad, Uttar Pradesh on 30.06.2011, under the other backward class category (OBC). Thereafter, on assessing the work, performance and conduct of the petitioner, he came to be promoted on the post of Headmaster on 15.05.2015. In the meantime, the State Government vide Government Order dated 20.07.2018, on having received complaints with regard to forged documents, pertaining to handicapped certificate, social status certificates upon which direct appointments came to be made, accordingly, directed verification of all such certificates with regard to their authenticity/genuineness. As per the Government Order, a three member committee, under the Chairmanship of the Additional District Magistrate, was required to inquire and examine the certificates, other than the seven districts, noted therein, namely, Agra, Aligarh, Firozabad, Hathras, Moradabad, Fatehpur and Hardoi.

5. Para- 6 of the Government Order relevant to the facts of the instant case reads as under:-

*दिव्यांगजन अनुसूचित जाति, जनजाति तथा अन्य आरक्षित वर्ग के फर्जी प्रमाण पत्र प्रस्तुत कर आरक्षित श्रेणी का लाभ लेने के प्रकरण भी सामने आये है। अतः इन सभी प्रमाण पत्रों का पुनः परीक्षण कराकर सत्यापन कराना होगा।1*

6. Pursuant thereof, all such candidates who had obtained appointment under the P.H. category were directed to appear before a Medical Board at Banaras Hindu University, Varansai (in short 'B.H.U.').

7. Petitioners herein were appointed under P.H. category, they appeared before the Medical Board on 29.10.2020.

8. The Medical Board, on examination, declared that petitioner is having 06% hearing disability. On the strength of the report, a show cause notice dated 23.03.2021, was issued by the third respondent-District Basic Education Officer, Sonbhadra, to the petitioner. Petitioner appeared and submitted his reply/objections stating, inter alia, that the P.H. certificate was issued to the petitioner in 2006 by the Government Medical Officer. During fourteen years, thereafter, the impairment of the petitioner improved for the better as petitioner was regularly taking treatment under the supervision of specialized doctors. It was further stated that it is not the case of the respondent that he had obtained appointment on the strength of forged and manufactured document, hence, services of the petitioner

could not have been terminated without following the procedure mandated under the Uttar Pradesh Basic Education (Teachers) Service Rules, 1981, read with Uttar Pradesh Basic Education Staff Rules, 1973 (hereinafter referred to as "Rules, 1973").

9. In rebuttal, learned counsels appearing for the respondents submit that the impugned order has been passed by the appointing authority on the strength of the report of the Medical Board communicated by the Chief Medical Officer, vide communication dated 08.03.2021. The name of the petitioner finds place at serial no. 3. It is further submitted that there was no occasion for conducting disciplinary proceedings since the impairment of the petitioner was much lower (06%) and in some cases (0%) than that mandated to declare the petitioners handicapped i.e. 40%. It is urged that petitioners have obtained appointment by misrepresentation. The impugned order is lawful and liable to be upheld.

10. Rival submissions fall for consideration.

11. The short question that arises for consideration is as to whether the petitioners could have been terminated on a show cause notice, the impugned order resting upon a medical report, without taking recourse under the Rules, 1973.

12. The facts, *inter se*, parties are not in dispute. The petitioner came to be appointed in 2006 as Assistant Teacher under the handicapped quota on the strength of a P.H. certificate dated 12.09.2006. Petitioner was assessed hearing impairment at 60%. Thereafter, petitioner earned promotion on 15.05.2015. On complaints being received by the State Government alleging that several candidates obtained appointments on forged and manufactured documents. Accordingly, vide Government Order dated 20.06.2018, State Government directed the District Magistrate to verify the authenticity of the documents insofar as it relates to the handicapped/social status certificate, in respect of candidates of all districts of the State, barring, seven districts noted in the Government Order. On receiving the report dated 18.03.2021, communicated by the Chief Medical Officer, the third respondent- District Basic Education Officer, Sonbhadra, upon a show cause notice, the services of the petitioner came to be terminated by the impugned order dated 23.06.2021. The order is under challenge.

13. I have perused the Government Order and other material brought on record with the assistance of learned counsel for the petitioners.

14. The Government Order specified that the committee would inquire and examine the genuineness of the certificates issued by the competent authority of all candidates having obtained appointment as Assistant Teachers on the strength of physical handicapped/social status certificates. The committee instead of inquiring into the genuineness/authenticity of the certificates, directed all such candidates, who claim to be handicapped, to appear before the Medical Board for medical examination to ascertain their handicap status.

15. On the medical report, services of the petitioner came to be terminated after issuing a show cause notice dated 22 March 2021. It is no where noted in the impugned

order that the P.H. certificate, issued by the respective Chief Medical Officers, which, inter alia, was the basis for appointment, is a forged or manufactured document. In other words the appointment of the petitioner cannot be said to be void ab initio or non est having obtained on a forged and non-existent document. The genuineness of the document on which the appointment of the petitioner rests is not under doubt nor have the Chief Medical Officer of any district under scrutiny, certified that the P.H. certificate was not issued from their office. The impugned order is founded on an acquired evidence i.e. a fresh medical report without returning a finding of fact that the earlier P.H. certificate issued by the Medical Officer is a forged and/or manufactured document. It is also not the case of the respondents that the impairment of the petitioners at the time of appointment is permanent or irreversible in the backdrop of the Medial Report. The finding cannot have been inferred but would rest upon evidence.

16. The question of fact could have been established in a regular departmental enquiry contemplated under the Rules, 1973. Sub-rule (3) of Rule 5 provides that the procedure prescribed under the U.P. Government Servant (Discipline and Appeal) Rules, 19992, would have to be followed. Rules, 1999, mandates a prescribed procedure for imposing major penalty of termination from service.

17. The Rules, 1999 mandates: (i) framing of charge; (ii) opportunity to the delinquent employee to deny his guilt and establish his innocence; (iii) an opportunity to defend himself by cross examination of witnesses produced against him; (iv) an opportunity to make representation to the proposed punishment.

18. Admittedly, the procedure prescribed thereunder was not followed. The respondents proceeded to terminate the services of the petitioner on an assumption that the P.H. certificate, which is the basis of the employment of the petitioners, is a forged and manufactured document, merely for the reason that the subsequent Medical Board has assessed their disability less than that mandated to declare a person physically handicapped.

19. Having due regard to the facts and circumstances of the case, services of the petitioner could not have been terminated outright on mere show cause notice. Admittedly, the P.H. certificate, which is the basis of appointment, has not been declared to be a forged or manufactured document by the competent authority issuing the certificate. Had the P.H. certificate been a forged and/or manufactured document i.e. non existent document, the procedure adopted by the respondents could have been justified.

20. Three Judge Bench of the Supreme Court in **Chairman and Managing Director, FCI and others Versus Jagdish Balaram Bahira and others3**, upon revisiting the law where the incumbent obtained benefit of admissions/appointment based on false social status certificate held that "where a benefit is secured by an individual - such as an appointment to a post or admission to an educational institution - on the basis that the candidate belongs to a reserved category for which the benefit is reserved, the invalidation of the caste or tribe claim upon verification would result in the appointment or, as the case may be, the admission being rendered void or non est."

21. In that event, the employer would not be required to initiate regular departmental proceedings under the Rules for the reason that the verification of the certificate by the competent authority would bind the disciplinary authority. In such a case, the delinquent employee can be removed from service upon a show cause notice. The disciplinary authority would have no occasion to return a finding in a proceedings to a charge. The very foundation on which the service of the delinquent employee rests upon being demolished, the consequence would be automatic removal from service.

22. In the instant case, the principle is not applicable. The impugned order rests upon a sole evidence i.e. medical report, the report, per se, would not be sufficient to terminate the service of the petitioners outright, without returning a further finding that the disability of the petitioners was irreversible and not liable of improvement/cured. Such a finding could have been returned in a regular disciplinary proceedings conducted under the rules, on a specific charge and either side leading evidence. Admittedly, the procedure mandated under the 1973 Rules, read with, Rules, 1999, was not followed before imposing major penalty that would in the given facts vitiate the impugned order terminating the services of the petitioner.

23. In view thereof, the writ petition is allowed. The impugned order dated 23 June 2021, passed by third respondent-District Basic Education Officer, Sonbhadra, is set aside and quashed. Petitioner of the leading petition and connected petitions shall be reinstated on their respective posts. Petitioners shall be entitled to arrears of salary and salary on month to month thereafter.

24. It is clarified that the disposal of the writ petitions would not preclude the respondents from verifying the genuineness/authenticity of the P.H. certificates as to whether it is a forged or manufactured document.

25. No cost.

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**(2021)10ILR A411**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 04.10.2021**

**BEFORE**

**THE HON'BLE MUNISHWAR NATH BHANDARI, A.C.J.**
**THE HON'BLE PRAKASH PADIA, J.**
**THE HON'BLE SANJAY KUMAR SINGH, J.**

Writ A No. 9814 of 2020

**Uttam Chand Rawat ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Shyam Shanker Pandey, Sri Krishna Mohan Singh, Sri Avneesh Tripathi

**Counsel for the Respondents:**
C.S.C., A.S.G.I., Sri Dhananjay Awasthi,Sri Rahul Sahai

**A. Constitution of India – Article 12 – State or its authority – Definition – Twin test – The writ petition would be maintainable against an authority or person only when it is discharging public duty/public function and the matter pertains to public law – It would be maintainable against the authority or the person which may be a private body, if it discharges public function/public duty, which is otherwise primary function of the State – Apex Court verdict laid down in *KK Saksena's case* followed. (Para 14, 17 and 20)**

**B. Constitution of India – Article 226 – Writ – Maintainability – Authority against whom writ can be maintained – Held, a writ petition would be maintainable against (i) the Government; (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function. (Para 18)**

**C. Constitution of India – Article 226 – Writ – Maintainability – Claim arise out of private contract – Held, if the writ petition refers to contractual obligation inter se between the parties, it would not be maintainable – The writ petition would not be maintainable against an authority or person even if it is discharging public function/public duty, if the controversy pertains to the private law such as a dispute arising out of contract or under the common law. (Para 22)**

**Larger bench decided the issues referred to it by writ court.** (E-1)

**Cases relied on :-**

1. M.K. Gandhi & ors. Vs Director of Education (Secondary) U.P. & ors.; 2005 (3) ESC 2265 (Alld) (FB)

2. Committee of Management, Delhi Public School & anr. Vs M.K. Gandhi & ors.; (2015) 17 SCC 353

3. Ramesh Ahluwalia Vs St.of Pun. & ors.; (2012) 12 SCC 331

4. Lal Bahadur Gautam Vs St.of U.P. & ors.; (2019) 6 SCC 441

5. Roychan Abraham Vs St. of U.P. & ors.; (2019) SCC OnLine All 3935

6. Anjani Kumar Srivastava Vs St. of U.P. & ors., 2017 (7) ADJ 112 (DB)

7. Ramakrishnan Mission & anr. Vs Kago Kunya & ors.; (2019) 16 SCC 303

8. K.K. Saksena Vs International Commission on Irrigation & Drainage & ors.; (2015) 4 SCC 670

9. Ajay Hasia & ors. Vs Khalid Mujib Sehravardi & ors.; (1981) 1 SCC 722

10. Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust Vs V.R. Rudani; (1989) 2 SCC 691

11. Binny Ltd. & anr. Vs Sadasivan & ors., (2005) 6 SCC 657

12. Federal Bank Ltd. Vs Sagar Thomas & ors., (2003) 10 SCC 333

(Delivered by Hon'ble Munishwar Nath Bhandari, A.C.J.)

1. Learned Single Judge has referred following questions to the Larger Bench finding conflicting judgments on the issue :

*"(i) Whether the element of public function and public duty inherent in the enterprise that an educational institution undertakes, conditions of service of teachers, whose functions are a sine qua non to the discharge of that public function or duty, can be regarded as governed by the private law of contract and with no remedy available under Article 226 of the Constitution?*

*(ii) Whether the decision in Rajesh Kumar Srivastava and others versus State of U.P. and others, 2020 (2) AWC 1693 is in teeth of the holding of the Full Bench in Roychan Abraham versus State of U.P. and others, (2019) SCC OnLine All 3935?"*

2. The questions have been referred after detailed consideration of the earlier judgments on the issue. The judgment in the case of ***M.K. Gandhi and others versus Director of Education (Secondary) U.P.***

***and others, 2005 (3) ESC 2265 (Alld) (FB)*** affirmed by the Apex Court in the case of ***Committee of Management, Delhi Public School and another versus M.K. Gandhi and others, (2015) 17 SCC 353*** has also been considered.

3. Learned Single Judge has given reference of the judgments of the Apex Court in the cases of ***Ramesh Ahluwalia versus State of Punjab and others, (2012) 12 SCC 331 and Lal Bahadur Gautam versus State of U.P. and others, (2019) 6 SCC 441***. It also noticed that the issue of maintainability of the writ petition was considered by the Larger Bench in the case of ***Roychan Abraham versus State of U.P. and others, (2019) SCC OnLine All 3935***. It was to revisit the view expressed by the Full Bench in the case of ***M.K. Gandhi (supra)*** and Division Bench in the case of ***Anjani Kumar Srivastava versus State of U.P. and others, 2017 (7) ADJ 112 (DB).*** The Full Bench in the case of ***Roychan Abraham (supra)*** answered the questions as under:-

*"64. Question (i): Private Institutions imparting education to students from the age of six years onwards, including higher education, perform public duty primarily a State function, therefore are amenable to judicial review of the High Court under Article 226 of the Constitution of India.*

*65. Question (ii): The broad principle of law which has been formulated in the judgement of the Full Bench in M.K. Gandhi and Division Bench in Anjani Kr. Srivastava is confined to the facts obtaining therein and is not an authority on the proposition of law that private educational institutions do not render public function and, therefore, are not amenable to judicial review of the High Court. The judgements do not require to be revisited."*

4. Learned Single Judge found judgment in the case of ***Rajesh Kumar Srivastava (supra)*** to be in conflict with other judgments. In the case of ***Rajesh Kumar Srivastava (supra)***, learned Single Judge held writ petition under Article 226 of the Constitution of India to be maintainable against the authority or the person discharging public duty only when issue of public law is involved. The writ petition would not be maintainable if claim is arising out of a private contract between the two parties. The aforesaid view was taken to be in conflict with the earlier judgment of this Court and, accordingly, matter has been referred to the Larger Bench.

5. The questions referred to the Larger Bench is about maintainability of the writ petition against the authority or the person discharging public duty/public function which may not fall within the definition of "State or its authority" under Article 12 of the Constitution of India.

6. The issue aforesaid has been considered by the Apex Court at length recently in the case of ***Ramakrishnan Mission and another versus Kago Kunya and others, (2019) 16 SCC 303.*** In the said case, the Apex Court has considered all the earlier judgment on the issue. The judgment in the case supra was given after considering the scope of Article 12 so as Article 226 of the Constitution of India. It is not only after analyzing the fact of the case but the proposition of law evolved by the Apex Court in the earlier judgments on maintainability of the writ petition. For maintainability of the writ petition, twin test is to be satisfied. The first test is about

the public function/public duty by an authority or a person and the second test is about the challenge to the action falls in the domain of public law. Accordingly, the writ petition would not be maintainable against the authority or the person referred under Article 226 of the Constitution of India merely for the reason of discharge of public function/public duty unless an issue of public law is involved.

7. The word "public law" has been elaborately discussed by the Apex Court in the case of **K.K. Saksena versus International Commission on Irrigation and Drainage and others, (2015) 4 SCC 670**. It was held that private law remedies would not be enforceable through the extraordinary jurisdiction of the High Court. Private law is a part of legal system under the common law that involves relationship between individuals such as law of contract or torts. It was held that even if writ petition is maintainable against an authority or person, before issuing it, Court needs to satisfy itself that the action of the authority or the person is in the domain of public law distinguished from private law. The contractual and commercial obligations are enforceable only by ordinary civil action.

8. In view of the judgments in the cases of ***K.K. Saksena (supra) and Ramakrishnan Mission (supra),*** the issue canvassed by learned Single Judge can be answered but before that, we would like to give reference of other judgments for clarity because issue of maintainability of the writ petition is coming time and again before this Court and presently, two judgments of the Larger Bench exist.

9. The issue of maintainability was initially discussed by the Apex Court in the case of ***Ajay Hasia and others versus Khalid Mujib Sehravardi and others, (1981) 1 SCC 722.*** It was mainly in reference to Article 12 of the Constitution of India. The issue of maintainability of the writ petition against a private body not falling under the definition of "State or its authority" under Article 12 of the Constitution of India needs to be considered under Article 226 of the Constitution of India. For ready reference, Article 12 and 226 of the Constitution of India are quoted hereunder :-

"***12. Definition*** *- In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.*

***226. Power of High Courts to issue certain writs****. -*

*(1) Notwithstanding anything in Article 32, every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.*

*(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to*

*the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.*

*(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without -*

*(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and*

*(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated.*

*(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32."*

10. The issue in reference of Article 12 and 226 of the Constitution of India was considered by the Apex Court in the case of ***Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691***. It was a case where order of termination of a teacher of a private aided and affiliated college was challenged. The Apex Court held writ petition to be maintainable even against the private body finding it to be discharging public duty. It was after referring to the activity of education by Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust. The judgment aforesaid was given in reference to Article 226 of the Constitution of India which provides jurisdiction of the High Court to issue order or writ against any person or authority. According to the judgment in the case supra, the writ petition is maintainable against the private educational institution discharging public duty/public function.

11. The issue of maintainability of the writ petition was again considered by the Apex Court in the case of ***Binny Ltd. and another versus V. Sadasivan and others, (2005) 6 SCC 657.*** It was held that writ of mandamus or remedy under Article 226 of the Constitution of India is a public law remedy and can be exercised against a body or person discharging public function/public duty. The word "public function" was elaborately discussed to define it. It was held that a body or person would be performing public function when it seeks to achieve collective benefit for the public or section thereof. Relevant paras of the said judgment are quoted hereunder:-

*"9. The superior court's supervisory jurisdiction of judicial review is invoked by an aggrieved party in myriad cases. High Courts in India are empowered under Article 226 of the Constitution to*

*exercise judicial review to correct administrative decisions and under this jurisdiction the High Court can issue to any person or authority, any direction or order or writs for enforcement of any of the rights conferred by Part III or for any other purpose. The jurisdiction conferred on the High Court under Article 226 is very wide. However, it is an accepted principle that this is a public law remedy and it is available against a body or person performing a public law function. Before considering the scope and ambit of public law remedy in the light of certain English decisions, it is worthwhile to remember the words of Subba Rao, J. expressed in relation to the powers conferred on the High Court under Article 226 of the Constitution in Dwarkanath v. ITO [(1965) 3 SCR 536 : AIR 1966 SC 81] (SCR, pp. 540 G-541 A):*

*"This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression "nature', for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Court to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary from of Government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself."*

*10. The writ of mandamus lies to secure the performance of a public or a statutory duty. The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities. Originally, the writ of mandamus was merely an administrative order from the Sovereign to subordinates. In England, in early times, it was made generally available through the Court of King's Bench, when the Central Government had little administrative machinery of its own. Early decisions show that there was free use of the writ for the enforcement of public duties of all kinds, for instance against inferior tribunals which refused to exercise their jurisdiction or against municipal corporations which did not duly hold elections, meetings, and so forth. In modern times, the mandamus is used to enforce statutory duties of public authorities. The courts always retained the discretion to withhold the remedy where it would not be in the interest of justice to grant it. It is also to be noticed that the statutory duty imposed on the public authorities may not be of discretionary character. A distinction had always been drawn between the public duties enforceable by mandamus that are statutory and duties arising merely from contract. Contractual duties are enforceable as matters of private law by ordinary contractual remedies such as damages, injunction, specific performance*

*and declaration. In the Administrative Law (9th Edn.) by Sir William Wade and Christopher Forsyth (Oxford University Press) at p. 621, the following opinion is expressed:*

*"A distinction which needs to be clarified is that between public duties enforceable by mandamus, which are usually statutory, and duties arising merely from contract. Contractual duties are enforceable as matters of private law by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by mandamus, which in the first place is confined to public duties and secondly is not granted where there are other adequate remedies. This difference is brought out by the relief granted in cases of ultra vires. If for example a minister or a licensing authority acts contrary to the principles of natural justice, certiorari and mandamus are standard remedies. But if a trade union disciplinary committee acts in the same way, these remedies are inapplicable: the rights of its members depend upon their contract of membership, and are to be protected by declaration and injunction, which accordingly are the remedies employed in such cases."*

*11. Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the Government to run industries and to carry on trading activities. These have come to be known as public sector undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between public functions and private functions when they are being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. In a book on Judicial Review of Administrative Action (5th Edn.) by de Smith, Woolf & Jowell in Chapter 3, para 0.24, it is stated thus:*

*"A body is performing a "public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides "public goods' or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the*

*form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and administrative techniques may be deployed, including rule making, adjudication (and other forms of dispute resolution); inspection; and licensing.*

*Public functions need not be the exclusive domain of the State. Charities, self-regulatory organisations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd's of London, churches) may in reality also perform some types of public function. As Sir John Donaldson, M.R. urged, it is important for the courts to "recognise the realities of executive power' and not allow "their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted'. Non-governmental bodies such as these are just as capable of abusing their powers as is Government."*

*29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies. According to Halsbury's Laws of England, 3rd Edn., Vol. 30, p. 682,*

*"1317. A public authority is a body, not necessarily a county council, municipal corporation or other local authority, which has public or statutory duties to perform and which perform those duties and carries out its transactions for the benefit of the public and not for private profit."*

*There cannot be any general definition of public authority or public action. The facts of each case decide the point.*

*30. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. But nevertheless it may be noticed that the Government or government authorities at all levels are increasingly employing contractual techniques to achieve their regulatory aims. It cannot be said that the exercise of those powers are free from the zone of judicial review and that there would be no limits to the exercise of such powers, but in normal circumstances,*

*judicial review principles cannot be used to enforce contractual obligations. When that contractual power is being used for public purpose, it is certainly amenable to judicial review. The power must be used for lawful purposes and not unreasonably.*

*31. The decision of the employer in these two cases to terminate the services of their employees cannot be said to have any element of public policy. Their cases were purely governed by the contract of employment entered into between the employees and the employer. It is not appropriate to construe those contracts as opposed to the principles of public policy and thus void and illegal under Section 23 of the Contract Act. In contractual matters even in respect of public bodies, the principles of judicial review have got limited application. This was expressly stated by this Court in State of U.P. v. Bridge & Roof Co. (India) Ltd. [(1996) 6 SCC 22] and also in Kerala SEB v. Kurien E. Kalathil [(2000) 6 SCC 293] . In the latter case, this Court reiterated that the interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily, the remedy is not a writ petition under Article 226.*

*32. Applying these principles, it can very well be said that a writ of mandamus can be issued against a private body which is not "State" within the meaning of Article 12 of the Constitution and such body is amenable to the jurisdiction under Article 226 of the Constitution and the High Court under Article 226 of the Constitution can exercise judicial review of the action challenged by a party. But there must be a public law element and it cannot be exercised to enforce purely private contracts entered into between the parties.*

*33. We are unable to perceive any public element in the termination of the employees by the appellant in Civil Appeal No. 1976 of 1998 and the remedy available to the respondents is to seek redressal of their grievance in civil law or under the labour law enactments especially in view of the disputed questions involved as regards the status of employees and other matters. So also, in the civil appeal arising out of SLP (Civil) No. 6016 of 2002, the writ petition has been rightly dismissed by the High Court. We see no merit in the contention advanced by the appellant herein. The High Court rightly held that there is no public law element and the remedy open to the appellant is to seek appropriate relief other than judicial review of the action taken by the respondent Company."*

12. Prior to the judgment aforesaid, the Apex Court had considered the same issue in the case of ***Federal Bank Ltd. versus Sagar Thomas and others, (2003) 10 SCC 333.*** The judgment aforesaid was given after considering the nature of work performed by the Federal Bank. The argument was raised that not only Bank was incorporated under the Companies Act but is governed by regulatory provisions of banking. The Apex Court did not accept the argument on maintainability of the writ petition merely for the reason that the authority or the person was incorporated under the Companies Act and is governed by the regulatory provisions. It was held that a writ petition under Article 226 of the Constitution of India would be maintainable against following; (i) the State

(Government); (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute with compulsion to perform statutory function. The writ petition therein was not held maintainable merely for the reason that Bank was incorporated under the Companies Act and otherwise governed by the regulatory provisions which may be Industries (Development and Regulation) Act, 1951. The Apex Court did not find State dominance or control over the affairs of the company. The relevant paras of the said judgment are quoted hereunder for ready reference :-

*"27. Such private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution. But in certain circumstances a writ may issue to such private bodies or persons as there may be statutes which need to be complied with by all concerned including the private companies. For example, there are certain legislations like the Industrial Disputes Act, the Minimum Wages Act, the Factories Act or for maintaining proper environment, say the Air (Prevention and Control of Pollution) Act, 1981 or the Water (Prevention and Control of Pollution) Act, 1974 etc. or statutes of the like nature which fasten certain duties and responsibilities statutorily upon such private bodies which they are bound to comply with. If they violate such a statutory provision a writ would certainly be issued for compliance with those provisions. For instance, if a private employer dispenses with the service of its employee in violation of the provisions contained under the Industrial Disputes Act, in innumerable cases the High Court interfered and has issued the writ to the private bodies and the companies in that regard. But the difficulty in issuing a writ may arise where there may not be any non-compliance with or violation of any statutory provision by the private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to.*

*28. The six factors which have been enumerated in the case of Ajay Hasia [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] and approved in the later decisions in the case of Ramana [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] and the seven-Judge Bench in the case of Pradeep Kumar Biswas [(2002) 5 SCC 111 : 2002 SCC (L&S) 633] may be applied to the facts of the present case and see whether those tests apply to the appellant Bank or not. As indicated earlier, share capital of the appellant Bank is not held at all by the Government nor is any financial assistance provided by the State, nothing to say which may meet almost the entire expenditure of the company. The third factor is also not answered since the appellant Bank does not enjoy any monopoly status nor can it be said to be an institution having State protection. So far as control over the affairs of the appellant Bank is concerned, they are managed by the Board of Directors elected by its shareholders. No governmental agency or officer is connected with the affairs of the appellant Bank nor is any one of them a member of the Board of Directors. In the normal functioning of the private banking company there is no participation or interference of*

*the State or its authorities. The statutes have been framed regulating the financial and commercial activities so that fiscal equilibrium may be kept maintained and not get disturbed by the malfunctioning of such companies or institutions involved in the business of banking. These are regulatory measures for the purpose of maintaining a healthy economic atmosphere in the country. Such regulatory measures are provided for other companies also as well as industries manufacturing goods of importance. Otherwise these are purely private commercial activities. It deserves to be noted that it hardly makes any difference that such supervisory vigilance is kept by Reserve Bank of India under a statute or the Central Government. Even if it was with the Central Government in place of Reserve Bank of India it would not have made any difference, therefore, the argument based on the decision of All India Bank Employees' Assn. [AIR 1962 SC 171 : (1962) 3 SCR 269] does not advance the case of the respondent. It is only in case of malfunctioning of the company that occasion to exercise such powers arises to protect the interest of the depositors, shareholders or the company itself or to help the company to be out of the woods. In times of normal functioning such occasions do not arise except for routine inspections etc. with a view to see that things are moved smoothly in keeping with fiscal policies in general.*

*29. There are a number of such companies carrying on the profession of banking. There is nothing which can be said to be close to the governmental functions. It is an old profession in one form or the other carried on by individuals or by a group of them. Losses incurred in the business are theirs as well as the profits. Any business or commercial activity, maybe banking, manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money are no doubt, such which do have impact on the economy of the country in general. But such activities cannot be classified as one falling in the category of discharging duties or functions of a public nature. Thus the case does not fall in the fifth category of cases enumerated in the case of Ajay Hasia [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] . Again we find that the activity which is carried on by the appellant is not one which may have been earlier carried on by the Government and transferred to the appellant company. For the sake of argument, even if it may be assumed that one or the other test as provided in the case of Ajay Hasia [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] may be attracted, that by itself would not be sufficient to hold that it is an agency of the State or a company carrying on the functions of public nature. In this connection, observations made in the case of Pradeep Kumar Biswas [(2002) 5 SCC 111 : 2002 SCC (L&S) 633] quoted earlier would also be relevant.*

*30. We may now consider the two decisions i.e. Andi Mukta [(1989) 2 SCC 691] and U.P. State Coop. Land Development Bank Ltd. [(1999) 1 SCC 741 : 1999 SCC (L&S) 389 : AIR 1999 SC 753] upon which much reliance has been placed on behalf of the respondents to show that a writ would lie against the appellant company. So far as the decision in the case of U.P. State Coop. Land Development Bank Ltd. [(1999) 1 SCC 741 : 1999 SCC (L&S) 389 : AIR 1999 SC 753] is concerned, it stands entirely on a different*

*footing and we have elaborately discussed it earlier.*

*31. The other case which has been heavily relied upon is Andi Mukta [(1989) 2 SCC 691]. It is no doubt held that a mandamus can be issued to any person or authority performing public duty, owing positive obligation to the affected party. The writ petition was held to be maintainable since the teacher whose services were terminated by the institution was affiliated to the university and was governed by the ordinances, casting certain obligations which it owed to that petitioner. But it is not the case here. Our attention has been drawn by the learned counsel for the appellant to paras 12, 13 and 21 of the decision (Andi Mukta [(1989) 2 SCC 691] ) to indicate that even according to this case no writ would lie against the private body except where it has some obligation to discharge which is statutory or of public character."*

13. The issue was again considered by the Apex Court in the case of ***K.K. Saksena (supra)*** where after elaborate discussion of the issue, a difference between the private law and public law was made. A controversy under private law is held to be a part of legal system under common law depending on individual's relationship which may be under contract law or law of torts, etc. The writ petition involving a question under private/common law would not be maintainable even if an authority or a person is discharging public duty or public function. It was held that if a writ petition is brought against an authority or a person discharging public duty or public function, it would be maintainable if an element of public law is involved. A writ petition involving a question under common law, i.e., arising out of the contract between the parties or a relationship involving a dispute under private law would not be maintainable. The word "public law" has been elaborately discussed and defined in the said judgment and is the governing factor to answer the question referred by learned Single Judge in this case.

14. According to the judgment of the Apex Court in the case of ***K.K. Saksena (supra)***, twin test is to be satisfied for maintainability of the writ petition under Article 226 of the Constitution of India. The writ petition would be maintainable against an authority or person only when it is discharging public duty/public function and the matter pertains to public law. Merely for the reason that an authority or a person is discharging public function/public duty would not be amenable to writ jurisdiction unless the action challenged therein falls under the domain of public law. A dispute arising out of Contract or under the common law would not make a writ to be maintainable. The relevant paras of the judgment in the ***K.K. Saksena (supra)*** are quoted hereunder:-

*"44. Within a couple of years of the framing of the Constitution, this Court remarked in Election Commission of India v. Saka Venkata Rao [Election Commission of India v. Saka Venkata Rao, AIR 1953 SC 210] that administrative law in India has been shaped in the English mould. Power to issue writ or any order of direction for "any other purpose" has been held to be included in Article 226 of the Constitution with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of the King's Bench in England. It is for this reason ordinary "private law remedies" are not*

*enforceable through extraordinary writ jurisdiction, even though brought against public authorities (see Administrative Law, 8th Edn., H.W.R. Wade and C.F. Forsyth, p. 656). In a number of decisions, this Court has held that contractual and commercial obligations are enforceable only by ordinary action and not by judicial review.*

*45. On the other hand, even if a person or authority does not come within the sweep of Article 12 of the Constitution, but is performing public duty, writ petition can lie and writ of mandamus or appropriate writ can be issued. However, as noted in Federal Bank Ltd. [Federal Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733], such a private body should either run substantially on State funding or discharge public duty/positive obligation of public nature or is under liability to discharge any function under any statute, to compel it to perform such a statutory function.*

*46. In the present case, since ICID is not funded by the Government nor is it discharging any function under any statute, the only question is as to whether it is discharging public duty or positive obligation of public nature.*

*47. It is clear from the reading of the impugned judgment that the High Court was fully conscious of the principles laid down in the aforesaid judgments, cognizance whereof is duly taken by the High Court. Applying the test in the case at hand, namely, that of ICID, the High Court opined that it was not discharging any public function or public duty, which would make it amenable to the writ jurisdiction of the High Court under Article 226. The discussion of the High Court is contained in paras 34 to 36 and we reproduce the same for the purpose of our appreciation : (K.K. Saksena case [K.K. Saksena v. International Commission on Irrigation and Drainage, 2011 SCC OnLine Del 1894 : (2011) 180 DLT 204], SCC OnLine Del)*

*"34. On a perusal of the preamble and the objects, it is clear as crystal that the respondent has been established as a scientific, technical, professional and voluntary non-governmental international organisation, dedicated to enhance the worldwide supply of food and fibre for all people by improving water and land management and the productivity of irrigated and drained lands so that there is appropriate management of water, environment and the application of irrigation, drainage and flood control techniques. It is required to consider certain kind of objects which are basically a facilitation process. It cannot be said that the functions that are carried out by ICID are anyway similar to or closely related to those performable by the State in its sovereign capacity. It is fundamentally in the realm of collection of data, research, holding of seminars and organising studies, promotion of the development and systematic management of sustained irrigation and drainage systems, publication of newsletter, pamphlets and bulletins and its role extends beyond the territorial boundaries of India. The memberships extend to participating countries and sometimes, as bye-law would reveal, ICID encourages the participation of interested national and non-member countries on certain conditions.*

*35. As has been held in Federal Bank Ltd. [Federal Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733] solely because a private company carries on banking business, it cannot be said that it*

*would be amenable to the writ jurisdiction. The Apex Court has opined that the provisions of the Banking Regulation Act and other statutes have the regulatory measure to play. The activities undertaken by the respondent Society, a non-governmental organisation, do not actually partake the nature of public duty or State actions. There is absence of public element as has been stated in V.R. Rudani [Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691] and Sri Venkateswara Hindu College of Engg. [K. Krishnamacharyulu v. Sri Venkateswara Hindu College of Engg., (1997) 3 SCC 571 : 1997 SCC (L&S) 841] It also does not discharge duties having a positive application of public nature. It carries on voluntary activities which many a non-governmental organisations perform. The said activities cannot be stated to be remotely connected with the activities of the State. On a scrutiny of the Constitution and bye-laws, it is difficult to hold that the respondent Society has obligation to discharge certain activities which are statutory or of public character. The concept of public duty cannot be construed in a vacuum. A private society, in certain cases, may be amenable to the writ jurisdiction if the writ court is satisfied that it is necessary to compel such society or association to enforce any statutory obligation or such obligations of public nature casting positive public obligation upon it.*

*36. As we perceive, the only object of ICID is for promoting the development and application of certain aspects, which have been voluntarily undertaken but the said activities cannot be said that ICID carries on public duties to make itself amenable to the writ jurisdiction under Article 226 of the Constitution."*

15. The issue was recently considered by the Apex Court in the case of ***Ramakrishnan Mission (supra).*** In the said judgment, the Apex Court has elaborately discussed the earlier judgments. The writ petition was not found maintainable against the mission merely for the reason that it is running a hospital, thus discharging public function/public duty. It is also when the land was allotted by the State on concessional price and the Mission was even receiving aid. It was found that aid received from the Government is not sufficient to meet with the expenditure incurred by the Mission. The Apex Court has considered the issue in reference to the element of public function which should be akin to the work performed by the State in its sovereign capacity. In the light of the judgment aforesaid, every public function/public duty would not make a writ petition to be maintainable against an authority or a person referred under Article 226 of the Constitution of India unless functions are such which are akin to the functions of the State or are sovereign in nature. Relevant paras of the said judgment are quoted hereunder for ready reference :-

*"17. The basic issue before this Court is whether the functions performed by the hospital are public functions, on the basis of which a writ of mandamus can lie under Article 226 of the Constitution.*

*18. The hospital is a branch of the Ramakrishna Mission and is subject to its control. The Mission was established by Swami Vivekanand, the foremost disciple of Shri Ramakrishna Paramhansa. Service to humanity is for the organisation co-equal with service to God as is reflected in the*

*motto "Atmano Mokshartham Jagad Hitaya Cha". The main object of the Ramakrishna Mission is to impart knowledge in and promote the study of Vedanta and its principles propounded by Shri Ramakrishna Paramahansa and practically illustrated by his own life and of comparative theology in its widest form. Its objects include, inter alia to establish, maintain, carry on and assist schools, colleges, universities, research institutions, libraries, hospitals and take up development and general welfare activities for the benefit of the underprivileged/backward/tribal people of society without any discrimination. These activities are voluntary, charitable and non-profit making in nature. The activities undertaken by the Mission, a non-profit entity are not closely related to those performed by the State in its sovereign capacity nor do they partake of the nature of a public duty.*

*19. The Governing Body of the Mission is constituted by members of the Board of Trustees of Ramakrishna Math and is vested with the power and authority to manage the organisation. The properties and funds of the Mission and its management vest in the Governing Body. Any person can become a member of the Mission if elected by the Governing Body. Members on roll form the quorum of the annual general meetings. The Managing Committee comprises of members appointed by the Governing Body for managing the affairs of the Mission. Under the Memorandum of Association and Rules and Regulations of the Mission, there is no governmental control in the functioning, administration and day to day management of the Mission. The conditions of service of the employees of the hospital are governed by service rules which are framed by the Mission without the intervention of any governmental body.*

*20. In coming to the conclusion that the appellants fell within the description of an authority under Article 226, the High Court placed a considerable degree of reliance on the judgment of a two-Judge Bench of this Court in Andi Mukta [Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691]. Andi Mukta [Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691] was a case where a public trust was running a college which was affiliated to Gujarat University, a body governed by the State legislation. The teachers of the University and all its affiliated colleges were governed, insofar as their pay scales were concerned, by the recommendations of the University Grants Commission. A dispute over pay scales raised by the association representing the teachers of the University had been the subject-matter of an award of the Chancellor, which was accepted by the government as well as by the University. The management of the college, in question, decided to close it down without prior approval. A writ petition was instituted before the High Court for the enforcement of the right of the teachers to receive their salaries and terminal benefits in accordance with the governing provisions. In that context, this Court dealt with the issue as to whether the management of the college was amenable to the writ jurisdiction. A number of circumstances weighed in the ultimate decision of this Court, including the following:*

*20.1. The trust was managing an affiliated college.*

*20.2. The college was in receipt of government aid.*

*20.3. The aid of the government played a major role in the control, management and work of the educational institution.*

*20.4. Aided institutions, in a similar manner as government institutions, discharge a public function of imparting education to students.*

*20.5. All aided institutions are governed by the rules and regulations of the affiliating University.*

*20.6. Their activities are closely supervised by the University.*

*20.7. Employment in such institutions is hence, not devoid of a public character and is governed by the decisions taken by the University which are binding on the management.*

*21. It was in the above circumstances that this Court came to the conclusion that the service conditions of the academic staff do not partake of a private character, but are governed by a right-duty relationship between the staff and the management. A breach of the duty, it was held, would be amenable to the remedy of a writ of mandamus. While the Court recognised that "the fast expanding maze of bodies affecting rights of people cannot be put into watertight compartments", it laid down two exceptions where the remedy of mandamus would not be available: (SCC p. 698, para 15)*

*"15. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus."*

*22. Following the decision in Andi Mukta [Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691] , this Court has had the occasion to re-visit the underlying principles in successive decisions. This has led to the evolution of principles to determine what constitutes a "public duty" and "public function" and whether the writ of mandamus would be available to an individual who seeks to enforce her right.*

*25. A similar view was taken in Ramesh Ahluwalia v. State of Punjab [Ramesh Ahluwalia v. State of Punjab, (2012) 12 SCC 331 : (2013) 3 SCC (L&S) 456 : 4 SCEC 715], where a two-Judge Bench of this Court held that a private body can be held to be amenable to the jurisdiction of the High Court under Article 226 when it performs public functions which are normally expected to be performed by the State or its authorities.*

*26. In Federal Bank Ltd. v. Sagar Thomas [Federal Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733], this Court analysed the earlier judgements of this Court and provided a classification of entities against whom a writ petition may be maintainable: (SCC p. 748, para 18)*

*"18. From the decisions referred to above, the position that emerges is that a writ petition under Article 226 of the Constitution of India may be maintainable against (i) the State (Government); (ii) an*

*authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function." (emphasis supplied)*

*27. In Binny Ltd. v. V. Sadasivan [Binny Ltd. v. V. Sadasivan, (2005) 6 SCC 657 : 2005 SCC (L&S) 881], a two-Judge Bench of this Court noted the distinction between public and private functions. It held thus: (SCC pp. 665-66, para 11)*

*"11. ... It is difficult to draw a line between public functions and private functions when they are being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest."*

*28. The Bench elucidated on the scope of mandamus: (SCC p. 673, para 29)*

*"29. ... However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action ... There cannot be any general definition of public authority or public action. The facts of each case decide the point." (emphasis supplied)*

*29. More recently in K.K. Saksena v. International Commission on Irrigation & Drainage [K.K. Saksena v. International Commission on Irrigation & Drainage, (2015) 4 SCC 670 : (2015) 2 SCC (Civ) 654 : (2015) 2 SCC (L&S) 119] , another two-Judge Bench of this Court held that a writ would not lie to enforce purely private law rights. Consequently, even if a body is performing a public duty and is amenable to the exercise of writ jurisdiction, all its decisions would not be subject to judicial review. The Court held thus: (SCC p. 692, para 43)*

*"43. What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is "State" within the meaning of Article 12 of the Constitution, admittedly a writ petition under Article 226 would lie against such a person or body. However, we may add that even in such cases writ would not lie to enforce private law rights. There are a catena of judgments on this aspect and it is not necessary to refer to those judgments as that is the basic principle of judicial review of an action under the administrative law. The reason is obvious. A private law is that part of a legal system which is a part of common law that involves relationships between individuals, such as law of contract or torts. Therefore, even if writ petition would be maintainable against an authority, which is "State" under Article 12 of the*

*Constitution, before issuing any writ, particularly writ of mandamus, the court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law."*

*30. Thus, even if the body discharges a public function in a wider sense, there is no public law element involved in the enforcement of a private contract of service.*

*31. Having analysed the circumstances which were relied upon by the State of Arunachal Pradesh, we are of the view that in running the hospital, Ramakrishna Mission does not discharge a public function. Undoubtedly, the hospital is in receipt of some element of grant. The grants which are received by the hospital cover only a part of the expenditure. The terms of the grant do not indicate any form of governmental control in the management or day to day functioning of the hospital. The nature of the work which is rendered by Ramakrishna Mission, in general, including in relation to its activities concerning the hospital in question is purely voluntary.*

*32. Before an organisation can be held to discharge a public function, the function must be of a character that is closely related to functions which are performed by the State in its sovereign capacity. There is nothing on record to indicate that the hospital performs functions which are akin to those solely performed by State authorities. Medical services are provided by private as well as State entities. The character of the organisation as a public authority is dependent on the circumstances of the case. In setting up the hospital, the Mission cannot be construed as having assumed a public function. The hospital has no monopoly status conferred or mandated by law. That it was the first in the State to provide service of a particular dispensation does not make it an "authority" within the meaning of Article 226. State Governments provide concessional terms to a variety of organisations in order to attract them to set up establishments within the territorial jurisdiction of the State. The State may encourage them as an adjunct of its social policy or the imperatives of economic development. The mere fact that land had been provided on a concessional basis to the hospital would not by itself result in the conclusion that the hospital performs a public function. In the present case, the absence of State control in the management of the hospital has a significant bearing on our coming to the conclusion that the hospital does not come within the ambit of a public authority.*

*33. It has been submitted before us that the hospital is subject to regulation by the Clinical Establishments (Registration and Regulation) Act, 2010. Does the regulation of hospitals and nursing homes by law render the hospital a statutory body? Private individuals and organizations are subject to diverse obligations under the law. The law is a ubiquitous phenomenon. From the registration of birth to the reporting of death, law imposes obligations on diverse aspects of individual lives. From incorporation to dissolution, business has to act in compliance with law. But that does not make every entity or activity an authority under Article 226. Regulation by a statute does not constitute the hospital as a body which is constituted under the statute. Individuals and organisations are subject to statutory requirements in a*

*whole host of activities today. That by itself cannot be conclusive of whether such an individual or organisation discharges a public function. In Federal Bank [Federal Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733], while deciding whether a private bank that is regulated by the Banking Regulation Act, 1949 discharges any public function, the Court held thus: (SCC pp. 758-59, para 33)*

*"33. ... in our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or a company carrying on any statutory or public duty. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. We don't find such conditions are fulfilled in respect of a private company carrying on a commercial activity of banking. Merely regulatory provisions to ensure such activity carried on by private bodies work within a discipline, do not confer any such status upon the company nor put any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution. Present is a case of disciplinary action being taken against its employee by the appellant Bank. The respondent's service with the Bank stands terminated. The action of the Bank was challenged by the respondent by filing a writ petition under Article 226 of the Constitution of India. The respondent is not trying to enforce any statutory duty on the part of the Bank." (emphasis supplied)*

*34. Thus, contracts of a purely private nature would not be subject to writ jurisdiction merely by reason of the fact that they are structured by statutory provisions. The only exception to this principle arises in a situation where the contract of service is governed or regulated by a statutory provision. Hence, for instance, in K.K. Saksena [K.K. Saksena v. International Commission on Irrigation & Drainage, (2015) 4 SCC 670 : (2015) 2 SCC (Civ) 654 : (2015) 2 SCC (L&S) 119] this Court held that when an employee is a workman governed by the Industrial Disputes Act, 1947, it constitutes an exception to the general principle that a contract of personal service is not capable of being specifically enforced or performed.*

*35. It is of relevance to note that the Act was enacted to provide for the regulation and registration of clinical establishments with a view to prescribe minimum standards of facilities and services. The Act, inter alia, stipulates conditions to be satisfied by clinical establishments for registration. However, the Act does not govern contracts of service entered into by the hospital with respect to its employees. These fall within the ambit of purely private contracts, against which writ jurisdiction cannot lie. The sanctity of this distinction must be preserved."*

16. In the light of the judgments referred to above, it is not difficult to answer questions framed by learned Single Judge. We are not elaborately discussing the judgments of the Larger Bench of this Court for the reason that the recent judgment of the Apex Court covers the issue. Thus, the questions can be answered with clarity though the earlier decision of the Larger Bench of this Court in the case of ***Roychan Abraham (supra)*** is also based on the judgment of the Apex Court referred in this order.

17. The substance of the discussion made above is that a writ petition would be maintainable against the authority or the person which may be a private body, if it discharges public function/public duty, which is otherwise primary function of the State referred in the judgment of the Apex Court in the case of **Ramakrishnan Mission (supra)** and the issue under public law is involved. The aforesaid twin test has to be satisfied for entertaining writ petition under Article 226 of the Constitution of India.

18. From the discussion aforesaid and in the light of the judgments referred above, a writ petition under Article 226 of the Constitution would be maintainable against (i) the Government; (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function.

19. There is thin line between "public functions" and "private functions" discharged by a person or a private body/authority. The writ petition would be maintainable only after determining the nature of the duty to be enforced by the body or authority rather than identifying the authority against whom it is sought.

20. It is also that even if a person or authority is discharging public function or public duty, the writ petition would be maintainable under Article 226 of the Constitution, if Court is satisfied that action under challenge falls in the domain of public law, as distinguished from private law. The twin tests for maintainability of writ are as follows :

*1. The person or authority is discharging public duty/public functions.*

*2. There action under challenge falls in domain of public law and not under common law.*

21. The writ petition would not be maintainable against an authority or a person merely for the reason that it has been created under the statute or is to governed by regulatory provisions. It would not even in a case where aid is received unless it is substantial in nature. The control of the State is another issue to hold a writ petition to be maintainable against an authority or a person.

22. If the writ petition refers to contractual obligation inter se between the parties, it would not be maintainable. Thus, the twin test, as suggested by us in this judgment is to be satisfied for maintainability of the writ petition and that too, after taking notice of the finding and observation made by us in reference to the nature of authority or person. Accordingly, we answer the questions referred by learned Single Judge in following terms :

*(1) The remedy under Article 226 of the Constitution of India would be available against an authority or a person only when twin tests are satisfied. The authority or the person should not only discharge public function or public duty but the action challenged therein should fall in the domain of public law. The writ petition would not be maintainable against an authority or person even if it is*

*discharging public function/public duty, if the controversy pertains to the private law such as a dispute arising out of contract or under the common law.*

*(2) The judgment of this Court in the case of* ***Rajesh Kumar Srivastava (supra)*** *is not against the ration pronounced by the Larger Bench in the case of* ***Roychan Abraham (supra)*** *rather it has followed the judgment of the Apex Court in the case of* ***K. K. Saksena (supra).***

23. Since the questions have been answered by the Larger Bench, the Registry is directed to place this order before the learned Single Judge where the writ petition is pending for hearing.

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**(2021)10ILR A431**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 23.09.2021**

**BEFORE**

**THE HON'BLE SALIL KUMAR RAI, J.**

Writ A No. 14185 of 2020
AND
Writ A No. 1429 of 2021
AND
Writ A No. 14504 of 2020

**Dr. Manohar Lal & Ors. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Sri Mritunjay Mohan Sahai

**Counsel for the Respondents:**
C.S.C., Sri Ajeet Kumar Singh, Sri Shashi Prakash Rai

**A. Service Law – UP State Universities Act, 1973 – Self Financing Courses – Contractual appointment – Appointment letter provided that the tenure would be subject to the decision of the government – Non-payment of salary – Validity challenged – Held, the recital in the appointment letters that the tenure of the petitioners was subject to the decision of the government was a representation, a promise, held out by the University to the petitioners – The University intends to renege from the assurance given to the petitioners. It cannot and the University has to be scrupulously held to its promise. (Para 44)**

**B. Constitution of India – Article 12 – State and other instrumentality – Definition – The University is a State under Article 12 of the Constitution and imparts higher education to students which is a public function and primarily a government function – The University being 'State', its acts are to be in consonance with Part III of the Constitution and have to confirm to the requirements of Article 14 of the Constitution and the rule inhibiting arbitrariness. (Para 38 and 39)**

**C. Constitution of India – Article 14 – Right to equality – Right against arbitrariness and unreasonableness – Ambit and Scope – Arbitrariness and equality were incompatible and inequality is implicit in any arbitrary act of the State and every arbitrary act of the State violates Article 14 – Requirement of non-arbitrariness in State actions demands that the action should be based on relevant considerations and must not be guided by any extraneous or irrelevant considerations and State action would amount to mala fide exercise of power and would be hit by Article 14 if the reason for the action was not legitimate and relevant but extraneous and outside the area of permissible considerations – E.P. Royappa's case followed. (Para 32)**

**D. Constitution of India – Article 14 – Doctrine of legitimate expectation – Right of hearing – Procedural fairness – Right against non-arbitrariness – Where the**

**decision maker, by his representation or past actions, had led the affected person to believe that any benefit enjoyed by the person would not be withdrawn without giving him an opportunity to represent in the matter – With the passage of time the doctrine has been extended to bind the public authorities to their representations assuring any benefit of a substantive nature unless some overriding public interest comes in way. (Para 45)**

**E. Constitution of India – Article 226 – Writ – Nature of State – Interference, when warranted – It is not the nature of the function of the State, contractual or otherwise, but the nature of its personality as State which must characterise all its actions and is decisive of the nature of scrutiny permissible for examining the validity of its acts. (Para 37)**

**F. Constitution of India – Article 226 – Writ – Judicial review – Contractual matter, when can be interfered with – Held, relief under Article 226 of the Constitution of India can be granted in disputes arising out of such contracts – There is no bar on the writ courts to direct specific performance of contract of service when State or any 'other authority' which is a State under Article 12 of the Constitution is the employer and one of the contracting party – Writ Courts can even strike down or declare as void a term in the contract if it violates any of the guarantees embodied in Article 14 of the Constitution. (Para 20, 25 and 37)**

**G. Constitution of India – Article 14 and 226 – Writ – Contractual employment by a public authority – Termination – Validity challenged – Held, with the development of law relating to judicial review of administrative actions a writ court can now examine the validity of the termination of a contractual employment by a public authority and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action. (Para 28)**

**H. Constitution of India – Article 226 – Writ – Question of facts, when can be interfered with – Judicial Review – Scope – Held, the Court may also adjudicate disputed questions of fact though the remedy under Article 226 of the Constitution, being a discretionary remedy, the Courts may, in certain circumstances, refrain from exercising their powers. (Para 20)**

**Writ petition allowed.** (E-1)

**Cases relied on :-**

1. Dr. Suresh Kumar Pandey Vs St. of U.P. & ors.; (2013) 3 A.D.J. 505

2. St. of Har. Vs Piyara Singh; (1992) 4 SCC 118

3. Mohd. Abdul Kadir Vs Director General of Police & ors.; (2009) 6 SCC 611

4. Kumari Shrilekha Vidyarthi Vs St.of U.P. & ors.; (1991) 1 SCC 212

5. Vinod Kumar Singh Vs St. of U.P. & ors.; (2017) 5 ADJ 808 (DB) (LB)

6. M/s. Bio Tech System Vs S. of U.P. & ors.; (2020) 11 ADJ 488 (DB)

7. Writ A No. 1097 of 2019; Dr. Ritu Verma Vs St. of U.P. & 4 ors. decided on 24.1.2019

8. Sirsi Municipality by its President Vs Cecilia Kom Francis Tellis; 1973 (1) SCC 409.

9. E.P. Royappa Vs St. of T.N. & ors.; (1974) 4 SCC 3

10. R.D. Shetty Vs International Airport Authority of India & ors.; (1979) 3 SCC 489

11. Gujarat State Financial Corporation Vs Lotus Hotels Pvt. Ltd.; (1983) 3 SCC 379

12. Central Inland Water Transport Corp. Ltd. & anr. Vs Brojo Nath Ganguly & anr.; (1986) 3 SCC 156

13. A.B.L. International Ltd. & ors. Vs Export Credit Guarantee Corporation of India Ltd. & ors.; (2004) 3 SCC 553

14. Gridco Ltd. & anr. Vs Sadanand Doloi & ors.; (2011) 15 SCC 16

15. Unitech Ltd. & ors. Vs Telangana State Industrial Infrastructure Corporation (TSIIC) & ors.; (2021) SCC OnLine SC 99

16. K.K. Saxena Vs International Commission On Irrigation and Drainage & ors.; (2015) 4 SCC 670

17. Janet Jeyapaul Vs S.R.M. University; (2015) 16 SCC 530

18. Roychan Abraham Vs St. of U.P. & ors.; 2019(3) ADJ 391 (FB)

19. Punjab Communications Ltd. Vs U.O.I. & ors.; (1999) 4 SCC 727

20. National Buildings Construction Corp. Ltd. Vs S. Raghunathan & ors.; (1998) 7 SCC 66

21. S. of Jharkhand & ors. Vs Brahmputra Metallics Ltd. & ors.; 2020 SCC OnLine SC 968

(Delivered by Hon'ble Salil Kumar Rai, J.)

1. Heard Shri M.M. Sahai and Shri Komal Mehrotra, learned counsel for the petitioners as well as Shri Ajeet Kumar Singh, Senior Counsel, assisted by Shri Shashi Prakash Rai, Advocate, representing Mahatma Gandhi Kashi Vidyapeeth, Varanasi (hereinafter referred to as, 'University') and its Vice Chancellor and Registrar, i.e., respondent Nos. 2 to 4.

2. In order to systemize the running of Self Financing Courses in different Universities and the degree colleges governed by the Uttar Pradesh State Universities Act, 1973 (hereinafter referred to as, 'Act, 1973'), the Government of Uttar Pradesh issued Government Orders dated 28.6.1999 and 4.2.2000, which provided that the teaching as well as non-teaching staff in the Self Financing Courses shall be appointed on contract basis according to the prescribed norms and their services shall come to an end on the discontinuation of the Self Financing Course.

3. In 2013 a Division Bench of this Court through its order dated 1.3.2013, passed in ***Dr. Suresh Kumar Pandey Vs. State of U.P. & Others, (2013) 3 A.D.J. 505*** laid-down certain norms for the Self Financing Courses run by the Universities and the Degree Colleges. The Division Bench directed that the services of teachers appointed under the Self Financing Scheme shall continue till the continuance of the course or till the satisfactory discharge of duty by the teacher. The relevant portion from paragraph No. 53 of the aforesaid judgment is reproduced below :-

"53(iii) All those courses which are open under self-financing scheme, the universities as well as colleges shall at least pay minimum pay scale admissible to teachers in accordance with Rules. **The service of teachers appointed under the self-financing scheme, should be permitted to continue till continuance of course or satisfactory discharge of duty.**

(iv) Since 2000 and onward, the Government has stopped the grant-in-aid and sanction of new course, even then Government shall ensure that Committee of Managements do not exploit the teachers and pay reasonable salary in contractual and ad hoc appointments in the recognized and affiliated colleges."(Emphasis added)

4. In pursuance to the order of the Division Bench in ***Suresh Kumar Pandey (Supra),*** a Government Order dated 15.7.2015 was issued prescribing the norms for Self Financing Courses run by the Universities. The Government Order specifically referred to the order of the Division Bench of this Court and provided that the teachers appointed in the Universities in the Self Financing Courses shall be appointed on a contract basis for

five years and on the expiry of the aforesaid period, the concerned teacher would be entitled to be considered for re-appointment before any fresh process of selection is started and the contract shall be renewed for another five years if the work and conduct of the teachers was found satisfactory. The Universities were also asked to appropriately amend their Statutes to enforce the norms provided in the Government Order dated 15.7.2015. The relevant portions of the Government Order dated 15.7.2015 are reproduced below :-

ष्उच्च शिक्षा अनुभाग–4 लखनऊः दिनांक 15 जुलाई, 2015

विषयः– विश्वविधालयों में स्ववित्तपोषित पाठ्यक्रमों के अन्तर्गत विभिन्न शैक्षिक/शिक्षणेत्तर पदों के सम्बन्ध में मानक।

महोदय,

स्ववित्तपोषित पाठ्यक्रम के संविदा शिक्षकों द्वारा वेतन भुगतान व अन्य सुविधायें प्रदान किय जोन के सम्बन्ध में योजित **रिट याचिका संख्या–729 (एस0बी0)/2012 डा0 सुरेश कुमार पाण्डेय बनाम उत्तर प्रदेश राज्य एवं अन्य में मा0 उच्च न्यायालय, लखनऊ बेंच, लखनऊ द्वारा दिनांक 01.03.2013 को पारित किये गये आदेश का कियात्मक अंश निम्नवत् है :–**

53. We have noticed that not only in the respondent's college, but in other colleges of the State of U.P., the students are admitted without following the norms prescribed by the Statute as well as UGC. Accordingly, we are of the view that the Government should look into it and appropriate orders/circulars should be issued immediately commanding different universities and colleges aided as well as not-aided, containing following directions :-

(i) ...

(ii)...

(iii) All those courses which are open under self-financing scheme, the universities as well as colleges shall at least pay minimum pay scale admissible to teachers in accordance with Rules. The services of teachers appointed under the self-financing scheme, should be permitted to continue till continuance of course or satisfactory discharge of duty.

(iv) Since 2000 and onward, the Government has stopped the grant-in-aid and sanction of new course, even then Government shall ensure that Committee of Managements do not exploit the teachers and pay reasonable salary in contractual and ad hoc appointments in the recognized and affiliated colleges.

(2) ...

3– **अतः मा0 उच्च न्यायालय के उक्त आदेशों के अनुपालन में** शासनादेश संख्या–214/70–4/2000–7 (7)/94, दिनांक 04 फरवरी, 2000 में आंशिक संशोधन करते हुए शासन द्वारा सम्यक विचारोपरान्त राज्य विश्वविधालयों में संचालित स्ववित्तपोषित पाठ्यकर्मों में कार्यरत **शिक्षकों के समस्याओं के निराकरण हेतु पुनः निम्नवत् मार्गदर्शन/दिशा–निर्देश निर्गत किये जाते हैः–**

(1) ...

(2) ...

(3) **राज्य विश्वविधालय में संचालित स्ववित्तपोषित पाठ्यकर्मो में संविदा पर नियुक्त शिक्षकों की संविदा अवधि 5 वर्ष होगी। प्रथम पांच वर्ष की संविदा समाप्त होने पर विश्वविधालय फिर से चयन की कार्यवाही प्रारम्भ करने से पूर्व कार्यरत शिक्षकों, जिनका कार्य एवं आचरण संतोषजनक हो और उनके विरूद्ध कोई अनुशासिक कार्यवाही प्रचलित न हो, के नाम पर निश्चित रूप से विचार**

**किया जायेगा और प्रत्येक पांच वर्ष के पश्चात् उनकी संविदा को अगले पांच वर्ष के लिए नवीनीकरण किया जायेगा।** संविदा पर नियुक्त किसी शिक्षक/शिक्षणेत्तर कर्मचारी का कार्य एवं आचरण संतोषप्रद न होने पर उनहें किसी भी समय हटाया जा सकेगा। कोई भी प्रतिकूल स्थिति उत्पन्न होने पर सम्बन्धित विश्वविधालय के कुलपति का विनिश्चय अन्तिम होगा।

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(7) राज्य विश्वविधालय में संचालित किसी स्ववित्तपोषित पाठ्यक्रम में छात्रों की संख्या शून्य हो जाती है तो विश्वविधालय की कार्यपरिषद् एवं कुलपति तथा कुलाधिपति के अनुमोदनोपरान्त ही ऐसे पाठ्यक्रम को बन्द किया जा सकता है।

4- ---

**5— उपरोक्त उल्लिखित व्यवस्थाओं को लागू करने के सम्बन्ध में राज्य विश्वविधालय की परिनियमावली में तदनुसार प्राविधान करने का कष्ट करें।**

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(Emphasis added)

5. The petitioners were appointed between 2008 to 2015 as teachers in different Self Financing Courses run by the University. It appears that the initial appointments were made for a period of one year or till the end of the academic session, whichever was earlier. The appointments were extended every year till 2015. The appointment letters issued to the petitioners in 2015, provided that the appointments were for a period of five years or till 30.6.2020, whichever was earlier and the petitioners were asked to sign the prescribed contract of service. The appointment letters also provided that the issue regarding the tenure of the appointees had been referred to the Government and the term in the contract fixing the tenure of the appointees to five years was subject to the decision of the Government.

6. On 13.3.2020 another Government Order was issued which prescribed fresh norms regarding the conditions of service of the teaching and non-teaching staff employed in the Self Financing Courses. The subject of the Government Order dated 13.3.2020 specified that the Government Order applied to the 'working' teaching and non-teaching staff employed in the Self Financing Courses. The Government Order, after referring to paragraph No. 53(iii) and (iv) of the judgement of the Division Bench of this Court in ***Dr. Suresh Kumar Pandey (Supra)***, repealed certain Government orders on the subject and provided that the services of the teaching and non-teaching staff in the Self Financing Course shall continue till the satisfactory discharge of their duty. The Government Order dated 13.3.2020 did not repeal the Government Order dated 15.7.2015. In Clause 9 of the Government Order it was stated that it was being issued by the State Government in exercise of its powers under Section 50(6) of the Act, 1973 and the Universities were asked to appropriately modify their Policies/Rules/Statutes in order to comply with the norms laid-down in the Government Order. The relevant portions of the Government Order dated 13.3.2020 are reproduced below :-

**षविषयः—उच्च शिक्षा विभाग के अधीन उत्तर प्रदेश राज्य विश्वविधालयों एवं अशासकीय**

**अनुदानित महाविधालयों में संचालित स्ववित्तपोषित योजनान्तर्गत पाठ्यकर्मों में तथा अशासकीय अनानुदानित स्ववित्तपोषित महाविधालयों में कार्यरत शिक्षकों एवं शिक्षणेत्तर कर्मचारियों के वेतन एवं सेवा शर्तों के मानक आदि के संबंध में।**

...

2– रिट याचिका संख्या–729 (एस0बी0)/2012, डा0 सुरेश कुमार पाण्डेय बनाम उत्तर प्रदेश सरकार व अन्य में मा0 उच्च न्यायालय द्वारा पारित आदेश दिनांक 01.03.2013 का सुसंगत अंश निम्नवत् हैः–

53. (iii) All those courses which are open under self-financing scheme, the universities as well as colleges shall at least pay minimum pay scale admissible to teachers in accordance with Rules. The services of teachers appointed under the self-financing scheme, should be permitted to continue till continuance of course or satisfactory discharge of duty.

(iv) Since 2000 and onward, the Government has stopped the grant-in-aid and sanction of new course, even then Government shall ensure that Committee of Managements do not exploit the teachers and pay reasonable salary in contractual and ad hoc appointments in the recognised and affiliated colleges.

**रिट याचिका संख्या–729 (एस0बी0)/2012 में पारित आदेश दिनांक 01.03.2013 के अनुपालन में शासनादेश संख्या 968/सत्तर–02–2013–18 (99)/2013, दिनांक 30 मई, 2013 द्वारा दिशा निर्देश जारी किये गये हैं।**

3– **माननीय उच्च न्यायालय के आदेशों के समादर में** उत्तर प्रदेश में समस्त स्ववित्तपोषित पाठ्यकर्मों की व्यवस्था को अधिक सुचारू एवं सुदृढ़ बनाने के उद्देश्य से प्रस्तर–1के पार्श्वांकित समस्त शासनादेशों को अवक्रमित करते हुये शासनादेश संख्या 1960/सत्तर–02–97–2 (85)/97, दिनांक 11 नवम्बर, 1997 के क्रम में कतिपय नई व्यवस्थायें लागू की जा रही है, जिनका उल्लेख निम्नलिखित प्रस्तरों में किया जा रहा है।

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7–**शिक्षकों/शिक्षणेत्तर कर्मचारियों की सेवा शर्तों के सम्बन्ध मेंः–**

(1) **शिक्षकों एवं शिक्षणेत्तर कर्मचारियों की सेवा सम्बन्धित विषय के पाठ्यक्रम के चलते रहने अथवा संतोषजनक सेवा रहने तक जारी रहेगी**। असन्तोषजनक सेवा होन की स्थिति में सेवा सम्बन्धी संविदा का विखण्डन करने से पूर्व नैसर्गिक न्याय के सिद्धान्तों का अनुपालन सुनिश्चित करते हुये सम्बन्धित विश्वविधालय के कुलपति का अनुमोदन प्राप्त किया जाना अनिवार्य है।

9– यह आदेश उत्तर प्रदेश राज्य विश्वविधालय अधिनियम, 1973 की धारा 50(6) में राज्य सरकार को प्रदत्त शक्तियों का प्रयोग करते हुये इस निर्देश के साथ निर्गत किये जा रहे हैं कि समस्त स्ववित्तपोषित पाठ्यक्रमों के सम्बन्ध में विश्वविधालय की **नीति/नियम/परिनियम** आदि में यथावश्यक प्राविधान करके उक्त निर्देशों का अनुपालन सुनिश्चित कराया जाएगा।

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(Emphasis added)

7. The main difference between the Government Orders dated 13.3.2020 and 15.7.2015 was regarding the tenure of service of the appointees. While Clause 3(3) of the Government Order dated 15.7.2015 provided that the tenure of the appointees would be for five years and they shall entitle to be considered for reappointment before starting a fresh process of recruitment; while Clause 7(1)

of the Government Order dated 13.3.2020 provides that the tenure of the appointees would be till the satisfactory discharge of their duties or till the continuance of the Self Financing Course, whichever was earlier.

8. The Government Order dated 13.3.2020 used the word 'salary' for the payments to be made to the staff in lieu of their services under the contract and, therefore, the said payments shall hereinafter be referred as 'salary' in the judgement.

9. The Executive Council of the University in its meeting held on 3.5.2020, accepted the norms laid-down in the Government Order dated 13.3.2020 and decided to incorporate them in the Statutes of the University. However, it has been stated by the counsel for the parties, that the relevant amendments have not yet been made in the statutes because the proposal of the Executive Council has not yet received the assent of the Chancellor.

10. It has been stated by the petitioners that, till 30.6.2020, no notice was issued to the petitioners indicating that they were not satisfactorily discharging their duties and no order was passed terminating their services, but the University has stopped paying the petitioners their salary and has asked the petitioners to execute a fresh contract for another five years after getting their work reviewed by the University. The University has stopped paying salary to the petitioners on the ground that their services came to an end on 30.6.2020. It has been stated in the writ petitions and also in the rejoinder affidavit filed by the petitioners that even after 30.6.2020, the University is taking work from the petitioners treating them to be in service but is not paying them their salary. Certain documents have been annexed by the petitioners with the rejoinder affidavit filed in Writ-A No. 14185 of 2020 to show that the University had taken services from the petitioners for examination and research purposes even after 30.6.2020.

11. Aggrieved by the action of the University in not paying salary to them, the petitioners have filed the present writ petitions for a mandamus commanding the University and its Officers to pay salary to the petitioners from July, 2020 onwards and ensure payment in the subsequent months without any delay.

12. After the hearing in the case was concluded and judgment was reserved, the petitioners in Writ - A No. 14185 of 2020 filed Application No. 4/2021 bringing on record an order dated 10.8.2021 issued by the Registrar of the University, which provides that the services of the teachers referred in the said order shall continue till the continuance of the relevant Self Financing Course or till the satisfactory discharge of duty by the concerned teacher or till the age of his superannuation, whichever was earlier. The order has been passed to implement the decision of the Vice-Chancellor taken in pursuance to the decision of the Executive Council in its meeting held on 3.5.2020 referred earlier. The order has been made effective from 1.7.2021.

13. The respondent Nos. 2, 3 and 4 have filed their counter affidavit in which they have admitted the contract of service executed by the petitioners in July, 2015 which provided that services of the petitioners was on a contract basis for a period of five years. The respondents

justify their act in not paying salary to the petitioners since July, 2020 on the ground that, as per their contract and appointment letters, the services of the petitioners came to an end on 30.6.2020. In their counter affidavit, the respondents have stated that if the petitioners approach the University, the University would consider their reappointment according to the Government Order dated 15.7.2015 read with Government Order dated 13.3.2020 and shall execute a fresh agreement with such petitioners. It has been further stated in the counter affidavit that the University was ready to extend the services of the petitioners if they were willing to sign fresh agreements with the University but shall be paid honorarium from the date of execution of the fresh agreement. It has been further stated in the counter affidavit that petitioner Nos. 3, 5, 8, 9, 11, 12, 14, 16, 19, 20, 24, 26, 27, 28, 29, 30, 32, 33, 35 and 37 have already executed fresh agreements with the University and are being paid honorarium from the date of the execution of the fresh agreement. The fresh agreements executed by the aforesaid petitioners have been annexed with the counter affidavit.

14. A perusal of the agreements annexed with the counter affidavit shows that even though the agreement provides that the contract period was till 30.6.2025, but at the same time it inverbatim incorporates Clause 7(1) of the Government Order dated 13.3.2020. It also appears from the documents annexed with the counter affidavit that fresh agreements were executed by the University only after the said petitioners had agreed for a review of their work by the University.

15. It was argued by the counsel for the petitioners that Clause 7(1) of the Government Order dated 13.3.2020 impliedly repealed the conditions stipulated in Clause 3(3) of the Government Order dated 15.7.2015 and by virtue of Clause 7(1) of the Government Order dated 13.3.2020, the petitioners were entitled to continue in service till satisfactory discharge of their duties without executing any fresh agreement and were to be treated in service as Lecturer under the contract executed in 2015 itself and be paid their salary as Clause 7(1) of the Government Order dated 13.3.2020 overrides the terms in contract restricting the period of service of the petitioners to five years. It was argued that the norms prescribed in the Government Order dated 13.3.2020 were accepted and adopted by the Executive Council in its meeting held on 3.5.2020 and in light of the directions of this Court in ***Dr. Suresh Kumar Pandey (Supra),*** the act of the University in treating the services of the petitioners as having come to an end on 30.6.2020 and not paying salary to the petitioners is arbitrary and violative of Article 14 of the Constitution. It was argued that in any case one ad hoc employee can not be replaced with another ad hoc employee. In support of their arguments, the counsel for the petitioners have relied on the judgements of the Supreme Court reported in ***State of Haryana Vs. Piyara Singh, (1992) 4 SCC 118, Mohd. Abdul Kadir Vs. Director General of Police & Others, (2009) 6 SCC 611, Kumari Shrilekha Vidyarthi Vs. State of Uttar Pradesh & Others, (1991) 1 SCC 212 and the Division Bench of this Court in Dr. Suresh Kumar Pandey Vs. State of U.P. & Others, 2013 (3) ADJ 505.***

16. Rebutting the argument of the counsel for the petitioners, the counsel for the respondents have argued that the Government Order dated 13.3.2020 has not repealed the Government Order dated

15.7.2015 and the Government order dated 13.3.2020 has not been given a retrospective effect. It was argued that the services of the petitioners were governed by the terms of the contract and not by statutory rules and therefore their services have not been terminated but automatically came to an end, as per their contract, on 30.6.2020 and they were not entitled to any payments after 30.6.2020 without executing a fresh agreement with the University. It was also argued by the counsel for the respondent University that the relationship between the University and the petitioners was a master- servant relationship, therefore the termination of the services of the petitioners cannot be declared a nullity by the courts and the courts cannot direct their reinstatement in service which would be the obvious consequence if the relief prayed by the petitioners for payment of their salary for the period after 30.6.2020 is allowed by the court. It was further argued by the counsel for the respondents that the dispute as raised in the writ petitions relates to contractual employment and the writ petitions are not maintainable in contractual matters. It was also argued that the services of the petitioners were governed by the terms of the contract and the Court under Article 226 of the Constitution of India can not go beyond the terms of the agreement/contract executed by the petitioners. In support of their arguments, the counsel for the respondents have relied on the judgements of this Court passed in ***Vinod Kumar Singh Vs. State of U.P. & Others, (2017) 5 ADJ 808 (DB) (LB), M/s. Bio Tech System Vs. State of U.P. & Others, (2020) 11 ADJ 488 (DB)***, Judgement and order dated 24.1.2019 passed in Writ-A No. 1097 of 2019 (***Dr. Ritu Verma Vs. State of U.P. & 4 Others)*** as well as the Judgement of the Supreme Court in ***Sirsi Municipality by its President Vs. Cecilia Kom Francis Tellis, 1973 (1) SCC 409.***

17. I have considered the submissions of the counsel for the parties.

18. Admittedly, the services of the petitioners are contractual in nature. It is also admitted that the contract executed between the petitioners and the University in 2015 provided that the services of the petitioners was for five years or till 30.6.2020, whichever was earlier.

19. The issue before this Court is as to whether the petitioners were entitled to continue in service till satisfactory discharge of their duties or till continuance of the self Financing Course without executing a fresh contract for the said purpose in light of Clause 7(1) of the Government Order dated 13.3.2020 or their services cam to an end, as per their contract on 30.6.2020. The other issue before this Court is regarding the maintainability of the petitions under Article 226 of the Constitution of India as the salary payable to the petitioners is a contractual obligation of the University.

20. The issue regarding maintainability of writ petitions in contractual matters where State or its instrumentality are a party to the contract has been examined by the Supreme Court in numerous cases. The recent trend is that relief under Article 226 of the Constitution of India can be granted in disputes arising out of such contracts and in the process the Court may also adjudicate disputed questions of fact though the remedy under Article 226 of the Constitution, being a discretionary remedy, the Courts may, in

certain circumstances, refrain from exercising their powers.

21. The scope of judicial review of State actions has widened after the judgement of the Supreme Court in ***E.P. Royappa Vs. State of Tamil Nadu and Others, (1974) 4 SCC 3*** which held that non-arbitrariness in State actions was indispensable to the right to equality protected by Article 14 of the Constitution. In ***E.P. Royappa (Supra),*** the court held that equality was antithetic to arbitrariness and 'where an act is arbitrary it is implicit that that it is unequal both according to political logic and constitutional law and therefore violative of Article 14 of the Constitution of India, and if it affects any matter relating to public employment it would also be violative of Article 16 of the Constitution.' The court further held that where the operative reason for State action was not relevant and legitimate but was extraneous and outside the permissible considerations the same would be mala fide exercise of power which is a feature of arbitrariness and thus hit by Article 14. It was observed that:-

"85. ... The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose. J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. ***From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies***; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. ***Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14***, and if it effects any matter relating to public employment, it is also violative of Article 16. ***Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment***. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16.

86. ***It is also necessary to point out that the ambit and reach of Articles 14 and 16 are not limited to cases where the public servant affected has a right to a post.*** Even if a public servant is in an officiating position, he can complain of violation of Articles 14 and 16 if he has been arbitrarily or unfairly treated or subjected to mala fide exercise of power by the State machine. ***It is therefore, no answer to the charge of infringement of Articles 14 and 16 to say that the***

***petitioner had no right to the post of Chief Secretary but was merely officiating in that post***. That might have some relevance to Article 311 but not to Articles 14 and 16. ..."

22. The principle formulated in ***E.P. Royappa (Supra)*** was applied by the Supreme Court in ***R.D. Shetty Vs. International Airport Authority of India and Others, (1979) 3 SCC 489*** to hold, as invalid, the act of the International Airport Authority of India in awarding contract to someone who did not fulfill the eligibility requirements prescribed in the tender documents. The court, while rejecting the contention that the eligibility requirements had no statutory force and hence the departure from them was not justiciable, held that principles of reasonableness and rationality were essential element of non-arbitrariness and must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law and the State cannot act arbitrarily and as a private individual in entering into relationship, contractual or otherwise with a third party. The court, while holding that International Airport Authority of India was a State under Article 12 of the Constitution, held the act of the Airport Authority as being violative of the equality clause of the Constitution and the rule of administrative law inhibiting arbitrary action. It was observed by the court that:-

"12. We agree with the observations of Mathew, J., in V. Punnan Thomas v. State of Kerala [AIR 1969 Ker 81] that:

"The Government, is not and should not be as free as an individual in selecting the recipients for its largesse. ***Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society.*** A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal."

... It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

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20. Now, obviously where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. ***The rule***

***inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise,*** and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance.

21. ***This rule also flows directly from the doctrine of equality embodied in Article 14.*** It is now well-settled as a result of the decisions of this Court in E.P. Royappa v. State of Tamil Nadu [(1974) 4 SCC 3 : (1974) 2 SCR 348] and Maneka Gandhi v. Union of India [(1978) 1 SCC 248] that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory...."

23. The judgement of the Supreme Court in ***R. D. Shetty (Supra)*** settled the issue regarding justiciability of State actions at the time of entering into contracts. However, in later cases the governments and entities held to be State under Article 12 of the Constitution argued against judicial review of their actions during the subsistence of the contract and against the maintainability of actions in writ courts for enforcement of their contractual obligations. The thrust of the arguments on behalf of the State had been that after the making of the contract, whether a commercial agreement or a service contract, any dispute between the parties was in the realm of contract and the State, if it defaults in performing its part of the contract can, at best, be charged with breach of contract for which the remedy was by way of damages or any other remedy available for breach of contract but a writ of mandamus cannot be issued compelling the State to perform its part of the contract. The argument has been that public law remedies cannot be invoked in disputes arising out of contract and the doctrine of fairness and reasonableness applies only in the exercise of statutory or administrative actions of the State and not for fulfillment of contractual obligations which have to be decided on the basis of law of contract. The arguments have been that in contractual matters, writ remedy can, at the most, be invoked only in cases of statutory contracts where actions of the State involve a public duty and when the State action has a public law character attached to it. The aforesaid arguments have been repeatedly rejected by the Supreme Court as would be evident from its judgements referred to subsequently.

24. The issue regarding judicial review of State actions in contractual matters and powers of the courts to enforce the contractual obligations of the State or its instrumentality was also considered by the Supreme Court in ***Gujarat State***

***Financial Corporation Vs. Lotus Hotels Pvt. Ltd., (1983) 3 SCC 379, w***here it was argued that a writ of mandamus cannot be issued compelling the Corporation (which was an instrumentality of State and thus State under Article 12 of the Constitution) to specifically perform a contract entered into by it. The Supreme Court rejected the aforesaid contention and held that the State can not commit breach of a solemn undertaking on which the other side had acted and then contend that the party suffering by the breach of contract may sue for damages but cannot compel for specific performance of the contract. The Supreme Court in addition to holding that the principle of promissory estoppel would estop the State from backing out of its obligation arising from a solemn promise made to the other party in the contract, also applied the principle laid down in ***R. D. Shetty (Supra)*** and held that the State acted unreasonably and violated the rule inhibiting arbitrary action in refusing to fulfill its contractual obligations. The relevant observations of the Supreme Court are reproduced below:-

"12. Viewing the matter from a slightly different angle altogether, it would appear that the appellant is acting in a very unreasonable manner. It is not in dispute that the appellant is an instrumentality of the Government and would be "other authority" under Article 12 of the Constitution. If it be so, as held by this court in *R.D. Shetty v. International Airport Authority of India* [(1979) 3 SCC 489, 511 : AIR 1979 SC 1628 : (1979) 3 SCR 1014, 1041] the rule inhibiting arbitrary action by the Government would equally apply where such corporation dealing with the public whether by way of giving jobs or entering into contracts or otherwise and it cannot act arbitrarily and its action must be in conformity with some principle which meets the test of reason and relevance.

13. Now if appellant entered into a solemn contract in discharge and performance of its statutory duty and the respondent acted upon it, the statutory corporation cannot be allowed to act arbitrarily so as to cause harm and injury, flowing from its unreasonable conduct, to the respondent. ***In such a situation, the court is not powerless from holding the appellant to its promise and it can be enforced by a writ of mandamus*** directing it to perform its statutory duty. A petition under Article 226 of the Constitution would certainly lie to direct performance of a statutory duty by "other authority" as envisaged by Article 12.

14. The High Court accordingly was fully justified in issuing a writ of mandamus to disburse the loan and therefore the appeal fails."

25. In ***Central Inland Water Transport Corporation Limited & Another Vs. Brojo Nath Ganguly & Another, (1986) 3 SCC 156***, the issue was the validity of the termination of the employee invoking Rule 9(i) of the Rules and also the validity the said Rule which was also part of the contract between the Central Inland Water Transport Corporation Ltd., i.e., the Corporation and its employees. The Rule permitted the employer to terminate the services of a permanent employee on three months' notice and further provided that the Corporation, i.e., the employer, may pay the equivalent of three months' basic pay and dearness allowance in lieu of the notice or may deduct a like amount on failure of the employee to give due notice. Rule 9(i) of the Rules had the effect of empowering the employer to terminate the services of a permanent employee without following the principles of natural justice. The High

Court, in writ proceedings, had declared the rule as void and had quashed the termination orders and had also directed the Corporation to reinstate the employees and pay them the arrears of salary. In appeal before the Supreme Court, it was argued by the Corporation that even if the Corporation was a State within the meaning of Article 12 of the Constitution, a contract of employment entered into by it was like any other contract entered into between two parties and a term in that contract cannot be struck down under Article 14 of the Constitution on the ground that it was arbitrary or unreasonable, unconscionable or unfair. The Supreme Court after holding that the Corporation was a State within the meaning of Article 12 of the Constitution, held that Rule 9(i) was against public policy and, therefore, void under Section 23 of the Indian Contract Act, 1872 and also ultravires Article 14 of the Constitution as it violated the audi alteram partem rule and conferred arbitrary power on the employer. The Supreme Court held that an instrumentality or agency of the State was subject to constitutional limitations, and its actions are State actions and must be judged in the light of the Fundamental Rights guaranteed by Part III of the Constitution and must also be in accordance with the Directive Principles of State Policy prescribed by Part IV of the Constitution, including Articles 39(a) and 41. The Supreme Court, after noticing that other legal systems permitted judicial review of contractual transactions where parties did not have equal bargaining power, and in the case before it, the contract was a standard form contract and there was gross inequality of bargaining power between the contracting parties, observed, that Courts in India will also, when called upon, strike down an unfair or unreasonable contract or any such clause in a contract where parties did not have equal bargaining power. It is relevant to note that the Supreme Court held that the remedy under Article 226 was an efficacious remedy in the case because the civil court could have only declared the rule as void and granted a declaration and damages for wrongful termination of service but could not have directed reinstatement as the same would have amounted to granting specific performance of contract of service. The court after declaring the rule as void affirmed the order of the High Court which had directed reinstatement of the employees and payment of arrears of salary to them. The observation of the Supreme Court that the remedy under Article 226 of the Constitution was an efficacious remedy in the case because the civil courts could not have ordered reinstatement as it would have amounted to granting specific performance of contract of service implies that there is no bar on the writ courts to direct specific performance of contract of service when State or any 'other authority' which is a State under Article 12 of the Constitution is the employer and one of the contracting party. The relevant observations of the Supreme Court are reproduced below :-

"103. The contesting respondents could, therefore, have filed a civil suit for a declaration that the termination of their service was contrary to law on the ground that the said Rule 9(i) was void. In such a suit, however, they would have got a declaration and possibly damages for wrongful termination of service but the civil court could not have ordered reinstatement as it would have amounted to granting specific performance of a contract of personal service. ***As the Corporation is "the State", they, therefore, adopted the far more efficacious remedy of filing a***

***writ petition under Article 226 of the Constitution."***

104. As the corporation is "the State" within the meaning of Article 12, it was amenable to the writ jurisdiction of the High Court under Article 226. It is now well-established that an instrumentality or agency of the State being "the State" under Article 12 of the Constitution is subject to the constitutional limitations, and its actions are State actions and must be judged in the light of the Fundamental Rights guaranteed by Part III of the Constitution. (see, for instance, Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi, International Airport Authority case and Ajay Hasia case). The actions of an instrumentality or agency of the State must, therefore, be in conformity with Article 14 of the Constitution. The progression of the judicial concept of Article 14 from a prohibition against discriminatory class legislation to an invalidating factor for any discriminatory or arbitrary State action has been traced in Tulsiram Patel case (at pages 473-476). The principles of natural justice have now come to be recognized as being a part of the constitutional guarantee contained in Article 14.

105. As pointed out above, Rule 9(i) is both arbitrary and unreasonable and it also wholly ignores and sets aside the audi alteram partem rule. It, therefore, violates Article 14 of the Constitution."

(Emphasis added)

26. The issue regarding judicial review of State action in contractual matters was also considered in ***Kumari Shrilekha Vidyarthi (Supra)*** wherein the Supreme Court while considering the validity of a circular issued by the State Government relating to renewal of tenure and also the termination of the engagement of the existing Government Counsel observed that even if the appointments of the District Government Counsel and its concomitants were viewed as purely contractual matters after the appointments were made, even then the termination of a District Government Counsel, by the impugned circular, could be decided on the anvil of Article 14 because every State action in order to survive must be devoid of the vice of arbitrariness which is the crux of Article 14 of the Constitution of India and basic to the rule of law. The Court held that it was the nature of the personality of the State as State which was significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which was decisive while examining the validity of the acts of the State. The Court held that requirements of Article 14 and contractual obligations are not alien concepts and can co-exist. The argument, that the actions of the State after making of the contract but during the subsistence of the contract were not amenable to judicial review on ground of arbitrariness, was rejected and it was held that 'to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14.' The Court observed that, even though to permit judicial review of State actions it was not necessary to import the concept of presence of some public element in a State action, all actions of the State or a public body have an impact on public interest, therefore, the requisite public element for the purpose of judicial review was also present in

contractual matters in which public bodies were involved. In this context the observations of the Supreme Court in ***Kumari Shrilekha Vidyarthi (Supra)*** are reproduced below :-

"**19. Even otherwise and sans the public element so obvious in these appointments, the appointment and its concomitants viewed as purely contractual matters after the appointment is made, also attract Article 14 and exclude arbitrariness permitting judicial review of the impugned State action. ...**

**20. Even apart from the premise that the 'office' or 'post' of D.G.Cs. has a public element which alone is sufficient to attract the power of judicial review for testing the validity of the impugned circular on the anvil of Article 14, we are also clearly of the view that this power is available even without that element on the premise that after the initial appointment, the matter is purely contractual.** Applicability of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, can it be said that the State can thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more? **We have no hesitation in saying that the personality of the State, requiring regulation of its conduct in all spheres by requirements of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirements of Article 14 and contractual obligations are alien concepts, which cannot co-exist.**

21...That being the philosophy of the Constitution, can it be said that it contemplates exclusion of Article 14 - non-arbitrariness which is basic to rule of law - from State actions in contractual field when all actions of the State are meant for public good and expected to be fair and just? We have no doubt that the Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. **In our opinion, it would be alien to the Constitutional Scheme to accept the argument of exclusion of Article 14 in contractual matters.** The scope and permissible grounds of judicial review in such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.

22. ...the State while exercising its powers and discharging its **functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality.** It is a different matter that the scope of judicial review in respect of

disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. **However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.**

...

24. The State cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfill the contractual obligations and remedies flowing from it. **It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act.** The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity."

(Emphasis added)

27. Subsequently, in ***A.B.L. International Ltd. & Others Vs. Export Credit Guarantee Corporation of India Ltd. & Others, (2004) 3 SCC 553***, while dealing with the issue as to whether writ petition under Article 226 of the Constitution of India was maintainable to enforce a contractual obligation of the State or its instrumentality, the Supreme Court while observing that the power to issue prerogative writs under Article 226 was plenary in nature and not limited by any other provision of the Constitution, held that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee enshrined in Article 14 of the Constitution. The relevant observations of the Supreme Court are reproduced below :-

"23. **It is clear from the above observations of this Court, once State or an instrumentality of State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the**

**Constitution of India.** Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of Article 14 then we have no hesitation that **a writ court can issue suitable directions to set right the arbitrary actions of the first respondent.**

...

27. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition :-

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable."

(Emphasis added)

28. In ***Gridco Limited & Another Vs. Sadanand Doloi & Others, (2011) 15 SCC*** 16 the issue before the Supreme Court was regarding the validity of the termination of an employee whose appointment was held, by the Court, to be on contractual basis. The issue before the Supreme court was whether the termination order was amenable to judicial review and whether, on the standards of judicial review applicable to it, the termination suffered from any legal infirmity calling for interference under Article 226 of the Constitution. The Supreme Court while deciding the issue as to whether the termination of the employee suffered from any legal infirmity calling for interference under Article 226 of the Constitution, held in the facts of the case, that there was no material to show that there was any unreasonableness, unfairness, perversity or irrationality in the action of the employer terminating the employment and there was no element of unequal bargaining power between the employer and the employee to call for an over-sympathetic or protective approach towards the latter. However while considering the issue as to whether the termination order was amenable to judicial review and the scope of judicial review in such matters, the Supreme Court, after referring to the observations made in ***Kumari Shrilekha Vidyarthi (Supra)***, noted the shift in legal position regarding amenability to judicial review of a termination of a contractual employment in accordance with the terms of the contract even when one of the contracting parties happened to be the State. The Court held that with the development of law relating to judicial review of administrative actions a writ court can now examine the validity of the termination of a contractual employment by a public authority and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action. It was observed by the Supreme Court that :-

"38. A conspectus of the pronouncements of this court and the development of law over the past few decades thus show that there **has been a notable shift from the stated legal position settled in earlier decisions, that termination of a contractual employment in accordance with the terms of the contract was permissible and the**

**employee could claim no protection against such termination even when one of the contracting parties happened to be the State.** Remedy for a breach of a contractual condition was also by way of civil action for damages/compensation. With the development of law relating to judicial review of administrative actions, a writ Court can now examine the validity of a termination order passed by public authority. **It is no longer open to the authority passing the order to argue that its action being in the realm of contract is not open to judicial review.**

39. **A writ Court is entitled to judicially review the action and determine whether there was any illegality, perversity,unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract...."**

(Emphasis added)

29. Recently in ***Unitech Limited & Others Vs. Telangana State Industrial Infrastructure Corporation (TSIIC) & Others, (2021) SCC OnLine SC 99*** the Supreme Court held that as a matter of principle, jurisdiction under Article 226 is not excluded in contractual matters and even the presence of an arbitration clause within a contract between the State instrumentality and a private party will not be an absolute bar to availing remedies under Article 226, if the state instrumentality violates its constitutional mandate under Article 14 to act fairly and reasonably. The Supreme Court held :-

"40. ... **But as a statement of principle, the jurisdiction under Article 226 is not excluded in contractual matters**. Article 23.1 of the Development Agreement in the present case mandates the parties to resolve their disputes through an arbitration. However, the presence of an arbitration clause within a contract between a state instrumentality and a private party has not acted as an absolute bar to availing remedies under Article 226. **If the state instrumentality violates its constitutional mandate under Article 14 to act fairly and reasonably, relief under the plenary powers of the Article 226 of the Constitution would lie.** This principle was recognized in ABL International:

...

41. **Therefore, while exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities is arbitrary or unfair and in consequence, in violation of Article 14.** The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of state power or a misuse of authority. In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary determination requiring a trial. **But equally, it is well-settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract. ...**" (Emphasis added)

30. At this stage, it would be relevant to consider the cases referred by the counsel for the University in support of his

argument that the present writ petitions were not maintainable because a writ petition is not maintainable in contractual matters or for reinstatement in service of a contractual employee. In support of their argument the respondents have relied on ***Sirsi Municipality (supra), M/s. Bio Tech System (Supra), Vinod Kumar Singh (Supra) and Dr. Ritu Verma (Supra).***

31. In ***Sirsi Municipality (Supra),*** the Supreme court held that dismissal or termination of servant of the State or of local authorities or statutory bodies can be declared to be invalid only if the dismissal is contrary to rules of natural justice or if it is in violation of the provisions of any statute. The respondents rely on the following observations of the Supreme Court :-

"15. The cases of dismissal of a servant fall under three broad heads. The first head relates to relationship of master and servant governed purely by contract of employment. Any breach of contract in such a case is enforced by a suit for wrongful dismissal and damages. Just as a contract of employment is not capable of specific performance similarly breach of contract of employment is not capable of finding a declaratory judgment of subsistence of employment. A declaration of unlawful termination and restoration to service in such a case of contract of employment would be indirectly an instance of specific performance of contract for personal services. Such a declaration is not permissible under the Law of Specific Relief Act.

16. The second type of cases of master and servant arises under Industrial Law. Under that branch of law a servant who is wrongfully dismissed may be reinstated. This is a special provision under Industrial Law. This relief is a departure from the reliefs available under the Indian Contract Act and the Specific Relief Act which do not provide for reinstatement of a servant.

17. The third category of cases of master and servant arises in regard to the servant in the employment of the State or of other public or local authorities or bodies created under statute.

18. Termination or dismissal of what is described as a pure contract of master and servant is not declared to be a nullity however wrongful or illegal it may be. The reason is that dismissal in breach of contract is remedied by damages. **It the case of servant of the State or of local authorities or statutory bodies, courts have declared in appropriate cases the dismissal to be invalid if the dismissal is contrary to rules of natural justice or if the dismissal is in violation of the provisions of the statute. Apart from the intervention of statute there would not be a declaration of nullity in the case of termination or dismissal of a servant of the State or of other local authorities or statutory bodies.**

19. The courts keep the State and the public authorities within the limits of their statutory powers. Where a State or a public authority dismisses an employee in violation of the mandatory procedural requirements or on grounds which are not sanctioned or supported by statute the courts may exercise jurisdiction to declare the act of dismissal to be a nullity. Such implication of public employment is thus distinguished from private employment in pure cases of master and servant."

32. A lot of water has flown under the bridge since the decision of the Supreme Court in ***Sirsi Municipality (Supra)***. ***Sirsi***

***Municipality (Supra)*** was decided before the judgement of the Supreme Court in E.P. Royappa (Supra). It has been observed earlier that the scope of judicial review of State actions has increased after the judgement of the Supreme Court in ***E.P. Royappa (Supra)*** where the Supreme Court gave a new interpretation to the equality clause enshrined in Article 14. It was held in ***E.P. Royappa (Supra)*** that arbitrariness and equality were incompatible and inequality is implicit in any arbitrary act of the State and every arbitrary act of the State violates Article 14. It was observed that the requirement of non-arbitrariness in State actions demands that the action should be based on relevant considerations and must not be guided by any extraneous or irrelevant considerations and State action would amount to mala fide exercise of power and would be hit by Article 14 if the reason for the action was not legitimate and relevant but extraneous and outside the area of permissible considerations. Subsequently the Supreme Court in ***R.D. Shetty (Supra)***, applied the principle laid down in ***E.P. Royappa (Supra)*** to hold as arbitrary and violative the action of an instrumentality of the State in awarding contract to a person who did not fulfill the eligibility requirements prescribed in the tender documents. The other judgements of the Supreme Court referred above show that after the judgements in ***E.P. Royappa (Supra)*** and ***R.D. Shetty (Supra***) there has been a marked change in the attitude of the courts on the issue of judicial review of State actions in contractual matters and now the courts favour judicial review in contractual matters on grounds of violation of Article 14. It is not only the State actions at the threshold, i.e., State action at the time of entering into contract, but also State actions during the subsistence of the contract which are subject to judicial review and a writ petition for enforcement of a contractual obligation of the State is maintainable. It is also apparent that judicial review in contractual matters is not restricted to procedural aspect, e.g., on grounds of violation of principles of natural justice, and the substantive aspect of State actions is also subject to judicial review as any action of the State, even in the realm of contract, would be arbitrary and violative of Article 14 if it is irrational, perverse, unreasonable or unfair. The shift in legal position on the question of judicial review of State actions in matters relating to service contracts was noticed by the Supreme Court in ***Gridco Limited (Supra)*** where the court observed that 'with the development of law relating to judicial review of administrative actions, it was no longer open to the authority to argue that its action, being in the realm of contract, was not open to judicial review'.

33. At this stage, it would be apt to refer to the decision of the Supreme Court in ***K.K. Saxena Vs. International Commission On Irrigation and Drainage and Others, (2015) 4 SCC 670*** where the Court held that a contract of personal service would be enforceable if the employee is employed by an authority which is a State within the meaning of Article 12 of the Constitution. The court did not qualify the said proposition with any exception that the contract would be enforceable only if the breach of contract was in violation of the principles of natural justice or contrary to the relevant statute. The observations of the Supreme Court in paragraph 52 of the judgement are reproduced below:-

"52. It is trite that ***contract of personal service*** cannot be enforced. There are three exceptions to this rule, namely:

(i) when the employee is a public servant working under the Union of India or State;

(ii) ***when such an employee is employed by an authority/body which is a State within the meaning of Article 12 of the Constitution of India***; and

(iii) when such an employee is "workmen" within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 and raises a dispute regarding his termination by invoking the machinery under the said Act.

***In the first two cases, the employment ceases to have private law character and "status" to such an employment is attached.*** In the third category of cases, it is the Industrial Disputes Act which confers jurisdiction on the Labour Court/Industrial Tribunal to grant reinstatement in case termination is found to be illegal."

34. In ***M/s. Bio Tech System (Supra),*** the Division Bench of this Court observed that it can not be held in absolute terms that a writ petition was not maintainable in all contractual matters seeking enforcement of obligations on part of the State or its authorities and the restrictions in exercising powers under Article 226 in contractual matters is essentially a self-imposed restriction. In this context the observation of the Division Bench of this Court in paragraph No. 43 of the reports are reproduced below :-

"4**3. We may, therefore, add that it cannot be held in absolute terms that a writ petition is not maintainable in all contractual matters seeking enforcement of obligations on part of the State or its authorities**. The limitation in exercising powers under Article 226 in contractual matters is essentially a self-imposed restriction. A case where the amount is admitted and there is no disputed question of fact requiring adjudication of detailed evidence and interpretation of the terms of the contract, may be an exception to the aforementioned general principle."

(Emphasis added)

35. In ***Vinod Kumar Singh (Supra)*** this Court had rejected the claim of the petitioner for regularization on the ground that a contractual employee did not fulfill the conditions for regularization as required by the relevant statute and the theory of legitimate expectations can not be successfully advanced by temporary, contractual or casual employees. Regularisation of service is against an existing substantive post. The petitioners, in the present case, are not claiming regularisation of their service. It is not the case of the petitioners that they are entitled to be regularised in service. The grievance of the petitioners is regarding non-payment of their salary as contractual employee in the self financing course run by the University. The case of the petitioners is that the petitioners are entitled to be treated in service till satisfactory discharge of duties by them and are entitled to salary for the period after 30.6.2020 and the act of the University in treating their service to have come to an end on 30.6.2020 is illegal and arbitrary. Whether the claim of the petitioners is justified and whether they have any enforceable right is a different issue but their claim cannot be referred as a claim for regularisation. The observation of this Court in ***Vinod Kumar Singh (Supra)*** holding that the theory of legitimate expectation can not be successfully advanced by a contractual employee is only in the context of the claim for regularization because regularization is made only in accordance with the relevant statutory rules. Evidently, the judgement of

this Court in ***Vinod Kumar Singh (supra)*** is not applicable in the present case.

36. The judgement of this court in ***Dr. Ritu Verma (Supra)*** is also not applicable in the present case as the same relates to transfer of a contractual employee and does not consider the issue regarding applicability of Article 14 in contractual matters.

37. The above discussion shows that it is too late in the day to argue against judicial review of State actions in contractual matters. The above discussion also shows that it is not the nature of the function of the State, contractual or otherwise, but the nature of its personality as State which must characterise all its actions and is decisive of the nature of scrutiny permissible for examining the validity of its acts. Every State action affects public interest "which is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality.' All State actions, including actions in contractual matters whether at the threshold or during the subsistence of the contract, have to confirm to the requirements of Article 14 and the rule inhibiting arbitrary action by "the State'. Reasonableness, fairness and rationality are essential elements of non-arbitrariness and therefore all State actions must confirm to norms which are fair, reasonable and rational. Both, Substantive and procedural elements of State actions, even if the action is in the realm of contract, have to confirm to the principle of non-arbitrariness and are therefore subject to judicial review by writ courts and a mandamus can be issued directing the public authority to fulfill its contractual obligations. Further, the scrutiny is more rigorous in cases of standard form contracts and the Writ Courts can even strike down or declare as void a term in the contract if it violates any of the guarantees embodied in Article 14 of the Constitution. The powers of the Court under Article 226 of the Constitution of India being plenary in nature are not circumscribed by the provisions of any statute including the Specific Relief Act, 1963 and the writ Courts can also direct specific performance of contract of service if the employee is employed by any entity which is a State under Article 12.

38. Under Section 4(2) of the Act, 1973 the University is deemed to have been established under the provisions of the Act, 1973 and is governed by the Act, 1973. It is not in dispute that the University is 'other authority' and therefore State as defined in Article 12 of the Constitution. The University being 'State' under Article 12 of the Constitution, its acts are to be in consonance with Part III of the Constitution and have to confirm to the requirements of Article 14 of the Constitution and the rule inhibiting arbitrariness. The University discharges public function by providing higher education to the students and also by conferring degrees and diplomas on persons who have pursued course of study in the University or in any of its affiliated college. In ***Janet Jeyapaul Vs. S.R.M. University, (2015) 16 SCC 530,*** the Supreme Court and in ***Roychan Abraham Vs. State of U.P. and Others, 2019(3) ADJ 391 (FB)***, a Full Bench of this Court held that providing higher education was a public function.

39. The University is a State under Article 12 of the Constitution and imparts higher education to students which is a public function and primarily a government

function. Appointment of teachers is integral to imparting education. In the light of the aforesaid facts and the observations of the Supreme Court in ***Kumari Srilekha Vidyarthi (Supra)*** that every State action affects public interest "which is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality', it can not be said that the appointments of the petitioners, being contractual in nature, do not give rise to any public law obligations and public law remedy is not available to the petitioners for redressal of their grievance arising from their contractual relationship with the University. Whether the claim of the petitioners is legitimate and whether they are entitled to the relief prayed, is a different issue which shall be considered presently.

40. At this stage it would be helpful to recapitulate the relevant facts of the case which are not in dispute. A Division Bench of this Court in ***Suresh Kumar Pandey (Supra)*** passed orders laying down certain norms for regulating the self financing courses and directed that teachers appointed in the self financing courses should be permitted to continue till the satisfactory discharge of their duties or till the continuance of the course, whichever was earlier. After the decision in ***Suresh Kumar Pandey (Supra)***, the State government issued a Government Order dated 15.7.2015 which provided that the teachers in the self financing courses shall be appointed on contractual basis for a period of five years and, on expiry of the contractual period of five years, shall be entitled to be considered for reappointment. In 2015, the petitioners, were appointed as teachers on contractual basis in different self financing courses run by the University. The appointment letters issued to the petitioners specified that the appointment of the petitioners was on contractual basis for a period of five years or till 30.6.2020, whichever was earlier. The appointment letters further provided that the issue regarding the tenure of the petitioners had been referred to the State government and the tenure of the petitioners as provided in the appointment letters shall be subject to the decision of the government. The petitioners were asked to sign the prescribed contract document. While the petitioners were still working as teachers in the self financing courses run by the University and before their tenure as specified in the appointment letters and the contract document expired, another Government Order dated 13.3.2020 was notified. The Government Order dated 13.3.2020 did not expressly repeal the Government Order dated 15.7.2015 but laid down fresh norms and conditions of service for the teaching and non-teaching staff working in different self financing courses. Clause 7(1) of the Government Order dated 13.3.2020 provided that the services of the teaching and non-teaching staff in the self financing courses shall continue till the satisfactory discharge of their duties or till the continuance of the relevant self financing course. The Government Order dated 13.3.2020 specified that it was being issued by the State government in exercise of its power under Section 50 (6) of the Act, 1973 and the Universities were required to appropriately amend their Statutes and modify their policies in line with the provisions in the Government order. The Executive Council of the University in its meeting held on 3.5.2020 accepted the norms laid down in the Government Order dated 13.3.2020 and resolved to incorporate them in the Statutes of the University. However, the proposed

amendments have not yet received the assent of the Chancellor and therefore the Statutes have not yet been amended. Both the Government Orders provided that they were being issued in pursuance to the directions of this court in ***Suresh Kumar Pandey (Supra)***. The petitioners were not paid their salary for the period after 30.6.2020 because the University considers the services of the petitioners to have come to an end on 30.6.2020 as provided in their contract document.

41. The petitioners plead that by virtue of Clause 7(1) of the Government Order dated 13.3.2020 their tenure stood automatically extended till the satisfactory discharge of their duties or till the continuance of the self financing course and they are not required to execute a fresh agreement with the University therefore the action of the University in not paying salary to the petitioners for the period after 30.6.2020 is unreasonable and arbitrary and violates Article 14 of the the Constitution. The University pleads that the Government Order dated 13.3.2020 is not retrospective therefore not applicable on the petitioners and because the tenure of the petitioners came to an end, as per their contract, on 30.6.2020, the petitioners were not entitled to salary for the period after 30.6.2020.

42. At this stage it would be relevant to consider the statutory provisions regarding the appointment of teachers on contractual basis in the Universities governed by the Act, 1973. Under Section 21(vii) of the Act, 1973, the Executive Council has the power to appoint officers, teachers and other employees of the University **and to define their duties and the conditions of their service.** The Executive Council is a statutory authority. The aforesaid power of the Executive Council is subject to the provisions of the Act, 1973. Sections 31 to 34 of the Act, 1973 relate to appointment of teachers and their conditions of service. Sections 31 to 34 of the Act, 1973 relate to appointments on substantive posts. The petitioners have not been appointed against substantive posts but have been appointed on contractual basis in different Self Financing Courses run by the Universities. There is no provision in Act, 1973 regarding appointment of teachers on contractual basis. However, the power to make contractual employments is implicit in the power to make regular appointments unless the rules governing recruitment specifically forbid the making of such an appointment. Thus, the power to appoint teachers on contract basis and to define their duties and conditions of service vests in the Executive Council by virtue of Section 21(vii) of the Act, 1973. Under Section 21 (xvi) of the Act, 1973 the Executive Council has the power to enter into, vary, carry out and cancel contracts on behalf of the University. A joint reading of Section 21(vii) and Section 21 (xvi) leads to the inference that the Executive Council of the University has the power to vary the terms of even a contract of service executed by the University. Under Section 13(1)(b) of the Act, 1973 the Vice Chancellor of the University is liable to implement the decisions taken by the authorities of the University, which includes the Executive Council.

43. It is evident from the appointment letters of the petitioners, which required that the petitioners sign the 'prescribed' contract document and is also evident from the contract documents annexed with the counter affidavit of the respondents, that the contracts executed by the petitioners was a standard form contract. The

inequality of bargaining power between the petitioners and the University is apparent. The contract between the petitioners and the University was not a product of any negotiation or settlement between the petitioners and the University. It was a 'take it or leave it' situation for the petitioners. There was no mutuality in the contract between the petitioners and the University because of the unequal bargaining power of the parties.

44. The appointment letters issued to the petitioners in 2015 and the contract executed by the petitioners stipulated that the tenure of the petitioners was till 30.6.2020. However, the letter of appointment issued to the petitioners also provided that the issue regarding tenure of the petitioners had been referred to the Government and their tenure **would be subject to the decision of the government**. The appointment letters required the petitioners to sign the prescribed contract. At this stage it is relevant to note that under Section 32 of the Act, 1973 even a teacher appointed on substantive basis in any University has to initially sign a contract of service which is lodged with the Registrar of the University but such contract has to be consistent with the Act, 1973 and the Statutes of the University. The term in the contract limiting the tenure of the petitioners to five years or till 30.6.2020, whichever was earlier, was a result of the provision in the appointment letters and was, therefore, subject to the decision of the government. The recital in the appointment letters that the tenure of the petitioners was subject to the decision of the government was a representation, a promise, held out by the University to the petitioners. The University intends to renege from the assurance given to the petitioners. It can not and the University has to be scrupulously held to its promise. The representation by the University to the petitioners in their appointment letters raises a legitimate expectation that the tenure of the petitioners would be governed by the decision of the government on the issue and not by the provision in the appointment letter or by the term in the contract. No overriding public interest has been brought to the notice of the court to allow the University to avoid its promise.

45. The doctrine of legitimate expectation originated as an aspect of procedural fairness and was restricted to a right of hearing in cases where the decision maker, by his representation or past actions, had led the affected person to believe that any benefit enjoyed by the person would not be withdrawn without giving him an opportunity to represent in the matter. With the passage of time the doctrine has been extended to bind the public authorities to their representations assuring any benefit of a substantive nature unless some overriding public interest comes in way. The representations could be through a promise expressly made or through past actions of the public authorities. The substantive aspect of legitimate expectations is now part of our legal system and it would be abuse of power to deny the promised benefit unless there is any overriding public interest. It was observed by the Supreme Court in ***Punjab Communications Ltd. Vs. Union of India and others, (1999) 4 SCC 727*** that the doctrine of legitimate expectation 'is at the root of the rule of law and requires regularity, predictability and certainty in the Government's dealings with the public.' It was held by the Supreme Court:-

"26. The principle of "legitimate expectation" is still at a stage of evolution as pointed out in de Smith's Administrative

Law (5th Edn.) (para 8.038). ***The principle is at the root of the rule of law and requires regularity, predictability and certainty in the Government's dealings with the public***. Adverting to the basis of legitimate expectation its procedural and substantive aspects, Lord Steyn in Pierson v. Secy. of State [(1997) 3 All ER 577, HL] (All ER at p. 606) goes back to Dicey's description of the rule of law in his Introduction to the Study of the Law of the Constitution [ See also "The Rule of Law as the Rule of Reason: Consent and Constitutionalism" in (1999) 115 LQR 221 at 234 that "Fairness is both procedural and substantive": Due Process and Fair Procedure by D.J. Gallagham (1996); and at p. 242 quoting Dicey (1959) at pp. 203-204.] (10th Edn., 1959, p. 203) as containing principles of enduring value in the work of a great jurist. Dicey said that the constitutional rights have roots in the common law. He said:

"The "rule of law', lastly, may be used as a formula for expressing the fact that with us the law of constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and its servants, thus the constitution is the result of the ordinary law of the land."

This, says Lord Steyn, is the pivot of Dicey's discussion of rights to personal freedom and to freedom of association and of public meeting and that it is clear that ***Dicey regards the rule of law as having both procedural and substantive effects.*** "[T]he rule of law enforces minimum standards of fairness, both substantive and procedural." On the facts in Pierson [(1997) 3 All ER 577, HL] the majority held that the Secretary of State could not have maintained a higher tariff of sentence than recommended by the judiciary when admittedly no aggravating circumstances existed. The State could not also increase the tariff with retrospective effect.

27. ... The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. ***The substantive part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit that it will be continued and not be substantially varied, then the same could be enforced.*** In the above case, Lord Fraser accepted that the civil servants had a legitimate expectation that they would be consulted before their trade union membership was withdrawn because prior consultation in the past was the standard practice whenever conditions of service were significantly altered. Lord Diplock went a little further when he said that they had a legitimate expectation that they would continue to enjoy the benefits of the trade union membership. The interest in regard to which a legitimate expectation could be had must be one which was protectable. ***An expectation could be based on an express promise or representation or by established past action or settled conduct***. The representation must be clear and unambiguous. It could be a representation to the individual or generally to a class of persons.

...

...

...

37. ***The above survey of cases shows that the doctrine of legitimate***

***expectation in the substantive sense has been accepted as part of our law and that the decision-maker can normally be compelled to give effect to his representation in regard to the expectation based on previous practice or past conduct unless some overriding public interest comes in the way.*** The judgment in Raghunathan case [(1998) 7 SCC 66 : 1998 SCC (L&S) 1770] requires that reliance must have been placed on the said representation and the representee must have thereby suffered detriment."

46. The observations in ***National Buildings Construction Corporation Ltd. Vs. S. Raghunathan and Others, (1998) 7 SCC 66*** referred in ***Punjab Communications (supra)*** that the representation of an authority would bind the authority only when the representee has placed reliance on it and has suffered detriment was made at a time when the doctrine of legitimate expectations was still underdeveloped and there was overlapping between the doctrines of promissory estoppel and legitimate expectation. The reason for it was that in the initial stages the doctrine of legitimate expectation was developed in the context of public law as an analogy to the doctrine of promissory estoppel developed in the context of private law and the principles of promissory estoppel were extended to the doctrine of legitimate expectations. The doctrine has subsequently been developed by judicial precedents, independently of the principle of promissory estoppel and to invoke the doctrine it is no more required that the representee should have placed reliance on the representation of the authority and must have thereby suffered detriment. The said development of the doctrine of legitimate expectations has been discussed by the Supreme Court in ***State of Jharkhand and others Vs. Brahmputra Metallics Ltd. and Others, 2020 SCC OnLine SC 968.***

47. In ***Brahmputra Metallics (Supra)***, the Supreme Court held that the doctrine of legitimate expectation in public law is founded on the principle of fairness and non arbitrariness surrounding the conduct of public authorities. The Supreme Court while holding that the representations of public authorities need to be held to scrupulous standards, observed that in order to invoke the doctrine of legitimate expectations it is not required that the party should suffer a detriment due to the reliance placed on the representation of the authority. ***It has been held by the Supreme Court that the doctrine of substantive legitimate expectation is one of the ways in which the guarantee of non-arbitrariness enshrined in Article 14 finds concrete expression.*** *It* was observed by the Supreme Court:-

"36. Under English Law, the doctrine of promissory estoppel has developed parallel to the doctrine of legitimate expectations. ***The doctrine of legitimate expectations is founded on the principles of fairness in government dealings. It comes into play if a public body leads an individual to believe that they will be a recipient of a substantive benefit. ...***

...

56.***...Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and***

***different course will amount to an abuse of power.*** Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.

37. Under English Law, the doctrine of legitimate expectation initially developed in the context of public law as an analogy to the doctrine of promissory estoppel found in private law. ***However, since then, English Law has distinguished between the doctrines of promissory estoppel and legitimate expectation as distinct remedies under private law and public law, respectively. De Smith's Judicial Review 22 notes the contrast between the public law approach of the doctrine of legitimate expectation and the private law approach of the doctrine of promissory estoppel:***

"[despite dicta to the contrary [Rootkin v. Kent CC, [1981] 1 WLR 1186 (CA); R v. Jockey Club Ex p RAM Racecourses Ltd., [1993] A.C. 380 (HL); R v. IRC Ex p Camacq Corp, [1990] 1 WLR 191 (CA)], it is not normally necessary for a person to have changed his position or to have acted to his detriment in order to qualify as the holder of a legitimate expectation [R v. Ministry for Agriculture, Fisheries and Foods Ex p Hamble Fisheries (Offshore) Ltd., (1995) 2 All ER 714 (QB)]... ***Private law analogies from the field of estoppel are, we have seen, of limited relevance where a public law principle requires public officials to honour their undertakings and respect legal certainty, irrespective of whether the loss has been incurred by the individual concerned*** [Simon Atrill, "The End of Estoppel in Public Law?' (2003) 62 Cambridge Law Journal 3]."

(emphasis supplied)

38. Another difference between the doctrines of promissory estoppel and legitimate expectation under English Law is that the latter can constitute a cause of action. ***The scope of the doctrine of legitimate expectation is wider than promissory estoppel because it not only takes into consideration a promise made by a public body but also official practice, as well. Further, under the doctrine of promissory estoppel, there may be a requirement to show a detriment suffered by a party due to the reliance placed on the promise***. Although typically it is sufficient to show that the promisee has altered its position by placing reliance on the promise, the fact that no prejudice has been caused to the promisee may be relevant to hold that it would not be "inequitable" for the promisor to go back on their promise. 24 ***However, no such requirement is present under the doctrine of legitimate expectation***. In Regina (Bibi) v. Newham London Borough Council 25, the Court of Appeal held:

"55 The present case is one of reliance without concrete detriment. We use this phrase because there is moral detriment, which should not be dismissed lightly, in the prolonged disappointment which has ensued; and potential detriment in the deflection of the possibility, for a refugee family, of seeking at the start to settle somewhere in the United Kingdom where secure housing was less hard to come by. ***In our view these things matter in public law, even though they might not found an estoppel or actionable misrepresentation in private law, because they go to fairness and through fairness to possible abuse of power. To disregard the legitimate expectation because no concrete detriment can be shown would be to place the weakest in society at a***

***particular disadvantage. It would mean that those who have a choice and the means to exercise it in reliance on some official practice or promise would gain a legal toehold inaccessible to those who, lacking any means of escape, are compelled simply to place their trust in what has been represented to them."***

(emphasis supplied)

39. Consequently, while the basis of the doctrine of promissory estoppel in private law is a promise made between two parties, ***the basis of the doctrine of legitimate expectation in public law is premised on the principles of fairness and non-arbitrariness surrounding the conduct of public authorities. ....***

...

...

41. While this doctrinal confusion has the unfortunate consequence of making the law unclear, citizens have been the victims. ***Representations by public authorities need to be held to scrupulous standards, since citizens continue to live their lives based on the trust they repose in the State***. In the commercial world also, certainty and consistency are essential to planning the affairs of business. When public authorities fail to adhere to their representations without providing an adequate reason to the citizens for this failure, it violates the trust reposed by citizens in the State. The generation of a business friendly climate for investment and trade is conditioned by the faith which can be reposed in government to fulfil the expectations which it generates.

...

50. ***As such, we can see that the doctrine of substantive legitimate expectation is one of the ways in which the guarantee of non-arbitrariness enshrined under Article 14 finds concrete expression.***

...

53. It is one thing for the State to assert that the writ petitioner had no vested right but quite another for the State to assert that it is not duty bound to disclose its reasons for not giving effect to the exemption notification within the period that was envisaged in the Industrial Policy 2012. Both the accountability of the State and the solemn obligation which it undertook in terms of the policy document militate against accepting such a notion of state power. ***The state must discard the colonial notion that it is a sovereign handing out doles at its will. Its policies give rise to legitimate expectations that the state will act according to what it puts forth in the public realm. In all its actions, the State is bound to act fairly, in a transparent manner. This is an elementary requirement of the guarantee against arbitrary state action which Article 14 of the Constitution adopts. A deprivation of the entitlement of private citizens and private business must be proportional to a requirement grounded in public interest***. This conception of state power has been recognized by this Court in a consistent line of decisions. As an illustration, we would like to extract this Court's observations in National Buildings Construction Cororation (supra):

***" The Government and its departments, in administering the affairs of the country are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of***

***discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice.***"

48. Clause 7(1) of the Government Order dated 13.3.2020 notifies the decision of the government that services of the teachers working in the self financing courses run by the Universities shall continue till the satisfactory discharge of their duties or till the continuance of the self financing course. The Government order dated 13.3.2020 was accepted by the appointing authority, i.e., Executive Council, in its meeting held on 3.5.2020. The University had represented to the petitioners that the period of their service would depend on the decision of the Government. The representations are relevant only for contracts of service executed while the Government Order dated 15.7.2015 was in force. Any promise as made in the appointment letters of the petitioners was not required in the service contracts executed after the Government Order dated 13.3.2020 because such contracts had to be in accordance with Clause 7(1) of the Government Order dated 13.3.2020. The rights of the petitioners, even if they did not crystallise on 13.3.2020, i.e., on the date when the Government Order was issued, they certainly crystallised on 3.5.2020, i.e., the date when the Executive Council decided to accept and adopt the Government Order. The tenure of the petitioners, even as per their contract, had not come to an end by either of the said dates. In this background, the University was bound by its assurance and the petitioners were entitled to continue in service and be paid their salary for the period after 30.6.2020. The aforestated inference does not amount to giving a retrospective effect to the Government Order or reading beyond the terms of the contract. It is holding the University to its representation in the context of the Government Order dated 13.3.2020 and the decision of the Executive Council. As noted earlier, there is no overriding public interest to persuade me not to bind the University to its promise. The petitioners have been wrongly denied their salary.

49. The sequence of events leading to the present writ petition- a Division Bench judgement of this Court directing that services of the teachers appointed in self financing course shall continue till the satisfactory discharge of their duties, the appointment of the petitioners in 2015 through an appointment letter which provided that the tenure of the petitioners would depend on the decision of the government, the decision of the Government that the services of the teachers appointed in self financing course shall continue till the satisfactory discharge of their duties notified through a Government Order dated 13.3.2020, the adoption of the Government Order by the appointing authority in its meeting held on 3.5.2020, still the University treating the tenure of the petitioners to have come to an end on 30.6.2020 and not paying them their salary- goes to show that the act of the University was very unfair, unreasonable and irrational and violates the rule inhibiting arbitrariness. The act of the University in not paying salary to the petitioners for the period after 30.6.2020 is clearly violative of Article 14 of the Constitution of India.

50. For the aforesaid reasons the petitioners are entitled to the relief prayed for. It is directed that the petitioners shall be treated to be in service till the

satisfactory discharge of their duties or till continuance of the relevant Self Financing Course, whichever is earlier, and shall be paid the salary payable to such teachers. The arrears of salary accrued in favour of the petitioners since 30.6.2020 shall also be paid within a period of two months from the date a copy of this order, downloaded from the official website of the court, is filed by any of the petitioners before the Vice-Chancellor of the University.

51. With the aforesaid directions, the writ petitions are ***allowed.***

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**(2021)10ILR A462**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 15.09.2021**

**BEFORE**

**THE HON'BLE SUNEET KUMAR, J.**

Writ A No. 15529 of 2018

**Dr. Ram Sharan Tripathi ...Petitioner**
**Versus**
**State of U.P. & Anr. ...Respondents**

**Counsel for the Petitioner:**
Sri Shashank Shekhar Mishra

**Counsel for the Respondents:**
C.S.C.

**A. Service Law – U.P. Qualifying Service for Pension and Validation Act, 2021 – Pension – Entitlement – Qualifying service – 17 years services rendered as the Ad hoc employee – Not counting it as the qualifying service – Validity challenged – Held, expression 'qualifying service', as defined under Act, 2021, would mean service rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of service rules – Under the pension rules a temporary government servant appointed against a substantive post is entitled to pension – The nomenclature 'adhoc' would have no bearing to non-suit the petitioner towards pension. (Para 9)**

**Writ petition allowed.** (E-1)

**Cases relied on :-**

1. Writ Petition (Writ-A) No. 68873 of 2015; Dr. Akhilesh Kumar Singh Vs St.of U.P. & ors. decided on 13.12.2017

2. Special Appeal Defective No. 1003 of 2020; St. of U.P. through its Secretary, Foods and Civil Supplies Vs Mahendra Singh decided on 04.02.2021

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

1. Heard learned counsels for the parties.

2. The second respondent, Director, Ayurvedic and Unani Services, Lucknow, issued an advertisement on 23.05.1987, for appointment on the post of Ayurvedic and Unani Medical Officers in the State of U.P. The advertisement invited applications for 206 posts of Unani Medical Officers and 1194 posts of Ayurvedic Medical Officers. 53 posts was reserved for female candidates. Petitioner, being fully qualified, was called for interview; on being recommended, petitioner came to be appointed by order dated 18.06.1988 on the post of Medical Officer (Ayurvedic). The name of the petitioner finds place at sl.no. 91. Petitioner resumed duty on 12.07.1988 at the State Ayurvedic Dispensary. After appointment, petitioner was posted at various State Ayurvedic Dispensaries. Petitioner after putting in 17 years of service, came to be regularized on 16.03.2005 in terms of U.P. Regularization of Ad-hoc Appointments (on the Post Outside the Purview of Public Service Commission) Rules, 19791. The name of

the petitioner finds place at sl.no. 125. Petitioner retired on the attaining the age of superannuation on 31.01.2014 from State Ayurvedic Dispensary, Guda, District Lalitpur. During the service period, petitioner was sanctioned Assured Carrier Progression scale (A.C.P.), Government Provident Fund and Group Insurance Scheme. Petitioner on retirement claimed pension, however, the same was not considered on the plea that petitioner lacks the requisite qualifying service of ten years. In other words the ad-hoc services rendered by petitioner since 1988 was not being counted towards pensionary benefits. Aggrieved, petitioner approached this Court by filing a petition, being Writ Petition No. 67672 of 2015, which came to be disposed of vide order dated 08.04.2016, directing the competent authority to decide the representation of the petitioner towards counting of ad-hoc service. Pursuant thereof, the impugned order dated 04.01.2018 has been passed by the first respondent, Secretary/Special Secretary, Ayush-1, U.P., Lucknow, whereby, petitioner has been denied the benefit of ad-hoc service.

3. It is noted in the impugned order that the appointment of the petitioner was made on stop gap basis as Medical Officer and not as regular officer of the State Government; petitioner was appointed on temporary basis, hence, not entitled to pension under the Rules governing pension. Petitioner came to be regularized in 2005 and retired in 2014 without completing qualifying service of ten years. It is further submitted that in view of U.P. Qualifying Service for Pension and Validation Act, 2021 (U.P. Act No. 1 of 2021)2 the services rendered by petitioner as ad-hoc employee would not count as "qualifying service" defined thereunder.

4. Learned counsel for the petitioner submits that petitioner came to be appointed against substantive vacancy of Medical Officer in the Unani and Ayurvedic Hospitals of the State Government, the appointment was against the pay scale admissible to a Medical Officer. The appointment was made after due approval by the Hon'ble Governor. As per appointment letter, petitioner was entitled to all benefits of pay scale, D.A., A.C.P. etc. It is not being disputed by learned counsel appearing for the State that appointment of the petitioner was against a substantive vacancy on the post of Medical Officer. The advertisement was duly issued by second respondent on approval of the State Government. Thereafter, services of the petitioner came to be regularized under Rule, 1979. It is further submitted that the services of Medical Officers, Community Health Centre were regularized under Rule, 1979 from retrospective date, i.e., from the date of their appointment on ad-hoc basis. The averment has not been denied in the counter affidavit.

5. It is further urged that services of the petitioner rendered on ad-hoc basis is covered by expression 'qualifying service' as defined under Act, 2021. Reliance has been placed on several judgments of this Court, whereby, petitions filed by similarly situated Medical Officers came to be allowed and their ad-hoc service was directed to be counted towards pensionary benefit. Reliance has been placed on the decision rendered by the Division Bench in **Dr. Akhilesh Kumar Singh Vs. State of U.P. and others3**. The order is extracted:

*"The petitioner has invoked the extra-ordinary jurisdiction of this Court for quashing of the order dated 14.8.2017 passed by the Principal Secretary, Medical*

*Education U.P., respondent no. 1 which has been filed as annexure 1 to the writ petition and for a direction to add his adhoc services for the purposes of payment of pension. A further prayer has been made that 12% interest per annum may be allowed for the delayed payment of pension and gratuity.*

*The petitioner was initially appointment as part time Medical Officer on honorarium in the year 1988. He continued as such for some time and then under the Government Order dated 1.10.1991, pursuant to the recommendations of the Committee constituted, he was appointed on adhoc basis along with 591 other Medical Officers on 28.2.1992.*

*The adhoc services of the petitioner were regularized w.e.f. 16.3.2005 and he ultimately retired on 31.7.2014.*

*On retirement he has not been granted pension. The Additional Director, Treasury and Pension is of the opinion that he has not completed a minimum of 10 years of qualifying service on regular basis which is mandatory for payment of pension.*

*The petitioner in such a situation filed writ petition 1592 (S/B) 2014 before the Lucknow Bench which was disposed of vide order dated 13.11.2014 with the direction to the Principal Secretary to consider the grievance of the petitioner for adding adhoc services rendered by him for the purposes of counting his qualifying services for the payment of pension.*

*In pursuance to the above order, the representation of the petitioner claiming pension after adding his adhoc services to his regular services came up for consideration before respondent no. 1 but the same has been rejected by the impugned office order dated 14th August 2015. Respondent no. 1 has refused to add the adhoc services rendered by the petitioner for the purposes of pensionery benefit after distinguishing his case from that of one Dr. Yashwant Singh but without assigning any reason for such a distinction.*

*We have heard Sri Shashank Shekhar Mishra, learned counsel for the petitioner and Dr. Rajeshwar Tripathi, Chief Standing counsel-II for the respondents.*

*In view of the respective submissions advanced on behalf of the parties the sole question which crops up for consideration is whether the adhoc services rendered by the petitioner as Medical Officer from 28.2.1992 to 15.3.2005 are liable to be added in the regular service rendered by him as Medical Officer from 16.3.2005 to 31.7.2014 for determining the qualifying services for the payment of pension.*

*It is not a issue that under Rule 574-B of the Civil Service Regulations the minimum qualifying services for grant of pension is 10 years.*

*A similar question had come up for consideration before the Court in Writ Petition No. 61974 of 2011 (Dr. Amrendra Narain Srivastava Vs. State of U.P., and another) decided on 1.3.2012 and it was held that the period of adhoc services rendered by the Government servant is to be counted for the purposes of payment of pension.*

*In another Writ Petition No. 27579 of 2014 (Dr. Prem Chandra Pathak*

*and another Vs. State of U.P. an others) decided on 16.5.2014 it was held that if against substantive post a government servant is working on adhoc basis, the adhoc services rendered by him would be counted for determining the qualifying service for grant of pensionery benefits.*

*Several other writ petitions were decided following the proposition of law as laid down in the above two decisions and in all of them adhoc period of service was directed to be counted towards qualifying service for the payment of post retiral dues.*

*It may be noted that the decision in the case of Dr. Amrendra Narain Srviastava was allowed to become final as it was not challenged any further.*

*In the case of State of U.P. and another Vs. Dr. Sri Kant Chaturvedi and others Service Bench No. 1896 of 2015 the Division Bench of this Court vide order dated 10.12.2015 relying upon the case of Dr. Hari Shankar Asopa Vs. State of U.P. and another reported in (1989) 1 UPLBEC 501 held that the benefit of adhoc services is to be given for pensionery benefits.*

*The relevant paragraph of the aforesaid judment is reproduced below:-*

*"The ratio of the judgment in no uncertain terms provides that the benefits of adhoc services is to be given to the petitioners while deciding their representation if pensionery benefits will be available to them."*

*In view of the above decisions, the law in no uncertain terms provides that the benefit of adhoc services is to be given to the government servants for the purposes of grant of pensionery benefits.*

*In writ petition 63440 of 2015 Dr. Prem Chandra Pathak (Retired) and another Vs. State of U.P., and two others decided on 27.2.2013 this Court relying upon the above decisions quashed the order of respondent no. 1 rejecting the representation of the petitioner therein with regard to counting of adhoc service for his pensionery benefits holding that it is not justified to refuse to add adhoc services rendered by the government servant for the purposes of qualifying service for grant of pension.*

*The Chief Standing Counsel-II after going through the aforesaid decisions accepts that the controversy arising in this petition stands covered by the decision by this Court in the case of Dr. Prem Chandra Pathak.*

*In view of the aforesaid facts and circumstances, notwithstanding any distinction if any, with the case of Dr. Yashwant Singh, as the petitioner had worked on adhoc basis against a substantive post from 28.2.1992 to 15.3.2005, the said period is liable to be added in the regular service rendered by him from 16.3.2005 to 31.7.2014. In this view of the matter, the petitioner had rendered substantive service from 28.2.1992 to 31.7.2014 ie. for about 22 years and as such is in no way disqualified for getting the pension.*

*Accordingly, the impugned order dated 14th August 2015 is quashed and the respondent no. 1 is directed to work out the pension admissible to the petitioner as aforesaid by adding his adhoc services and start paying pension thereof on monthly basis. w.e.f 1st January 2018 and the arrears be paid within a period of three months with interest @ 12% per annum.*

*The writ petition is allowed."*

6. Learned counsel for the respondents has not disputed the proposition adverted to in the aforenoted judgment. He, however, submits that in view of the amendment brought about by Act, 2021, defining "qualifying service', the service rendered by petitioner as an ad-hoc employee would not fall within the ambit of the expression "qualifying service" defined under Section 2 of Ordinance dated 21.10.2020 (subsequently Act, 2021), which reads thus:

*"2. Notwithstanding anything contained in any rule, regulation or Government order for the purpose of entitlement of pension to an officer, "Qualifying Service" means the services rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of the service rules prescribed by the Government for the post."*

7. The provision was considered by the Division Bench of this Court in **State of U.P. through its Secretary, Foods and Civil Supplies Vs. Mahendra Singh4.** The relevant portion of the order is extracted:

*"It is clear from perusal of Section 2 of the Ordinance that it would have effect notwithstanding anything contained in U.P. Retirement Benefit Rules, 1961 or Regulation 361 and 370 of the Civil Service Regulation. Though it has been informed at the bar that in certain writ petitions, validity of the aforesaid U.P. Ordinance has been challenged, however, even if for purpose of adjudicating the present appeal the Ordinance is accepted as it is, section 2 thereof would inure to the benefit to the opposite party-petitioner and not to the benefit of appellants. The word "Qualifying Service" has been defined in Section 2 of the aforesaid U.P. Ordinance to mean the services rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of the service rules prescribed by the Government for the post.*

*As discussed aforesaid, the appellants have admitted the appointment of the opposite party-petitioner on temporary post of Godown Chaukidar from 04.09.1981 till the date of his appointment on a regular post in 1997. Therefore, under this very U.P. Ordinance, the petitioner is entitled to his claim for counting the period of his service from the date of his appointment on 04.09.1981 on a temporary post till his regularization on the permanent post in the year 1997.*

*In view of the aforesaid, the present appeal is devoid of merit and is, accordingly, dismissed."*

8. In the facts of the present case, the admitted position, inter se parties is, (i) petitioner came to be appointed against substantive vacancy; (ii) the salary was borne by Government; (iii) petitioner was entitled to all benefits as applicable to a State employee.

9. T he expression "qualifying service", as defined under Act, 2021, would mean service rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of service rules prescribed by the Government for the post. In the present case, the Government, having regard to the large number of vacancies existing in State of U.P. of Ayurvedic and Unani Medical Officer, took a conscious decision to curtail

the long procedure of appointment through the Public Service Commission by directly issuing advertisement inviting applications from eligible candidates for the post and on the recommendation of the selection committee, candidates were selected. The appointment letter were issued after obtaining approval from Hon'ble Governor. It cannot be said in the circumstances that the rules applicable for appointment were not followed. The rules, as were made applicable for appointment on ad-hoc basis was duly complied and followed and petitioner, admittedly, came to be appointed against substantive vacancy, thereafter, his service came to be regularized under Rule, 1979. In the circumstances, it cannot be said that appointment of the petitioner was against the service rules prescribed by Government. Under the pension rules a temporary government servant appointed against a substantive post is entitled to pension. The nomenclature "ad-hoc' would have no bearing to non-suit the petitioner towards pension. The nature of appointment is temporary appointment against a substantive post after following the procedure laid down to appoint such ad-hoc/temporary Medical Officer. In the opinion of the Court, the petitioner's service would fall within the expression "qualifying service" as petitioner came to be appointed against substantive post by following procedure prescribed by the State Government. It is not in dispute that appointing authority of the petitioner is the Hon'ble Governor.

10. In the result, the writ petition is **allowed.** Impugned order dated 04.01.2018, is hereby set aside and quashed. It is held that the service rendered by petitioner on ad-hoc basis would count towards "qualifying service", consequently, petitioner is held entitled for pension. The first respondent is directed to compute pension and other post retiral dues admissible to the petitioner by adding the period of ad-hoc service rendered by him. Petitioner shall be entitled to pension on month to month basis with effect from the date of his superannuation. The arrears of pension would be computed and released within the period of three months, along with simple interest at the rate of 6% per annum from the date of retirement till actual payment.

11. No Cost.

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**(2021)10ILR A467**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 29.09.2021**

**BEFORE**

**THE HON'BLE ASHWANI KUMAR MISHRA, J.**

Writ A No. 62994 of 2014

**Lallan Mishra ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri R.B. Tripathi

**Counsel for the Respondents:**
C.S.C., S.C.

**A. Service Law – Collection Amin – Dismissal from service – Enquiry – Right of cross examination – Allegation of recovery being found deficient and much below the target – No oral enquiry – No statement of the author of report – Validity challenged – Held, the inquiry cannot be said to have been conducted in a fair and impartial manner inasmuch as neither any oral inquiry was conducted nor even the report relied upon against the petitioner was proved by the**

**statement of its authors. This apparently was done as the inquiry officer in that situation would have been required to record his own statement for proving his report. No right of cross-examination was otherwise given to petitioner – Inquiry itself was not conducted in a fair and impartial manner since the bias of inquiry officer was clearly established. (Para 12)**

**B. Service jurisprudence Law – No one can be Judge in its own matter –Fair and impartial inquiry – Essential – Complainant himself became inquiry officer and, therefore, acted as a judge in his own cause – Held, status of an inquiry officer is that of a quasi judicial authority and that he is supposed to be an independent adjudicator. The inquiry officer cannot act as a prosecutor while being a judge himself. (Para 11 and 13)**

**Writ petition allowed.** (E-1)

**Cases relied on :-**

1. St. of U.P. & ors. Vs Saroj Kumar Sinha; (2010) 2 SCC 772

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Petitioner was substantively appointed as Collection Amin on 4.3.1977 and his services were confirmed w.e.f. 4.3.1979 vide order dated 4.6.1990. While in service, a report was submitted by the Naib Tehsildar against the petitioner that his recovery during the relevant period was deficient and was much below the target allotted to him and that he had used indecent language in a review meeting held by the Sub Divisional Magistrate, Ballia. The report also indicated that the petitioner was not touring in his area of recovery nor he furnished tour program, which amounted to an act of misconduct on part of the petitioner. The Naib Tehsildar accordingly submitted this report to the Tehsildar who recommended for his suspension on 14.6.2010. On the basis of such recommendation, an order of suspension was passed against the petitioner by the Sub Divisional Magistrate, Ballia on 17.6.2010. Ultimately a charge-sheet came to be served upon the petitioner on 30.7.2010 by Sub Divisional Magistrate, Ballia containing 8 charges. A Perusal of the charge-sheet would go to show that basis of the charge and proposed disciplinary action is the report of the Naib Tehsildar dated 12.6.2010 and the endorsement of Tehsildar dated 14.6.2010. The first charge against petitioner was that his recovery between 23.11.2009 to 31.5.2010 was below the target allotted to him. The second charge was regarding non availability of petitioner in his area over which the concerned revenue authorities expressed their displeasure. The third charge was that the petitioner did not vacate the house and was using it for commercial purposes. The fourth charge related to non submission of explanation despite a direction issued in that regard. The fifth charge is with regard to use of indecent language by the petitioner in a review meeting. The seventh charge is similar as per which petitioner refused to put a note and thereby committed misconduct. The last charge was regarding petitioner's misbehaviour with defaulters and exercise of influence for not being compelled to furnish his tour program. Charge Nos. 8,7,2 and 1 are based entirely upon the report of the Naib Tehsildar dated 12.6.2010 as also the recommendation of Tehsildar, Ballia dated 14.6.2010.

2. A reply to the charge-sheet was submitted by the petitioner stating that the disciplinary proceedings are a counter blast only because he had filed Writ Petition No. 51459 of 2010, before this Court. Many

other grounds were taken in defence by the petitioner. All the charges were nevertheless emphatically denied.

3. It appears that initially one Sri Munauver Ali, Tehsildar acted as the inquiry officer. During the pendency of the proceedings, however, the official who made the endorsement against the petitioner on 14.6.2010 and had also recommended petitioner's suspension became Tehsildar and proceeded to act as the inquiry officer in the disciplinary proceedings. Petitioner claims to have submitted an objection against it and requested for change of inquiry officer on the ground that being the complainant himself Ashutosh Dubey could not act as the inquiry officer also. However, no orders appear to have been passed in the matter and the inquiry officer proceeded to submit his report on 28.3.2011. It is urged that neither any opportunity of cross-examining the witnesses was

4. Based upon the report of the inquiry officer, a show cause notice was issued to the petitioner calling upon him to submit reply as to why he be not dismissed from service. A reply was submitted raising various legal and factual objections to the enquiry report. The disciplinary authority however has reverted the petitioner to initial scale of pay admissible to him vide order dated 5.5.2011, against which an appeal and revision have also been rejected. These orders are challenged in the instant writ petition.

5. Learned counsel for the petitioner contends that the inquiry proceedings lacked fairness inasmuch as the inquiry officer who was himself the complainant conducted the inquiry and, therefore, the first principle of natural justice that a person should not be the judge of his own cause, stands breached. The inquiry proceedings are also questioned on the ground that neither any date, time or place was fixed for conducting the inquiry nor any oral enquiry was held and the right of cross-examination was also denied to petitioner. It is also argued that denial of subsistence allowance has also vitiated the inquiry.

6. A counter affidavit has been filed controverting the averments made in the writ petition to which a Rejoinder affidavit is filed reiterating the averments made in the wri

7. I have heard Sri R.B. Tripathi, learned counsel for the petitioner, Sri Sharad Chandra Upadhyay, learned Standing Counsel for the State and perused the materials on record.

8. From the facts, as have been noticed above, it is apparent that the disciplinary proceedings were initiated against the petitioner on the basis of the note submitted by the Naib Tehsildar and Tehsildar. Recommendation was made by the Tehsildar for initiating disciplinary action and placing the petitioner under suspension. This note of Tehsildar dated 14.6.2010 is on record clearly reveals that Tehsildar was in agreement with the report of the Naib Tehsildar dated 12.6.2010 and had also recommended for placing the petitioner under suspension. This report also forms the main basis of disciplinary action.

9. Records reflect that initially one Munawwar Ali was the inquiry officer at the time of issuance of charge-sheet to petitioner. However, during the inquiry proceedings, Tehsildar who had

recommended disciplinary action and suspension of petitioner himself became the inquiry officer. Pleadings in paragraphs Paras- 23 and 24 of the writ petition are specific according to which the inquiry was conducted by Ashutosh Dubey who, in his capacity as Tehsildar, had recommended petitioner's suspension while endorsing the report dated 12.6.2010. A specific averment is also made about petitioner moving an application for change of inquiry officer. In the counter affidavit filed by the State receiving of such application is disputed on the ground that such application does not exist on record but the enquriy officer has refused to such objection in his report which support petitioner's contention that an objection was raised by him in this regard.

10. The inquiry officer in his report has recorded that 26.3.2010 was the date fixed for holding inquiry and he made efforts to convince the petitioner about fairness in the inquiry but the petitioner insisted in his objection of bias against the inquiry officer. The inquiry officer, therefore, proceeded to examine the records on his own and submitted his report holding the petitioner guilty of the charges levelled against him.

11. From a perusal of the inquiry report, it is also apparent that neither any date was fixed for recording oral evidence of witnesses nor any oral statement appears to have actually been recorded. There is also nothing on record to show that any date was fixed for cross-examining the witnesses. The inquiry officer for holding the charges against the petitioner, has relied upon the report of the Naib Tehsildar as also his own endorsement dated 14.6.2010. This clearly shows that the inquiry officer was himself the complainant and relied upon his own report for proving the guilt of the petitioner. Four out of the eight charges were based essentially upon the report of the inquiry officer himself. This clearly reflects that the complainant himself became the inquiry officer and, therefore, acted as a judge in his own cause.

12. Even otherwise the inquiry cannot be said to have been conducted in a fair and impartial manner inasmuch as neither any oral inquiry was conducted nor even the report relied upon against the petitioner was proved by the statement of its authors. This apparently was done as the inquiry officer in that situation would have been required to record his own statement for proving his report. No right of cross-examination was otherwise given to petitioner. This Court, therefore, finds substance in the petitioner's contention that the inquiry itself was not conducted in a fair and impartial manner since the bias of inquiry officer was clearly established.

13. Law is settled that the status of an inquiry officer is that of a quasi judicial authority and that he is supposed to be an independent adjudicator. The inquiry officer cannot act is a prosecutor while being a judge himself. In State of Uttar Pradesh and others Vs. Saroj Kumar Sinha, (2010) 2 SCC 772 the law on the subject has been summarised in following words:-

*28. An inquiry officer acting in a quasi judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/ disciplinary authority/ Government. His function is to examine the evidence presented by the department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the*

*aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.*

*29. Apart from the above by virtue of Article 311(2) of the Constitution of India the departmental inquiry had to be conducted in accordance with rules of natural justice. It is a basic requirement of rules of natural justice that an employee be given a reasonable opportunity of being heard in any proceeding which may culminate in a punishment being imposed on the employee.*

*30. When a department 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 enquiry 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."*

*(emphasis supplied)*

14. It is otherwise on record that in respect of the house allotted to petitioner a dispute was raised before the Civil Court and an injunction infavour of petitioner was operating. His defence on merits in that regard does not appear to have been examined in correct perspective. In such circumstances, this court finds that the disciplinary inquiry conducted against the petitioner lacks fairness and objectivity and the bias of inquiry officer was apparent on record. In such circumstances, inquiry report as well as consequential orders of punishment, as confirmed in appeal and in revision, are found to be violative of principles of natural justice and are otherwise unsustainable for the reasons recorded above.

15. Consequently, writ petition succeeds and is allowed. Orders impugned dated 5.5.2011, 1.5.2012 and 15.7.2014 (Annexures-21,25 and 28 to the writ petition) stands quashed. Ordinarily this Court would have remitted the matter for conducting fresh inquiry from the stage it has gone bad, but this course is not followed in the facts of the present case since the petitioner has already attained the age of superannuation in the year 2011 and a period of more than 10 years have gone by. He has been sufficiently punished even without establishing his guilt. Any direction now for his participation in the inquiry would amount to further harassment of petitioner and would otherwise be impermissible in law.

16. Consequently, a writ of mandamus is issued to the respondents to correctly fix petitioner's salary as also his retiral benefits as per his entitlement and release all monetary benefits to him within a period of four months from the date of presentation of a copy of this order.

17. Costs are made easy.

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**(2021)10ILR A471**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 22.10.2021**

**BEFORE**

**THE HON'BLE ROHIT RANJAN AGARWAL, J.**

Writ C No. 15420 of 2020
Alongwith other cases

**Najakat Ali ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Vishal Tandon

**Counsel for the Respondents:**
C.S.C., Sri Subhash Chandra Pandey

**A. Civil Law – National Food Security Act, 2013 – Control Order, 2016 – Fair Price Shop Licence – Cancellation – *Audi alteram partem* – No regular enquiry conducted, though opportunity to file reply was given – It's effect – Applicability of GO dated 29.07.2004 and 16.10.2014 – Held, the principle of audi alteram partem is complied once the notice is issued and an opportunity is provided to a dealer/agent to submit his reply and the same being considered by the authorities – Held, the opportunity, as provided under the Control Order, 2016, is given before the license is cancelled – High Court rejected the claim that a full fledged inquiry be conducted providing opportunity of cross-examination of witness, copy of documents, complaint and consideration of subsequent affidavits, if filed in favour of the dealer, by the authorities. (Para 96 and 125)**

**B. Civil Law – Fair price Shop Licence – Cancellation process – Nature – It is not a departmental or regular inquiry under Article 311 of the Constitution of India – It is only a inquiry of summary nature where in case of violation of terms of conditions of license, action is initiated. (Para 96)**

**C. Civil Law – Fair price Shop Licence – Terms and Condition of Agreement – Non-compliance by the Dealer – Effect – Grant of a license is not a right – The burden of duty is very heavily cast upon a dealer, who has to strictly comply with the conditions of license, and cannot travel beyond the agreement executed by him, which lays various restriction upon him. Agreement is not executed blindly, but with an open eye by the licensee with the State – Once the action is taken, upon any violation, the dealer cannot turn around and blame the system on mere technicalities, as the agreement binds him to comply the conditions. (Para 115 and 116)**

**Writ petition dismissed.** (E-1)

**Cases relied on :-**

1. K.S. Puttaswamy (Retired) & anr. (AADHAAR) Vs U.O.I. & anr.; (2019) 1 SCC 1

2. Puran Singh Vs St. of U.P. & ors.; 2010(3) ADJ 659

3. Ranjeet Vs St. of U.P. & ors.; (2019) 9 ADJ 704 (DB)

4. Misc. Single No. 21538 of 2018; Shakeel Ahamad Vs The St. of U.P. & anr. decided on 16.12.2020

4. Ram Murat Vs Commissioner, Azamgarh Division; (2006) 5 ADJ 396

5. Indrapal Singh Vs St. of U.P.; 2013 (10) ADJ 612 (F.B.)

6. Ram Prakash Vs St. of U.P.; (2017) 7 ADJ 126

7. Writ Petition No. 30912 of 2009; Rajneesh Kumar Tyagi Vs St. of U.P. & ors. decided on 19.01.2010

8. Writ C No. 12737 of 2013; Ashok Kumar Tiwari Vs St. of U.P. & ors. decided on 28.11.2014

9. Ajay Pal Singh Vs St. of U.P. & ors.; (2018) 7 ADJ 301

10. Writ C No. 46648 of 2017; Aajad Kumar Vs St. of U.P. & ors. decided on 23.10.2017

11. Smt. Santara Devi Vs St. of U.P. & ors.; (2016) 2 ADJ 70

12. Meena Devi Vs St.of U.P. & ors.; (2018 ) 10 ADJ 385

13. St. of Kerala Vs K.T. Shaduli Yusuf & ors.; (1977) 2 SCC 777

14. Writ C No. 16372 of 2018; Smt. Kaushar Jahan Vs St. of U.P. decided on 23.05.2018

15. Maneka Gandhi Vs U.O.I. & ors.; (1978) 1 SCC 248

16. A.K. Kraipak Vs U.O.I., (1969) 2 SCC 262

17. Baraka Overseas Traders Vs Director General of Foreign; (2006) 8 SCC 103

18. St. of W.B. & ors. Vs R.K.B.K. Limited & anr.; (2015) 10 SCC 369

19. Writ C No. 61939 of 2015; Lakhan Singh Vs St. of U.P. & ors. decided on 18.10.2019

20. Kallu Khan Vs St. of U.P. & anr.; 2008 (6) ADJ 453 (DB)

21. Writ C No. 58035 of 2017; Meena Devi Vs St. of U.P. & 4 ors. decided on 30.07.2018

22. A.S. Motor Pvt. Ltd. Vs U.O.I.; (2013)10 SCC 114

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. "Right to food' emanates from "right to life' guaranteed under Article 21 of the Constitution of India. Moving forward Central Government enacted National Food Security Act, 2013 (*hereinafter called as "Act of 2013"*) keeping in mind Article 47 of the Constitution, which mandates the States with duty to raise the level of nutrition and standard of living and to improve public health.

2. Act of 2013 was implemented with the object of providing food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of food at affordable price to people to live a life with dignity and for matters connected therewith. The Government implemented Targeted Public Distribution System under which foodgrains is provided to the "eligible household" at subsidised rates which includes people Below Poverty Line, including Antyodaya Anna Yojana, and Above Poverty Line households. Section 2(23) of Act of 2013 provides for "Targeted Public Distribution System", which means the system for distribution of essential commodities to the ration card holders through fair price shops.

3. Following the implementation of Act of 2013, the State Government framed Uttar Pradesh State Food Security Rules, 2015 *(hereinafter called as "Rules of 2015*") exercising powers under Section 40 of Act of 2013.

4. The Central Government thereafter enacted "The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (hereinafter called as "Act of 2016") for providing good governance, efficient, transparent, and targeted delivery of subsidies, benefits and services, the expenditure for which is incurred from the Consolidated Fund of India, to individuals residing in India through assigning of unique identity numbers to such individuals and for matters connected therewith or incidental thereto. The validity of said Act was challenged before Supreme Court of India in case of **K.S.Puttaswamy (Retired) and Another (AADHAAR) vs. Union of India and Another (2019) 1 SCC 1,** and Apex Court upheld the validity of Act of 2016.

5. As the country had become self sufficient in the production of foodgrains, the necessity arose for distribution of foodgrains through Targeted Public Distribution System to the last person (Antyodaya). Act of 2013 was the step towards fulfilment of object of the Government creating a system so that the foodgrains reaches the most vulnerable section of society. Enactment of the Aadhaar Act in year 2016 was with the aim that subsidy granted from the Consolidated Fund of India reach to the most deserving and needy person, further capping the pilferage which existed in the delivery system.

6. Section 40 of Act of 2013 mandated the State Government by notification, and subject to the condition of

previous publication, and consistent with the Act and rules framed by the Central Government to make rules to carry out provisions of Act of 2013.

7. Rules of 2015 was the first step by the State Government towards the achievement of fulfilment of dreams for foodgrains reaching to most vulnerable section of the society through Targeted Public Distribution System. Prior to enactment of Act of 2013, the State Governments were issuing various Government Orders from time to time exercising power under Section 3 of the Essential Commodities Act, 1955 *(hereinafter called as "Act of 1955")*, which was enacted for the control of production, supply and distribution of essential commodities.

8. Section 3 of Act of 1955 provided power to the State Government to issue order for controlling and regulating the production, supply and distribution of the essential commodities. It was in exercise of this power under Section 3 of Act of 1955 that U.P. Scheduled Commodities (Regulation of Distribution) Order, 1989 was issued.

9. Thereafter came the U.P. Scheduled Commodities Distribution Order 1990 and Clause 24 of the Order provided for "rescission' of earlier Uttar Pradesh Foodgrains and Other Essential Articles Distribution Order, 1977 and Uttar Pradesh Scheduled Commodities (Regulation of Distribution) Order, 1989.

10. The U.P. Scheduled Commodities Distribution Order 1990 occupied the field for regulating and controlling the distribution of essential commodities in the State till it was superseded by Uttar Pradesh Scheduled Commodities Distribution Order, 2004 *(hereinafter called as "Order of 2004").*

11. The Order of 2004, for the first time, provided for the benefit of distribution of foodgrains to the "Antyodaya families" and a classification was made between the families living Below Poverty Line (BPL) and those Above Poverty Line (APL). This Order was also issued in exercise of the power under Section 3 of Act of 1955. Clause 2(c) of Order of 2004 defined "Agent", which means, a person or a cooperative society or a Corporation of the State Government authorised to run a fair price shop under the provisions of the Order. Similarly, Clause 2(l) defined "Fair Price Shop", which means a shop set up under the orders of the State Government for the distribution of Scheduled Commodities. Clause 4 envisaged provision for "running of fair price shop' which shall be run through such person and in such manner as the Collector, subject to the directions of the State Government may decide. Sub- clause (2) of Clause 4 provided that a person appointed to run a fair price shop under sub-clause (1) shall act as the agent of the State. Further sub-clause (3) of Clause 4 provided that a person appointed to run a fair price shop under sub-clause (1) shall sign an agreement, as directed by the State Government regarding running of fair price shop as per the draft appended to the Order.

12. The Order of 2004 further provided for various provisions for identification of families living Below the Poverty Line, ration card, quantity per unit to be prescribed, quantities that may be purchased on ration card, etc. Clause 21 provided for monitoring in accordance with the order issued by the State Government.

Clause 27 was in regard to "Penalty' for contravening any of the provisions of the Order and the punishment shall be in accordance with the orders issued by the State Government from time to time. Clause 28 provided for the "Appeal' against the order of penalty.

13. Pursuant to enforcement of Order of 2004, various dispute arose in regard to the procedure to be followed in case of penalty being imposed upon the fair price shop dealers, contravening the provisions.

14. As there were conflicting views of various benches of this Court, the matter was referred to Full Bench in case of **Puran Singh vs. State of U.P. and others 2010(3) ADJ 659,** "whether an opportunity of hearing is mandatory to be given to a fair price shop agent before suspension of fair price shop agreement?" The Full Bench, after noticing the Order of 2004 as well as Government Order dated 29.7.2004, which was issued for monitoring/regulating various kind of procedure, found that proviso to the Government Order dated 29.7.2004 provided for an opportunity to the fair price shop owner before his licence was suspended. Relevant para 35 of the judgment is extracted hereas under :

*"Power of suspension is centrally there but while exercising care is to be taken to the mandate of the proviso which states that the order is to be speaking one. Thus so far the power of suspension while proceeding to call upon the licencee about cancellation of the shop is concerned it is always there. It will be incorrect to hold that without preliminary enquiry in respect to a fact finding and without any opportunity the shop is not to be suspended."*

15. After the decision of the Full Bench, the State Government came out with the Government Order dated 16.10.2014, which was in continuation with the earlier Government Order dated 29.7.2004, providing for the entries of ration cards to be examined besides the stock register, sale register and distribution certificate issued by the village level vigilance committee and official observer appointed for supervising distribution. Further duty was cast upon the licencing authority to examine the explanation furnished alongwith the documentary evidence by the licensee and then pass a reasoned and speaking order.

16. After the enactment of Act of 2013, and Act of 2016, the State Government having already framed the Rules of 2015, came out with the Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 (hereinafter called as "Control Order 2016") superseding the earlier Government Order of 20.12.2004 as well as all the Government Orders issued prior to coming of this Order.

17. Control Order 2016 was issued in the light of Act of 2013 and provided for the complete mechanism for the distribution of foodgrains allotted by the Central and the State Government for distribution under the Targeted Public Distribution System. It not only provides for the identification of eligible households ration cards, lifting and distribution of foodgrains by the State, procedure for appointment of agent for fair price shop but, for the first time, system was introduced for operation of fair price shops.

18. It included the mechanism wherein competent authority is required to take prompt action in respect of any violation of condition of licence including

any irregularity committed by the fair price shop owner, which may include suspension or cancellation of fair price shop licence.

19. Sub-clause (7) of Clause 8 provides for the inquiry in irregularity of distribution by a fair price shop owner, and in case licence is suspended, after inquiry, a show cause notice has to be issued by the competent authority and it is only after the reply/explanation, by the dealer is given, the same shall be examined by the officer concerned and the order is passed. Relevant Clause 8 of Order of 2016 is extracted hereas under :

*"**8. Operation of fair price shops**-- (1) The fair price shop owner shall disburse foodgrains to the ration card holders as per his entitlement under the Targeted Public Distribution System.*

*(2) A ration card holder may draw his full entitlement of food grains in more than one installment.*

*(3) The fair price shop owner shall not retain the ration cards after the supply of the foodgrains.*

*(4) The license issued by the State Government to the fair price shop owner shall lay down the duties and responsibilities of the fair price shop owner, which shall include, inter alia, –*

*(i) Sale of foodgrains as per the entitlement of ration card holders under the Targeted Public Distribution System at the prescribed retail issue price;*

*(ii) display of information on a notice board at a prominent place in the shop on daily basis regarding (a) entitlement of food grains, (b) scale of issue, (c) retail issue prices, (d) timings of opening and closing of the fair price shop including lunch break, if any, (e) stock of foodgrains received during the month, (f) opening and closing stock of foodgrains, (g) the mechanism including authority for redressal of grievances with respect to quality and quantity of food grains under the Targeted Public Distribution System and (h) toll-free helpline number;*

*(iii) maintenance of the records of ration card holders, e.g. stock register, issue or sale register shall be in the form prescribed by the State Government including in the electronic format in a progressive manner;*

*(iv) display of samples of food grains being supplied through the fair price shop;*

*(v) production of books and records relating to the allotment and distribution of food grains to the inspecting agency and furnishing of such information as may be called for by the designated authority;*

*(vi) the shop keeper shall in the end of each month submit a detailed description of receipt of foodgrain and other essential commodities, actual distribution during the month and remaining balance of stock to designated officer who will send a compilation of all such certificates under his area of appointment to the competent authority;*

*(vii) opening and closing of the fair price shop as per the prescribed timings displayed on the notice board.*

*(5) Any ration card holder desirous of obtaining extracts from the records of a fair price shop owner may*

*make a written request to the owner along with the deposit of the fees specified by order by the State Government. The fair price shop owner shall provide such extracts of records to the ration card holder within fourteen days from the date of receipt of a request and the said fee:*

*Provided that the State Government may prescribe the period for which the records are to be kept for providing the ration card holder by the fair price shop owner.*

*(6) The State Government shall prescribe the procedure to be followed by the designated authority in cases where the fair price shop owner does not provide the records in the manner referred in sub-clause (5) to the ration card holder in the stipulated period and the designated authority in each case shall ensure that the records are provided to the ration card holder without any undue delay.*

*(7) The Competent Authority shall take prompt action in respect of violation of any condition of license including any irregularity committed by the fair price shop owner, which may include suspension or cancellation of the fair price shop owner's license.*

*An inquiry regarding irregularities in distribution by a fair price shop owner shall be conducted by the Designated officer or by the District Magistrate. After inquiry, if the license of fair price shop owner is suspended along with a show cause notice by the competent authority, then the reply/explanation of show cause notice by fair price shop owners will be examined by an officer at least one rank above the inquiry officer. If the preliminary enquiry had been conducted by a district level officer, then the explanation by fair price shop owners shall be examined by another district level officer.*

*(8) The maximum period within which proceedings relating to enquiry into irregularities committed by the fair price shop owner shall be concluded, resulting in any action as under sub-clause (7) shall be two months.*

*(9) In case of suspension or cancellation of the agreement, the Competent Authority shall make alternative arrangements for ensuring uninterrupted supply of food grains to the eligible households:*

*Provided that in case of cancellation of the agreement of the fair price shop owner, new agreement shall be issued within a month of cancellation.*

*(10) The State Government shall furnish complete information on action taken against a fair price shop owner under this clause annually to the Central Government in the format at Annexure-V."*

20. Similarly, Clause 9 provides for monitoring by the Food Commissioner. Clause 13 of the Control Order 2016 provides for appeal against the action taken by authorities.

21. Bunch of these petitions mostly raise common grounds that the Licensing Authority and also the Appellate Authority did not afford opportunity of hearing before cancelling the license. Further, no opportunity for cross examining the witnesses, inspection of documents, non supply of inquiry report to the dealer by the Licensing Authority in proceedings for cancellation of license. Moreover,

subsequent affidavits filed by the complainant in favour of the dealer is also not taken into account by the authorities.

22. In almost all the petitions ground taken is that District Licensing Authorities do not follow the procedure prescribed under Government Order dated 29.07.2004 and 16.10.2014, which requires the authorities to grant opportunity to the licensee in strict terms before proceeding to cancel the license, and various coordinate benches of this Court, relying upon the said Government Orders had proceeded to quash the order of cancellation.

23. The questions, which emerge for consideration by this Court are:

"(i) Whether after issuance of Control Order 2016, having been issued in the light of Act of 2013 and Act of 2016, the earlier Government Order of 2004 stood superseded and repealed?

(ii) Whether any benefit can be extended to the dealers/licensee of the Government Orders dated 29.7.2004 and 16.10.2014, when their license has been cancelled under the new scheme of 2016, which provides for complete mechanism in itself?"

24. I have heard S/Sri Vishal Tandon, Saurabh Pandey, Pradeep Kumar, T.Islam Arvind Prabodh Dubey, Ashok Kumar Singh, Suresh Chandra Pandey and Sri Danbeer Mishra, learned counsel for the petitioner in their respective case, Sri Manish Goyal, learned Additional Advocate General, assisted by Sri Shri Prakash Singh and Sri Shashi Kant Upadhyay, learned Standing Counsel for the respondents-State.

25. Sri Vishal Tandon, learned counsel appearing in Writ Petition No. 15420 of 2020 submitted that the State Government had issued Government Order dated 29.07.2004 for monitoring/regulating various kinds of procedure, while Order of 2004 contained the provisions of maintenance, supplies of foodgrains and other essential commodities in the State. Both these Government Orders were considered by the Full Bench of this Court in **Puran Singh (supra),** and the Court found that Government Order dated 29.07.2004 provided for full-fledged inquiry pursuant to show-cause notice for cancellation.

26. The State Government, thereafter, had issued Government Order on 16.10.2014 modifying the earlier Government Order dated 29.07.2004, providing that while conducting inquiry with respect to alleged irregularities committed by fair price dealer, the competent authority was required to verify entries made in distribution register with the ration cards of the card holders.

27. Secondly, recording statement of complainant/card holder and providing opportunity to cross-examine such witness was to be given for ensuring fairness and transparency. According to him, Government Order of 29.07.2004 was further modified on 16.12.2015, directing all Sub Divisional Officers and District Supply Officers to maintain a order-sheet in proceedings of suspension/cancellation of fair price shop for maintaining transparency.

28. Repealing of Order of 2004, by promulgating the Control Order 2016 would not render otiose the earlier Government Orders dated 29.07.2004, 16.10.2014 and 16.12.2015 as the Control Order 2016 did not provide any

procedure/mechanism to be followed while suspending/cancelling any license.

29. State Government on 05.08.2019 had issued another Government Order wherein complete procedure for suspension/cancellation has been prescribed and earlier Government Orders occupying the field have been repealed. The said Government Order provides for recording statement of complainants/card holders and the competent authority being obliged to provide opportunity of cross-examination to license holder. Reliance has been placed upon a decision of Division Bench of this Court in case of **Ranjeet vs. State of U.P. and others, (2019) 9 ADJ 704 (DB).** Reliance has also been placed upon decision of co-ordinate Bench of this Court in **Misc. Single No. 21538 of 2018 (Shakeel Ahamad vs. The State of U.P. through Additional Commissioner (Food), Lucknow and another**, wherein this Court on 16.12.2020 had observed that district administration had not proceeded against any of the observers who failed to discharge their duty of ensuring the proper distribution of essential commodities amongst the beneficiaries.

30. He further contended that once the mechanism has been provided in the Control Order 2016 for the appointment of vigilance committee which is constituted under Rule 9 of Rules of 2015 for supervising the functioning of targeted public distribution system in the State, no action is being taken by the State authorities against such members of the vigilance committee which is under direct control of the Food Commissioner and is required to monitor the entire distribution of foodgrains under Clause 9 of Control Order 2016.

31. According to him, if the licensee is held liable for the shortfall in distribution, then he alone cannot be penalised for such action because the Control Order 2016 as well as Rules of 2015 provide for monitoring of such licensee through the mechanism provided by appointment of vigilance committee.

32. Elaborating further he contended that the observer so appointed, after completion of distribution by the licensee, issues a distribution certificate under his signature which forms the basis of lifting of foodgrains from the godown for the next month. Once such certificate is issued by the observer and the quota for the next month is lifted by the dealer, the question of short distribution of foodgrains or any irregularity does not arise.

33. Emphasis has been laid that the entire public distribution system is being monitored and observed by the designated officers of the State Government, who at every step ensure that the foodgrains which are lifted by the dealer reach the ultimate beneficiary and necessary check and balance has been provided at every stage so as to only blame dealer and not the officials of the State Government who are entrusted with the duty of overseeing and managing the entire distribution system would be unfair and is only to harass the dealers as has been done in the present case.

34. Sri Tandon next contended that Section 24 of the U.P. General Clauses Act, 1904 saved the Government Orders dated 29.07.2004, 16.10.2014 and 16.12.2015 after repeal of the Order 2004 as there was nothing inconsistent in the said Order with the Control Order 2016. Relevant provision of Section 24 runs as under:-

*"24. Continuation of appointments, notifications, orders etc. issued under enactments repealed and re-enacted:--Where any enactment is repealed and re-enacted by an ( Uttar Pradesh ) Act, with or without modification, then, unless it is otherwise expressly provided, any appointment, ( or statutory instrument or form) made or issued under the repealed enactment shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted, unless and until it is superseded by any appointment, ( or statutory instrument or form) made or issued under the provisions so re-enacted."*

35. He also referred to definition of the term 'Enactment' as defined in section 2(14) of the above Act, which runs as under:

*"Enactment"--"Enactment" shall include a regulation (as hereinafter defined ) and any Regulation of the Bengal, Madras or Bombay Code, and shall also include any provisions contained in any Act or in any such Regulation as aforesaid."*

36. He submitted that the term 'Enactment' as used in section 24 includes regulation issued by the Government in exercise of the powers conferred under the enactment and so the aforesaid G.Os. issued under the Control Order of 1990 which are not inconsistent with the provisions of re-enacted Control Order of 2004 shall continue in force and shall be deemed to have been made and issued under the re-enacted Order.

37. He relied upon decision of Division Bench in case of **Ram Murat vs. Commissioner, Azamgarh Division, (2006) 5 ADJ 39**6 and also Full Bench decision in case of **Indrapal Singh vs. State of U.P., 2013 (10) ADJ 61**2 (F.B.).

38. Learned counsel has also relied upon decision of co-ordinate Bench in case of R**am Prakash vs. State of U.P. (2017) 7 ADJ 126, Rajneesh Kumar Tyagi vs. State of U.P. and others, Writ Petition No. 30912 of 2009, decided on 19.01.2010, Ashok Kumar Tiwari vs. State of U.P. and others, Writ-C No. 12737 of 2013, decided on 28.11.2014, Ajay Pal Singh vs. State of U.P. and others, (2018) 7 ADJ 301, Aajad Kumar vs. State of U.P. and others, Writ-C No. 46648 of 2017, decided on 23.10.2017, Shakeel Ahamad vs. State of U.P. and another, Misc. Single No. 21538 of 2018,** decided on 16.12.2020 and **Smt. Santara Devi vs. State of U.P. and others (2016) 2 ADJ 70.**

39. Sri Saurabh Pandey, learned counsel appearing in Civil Misc. Writ Petition No. 40982 of 2019 submitted that aim and object of the Act of 2013 is similar to the Essential Commodities Act, 1955 with the only change that now right of an individual has been solidified. According to him, an individual has a right to receive his entitlement but there needs to be a mechanism for realisation of the same, and thus comes the importance of fair price dealer without whom the dream of food security cannot be fulfilled. He stressed that it is very imperative for the State that fair price dealers play quintessential role in furtherance of the aim and objective of the Act of 2013 to ensure access to adequate quantity of food at affordable prices to people to live with dignity. According to him, without active participation of the fair price dealers, the aim and objective cannot be achieved, and thus in case both

individual as well as dealer are aligned, the problem of providing food can be achieved.

40. According to him, Government Order of 29.07.2004 provided a comprehensive procedure with respect to suspension/cancellation of the license. It was considered by the Full Bench in Puran Singh (supra), where Court mandated full-fledged inquiry after issuance of show-cause notice and the said decision guided various subsequent decisions of this Court. This led to the issuance of Government Order dated 16.10.2014 modifying the Government Order of 29.07.2004 providing further for tallying the register of dealer with the ration card of the individual making the allegation of irregularity in distribution of the foodgrains and further providing cross-examination of the person alleging such irregularity.

41. Subsequently, State Government on 05.08.2019 after enactment of Act of 2013 and Control Order 2016 had issued a Government Order providing for complete procedure for suspension/cancellation which was issued keeping in mind the said Act. According to him, Control Order of 2016 does not provide for any procedure for suspension and cancellation.

42. He next submitted that the decision of co-ordinate Bench in case of **Meena Devi vs. State of U.P. and others, (2018 ) 10 ADJ 385** had taken note of the fact that after the enactment of Act of 2013 and Control Order 2016, the decisions rendered are per incuriam but not the subsequent decisions.

43. Adding to the argument made by Sri Tandon, learned counsel submitted that that distribution certificate issued by the observer (vigilance committee) is a presumption in favour of the dealer regarding distribution of foodgrains until and unless some material is brought to rebut such presumption based on Section 114(e) of the Indian Evidence Act, 1872.

44. According to him, principles of natural justice require that a proper opportunity of hearing should be accorded to licensee before his license is put under suspension or cancelled. The authorities while suspending/cancelling, act as a quasi judicial authority and should act in a transparent manner affording opportunity of hearing providing the documents relied upon, providing opportunity to question or cross-examine the complainant and thereby holding a full-fledged inquiry before the license is suspended or cancelled.

45. According to him, model/draft agreement executed by dealer with the State also provides for procedure to be adopted for cancellation of the dealership/license which includes opportunity to see the evidence against him and permit him to present his case. The opportunity which is to be given includes the opportunity to examine the witnesses and cross-examine them. Reliance has been placed upon decision of the Apex Court in case of **State of Kerala vs. K.T. Shaduli Yusuf and others, (1977) 2 SCC 777** (Paragraph No. 4). He also relied upon the decision in case of S**mt. Kaushar Jahan vs. State of U.P., Writ-C No. 16372 of 2018,** decided on 23.05.2018.

46. Learned counsel emphasized that principles of natural justice is applicable by implication in administrative and quasi judicial matter, and its execution should be express and clearly provided for as held by Apex Court in case of **Maneka Gandhi vs. Union of India and others, (1978) 1 SCC**

**248** (Paragraph Nos. 9, 10, 11, 12, 14 and 93), **A.K. Kraipak vs. Union of India, (1969) 2 SCC 262** (Paragraph Nos. 13 and 19). According to him, right accrues in favour of the person to whom license is granted, and deprivation of such right without a hearing is violation of principles of natural justice and thus a vested right having accrued in favour of the dealer cannot be taken a way in such a casual manner.

47. Reliance has been placed upon decision of the Apex Court in case of **Baraka Overseas Traders vs. Director General of Foreign (2006) 8 SCC 103** (Paragraph Nos. 9 and 10). He next contended that as agreement provides for duties of a dealer, then there are also the corresponding rights, and the fairness demands that procedure adopted with respect to suspension and cancellation should be fair and transparent.

48. It was lastly contended that action of State authorities and its officials has been very arbitrary and casual while dealing with matters of suspension and cancellation. Simply on frivolous complaints of few card holders, the authorities act in an arbitrary manner and license is immediately suspended without any opportunity of hearing or providing any preliminary report or the documents relied by such authorities in dealing with the license of the dealer. According to Sri Pandey, authorities proceed on vague allegations and where there are hundreds of card holders attached with a fair price shop only on a complaint of a few card holders, the authorities proceed to suspend and cancel the license.

49. Neither any inquiry report is given nor the complaint on which the action is initiated is supplied nor such complainants are confronted for cross-examination so as to arrive at conclusion and cancel the license which was granted pursuance to the agreement executed between the dealer and the State. According to him, Act of 2013 has taken care of the card holder who has a right of foodgrains, but the said right does not curtail the protection granted under the agreement before any action is taken by the State authorities. The State cannot blindly on the complaint assuming the complaint to be gospel truth without adhering to the principles of natural justice cancel the license.

50. Sri Manish Goyal, Additional Advocate General submitted that the entire bunch of cases and the argument raised by petitioners' counsels is confined to the fact that opportunity of hearing, cross examination, non supply of inquiry report and affidavits filed by the complainants having not been given to the dealer in proceedings for cancellation of licence vitiates the entire procedure being in violation of different Government Orders such as of 29.07.2004, 16.10.2014 and 16.12.2015.

51. Further, issuance of Control Order 2016 though deriving its power under Section 3 of the Act of 1955 was issued to fulfil the object of the Act of 2013 as well as Act of 2016. The State Government in furtherance of Article 47 of the Constitution of India which are the directive principle, had tried to create a system through Targeted Pubic Distribution System so that the foodgrains/essential commodities reaches the last person/Antyodaya and the object and scheme of the Central Government is fulfilled capping the pilferage and the loophole in the distribution system.

52. He pointed out that the Control Order 2016 has its root from the Act of 2013 which was enacted with the object of distribution of foodgrains at subsidised rate to the household living Below the Poverty Line as well as Above the Poverty Line. He invited the attention of the Court to definition of "eligible household" under Section 2(3); "fair price shop" under Section 2(4); "priority households" under Section 2(14); "ration card" under Section 2(16); "social audit" under Section 2(20); "Targeted Public Distribution System" under Section 2(23); and "Vigilance Committee" under Section 2(24) of the Act of 2013.

53. He next contended that Section 3 of the Act of 2013 provides for right to receive foodgrains at subsidised rates by persons belonging to eligible households under Targeted Public Distribution System. Section 7 envisages for the implementation of schemes for realisation of entitlements by the State Government. Section 10 provides for the State Government to prepare guidelines and to identify priority households. Section 15 provides for District Grievance Redressal Officer and the appointment has to be made by State Government for appointing such officers at the District Level.

54. He then contended that the State Government thereafter framed U.P. State Food Security Rules, 2015 which were issued in exercise of power under Section 40 of the Act of 2013. Chapter III of the Rules of 2015 provides for "Grievance Redressal System' and sub-rule (4) of Rule 5 provides the procedure how the District Grievance Redressal officer shall deal with the complaint made to him. Sub-rule (4)(c) of Rule 5 provides that in case the officer is satisfied that if prima facie ground exist, he shall proceed by issuing notice and fixing date, time and place. Sub-rule (4)(d) of Rule 5 provides that after taking evidence as adduced before him, he shall hear the party and proceed with the complaint. Rule 7 provides for an appeal against the order of District Grievance Redressal Officer. Rule 9 provides for Vigilance Committee that has to be constituted by the State Government at Fair Price Shop, Block, District and State level. Vigilance Committee has to meet once in ever quarter of a calendar year. Rule 10 further provides for "Social Audit' by a local authority authorised by the State Government.

55. He then contended that Central Government enacted Act of 2016, which came for good governance, efficient, transparent, and targeted delivery of subsidies, benefits and services, the expenditure for which is incurred from the Consolidated Funds of India or by the Consolidated Funds of the State.

56. The subsidies, which were granted by the Central Government and the State Government is now being sent directly to the individual after creation of Aadhaar System and every individual was provided with a unique number or the Aadhaar number. Section 7 of the Act of 2016 made it mandatory for the receipt of certain subsidies, benefits and services that a person should have a Aadhaar number. Thus the twin effect of the Act of 2013 and 2016 created a system whereby subsidy given by the respective Governments in form of foodgrains and other essential commodities was to reach the individual/household/persons standing at the last.

57. The State Government therefore issued the Control Order 2016 keeping in

mind the Act of 2013 and 2016 with the object and motive of providing the foodgrains and essential commodities to every eligible household/individual who has been given right to receive foodgrains at a subsidised price under Section 3 of the Act of 2013.

58. The definition clause of Control Order 2016, Clauses 2(d), 2(e), 2(m), 2(r), 2(w) define the term "Antyodaya Anna Yojna", "Antyodaya Households", "Eligible Households", "Food Security Act" and "Social Audit", which are extracted hereas under :

*(d) "Antyodaya Anna Yojana" means the scheme by the said name launched by the Central Government on the 25th day of December, 2000 and modified from time to time."*

*(e) "Antyodaya Households" means those households identified by the State Government to receive food grains under the Antyodays Anna Yojana."*

*(m) "Eligible Households" means all those households who have been identified for the purpose under the National Food Security Act of 2013."*

*(r) "Food Security Act" means the National Food Security Act, 2013 (20 of 2013).*

*(w) "Social Audit" means the process in which people collectively monitor and evaluate the planning and implementation of Targeted public Distribution System in accordance with Section 10 of Uttar Pradesh Food Security Rules, 2015."*

59. He next invited attention of the Court to Clause 6 of the Control Order, 2016, which is in regard to "Distribution of food grains by States'. Clause 7, which is in regard to appointment and regulation of fair price shops and how a person is appointed to run a fair price shop, and sub-clause 2(iii) of Clause 7 provide that after an execution of an agreement between the dealer and State Government, the said appointment was to come in force.

60. Clause 8 of Control Order 2016, according to Sri Goyal is the most relevant clause wherein a complete mechanism has been provided for appointment of fair price shop and sub-clause (7) of Clause 8 provides action taken by competent authority in case of any violation of condition of licence including any irregularity committed by the dealer which includes suspension or cancellation of the licence. The said clause provides for an inquiry into irregularity in distribution by the dealer which is conducted by a designated officer or by District Magistrate and after inquiry, if some irregularity is found, the licence of fair price shop shall be suspended along with a show cause notice, and, the dealer is required to submit a reply/explanation to the show cause notice and it is only after examination of reply by the officer concerned that any order is passed. He then contended that the earlier order of 2004 did not contain such a provision and the external aid of Government of 29.7.2004 and 16.10.2014 was taken where a licence was suspended or cancelled.

61. Reliance placed upon decision of **Puran Singh (supra)** is not applicable in the present case as Control Order 2016 provides complete mechanism against situation arising out of, in case of suspension or cancellation.

62. As the Order of 2004 was silent as to the inquiry or show cause notice or submission of any reply/examination by the designated officer, the Full Bench relying

upon another Government Order dated 29.07.2004 had held that an opportunity of hearing was mandatory before licence being suspended. But in the present scenario, Control Order 2016 is a complete solution.

63. Accordingly to Sri Goyal, as the Control Order of 2004 was silent, the Government Order dated 16.10.2014 was issued pursuant to the decision of Full Bench as well as direction of this Court in the year 2012, but the present Control Order 2016 takes care of all these facts and the repeal clause providing for repeal of all earlier Government Orders, the argument of petitioner's counsel cannot be sustained.

64. He next contended that the Act of 2013 mandated that right to food is the vested right of an individual as well as eligible household, and the dealers do not have any vested right, as their existence, is under an agreement, and they are acting as an agent of the State.

65. The Central Act has been enacted with the motive of providing subsidised foodgrains to the last person of the society so as to eliminate hunger and poverty, and the State with the help of its agent/dealer is trying to realise its goal. Any violation of terms of agreement has to be dealt with the provision of the Control Order 2016. He then contended that the inquiry is limited to the violation of condition of licence and the irregularity.

66. An agreement executed between the petitioner and the State Authorities was placed before the Court and Clause 19 of agreement reads as under :

*'19. यदि और जब कभी एतत् पूर्व दी गयी शर्तों और प्रतिबन्धों में से किसी का भी एजेन्ट(फुटकर) द्वारा उल्लंघन किया जाए अथवा पालन न किया जाए तो जिला मजिस्टेट / जिला पूर्ति अधिकारी / नगर राशनिंग अधिकारी / सम्भागीय खाद्य नियंत्रक / अतिरिक्त जिला अधिकारी (आपूर्ति) किसी पूर्ववर्ती कारण अथवा अधिकारों के अधित्वजन के होते हुए भी जमा की गयी प्रतिभूति या उसके किसी भी अंश को जब्त कर सकता है और इसके अतिरिक्त इस अनुवेष पत्र को समाप्त कर सकता है। यदि और जब एजेन्ट (फुटकर) द्वारा जमा की गयी प्रतिभूति या उसका कोई अंश यथा पूर्वोक्त रूप से जब्त कर लिया जाये तो एजेन्ट(फुटकर) ऐसे समय के भीतर, जिसकी उक्त प्राधिकारी अनुमति दे, उक्त प्रतिभूति की पुनः पूर्ति यथा पूर्वोक्त जब्त की गई धनराशि के बराबर धनराशि जमा करके करेगा।''*

67. ere the Food Commissioner shall ensure the regular inspection of fair price shop. Clause 13 provides for an appeal in case any person is aggrieved by the order of designated authority or competent authority or in relation to action or subject covered under the Act of 2013. Clause 19 is the validation clause. Clause 20 is the repealing provision, which is extracted hereas under :

*"20. Provisions of the order to prevail over previous orders of State Government- The provisions of this order shall have effect not withstanding anything to the contrary contained in any order made by the State Government before the commencement of this order except as respects anything done, or omitted to be done thereunder before such commencement."*

68. Sri Goyal then placed before the Court the judgment of Apex Court in **K.S.Puttaswamy (supra)** i.e. Aadhaar case wherein the Apex Court while upholding the validity of Act of 2016 had held that there is a paradigm shift in addressing the problem of security and eradicating extreme poverty and

hunger. The shift is from the welfare approach to a right based approach. As a consequence, right of everyone to adequate food no more remains based on Directive Principles of State Policy (Article 47), though the said principles remain a source of inspiration. He also contended that in the Aadhaar judgment, the Court also observed that there are rampant corruption at various levels in implementation of benevolent and welfare schemes which has deprived the actual beneficiaries in receiving subsidies, benefits and services which get frittered away though on papers, it is shown that they are received by the persons for whom they are meant. There have been cases of duplicate and bogus ration cards, BPL cards, LPG connections etc. Reliance has been placed upon paragraphs 19, 62, 63, 64, 314, 315, 318, 330, 333, 361, 362, 466, 467 and 468 of the judgment.

69. Learned Additional Advocate General, also placed before the Court notification dated 17th August, 2015 issued by Ministry of Consumer Affairs, Food and Public Distribution, exercising power under Clause (e) of sub-section (2) of Section 39 read with Clause (d) of sub-section (4) of Section 22 of the Act of 2013, called "The Food Security (Assistance to State Governments) Rules, 2015.

70. Rule 2(a) thereof defines "Aadhaar Number', 2(b) defines "Act' means, National Food Security Act, 2013, Section 2(g) "Point of sale device', means a device to be installed and operated at fair price shops for identification of entitled persons and households for delivery of foodgrains, based on "Aadhaar number' or other authentication tools, specified by Central Government from time to time.

71. According to him, the Central Rules of 2015 having been framed after consultation with the State Government, under the Act of 2013 for providing the foodgrains and essential commodities directly under the supervision of Central and the State Government. Help of E Pos Machine was taken so that maximum pilferage can be capped, and distribution be monitored.

72. However, according to him, the fair price shop dealers started getting the thumb authentication of the card holders, but the entire foodgrains was not being provided to them, which has resulted in many of the complaints coming with the district authorities. He further invited attention to Rule 3, which is the time limit prescribed for allocation of foodgrains. Rule 5 thereof provides "duty of the State Governments' and Rule 7, which is the "Norm and pattern of Central assistance', provides for 50% as the Central share to the State of U.P. and rest 50% by the State Government. Rule 8 provides for "advance payment of margins to fair price shop dealers'.

73. Reliance has also been placed upon decision of Apex Court in case of **State of West Bengal and others vs. R.K.B.K. Limited and Another (2015) 10 SCC 369.** Relevant paras 24 and 25 of the judgment are extracted hereas under :

*"24. We have referred to the said passage of Peerless case, for the Control Order was brought into force for maintenance of supplies and for securing the equitable distribution and availability of kerosene at fair prices in West Bengal. It has controlling measures and it subserves the public purpose. The intent of the Control Order is to totally prohibit creation of any kind of situation which will frustrate the proper distribution of kerosene oil. The purpose of any Act or Rule or Order has its own sanctity. While*

*interpreting the same, the text and context have to be kept in mind. In this regard, we may usefully refer to an authority in Workmen v. Dimakuchi Tea Estate, AIR 1958 SC 353, wherein the three-Judge Bench while interpreting the expression "any person" occurring in Section 2(k) of the Industrial Disputes Act, 1947 observed that the definition clause must be read in the context of the subject matter and scheme of the Act, and consistently with the objects and other provisions of the Act. Elaborating further, the Court proceeded to state: (Workmen vs. Dimakuchi Tea Estate, AIR 1958 SC 353 p. 356, para 9)*

*"9. .... It is well settled that:*

*"the words of a statute, when there is a doubt about their meaning are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained". (Maxwell, Interpretation of Statutes, 9th Edn., p. 55).*

*25. Keeping in view the aforesaid rule of interpretation, we are constrained to think that it would be incongruous to hold that even when the licence of an agent at the State level is granted and issued by the Director, a District Magistrate, as defined in paragraph 3(e) of the Control Order, in exercise of concurrent jurisdiction can suspend or cancel the State level licence. Be it noted, as per Section 21 of the General Clauses Act, power to issue notification/ order/rules/bye-laws, etc. includes the power to amend/ vary or rescind. Though the said provision is not applicable, yet it is indicative that generally unless the statute or rule provides to the contrary, either expressly or impliedly, issuing or appointing authority would also exercise the right to cancel or suspend the licence. As has been stated earlier, on a cursory reading it may appear that paragraph 9 confers concurrent jurisdiction. The said paragraph deals with suspension or cancellation of licence and is a composite paragraph, which applies to licence granted to an agent as well as the dealer. It refers to the power of a Director and District Magistrate having jurisdiction. The words "District Magistrate having jurisdiction" are also used in paragraph 6. The expression "District Magistrate having jurisdiction" reflects the legislative intent that District Magistrate having jurisdiction under paragraph 9 would be the same District Magistrate or authority which has the power to grant licence to a dealer in Form B under paragraph 6. Read in this manner, we have no hesitation in holding that it is the Director alone who could have issued the show cause notice under paragraph 9 and has the authority and jurisdiction to pass an order in terms of paragraph 9 of the Control Order. The earlier notice issued by SCFS has to be regarded at best a show cause notice to ascertain and affirm facts alleged and it ensured a response and reply from the first Respondent. The said notice by SCFS could not have culminated in the order under paragraph 9, for he has no authority and jurisdiction to pass an order suspending or cancelling the licence. Therefore, the matter was rightly referred to the Director for action, if required, in terms of paragraph 9 of the Control Order.*

74. He also referred to the decision of coordinate bench of this Court dated 18.10.2019 in **Writ -C No.61939 of 2015**

**(Lakhan Singh vs. State of U.P. and others)** and relied upon paras 14 to 20 thereof, which are extracted hereas under :

*"14. It may also be taken note of that the commodities which are being distributed through the public distribution system are essential commodities within the meaning of Section 2(a) of the Act, 1955. The 1955 Act was enacted in the interest of general public for control of the production, supply and distribution of, and trade and commerce, in certain commodities. It was enacted by the Parliament in exercise of concurrent jurisdiction under Entry 33, List III, Schedule VII of the Constitution which reads as under:-*

*"33. Trade and commerce in, and the production, supply and distribution of,--*

*(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;*

*(b) foodstuffs, including edible oilseeds and oils;*

*(c) cattle fodder, including oilcakes and other concentrates;*

*(d) raw cotton, whether ginned or unginned, and cotton seed; and*

*(e) raw jute."*

*15. The objectives of the scheme of distribution of essential commodities in terms of the Control Orders issued under the Act, 1955 were succinctly laid down in the case of* ***Kallu Khan Vs. State of U.P. & Anr. 2008 (6) ADJ 453 (DB)*** *in the following terms:-*

*"19. It would be appropriate to consider the basic idea of distribution of essential commodities under the 1955 Act and the system of appointment of agents in furtherance of discharge of the aforesaid function. It cannot be disputed that even before 73rd Amendment of the Constitution the Government has undertaken the responsibility of distribution of essential commodities to public at large at controlled or fair price. The purpose of the said responsibility is obvious. The majority of the citizens in the country live either below poverty live or almost at par or little above thereof. They are not able to meet their two times meals by the meagre income they earn and, therefore, the market forces, if are allowed to operate freely without any protection to such persons, probably majority of such people would be forced to die of starvation and they may not be able to survive at all. This experience we had even before independence and immediately after independence when the hoarders created a situation of scarcity of food items causing virtual revolution in different parts of the country at times. Various social and welfare measure were taken by the then Government and one of the major decision taken with the intervention of Parliament is enactment of 1955 Act conferring power upon the Government to control production, supply and distribution of, and trade and commerce in certain commodities, namely, essential commodities as defined under Section 2(1) of 1955 Act. Therefore, the basic idea and intention of the legislature under the Act is to make available essential commodities to the public at large at fair price except of the cases where the availability and equitable distribution would be necessary*

*for defence of India or for any efficient conduct of military operations. The Act intends to provide welfare measure for availability of essential commodities to public at large at fair price and rest of the machinery or mechanism is incidental for achieving the aforesaid goal. The appointment of fair price shop dealers, therefore, as such, is not the primary objective of 1955 Act but it is a channel by which the objective of making essential commodities available to public at large at fair price is to be achieved. It is always permissible and open to the Government to make the essential commodities available to public at large at fair price through the agencies or instrumentalities of its own namely, its own officers or officials or by creating a department or alike. Simultaneously, instead of undertaking the said job on its own it can discharge the aforesaid obligation through private persons or bodies by appointing them as its agents. Bereft of the authority conferred upon such agents by the Government for distribution of essential commodities at fair price, such persons had no fundamental or legal right of dealing with such essential commodities on behalf of the Government to distribute to public at large the essential commodities at fair prices, though on their own, in their private capacity, it is always open to them to make the commodities which are essential commodities under the Act available to public at large at fair price without having any corresponding burden upon the Government if there is no otherwise prohibition under any other law and the statutory provisions otherwise controlling the production, storage etc. of such essential commodities are observed by them..."*

*16. It may be apposite to refer to the provisions of Part IX of the Constitution introduced in terms of 73rd Constitutional Amendment whereunder provisions pertaining to "Panchayat" were inserted providing for its constitution, composition, reservation of seats, duration of Panchayats, disqualification for membership, powers, authority and responsibilities of Panchayats, elections to the Panchayats etc. The aforesaid 73rd Amendment of the Constitution came into force on 24.04.1993. For the purpose of present case it would be appropriate to refer Article 243-G which reads as under:-*

*"2**43G. Powers, authority and responsibilities of Panchayats.**--Subject to the provisions of the Constitution, the Legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats at the appropriate level, subject to such conditions as may be specified therein, with respect to--*

*(a) the preparation of plans for economic development and social justice;*

*(b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule."*

*17. The Eleventh Schedule as referred to in Article 243G contains a list of the matters which may be entrusted to the Panchayats and item 28 thereof reads as under:-*

*"28. Public distribution system."*

*18. It would be important to notice at this stage that even prior to 73rd Amendment, Village Panchayat system was already recognised and well established in the State of Uttar Pradesh and was governed by U.P. Panchayat Raj Act, 1947. Consistent with the amendment made in the Constitution, the Act of 1947 was also amended and Section 15 which provides for functions of Gram Panchayat was also substituted by U.P. Act No.9 of 1994. It would be appropriate to reproduce the relevant part of Section 15 as under:-*

*"15(xxix) Public distribution system:*

*(a) Promotion of public awareness with regard to the distribution of essential commodities.*

*(b) Monitoring the public distribution system."*

*19. The objectives of the public distribution system and its importance in the scheme of distribution of essential commodities to the public at large was emphasized in Gopi Vs. State of U.P. & Ors. 2007(6) ADJ 231 (DB) in the following terms:-*

*"25. Realising the importance of the Public Distribution System, Parliament while bringing about the 73rd constitutional amendment included the Public Distribution System as one of the primary functions of the Gram Panchayat and it has been incorporated in Article 243-G of Part 9 of the Constitution. The Public Distribution System is obviously a avowed function of the State in order to ensure the distribution of essential commodities fairly. The object is clearly to provide benefit to the public at large in order to ensure supply of essential commodities which is necessary for the sustenance of daily life. The aforesaid object, therefore, has to be fulfilled keeping in view the intention of the legislature which is to promote public awareness and ensure distribution of essential commodities. In essence, the object is to provide benefit to the public at large. As a necessary corollary to the same, the object is not to set up any trade for the benefit of any individual. It may be that by virtue of this licensing system, an individual also gets the opportunity to benefit himself by setting up a fair price distribution unit. However, such a licence does not fall within the category of a fundamental right to carry on trade and business as understood under Article 19(1)(g) of the Constitution of India. The Government Order which has been issued under the provisions of the Essential Commodities Act, is to regulate the supply and distribution of essential commodities fairly. The suspension of such a licence, pending inquiry is a step in the process of eliminating any such discrepancy which affects the public at large. The authorities while proceeding to suspend a licence, have the authority to attach a fair price shop to another Agency, in order to ensure that the public at large does not suffer on account of such suspension. Thus, viewed from any dimension, the power of suspension if exercised bonafidely in public interest does not by itself cause prejudice to a licensee inasmuch as he has a remedy by filing an appeal against such an order and even otherwise upon the satisfaction of the authority after hearing the objections, the authority can still restore the licence subject to a satisfactory reply being submitted by the licensee.*

*20. The aforementioned judgments in the case of Kallu Khan Vs. State of U.P. & Anr. and Gopi Vs. State of U.P. & Ors. were subsequently approved by a Full Bench of this Court in P**uran***

***Singh Vs. State of U.P. & Ors. 2010 (3) ADJ 659 (FB)."***

75. Lastly it was contended that the petitioner had not taken any such ground for cross-examination in his appeal and no vested right accrues in favour of the petitioner as his case rests on the agreement executed between the parties. Moreover, the petitioner was provided sufficient opportunity to submit his reply and it was only after the consideration of his reply that the authorities had proceeded to cancel his licence. The grounds taken in appeal has been addressed by the appellant authority, and writ petition under Article 226 of the Constitution of India is not maintainable.

76. I have heard the rival submissions and perused the material on record.

77. In this 21st Century, the Government recognised the importance of food for eliminating poverty and hunger from the Society and enacted Act of 2013 recognising "right to food' of an individual and household.

78. The focus shifted, and right of an individual was recognised for the first time for getting the foodgrains from the central pool distributed through State Government. The Government then in order to ensure that it reaches the last person through Targeted Delivery System, enacted Act of 2016, making Aadhaar number mandatory for getting the foodgrains.

79. It was on this central theme that State Government came out with a new Control Order, 2016 superseding and repealing all the earlier Government Orders issued in exercise of power under Section 3 of Act of 1955, providing a complete mechanism for fulfilling the dream of eliminating hunger and poverty.

80. The Act of 2016 was approved by the Apex Court in **K.S.Puttaswamy's case (supra)** holding that it empower the marginalised Section of the Society, particularly those who are illiterate and living in abject poverty or without any shelter. The Hon'ble Court recognised that there is a paradigm shift in addressing the problem of security and eradicating extreme poverty and hunger. The shift is from the welfare approach to a rights-based approach. As a consequence, right of everyone to adequate food no more remains based on directive principles of State policy (Article 47), though the said principle remain source of inspiration. Relevant paras 314 and 315 of the judgment are extracted hereas under :

*"314. It may be highlighted at this stage that the Petitioners are making their claim on the basis of dignity as a facet of right to privacy. On the other hand, Section 7 of the Aadhaar Act is aimed at offering subsidies, benefits or services to the marginalised Section of the society for whom such welfare schemes have been formulated from time to time. That also becomes an aspect of social justice, which is the obligation of the State stipulated in Para IV of the Constitution. The rationale behind Section 7 lies in ensuring targeted delivery of services, benefits and subsidies which are funded from the Consolidated Fund of India. In discharge of its solemn Constitutional obligation to enliven the Fundamental Rights of life and personal liberty (Article 21) to ensure Justice, Social, Political and Economic and to eliminate inequality (Article 14) with a view to ameliorate the lot of the poor and*

*the Dalits, the Central Government has launched several welfare schemes. Some such schemes are PDS, scholarships, mid day meals, LPG subsidies, etc. These schemes involve 3% percentage of the GDP and involve a huge amount of public money. Right to receive these benefits, from the point of view of those who deserve the same, has now attained the status of fundamental right based on the same concept of human dignity, which the Petitioners seek to bank upon.*

*315. The Constitution does not exist for a few or minority of the people of India, but "We the people". The goals set out in the Preamble of the Constitution do not contemplate statism and do not seek to preserve justice, liberty, equality an fraternity for those who have the means and opportunity to ensure the exercise of inalienable rights for themselves. These goals are predominantly or at least equally geared to "secure to all its citizens", especially, to the downtrodden, poor and exploited, justice, liberty, equality and "to promote" fraternity assuring dignity. Interestingly, the State has come forward in recognising the rights of deprived Section of the society to receive such benefits on the premise that it is their fundamental right to claim such benefits. It is acknowledged by the Respondents that there is a paradigm shift in addressing the problem of security and eradicating extreme poverty and hunger. The shift is from the welfare approach to a right based approach. As a consequence, right of everyone to adequate food no more remains based on Directive Principles of State Policy (Article 47), though the said principles remain a source of inspiration. This entitlement has turned into a Constitutional fundamental right. This Constitutional obligation is reinforced by obligations under International Convention. The Universal Declaration of Human Rights (Preamble, Article 22 & 23) and International Covenant on Economic, Social and Cultural Rights to which India is a signatory, also casts responsibilities on all State parties to recognize the right of everyone to adequate food. Eradicating extreme poverty and hunger is one of the goals under the Millennium Development Goals of the United Nations. The Parliament enacted the National Security Food Act, 2013 to address the issue of food security at the household level. The scheme of the Act designs a targeted public distribution system for providing food grains to those below BPL. The object is to ensure to the people adequate food at affordable prices so that people may live a life with dignity. The reforms contemplated Under Section 12 of the Act include, application of information and communication technology tools with end to end computerization to ensure transparency and to prevent diversion, and leveraging Aadhaar for unique biometric identification of entitled beneficiaries. The Act imposes obligations on the Central Government, State Government and local authorities vide Chapter VIII, IX and X. Section 32 contemplates other welfare schemes. It provides for nutritional standards in Schedule II and the undertaking of further steps to progressively realize the objectives specified in Schedule III."*

81. The Apex Court further recognised that State in order to fulfil its duty as per the Charter of Directive Principles contained in Part IV of the Constitution, the Aadhaar Act recognises various socio-economic rights of poor and marginalised section of the Society. Relevant paras 330 and 333 of the judgment are extracted hereas under :

*"330. The purpose of citing aforesaid judgments is to highlight that this*

*Court expanded the scope of Articles 14 and 21 of the Constitution by recognising various socio-economic rights of the poor and marginalised Section of the society and, in the process, transforming the constitutional jurisprudence by putting a positive obligation on the State to fulfill its duty as per the Charter of Directive Principles of the State Policy, contained in Part IV of the Constitution. It is to be kept in mind that while acknowledging that economic considerations would play a role in determining the full content of the right to life, the Court also held that right included the protection of human dignity and all that is attached to it, 'namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms' (See Francis Coralie Mullin v. The Administrator, UT of Delhi (1981) 1 SCC 608). It is, thus, of some significance to remark that it is this Court which has been repeatedly insisting that benefits to reach the most deserving and should not get frittered mid-way. We are of the opinion that purpose of Aadhaar Act, as captured in the Statement of Objects and Reasons and sought to be implemented by Section 7 of the Aadhaar Act, is to achieve the stated objectives. This Court is convinced by its conscience that the Act is aimed at a proper purpose, which is of sufficient importance."*

*279. Section 7, which provides for necessity of authentication for receipt of certain subsidies, benefits and services has a definite purpose and this authentication is to achieve the objectives for which Aadhaar Act is enacted, namely, to ensure that such subsidies, benefits and services reach only the intended beneficiaries. We have seen rampant corruption at various levels in implementation of benevolent and welfare schemes meant for different classes of persons. It has resulted in depriving the actual beneficiaries to receive those subsidies, benefits and services which get frittered away though on papers, it is shown that they are received by the persons for whom they are meant. There have been cases of duplicate and bogus ration cards, BPL cards, LPG connections etc. Some persons with multiple identities getting those benefits manifold. Aadhaar scheme has been successful, to a great extent, in curbing the aforesaid malpractices. By providing that the benefits for various welfare schemes shall be given to those who possess Aadhaar number and after undergoing the authentication as provided in Section 8 of the Aadhaar Act, the purpose is to ensure that only rightful persons receive these benefits. Non-action is not costly. It's the affirmative action which costs the Government. And that money comes from exchequer. So, it becomes the duty of the Government to ensure that it goes to deserving persons. Therefore, second component also stands fulfilled.*

82. The Apex Court while upholding the validity of the Act of 2016 had laid emphasis on the benefit and welfare measures which were going to be extended to the marginalised section of the Society, *considering the benefit extended by the State reaching the poor, held as under :*

*"466. As all these three kinds of welfare measures are sought to be extended to the marginalised Section of society, a collective reading thereof would show that the purpose is to expand the coverage of all kinds of aid, support, grant, advantage, relief provisions, facility, utility or assistance which may be extended with the support of the Consolidated Fund of India*

*with the objective of targeted delivery. It is also clear that various schemes which can be contemplated by the aforesaid provisions, relate to vulnerable and weaker Section of the society. Whether the social justice scheme would involve a subsidy or a benefit or a service is merely a matter of the nature and extent of assistance and would depend upon the economic capacity of the State. Even where the state subsidizes in part, whether in cash or kind, the objective of emancipation of the poor remains the goal.*

*467. The Respondents are right in their submission that the expression subsidy, benefit or service ought to be understood in the context of targeted delivery to poorer and weaker Sections of society. Its connotation ought not to be determined in the abstract. For as an abstraction one can visualize a subsidy being extended by Parliament to the King; by Government to the Corporations or Banks; etc. The nature of subsidy or benefit would not be the same when extended to the poor and downtrodden for producing those conditions without which they cannot live a life with dignity. That is the main function behind the Aadhaar Act and for this purpose, enrolment for Aadhaar number is prescribed in Chapter II which covers Sections 3 to 6. Residents are, thus, held entitled to obtain Aadhaar number. We may record here that such an enrolment is of voluntary nature. However, it becomes compulsory for those who seeks to receive any subsidy, benefit or service under the welfare scheme of the Government expenditure whereof is to be met from the Consolidated Fund of India. It follows that authentication Under Section 7 would be required as a condition for receipt of a subsidy, benefit or service only when such a subsidy, benefit or service is taken care of by Consolidated Fund of India. Therefore, Section 7 is the core provision of the Aadhaar Act and this provision satisfies the conditions of Article 110 of the Constitution. Upto this stage, there is no quarrel between the parties.*

*468. In this context, let us examine provisions of Sections 23(2)(h), 54(2)(m) and 57 of the Aadhaar Act. Insofar as Section 23 is concerned, it deals with powers and functions of the Authority. Sub-section (1) thereof says that the Authority shall develop the policy, procedure and systems for issuing Aadhaar numbers to individuals and perform authentication thereof under this Act. As mentioned above, Under Section 3 of the Aadhaar Act, Aadhaar number is to be issued and authentication is performed Under Section 8 of the Aadhaar Act. Sub-section (2) stipulates certain specified powers and functions which the Authority may perform and Sub-section (h) thereof reads as under:*

*23(2)(h) specifying the manner of use of Aadhaar numbers for the purposes of providing or availing of various subsidies, benefits, services and other purposes for which Aadhaar numbers may be used.*

*This provision, thus, enables the Authority to specify the manner of use of Aadhaar with specific purpose in mind, namely, for providing or availing of various subsidies, benefits and services. These are relatable to Section 7. However, it uses the expression 'other purposes' as well. The expression 'other purposes' can be read ejusdem generis which would have its relation to subsidies, benefits and services as mentioned in Section 7 and it can be confined only to that purpose i.e. scheme of targeted delivery for giving any*

*grant, relief etc. when it is chargeable to Consolidated Fund of India. Therefore, this provision, according to us, can be read as incidental to the main provision and would be covered by Article 110(g) of the Constitution."*

83. The combining effect of Act of 2016 (Aadhaar) and Act of 2013 led to a transformational change in the Society and the delivery system of the Government, as now the subsidy, which was given under the various scheme of the Central and state Government, started reaching to whom it was meant for.

84. The Government had recognised that there was huge pilferage in the distribution system, not only in the Public Distribution System for foodgrains, but over other areas also where subsidy was being given from the consolidated fund of India or the fund of the State that it never reached the person for whom it was released. The Control Order, 2016 was promulgated with the idea of combining the two central Act with the object of giving better result, eliminating and capping the pilferage from the earlier system, which existed having its sources under Section 3 of the Act of 1955. The earlier Order of 2004, which had its root from the Act of 1955, did not provide a complete mechanism. Thus, with the external aid of Government Orders, issued from time to time, that matter relating to suspension and cancellation (penalty) was being proceeded with.

85. The Full Bench of **Puran Singh (supra)** was also a case where the matter was referred, on there being difference of opinion as to whether any opportunity of hearing was required prior to suspension.

86. As no mechanism was provided under the Order of 2004, and the Government Order dated 29.7.2004, supplanting the said order of 2004 provided for certain opportunity of hearing which was explained by the Full Bench in **Puran Singh (supra)**. The State on 16.10.2014 and 16.12.2015 had to issue another clarificatory Government Orders as the problem was creeping day by day as there was no fixed procedure laid down to address the problem in regard to suspension and cancellation of licence of a dealer.

87. It was in the year 2016, that a complete mechanism was provided by the State Government in the form of Control Order, 2016 having its roots from Act of 2013 and 2016. The State Government repealed all its earlier Government Orders issued in the year 2004, 2014 and 2015. Clause 8 of the Control Order, 2016 provides for operation of the fair price shop. Sub-clause (7) of Clause 8 provides for detailed procedure to be followed by the competent authority in case there is any violation of any condition of a licence including any irregularity committed by the dealer. The inquiry is to be conducted by the Designated officer or District Magistrate, and after inquiry, if the license of fair price shop is suspended along with a show cause notice, then reply/ explanation of show cause notice by dealer has to be examined by an officer one rank above the inquiry officer. This provision was not there in the Order of 2004, and the Full Bench in **Puran Singh (supra)** held that opportunity of hearing was necessary before suspending the licence taking help of another Government Order dated 29.7.2004.

88. As it has been noted above that the Act of 2013 and the Aadhaar judgment had recognized the right to food of an individual and household, the dealer or fair

price show owner, who are an agent of State cannot claim parity with the right of an individual. The obligation of providing foodgrains to an individual or household is upon the State. In order to fulfill its obligation envisaged under Article 47 of the Constitution of India, being directive principle, the State Government carries out its obligation through appointing agents in the form of fair price shop dealer, and entering into an agreement with them and granting licence. The agent/dealer is bound by the terms and conditions of licence.

89. The term "licence", as defined in Advanced Law Lexican IIIrd Edition means, *"an authority to do something which would otherwise be inoperative, wrongful or illegal; a formal permission from a Cinstituted authority to do something"*.

90. Similarly, term "licencee" means person who is in occupation, a subsisting agreement for licence. Thus, the entire claim of a dealer/agent rests upon the agreement executed by him with the State.

91. There is a marked difference between right of an individual or household claiming food under the Control Order, 2016 and the claim of a dealer/agent whose very existence rest upon the terms of an agreement.

92. The argument raised at the bar that right of the petitioner/dealer/agent are being infringed upon by the State/District Authorities in suspending or cancelling the license without following the principles of natural justice or adhering to the various procedures laid down in the various Government Orders issued from time to time from 2004 to 2015, does not hold ground, as it is vested right of an individual to receive foodgrains and not the vested right of the agent/dealer.

93. The Hon'ble Apex Court has also recognized the right to food of an individual under Article 21, dealing the Aadhaar case, and noticed that there being a paradigm shift in addressing problem of security and eradicating extreme poverty and hunger. The shift is from the welfare approach to a rights-based approach.

94. As the existence of agent/dealer arise from the agreement executed between them and the State, any failure on their part or term of license being violated, the matter has to be dealt with by the authority within the scope and ambit of the Act/Control Order under which the same has been executed. The argument advanced that the petitioners have vested right is not correct as the license granted to a dealer/agent does not fall within the ambit of fundamental right to carry on their business, as provided under Article 19(1)(g) of the Constitution.

95. While dealing with the matter of suspension or cancellation of a license, the authority have to confine themselves to the violation of the condition of license and sub-clause (7) of Clause 8 of Control Order, 2016 protects the interest of agent/dealer by affording an opportunity once an inquiry is conducted and any material coming on record against the term of condition of license, the same being suspended and a show cause notice is to be issued seeking reply/explanation.

96. The principle of *audi alteram partem* is complied once the notice is issued and an opportunity is provided to a dealer/agent to submit his reply and the same being considered by the authorities. The claim that a full fledged inquiry be

conducted providing opportunity of cross-examination of witness, copy of documents, complaint and consideration of subsequent affidavits, if filed in favour of the dealer, by the authorities cannot be accepted, as it is not a departmental or regular inquiry under Article 311 of the Constitution of India and is only a inquiry of summary nature where in case of violation of terms of conditions of license, action is initiated and opportunity, as provided under the Control Order, 2016, is given before the license is cancelled.

97. A coordinate Bench of this Court while dealing with the issue of nature of inquiry in case of **Meena Devi vs. State of U.P. and 4 others Writ C No.58035 of 20**17, in its judgment dated 30.07.2018, held as under :

*"51. This Court is of the considered opinion that a fair price shop licence is only an agent for distribution of scheduled commodities under the Public Distribution System. Such a licensee being only an agent acts for the principal i.e. the Government with a fixed rate of commission on the amount of allocation of essential commodities and their distribution by weight. The Public Distribution System has been envisaged by the government only to help the poor and needy. It is honest tax-payer's money which is used to subsidize the price of such essential commodities so that they come within the reach of poor and needy and they are able to feed themselves and their family in a respectable fashion and are not led to mendicancy and starvation. The principal remaining the State Government, and the licensee being only an agent, the principal is entitled to take away the licence in case of irregularity in distribution. Of course, there should exist valid reasons for taking away of such licence and some opportunity of hearing is required to be given to the agent in case of complaints being received against him. However, there is no fundamental right nor any Constitutional right for such a licensee akin to Article 311 of the Constitution of India. Even in the case of government servants protected under Article 311 of the Constitution of India the degree of proof required for establishment of guilt is that of "preponderance of probability".*

**98. The Court also took note of the decision of Apex Court in case of A.S.Motor Pvt. Ltd. vs. Union of India (2013)10 SCC 114** wherein the Apex Court had dealt with the principles of natural justice and their applicability in the realm of contract/license/agreement entered between the Government and agent. The Apex Court held as under :

*"8. Rules of natural justice, it is by now fairly well settled, are not rigid, immutable or embodied rules that may be capable of being put in straitjacket nor have the same been so evolved as to apply universally to all kind of domestic tribunals and enquiries. What the Courts in essence look for in every case where violation of the principles of natural justice is alleged is whether the affected party was given reasonable opportunity to present its case and whether the administrative authority had acted fairly, impartially and reasonably. The doctrine of audi alteram partem is thus aimed at striking at arbitrariness and want of fair play. Judicial pronouncements on the subject have, therefore, recognised that the demands of natural justice may be different in different situations depending upon not only the facts and circumstances of each case but also on the powers and composition of the*

*Tribunal and the rules and Regulations under which it functions. A Court examining a complaint based on violation of rules of natural justice is entitled to see whether the aggrieved party had indeed suffered any prejudice on account of such violation. To that extent there has been a shift from the earlier thought that even a technical infringement of the rules is sufficient to vitiate the action. Judicial pronouncements on the subject are a legion. We may refer to only some of the decisions on the subject which should in our opinion suffice."*

99. As regards an opportunity to cross-examine the persons whose statements had been recorded, the Apex Court held as under :

*"16. The contention that the Appellant should have been given an opportunity to cross-examine the persons whose statements had been recorded by the agency in the course of its inquiry and verification was rightly rejected by the High Court keeping in view the nature of the inquiry which was primarily in the realm of contract, aimed at finding out whether the Appellant had committed any violation of the contractual stipulations between the parties. Issue of a show-cause notice and disclosure of material on the basis of which action was proposed to be taken against the Appellant was in compliance with the requirement of fairness to the Appellant who was likely to be affected by the proposed termination. Absence of any allegation of mala fides against those taking action as also the failure of the Appellant to disclose any prejudice, all indicated that the procedure was fair and in substantial, if not strict, compliance with the requirements of Audi Alteram Partem. The first limb of the challenge mounted by the Appellant, therefore, fails and is hereby rejected."*

100. Thus, under the Control Order, 2016, specific provision having been made for consideration of reply/explanation pursuant to the suspension, the requirement of audi *alteram partem* having been afforded to a dealer appointed under an agreement, cannot claim that a regular inquiry to be conduced giving opportunity for examination of documents, cross examination of witnesses, providing copy of inquiry report and taking of affidavits, as provided under the departmental proceedings.

101. Clauses 19 and 20 of the Control Order, 2016, providing for validation and provisions for prevailing of the present control orders over the previous orders issued by the State Government, is clear enough to hold that the earlier Government Orders of 2004, 2014 and 2015 having stood repealed, do not occupy the field for laying down the procedure in respect of dealing with the matter of suspension and cancellation of a license. The entire procedure has been provided under the new Control Order, 2016.

102. Now coming to the argument raised in regard to Section 24 of the General Clauses Act, saving the earlier Order of 2004, Government Order dated 29.7.2004 and 16.10.2014 is of no avail to him as the Control Order 2016 came into force in the light of Central Act of 2013 and Act of 2016 and all earlier Government Orders having stood repealed. Section 24 is a saving clause only when any enactment is repealed or re-enacted with or without modification, then, any act done under the repealed enactment, so far as it is not inconsistent with the provisions re-enacted,

continue in force, and be deemed to have been issued under the provisions so re-enacted.

103. The Government Orders of 2004 and 2014 were only supplementing the Order of 2004 which was issued under Section 3 of Act of 1955, as there being no provision for dealing with suspension and cancellation of license, while Control Order, 2016 deriving its sources from the Act of 2013 and 2016 recognising right of an individual provided for the complete mechanism while dealing with the suspension/ cancellation of a license.

104. Section 24 of General Clauses Act would not be applicable in the present scenario as the effect of earlier Government Orders came to an end, after complete procedure having been promulgated by the State Government. The Government Orders of 29.7.2004 and 16.10.2014 were there to fill up the lacuna of Order of 2004, which did not provide for procedure in case of penalty (suspension/cancellation).

105. Reliance placed upon Division Bench decision in **Ram Murat (supra)** and Full Bench judgment in the case of **Indrapal Singh (supra)** are not applicable in the present case as Control Order, 2016 provides entire mechanism and the earlier orders of 2004 and 2014 are of no help as the re-enacted provision needs no external help. Relevant paras 38 and 39 of **Indrapal Singh's judgment (supra)** is extracted hereas under :

*"38. Once the State Government who otherwise is empowered to issue Government Order controlling the subject of way and manner in which fair price shop dealer is to be appointed and the fair price shops are to be run and the State Government in its wisdom has proceeded to pose restriction and disqualification on an incumbent and his family members as defined in Paragraph 4.7 from being appointed as agent on Pradhan/Up-pradhan being there or being elected subsequently as Pradhan or Up-pradhan, then in said context the provision of U.P. Scheduled Commodities Distribution Order, 2004, containing the definition of household cannot be pressed into the services as by virtue of the provision of Section 24 of the U.P. General Clauses Act, 1904, the aforementioned Government Orders dated 3rd July, 1990 and 18th June, 2002 stands saved and are operating with full force as no inconsistent provision has been re-enacted. Relevant extract of Section 24 reads as follows;*

*"24. Constitution of appointments, notifications, orders etc issued under enactments repealed and re-enacted.--Where any enactment is repealed and re-enacted by an (Uttar Pradesh) Act, with or without modification, then, unless it is otherwise expressly provided, any appointment, (or statutory instrument or form) made or issued under the repealed enactment shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted, unless and until it is superseded by any appointment, (or statutory instrument or form) made or issued under the provisions so re-enacted."*

*39. Apex Court in the case of State of Punjab v. Harnek Singh 2002 (3) SCC 481, has proceeded to mention that Section 24 of the General Clauses Act deals with the effect of repeal and re-enactment of an Act and the object of the section is to preserve the continuity of the notifications,*

*orders, schemes, rules or bye-laws made or issued under the repealed Act unless they are shown to be inconsistent with the provisions of the re-enacted statute. Anything duly done or suffered thereunder, are used by legislature and saving clause, is intended with the object that unless different intention appears, the repeal of an Act would not effect. The General Clauses Act has been enacted to avoid superfluity and repetition of language in various enactments. The object of this Act is to shorten the language of Central Acts, to provide as far as possible, for uniformity of expression in Central Acts, by giving definition of series of terms in common use, to state explicitly certain convenient rules for the construction and interpretation of Central Acts, and to guard against slips and oversights by importing into every Act certain common form clauses, which otherwise ought to be inserted expressly in every Central Act. In other words the General Clauses Act is a part of every Central Act and has to be read in such Act unless specifically excluded. Even in cases where the provisions of the Act do not apply, Courts in the country have applied its principles keeping in mind the inconvenience that is likely to arise otherwise, particularly when the provision made in the Act are based upon the principles of equity, justice and good conscience."*

106. Once the complete procedure was there, the State withdrew all its Government Orders bringing to rest the controversy raised due to incomplete regulations.

107. Coming to the next argument raised from petitioners' side, relying upon the decision of **Menka Gandhi's case (supra**) that right accrues in favour of a person to whom a license is granted and deprivation of such right without hearing is violation of principles of natural justice and a vested right having been accrued in favour of a dealer cannot be taken away in a casual manner, has no force, as in case of **Menka Gandhi (supra)**, the passport was impounded without affording opportunity of hearing but in the present case the licensee/agent/dealer was given a show cause notice and his reply was considered before cancellation of his license.

108. Likewise, in **A.K.Kraipak and Ors. (supra)**, the Court held that the principles of natural justice requires hearing before an order is passed to prevent miscarriage of justice. Similarly, reliance placed on **K.T.Shaduli Yusuff and others (supra)** also takes note of providing opportunity before an assessment is made under the Taxing Statute. In **Baraka Overseas Traders (supra)**, the Apex Court while considering the effect of withdrawal of license granted under Duty Exemption Scheme requires opportunity of hearing.

109. However, these cases are of no help to the petitioners, as they have already been served with a notice seeking reply and action taken pursuant to the consideration of reply by the Licensing Authority.

110. The principle of *audi alteram partem* has been complied with as a clear procedure has been envisaged in sub-clause (7) of clause 8 of Control Order, 2016. The argument as to the vested right of a dealer cannot be accepted as his claim arises from the agreement and a dealer is bound by terms and conditions of a license. Any violation of a condition would result in proceeding for suspension or revocation of such license. The authorities had to

consider and proceed under the procedure prescribed in the Control Order, 2016.

111. Reliance placed upon decisions of co-ordinate Benches of this Court are of no help, as in none of the cases Act of 2013 and 2016 was considered, nor the judgment of Apex Court in Aadhaar case was brought to notice.

112. It was for the first time that Sri Goyal brought to the notice the above facts and pointed to the complete mechanism provided under the Control Order, 2016. None of the decisions placed before the Court had taken note of the said fact except in **Meena Devi (supra)** where the Court had considered the Control Order 2016.

113. Clause 1(2)(kha) of Government Order dated 05.08.2019 only provides for a preliminary inquiry in case of a complaint by a card holder. During investigation, the distribution done by dealer has to be seen/verified from the portal, while it is optional that the entries may be verified from the card of the card holders. It further provides for cross-examination of the complainant and other witnesses during investigation, but does not provide for cross-examination by the dealer.

114. This Government Order does not in any way override the statutory provisions of Control Order, 2016 or dilute sub-clause (7) of Clause 8, but only provides for a caution during an inquiry.

115. The grant of a license is not a right, as claimed by the petitioner. Moreover, the argument that a dealer has been roped in by the State to achieve its object of providing food to every individual and household and thus this duty entrusted also entails a right of a dealer does not hold ground as the dealer is duty bound and tied to conditions of license. Any violation will invite the penal action of the State as it amounts to blocking the aim and object of the State.

116. The burden of duty is very heavily cast upon a dealer, who has to strictly comply with the conditions of license, and cannot travel beyond the agreement executed by him, which lays various restriction upon him. The agreement is not executed blindly, but with an open eye by the licensee with the State. Once the action is taken, upon any violation, the dealer cannot turn around and blame the system on mere technicalities, as the agreement binds him to comply the conditions.

117. It has been a constant effort of both the Central and State Governments post independence that the distribution of foodgrains and other essential commodities reach to the various section of the Society. With every advancement of technology, new methods are put into system for better channelization and utilization of the resources so as to reach its ultimate goal.

118. The unique number, (Aadhaar Act) is one such novel method and with the technical advancement, the effort of the Government had been reduced to quite number of times in making the subsidy reach to its ultimate beneficiaries. Still, after capping the pilferage in the system, the Public Distribution System sometimes finds itself at crossroads, due to dishonest intention of the people involved in the system, such as, dealer/agent and also some of the officials of State Government.

119. Though, Control Order, 2016 takes care for the appointment of Vigilance

Committee and Observers and their submitting report to the authorities, then too cases are coming up where the poor are not getting the foodgrains meant for them, and the same being siphoned off by unscrupulous.

120. The State Government was earlier directed by this Court on 19.07.2017 in Writ-C No.15723 of 2017 to come up with a policy as to action to be taken against such defaulting agent of the State Government but till date no such policy of the State Government has been framed. This Court finds that though the Control Order 2016 insulates the entire procedural system of distribution of foodgrains to individuals and households, and penalises (suspension/cancellation) the dealers, but no mechanism has been provided in dealing with the defaulting officials of the State Government.

121. If the State recognizes a right of a individual in regard to foodgrains and essential commodities for solving hunger and poverty, it also has to deal with its corrupt and defaulting officials who are also denting and creating obstruction in the passage of flowing of subsidies and other benefits to the deserving.

122. This Court feels that once the State starts taking action against such defaulting officials, a considerable improvement will be reflected in the entire Public Distribution System and the Government can truly achieve its object in enacting the National Food Security Act.

123. The argument that only on complaint of few, results in proceeding for suspension and cancellation of license needs examination, does not appeal to the Court, as the recipient of the Public Distribution System are the people living Below Poverty Line, Antyodaya and Above Poverty Line households. It cannot be expected that people, who are getting subsidized ration, can muster enough courage to come up and report to the authorities against a dealer/agent. It is only when there is constant shortfall of supply at the end of dealer or the poor being harassed to such an extent, then, few muster courage to report the matter to the system.

124. We, people in India, are well aware that complaint falls on deaf ears on the Government authorities, especially coming from the people from vulnerable section of Society. One can imagine the plight of a poor man, not getting the foodgrains meant for him, and harsh treatment at the dealer end. It is only in few and exceptional cases that action are initiated.

125. The Courts cannot turn blind eye towards the plight of poor and miserable section of the Society, and grant leverage to dealers and agents restoring license in the garb of technicalities of not supplying inquiry report, opportunity of cross examination, affidavits submitted subsequently etc. It is not a case where no opportunity to file reply, as mandated under sub-clause (7) of Clause 8, was not given. It was only after the consideration of reply and show cause notice that license was cancelled.

126. The dealer/agent thereafter has a remedy of appeal under Clause 13 of Control Order, 2016 wherein he can take all the grounds available to him. Once the grounds are taken by him, and the Appellate Authority records finding, nothing remains to be considered by this Court exercising power under Article 226

of the Constitution of India, as the proceedings are summary in nature.

127. This Court can look into and grant indulgence only when the procedure laid down under the Control Order, 2016 having not been complied with or the opportunity, as envisaged under sub-clause (7) of Clause 8, has not been provided to an agent/dealer. Once the entire exercise has been completed and appeal has been filed with all the grounds available, and finding having being recorded by the Appellate Authority, then nothing remains to be seen and considered by this Court, exercising extra ordinary jurisdiction under Article 226 of the Constitution.

128. Thus, both the questions (i) and (ii) stand answered i.e. pursuant to the promulgation of Control Order 2016, the earlier Government Order of 2004 stood superseded and repealed. Further no benefit of Government Orders dated 29.07.2004 and 16.10.2014 can be extended while dealing with matters relating to suspension and cancellation of license under new regime of 2016.

129. Now I proceed to take up cases individually:-

**(i) Writ-C No.15420 of 2020**

130. In this case, license of petitioner stood cancelled after his reply was considered. The ground taken is that notary affidavits of various cardholders submitted in favour of the dealer was not considered by the licensing authority. Further the inquiry report was not supplied and under political pressure, the license was cancelled.

131 . From perusal of cancellation order it appears that all the grounds raised in the reply to show cause notice was considered in detail before the license was cancelled. In the appeal, no ground was taken as to non supply of enquiry report or for cross examination. The Appellate Authority on 02.7.2020 had dismissed the appeal.

**(ii) Writ-C No.28966 of 2018**

132. In the instant writ petition, against a show cause notice a reply was submitted but the licensing authority cancelled the license. The grounds taken in the writ petition are that neither the enquiry report nor the affidavits of the complainant were ever given/supplied to the petitioner and it was due to enmity with the Village Pradhan that cancellation proceedings were launched. Further ground has been taken that the distribution of essential commodities is verified every month by the observer and a certificate is issued. Thus the charges appears to be incorrect.

**(iii) Writ C No.1464 of 2019**

133. This writ petition arises out of cancellation order dated 26.12.2017 and appellate order dated 26.11.2018. The grounds taken are that some of the relatives of earlier fair price shop dealer had made frivolous complaint and the local member of Parliament had written letter to the Sub Divisional Magistrate and thus action for cancellation took place within 10 days. Secondly, no opportunity of hearing was given to the petitioner and the documents filed were not considered.

**(iv) Writ-C No.5430 of 2019**

134. In this writ petition cancellation as well as appellate orders have been challenged on the ground that as the husband of petitioner was suffering from ailment and an application was filed for extension of time but no further time having been provided by the Licensing Authority, and by an ex parte order the license was cancelled. The grounds taken in the writ petition are that at the time of issuance of charge sheet, enquiry report as well as statement of card holders were provided and further no opportunity of hearing was given.

**(v) Writ-C No.8204 of 2019**

135. In this writ petition proceedings for cancellation was initiated on a complaint. After enquiry, the license was suspended on 14.8.2017 and opportunity for filing objection was granted. A reply was filed on 11.10.2017 denying the charges. However, on 23.12.2017 the license was cancelled. The appeal filed against the cancellation order was also dismissed. The ground taken is that opportunity of hearing was not given and in the enquiry, no opportunity was given for examining the witnesses and cross examining the complainant.

**(vi) Writ-C No.24220 of 2019**

136. In this writ petition, license was cancelled pursuant to the show cause notice issued to the petitioner and reply having been considered on 5.11.2018. Appeal against the cancellation order has also been dismissed. The grounds taken in the petition is that no opportunity was granted to cross examine the Tehsildar report and Inquiry Officer had not appeared before the Licensing Authority.

**(vii) Writ-C No.40982 of 2019**

137. In this case, spot inspection was conducted and certain deficiency being found, show cause notice was issued to which reply having been submitted on 23.2.2019 and the license was cancelled on 28.6.2019. The grounds taken are that neither opportunity of hearing was provided, nor the enquiry report was supplied. In the appeal, none of the grounds were taken by the petitioner and the Appellate Authority dismissed the appeal.

**(viii) Writ-C No.1212 of 2020**

138. In this case a complaint having been made on 21.3.2017 with respect to non distribution of essential commodities to the card holders. An enquiry was conducted, and on report being submitted, action was initiated and license was put under suspension on 30.3.2017. After reply being submitted and considered, the license was cancelled. The ground taken is that the Order of 2004 was repealed on 10.08.2016 and new Control Order, 2016 came into existence on the same day, thus cancellation order dated 30.3.2017 has no legs to stand alongwith all the other consequential orders as the said exercise has been done in violation of Government Orders. Reliance has been placed upon Full Bench judgment in the case of Puran Singh (supra) and the provisions of the Government Order dated 29.7.2004 having not been adhered to and non affording of opportunity to cross examine the complainant and non supply of enquiry report has been taken.

**(ix) Writ C No.12376 of 2019**

139. This writ petition has been filed on the ground that on the basis of false

complaint of not supplying the essential commodities and misbehaviour with the card holders, the license was cancelled by an ex parte order on 24.5.2017. The appeal against the cancellation order has also been rejected.

**(x) Writ-C No.13484 of 2019**

140. In this case, on complaint made by some of the villagers, an inquiry was conducted and report being submitted on 3.5.2019. The Sub-Divisional Magistrate issued show cause notice to the petitioner and license was kept under suspension. A detailed reply was submitted on 26.7.2019 alongwith affidavits of complainants but the license was cancelled on 16.9.2019. Appeal against the said order was also dismissed. The ground taken is that without recording any reasoning, appeal has been rejected. Apart from this ground, no other ground has been taken in the writ petition.

(**xi) Writ-C No.18436 of 2020**

141. In this case proceedings were initiated on the complaint of card holders and an inspection was made, wherein deficiency in the stock was found. A first information report was also lodged against the petitioner on 11.5.2018. Against the show cause notice, a reply was submitted and by order dated 25.7.2018 the license was cancelled. The appeal against the cancellation order has also been dismissed, and ground taken is that the card holders have submitted affidavits in favour of the dealer before the Superintendent of Police, Basti but the authorities, without considering the evidence, had proceeded to cancel the license.

142. All the writ petitions more or less raise similar and common ground(s) for consideration which are as under:-

(i.) Non supply of complaint and affidavits of cardholders before enquiry officer.

(ii) Non supply of enquiry report

(iii) Non affording of opportunity to examine the witnesses/card holders and cross examine the complainant/enquiry officer

iv) Non supply of documents and material relied upon by the enquiry officer/complainant mentioned in the show cause notice/suspension order

(v) Non providing of opportunity of hearing

(vi) Non consideration of affidavits filed in favour of dealer/licensee post complaints

143. The dispute between the dealer/licensee and the State has been going on since inception of Control Order in the State pursuant to the enforcement of Act of 1955.

144. Effort of State Government from time to time has been to reduce and curtail the litigation between the licensee and licensor. Control Orders of 1990 and 2004 did not provide for any mechanism for redressal of such dispute, nor any procedure was provided in these control orders. State had to supplement/supplant by various Government Orders such as 29.07.2004, 16.10.2014 and 16.12.2015. Decision of Full bench in the case of **Puran Singh (supra)** was only to harmonize Government Order dated 29.07.2004 with the order of 2004.

145. When the Act of 2013 was enforced with certain objects followed by

Act of 2016, the State Government, in order to ensure targeted delivery of essential commodities to the last person of the society, promulgated Control Order 2016 providing a complete procedure to cut short the dispute arising between the licensee and the licensor.

146. Earlier no such provision existed under Order of 2004 which found place under sub-Clause (7) of Clause 8 of Control Order 2016. Mechanism provided for action against a licensee only when, on an enquiry, any adverse material is on record, show cause notice is mandated and after consideration of reply, the license can be cancelled.

147. Thus, requirement of hearing a licensee before his license is cancelled, is protected under the new regime. It is not a unilateral action which the authorities can take by cancelling the license at their whims. Further, safeguard has been provided under Clause 13 by providing a right to appeal against the action of the licensor. These actions were missing under the previous Control Orders and time to time external aid was taken when it was found that action of the State Authorities cannot be left at their mercy.

148. It has to be kept in mind that proceedings before these administrative authorities are summary in nature and ground taken that full-fledged departmental inquiry should be held and the procedure, as provided under the departmental inquiry should be followed, cannot be accepted. In the case of **Meena Devi (supra**), this Court had in clear terms relying upon the decision of Apex Court in case of **A.S. Motors (supra)** rightly held that Article 311 of the Constitution is not attracted and no such inquiry can be held.

149. This Court finds that once earlier Government Orders were repealed and Control Order 2016, providing for procedure, the Government Order dated 29.07.2004 being inconsistent with the Control Order 2016 cannot be taken into account and is not saved under Section 24 of the General Clauses Act.

150. Principle of audi alteram partem is fully adhered to once the opportunity is granted by the licensor for giving reply/explanation. The argument that no opportunity of hearing was provided cannot be accepted.

151. It has already been discussed above that a dealer is bound by the license/agreement and violation of any of the conditions of the agreement leads to suspension/revocation of his license. His license is subservient to right of an individual card holder given under Section 3 of the Act of 2013, and thus no question arises to grant him leverage for benefit of procedure of a departmental inquiry.

152. In view of the above, this Court finds that the ground raised in this bunch of petitions for non supply of complaint and affidavits of cardholders before enquiry officer; non supply of inquiry report; non affording of opportunity to examine the witnesses/card holders and cross examine the complainant/Inquiry Officer; non supply of documents and material relied upon by the enquiry officer/complainant mentioned in the show cause notice/suspension order; non providing of opportunity of hearing; and, non consideration of affidavits filed in favour of dealer/licensee post complaints, do not hold good in the light of Control Order, 2016, providing for complete mechanism under sub-clause (7) of Clause 8.

153. Considering the facts and circumstances of the case, I find that no interference is required in the orders impugned in this bunch of writ petitions passed by Licensing and the Appellate Authority cancelling the license of the dealer/agent.

154. All the writ petitions stand dismissed.

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**(2021)10ILR A507**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 07.09.2021**

**BEFORE**

**THE HON'BLE MANOJ KUMAR GUPTA, J.**
**THE HON'BLE DEEPAK VERMA, J.**

Writ C No. 16346 of 2021

**Sham-E-Husaini Hospital & Trauma Centre, Ghazipur & Anr. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Sri Varad Nath

**Counsel for the Respondents:**

**A. Constitution of India – Article 14 – Principle of natural justice – Opportunity of hearing – Significance – Held, in order to meet the requirements of principles of natural justice, the person affected has to be afforded opportunity of hearing. One of the facet thereof is that the explanation submitted by such person is taken into consideration. (Para 8)**

**B. Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 – S. 19(2) – Registration of Sonography Centre – Cancellation – Failure to provide opportunity of hearing – Non-consideration of the explanation – Effect – Minutes of the Advisory Committee does not contain any reason – No satisfaction was recorded in the impugned order that the petitioner had not complied with the requirements of the Act – Validity challenged – High Court quashed cancellation of registration holding it in gross violation of the principles of natural justice. (Para 8, 9 and 10)**

**Writ petition allowed.** (E-1)

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

1. Heard learned counsel for the petitioners and learned Standing Counsel for the

2. The instant petition has been filed assailing the order dated 13.1.2020 passed by respondent No.3 on recommendation of the Advisory Committee under the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as 'the Act') cancelling the registration of Sonography Centre of petitioner No.1 which is a Hospital run by petitioner No.2.

3. The case of the petitioners is that the petitioner's hospital was granted registration under the Act for a period of five years by order of respondent No.3 dated 3.2.2016. It was valid till 2.2.2021. An inspection of sonography facility at the petitioner's hospital was made on 23.8.2019 by National Inspection and Monitoring Committee. Based on its report a show cause notice was issued to the petitioner by respondent No.3 on 3.9.2019 requiring the petitioner to submit reply within seven days in respect of short comings enumerated in

the notice failing which legal action as contemplated under the Act, shall be taken. The petitioner had submitted a detailed explanation in respect of each charge on 17.9.2019. By the impugned order, the registration of sonography facility of the petitioner's hospital has been cancelled for alleged violation of the provisions of the Act. Petitioner No.2 claims to have submitted an application for renewal of registration on 16.3.2021 in the office of respondent No.4. At that stage, petitioner No.2 was informed that it was not possible to renew the registration as it had already been cancelled by respondent No.3 by the impugned order.

4. One of the submissions of learned counsel for the petitioners is that the impugned order has been passed in gross violation of the principles of natural justice. The order does not take into consideration the explanation of the petitioner.

5. Learned Standing Counsel is in receipt of instructions from the Chief Medical Officer, Ghazipur and the same has been placed on record for our perusal.

6. Learned Standing Counsel submitted that although impugned order passed by respondent No.3 only mentions that the explanation has not been found to be satisfactory, therefore, the registration is being cancelled but the Advisory Committee had considered the explanation of the petitioner in all respect. In order to buttress the submission he has produced before us the minutes of the meeting of Advisory Committee held on 17.9.2019. At Item No.3, the Advisory Committee has noted that the petitioner's hospital had submitted its reply which was considered by the member of the Committee and they do not agree to the same and therefore had recommended for cancellation of registration of the petitioner's hospital under the Act.

7. As noted above, the order of respondent No.3 only mentions that the Advisory Committee had not found the explanation to be satisfactory, consequently, the registration is being cancelled.

8. It is well settled that in order to meet the requirements of principles of natural justice, the person affected has to be afforded opportunity of hearing. One of the facet thereof is that the explanation submitted by such person is taken into consideration. It pre-supposes application of mind and as a necessary corollary thereof, the decision should contain reasons for not accepting the explanation.

9. As noted above, the minutes of the Advisory Committee does not contain any reason at all except for the observation that the members of the Committee did not find the explanation to be satisfactory and likewise, respondent No.3 had also proceeded to cancel the registration by simply recording that the explanation was not found satisfactory by the Advisory Committee. The Advisory Committee, nor the impugned order records any satisfaction that the petitioner had not complied with the requirements of the Act or the Rules framed thereunder albeit it being a sine-qua-non for cancelling the registration under Section 19(2) of the Act.

10. We are therefore of the considered opinion that the decision of the Advisory Committee as well as consequent order passed by respondent No.3 cancelling the registration of petitioner's sonography facility are in gross violation of the

principles of natural justice and cannot be sustained and hereby quashed with liberty to the respondents to pass fresh order in accordance with law within four weeks from the date of communication of the instant order.

11. The application for renewal of registration of the sonography facility of the petitioner's hospital shall be considered in the light of the decision that would be taken by the respondents in pursuance of the impugned order.

12. Liberty is reserved in favour of the petitioners to move fresh application in that regard. It is clarified that until petitioners get a fresh registration under the Act, they shall not carry on any activity relating to sonography or any other kind of scanning which is prohibited under the Act without a valid registration.

13. The petition stands allowed to the extent indicated above.

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**(2021)10ILR A509**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 28.09.2021**

**BEFORE**

**THE HON'BLE VIVEK KUMAR BIRLA, J.**

Writ C No. 23781 of 2021

**Gurudeen ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Sanjeev Kumar Khare

**Counsel for the Respondents:**
C.S.C.

**A. Civil Law – Mutation case – Praying for its disposal within stipulated time, Writ of Mandamus sought for – Absence of lawyers from works – Effect – Held, the poor litigant, in such matters, particularly, at the lower level on the revenue side, is charged fees for pursuing his grievance, however, in such pursuation litigant/ petitioner is not getting any relief on merits of his claim – Further held, now the time has come to take cognizance of all such matters where meaningless litigation is being generated due to lawyers abstaining from work and as already observed in Prafull Kumar, is not serving any substantial cause of the litigant or of the society at large – High Court directed the authority to decide the case as expeditiously as possible in case parties are present in- person before the Presiding Officer. (Para 16, 17 and 19)**

**Writ petition dismissed.** (E-1)

**Cases relied on :-**

1. Chadra Bali Vs Additional Commissioner & ors. 2012 (4) ADJ 13

2. Radha Devi Vs St. of U.P. & ors. 2016 (6) ADJ 753

3. Prafull Kumar Vs St. of U.P. & anr., 2021 (7) ADJ 443

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

1. Heard learned counsel for the petitioner and Sri Rituraj Singh, learned Standing Counsel appearing for the State respondents.

2. Present petition has been filed for commanding the respondent no. 3 to decide the mutation case no. 920 of 2018, (Gurudeen vs. Rajbahadur), Computer Case No. 201814360300920 under Section 34 of U.P. Land Revenue Act, within stipulated period.

3. Earlier petitioner for the same cause of action has approached this Court by way of filing **Writ- C No. 17160 of 2019 (Gurudeen vs. State of U.P. And 2019)**, which was disposed of vide order dated 20.5.2019, the said order is quoted as under:-

*"Heard learned counsel for the petitioner.*

*This writ petition has been filed seeking the following relief:-*

*"(i) Issue a writ, order or direction in the nature of mandamus commanding to the respondent no. 2 i.e. Tehsildar, Tehsil-Machhalishahar, District-Jaunpur to decide the mutation case bearing no. 00920 of 2018 Computer Case no. T201814360300920 (Gurudeen Vs. Ram Bahadur), Under section 34 of U.P. Land Revenue Act, pending in the court of respondent no. 2 since 05.03.2018, within stipulated period fix by this Hon'ble Court."*

*It is submitted that a mutation case filed by the petitioner is pending consideration since March 2018.*

*The writ petition is therefore disposed of directing the respondent no. 2 to decide the pending proceedings as expeditiously as possible without granting any unnecessary adjournment to any of the parties.*

*It shall however afford precedence to matters of a similar nature which have remained pending for a greater period of time."*

4. Submission of learned counsel for the petitioner is that several dates were fixed but the court below has not decided the case by complying the order of this Court. The above quoted order indicates that direction was issued to decide the proceedings as expeditiously as possible without granting any unnecessary adjournment to any of the parties.

5. Learned counsel for the petitioner further submitted that the Presiding Officer was not present on several dates, as such, the disposal of the case is being delayed hence a direction to dispose of the case within a time bound period be issued.

6. Allegations are being raised against the Presiding Officer, whereas perusal of the order-sheet indicates that a clear reason for being not present in the Court has been given that the Presiding Officer is busy due to administrative reason. It is of common knowledge that the officers presiding over such courts are at times, required to attend various tasks by remaining present on the spot or being present in the office of the superior authorities etc, in other words, by physically remaining out of their offices or busy for administrative reasons. Hence, the reason that Presiding Officer is busy due to administrative reason is broadly understandable, though it cannot be a ground for intentionally adjourning the matter.

7. Now the time has come that before issuing direction or even notice to the Presiding Officer, the order-sheet should be looked into to ascertain as to whether substantial cause of delay is on the part of the lawyers or not.

8. Perusal of the order-sheet clearly indicates that after passing of aforesaid order dated 20.5.2019 by this Court, on 37 dates, the lawyers were not working and it

is only on few dates they were present and proceedings were undertaken. For certain period courts were not functioning due to Covid-19 Pandemic.

9. On the earlier occasion also I have considered the question of issuing writ of mandamus in case of disposal of mutation cases after considering the judgment of this Court in case of **Chadra Bali vs. Additional Commissioner And Others 2012 (4) ADJ 13,** wherein general mandamus was issued to decide certain nature of cases within a time bound period as well as the Government Order dated 16.5.2012 issued by the State Government, whereon a circular dated 17.5.2012 was issued by the Commissioner Board of Revenue, Lucknow and provisions of U.P. Janhit Guarantee Adhiniyam, 2011.

10. After taking note of the provisions of the U.P. Janhit Guarantee Adhiniyam, 2011 following observations were made by this Court in paragraph nos. 8, 9 and 10 in the case of **Radha Devi Vs. State of U.P. And Others 2016 (6) ADJ 753.**

*"8. A notification dated 15.1.2011 was issued notifying the services, designated officers, first appeal officers, second appellate authority and stipulated time limits.*

*9. Uncontested mutation of land is included as one of the services and time period provided is 45 working days. The designated officer is Tehsildar and in case he does not decide within the stipulated limit first appeallate officer is Sub Division Magistrate and the stipulated time of disposing of first appeal is 30 working day. The second appellate authority is District Magistrate in such matters. Section 4 provides right to obtain service within stipulated time limits, Section 5 provides for services of stipulated time limit; Section 6 provides for appeal; Section 7 provides for penalty in case the service is not provided by the designated officer or the first appeal officer as the case may be within stipulated time without sufficient and reasonable cause. The second appellate authority even has power to recommend disciplinary action if he is satisfied that the designated officer or the first appeal officer has failed to discharge the duties assigned to him under this Act.*

*As such the aforesaid Act No. 3 of 2011 provides complete remedy where such cases are not decided within the stipulated time.*

*10. Therefore, in view of the aforesaid no directions are required to be passed and the petitioner may approach the competent authority in view of the observations made hereinabove, who is under obligation to consider any such application if filed by the petitioner. "*

*(Emphasis Supplied)*

11. I have considered the question for granting mandamus in such cases from a different view point also in the case of **Prafull Kumar vs. State of U.P. and another, 2021 (7) ADJ 443**, paragraph nos. 4, 5, 6 and 7 of the same are quoted as under:-

*"4. A perusal of the order-sheet right from the year 2014 reflects that except on few dates almost throughout the lawyers were abstaining from work. Once the appeal was dismissed for want of prosecution also. It is also pertinent to note that in fact, the lawyers are so regularly abstaining from work that a rubber stamp is being used on the order-sheet that the*

*lawyers are abstaining from work. This position is continuing since the year 2014 itself till date except the period during which the Court was not functioning due to Covid-19 Pandemic.*

*5. Almost everyday large number of petitions are coming before this Court with similar prayers that proceedings may be decided within a time bound period and in most of the cases order sheet of the case reflects the same state of affairs with only very few exception.*

*6. This speaks a lot about sorry states of affairs in the courts below, particularly on revenue side.*

*7. Under such circumstances, this Court refuses to grant the relief as prayed for in this writ petition. Lawyers cannot take working of the Court for granted as on one hand, obviously the lawyers must have charged their professional fee and thereafter, they are abstaining from work and on the other hand, they are seeking a direction to the Court concerned to decide the case within a specific period. It is a sheer wastage of time of the Court concern and ultimately of resources, financial or otherwise, of the litigants as well of the tax payers, as daily cost of running a Court is huge but is not serving any purpose, neither of the litigants nor of the society at large. Further, again on one hand, lawyers are not working, on the other hand, if such directions and/or mandamus is issued, the Court/Authority is put under the threat of Contempt of Court, if case is not decided. This again generate litigation creating unnecessary burden on the Court. Again the big question mark is there, for whose benefit? May be the same lawyer who is abstaining from work is generating this litigation, which in fact, is not serving as substantial counsel of the litigant or of the society at large. "*

*(Emphasis supplied)*

12. Therefore, it is clear that such matters are liable to be decided as expeditiously as possible and in a time bound manner. However, when the lawyers are abstaining from the work, the words "working days' assumes importance. In the present case itself it is clear that apprehension of this Court as expressed in the case of **Prafull Kumar (Supra)** was not baseless as it is clear from the facts of the present case where even after mandamus was issued by this Court, the lawyers were abstaining from work, therefore, clearly, "working days" are not available with the court/ authority concerned due to reason "lawyers abstaining from work', however, again for this reason only interest of justice should not suffer and court/ authority should proceed if litigant/ litigants is/ are present in person.

13. In such view of the matter, I do not find any good ground to entertain the present petition to grant the prayer for which the petitioner has already approached this Court wherein, direction was issued to decide the case, expeditiously, although, no direction was issued to decide the case within time bound manner. This is a glaring example of non functioning of the lawyers at the revenue side in particular, which I have already noted in **Prafull Kumar (Supra).**

14. At the cost of repetition it may be highlighted that this is a case where even after obtaining the order from this Court, lawyers were abstaining from work and thereafter, again they approach this Court seeking for further direction. At times

contempt proceedings are initiated. Usually, experience of this Court in such matters is that initially the contempt petitions are also disposed of by giving one more opportunity to opposite party to decide the case/ comply the order of this Court. At times, again lawyers do not appear and second contempt petition is filed, whereon usually notices to Presiding Officers are issued. In such manner, the Advocates on the one hand, charge their professional fees and on the other hand, even after direction of this Court to argue the matter, they do not appear to argue the case on the ground of call for strike or resolution of the concerned Bar Association to refrain from work for any reason whatsoever. Hence, meaningless litigation is generated before this Court without there being any fruitful relief granted to the litigant.

15. This speaks a lot about sorry states of affairs in the courts below, particularly on revenue side. Clearly, apprehension of this Court as expressed in **Prafull Kumar (Supra)** was not without basis.

16. The poor litigant, in such matters, particularly, at the lower level on the revenue side, is charged fees for pursuing his grievance, however, in such pursuation litigant/ petitioner is not getting any relief on merits of his claim and grievance on the procedural side of the matter remains that the court is not proceeding to decide and/ or pass orders and that the court be directed to proceed to decide the case within a time bound manner.

17. In such view of the matter, I do find any good ground to grant any such relief as prayed for in this petition. Now the time has come to take cognizance of all such matters where meaningless litigation is being generated due to lawyers abstaining from work and as already observed in **Prafull Kumar (Supra)**, is not serving any substantial cause of the litigant or of the society at large and is not in the interest of justice as huge time of the Courts and therefore, huge public money is wasted in attending such meaningless litigation.

18. As noticed in **Radha Devi (Supra)** the petitioner should also press the provisions of Janhit Guarantee Adhiniyam, 2011 into service before the Court/ authority concerned in such matters.

19. However, in the interest of justice, as the litigants should not suffer for any reason, it is provided that in case parties are present in- person before the Presiding Officer, the Presiding Officer/ authority concerned shall make all efforts to decided the case as expeditiously as possible as already directed by this Court.

20. Learned Standing Counsel as well as the Registry of this Court is directed to send a copy of this order to the concerned Bar Association within a period of 15 days from today so that the Bar Association and learned members of the concerned Bar Association may be sensitized about the working of the court and plight of the litigants from whom they have charged their professional fees.

21. The registry is further directed to forward a copy of this order to all the District Judges and Commissioners of the region and Board of Revenue for being forwarded to all the Bar Associations for the purpose of sensitizing the lawyers on this issue.

22. Time has come when Bar Council of the State as well as Bar Council of India

should also deliberate on this issue and pass appropriate resolution/ guidelines. Therefore, Registry is further directed to send copy of this order to U.P. Bar Council and Bar Council of India also for consideration and doing the needful.

23. Accordingly, present petition stands dismissed, however, with the observations as made above.

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**(2021)10ILR A514**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD15.09.2021**

**BEFORE**

**THE HON'BLE NEERAJ TIWARI, J.**

Writ C No. 28821 of 2018

**Nar Singh ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Umesh Prasad Singh

**Counsel for the Respondents:**
C.S.C.

**A. Civil Law – Arms licence – Cancellation on the ground of apprehension – No finding to the effect that continuance of arms licence is harmful for public peace or safety – No criminal history of licence holder – No allegation of obtaining the licence by means of fraud – Validity challenged – Held, the cancellation of the arms licence only on the ground of apprehension is bad and not sustainable in the eye of law. (Para 11)**

**Writ petition allowed.** (E-1)

**Cases relied on :-**

1. Satyendra Bahadur Singh @ Guddu Singh Vs St. of U.P. & ors.; 2016 0 Supreme (All) 358

2. Hiramani Singh Vs St. of U.P. & anr.; 2010 LawSuit (All) 3030

3. Rajendra Singh Vs Commissioner, Lucknow Division, Lucknow & ors.; 2011 LawSuit(All) 2876

4. Mulayam Singh Vs St. of U.P. & ors.; 2012 LawSuit(all) 1651

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. Learned counsel for the petitioner submitted that petitioner was issued arms licence of pistol by the District Magistrate, Gorakhpur vide order dated 14.6.2013 and accordingly, he purchased the pistol. He next submitted that District Magistrate, Gorakhpur-respondent no. 3 issued show cause notice under Section 17(3) of the Arms Act, 1959 (hereinafter referred to as the Act, 1959) to the petitioner on 12.10.2015 as to why his licence may not be cancelled, against which petitioner filed reply on 9.3.2016. Ultimately respondent no. 3 vide impugned order dated 10.5.2016 cancelled the arms licence of the petitioner only on the ground of apprehension. Petitioner is a law abiding person and during course of Panchayat Election, 2015, he deposited his pistol in the Malkhana of Police Station Gagaha. He next submitted that in the impugned order, it has been observed that in an incident, petitioner himself has received injury, but contrary to that, his arms licence has been cancelled on the ground of apprehension only. Against the said order, petitioner preferred an appeal under Section17 (3) of the Act, 1959 which was also dismissed by the Divisional Commissioner vide order dated 17.02.2018 affirming the order of the respondent no. 3. He next submitted that petitioner is having no criminal case except challan under

Sections 107/116 Cr.P.C. and 151 I.P.C. in which he was released on furnishing the bail bond. The term of challan under the aforesaid sections expires after six months.

3. Learned counsel for the petitioner relied upon the judgments of this Court in the cases of ***Satyendra Bahadur Singh @ Guddu Singh Vs. State of U.P. and others, reported as 2016 0 Supreme (All) 358, Hiramani Singh Vs. State of U.P. and another reported as 2010 LawSuit (All) 3030 decided on 15.12.2010, Rajendra Singh Vs. Commissioner, Lucknow Division, Lucknow and others*** reported as 2011 LawSuit(All) 2876 decided on 10.03.2011 and ***Mulayam Singh Vs. State of U.P. and others*** reported as ***2012 LawSuit(all) 1651*** decided on 14.05.2012.

4. Learned counsel for the petitioner next submitted that in the matter of ***Satyendra Bahadur Singh (supra)*** which is based on same facts, the Court has taken the view that on the ground of apprehension, arms licence cannot be cancelled. He next submitted that in the aforesaid three other judgments, the Court has also taken the view that even in case of pendency of solitary criminal case, arms licence cannot be cancelled, therefore, the impugned orders dated 10.5.2016 and 17.2.2018 are bad in law and liable to be quashed.

5. Learned Standing Counsel vehemently opposed the submissions raised by learned counsel for the petitioner, but could not dispute the aforesaid facts.

6. I have considered the submissions advanced by learned counsel for the parties and perused the record, impugned orders as well as judgments relied upon by learned counsel for the petitioner. The undisputed fact is that petitioner is having no criminal case except challan under Sections 107/116 Cr.P.C. and 151 I.P.C. Further he himself received gun shot injury from his rivals and he has also been released under Sections 107/116 Cr.P.C. and 151 I.P.C. after furnishing the bail bond even otherwise its a preventive measure. In the impugned order, reason for cancellation of arms licence is only apprehension and there is no finding to demonstrate that continuance of arms licence is harmful for public peace or safety. The appellate authority has also affirmed the order of the District Magistrate-respondent no. 3 without considering this fact that apprehension cannot be a ground for cancellation of arms licence coupled with no criminal incident of licence holder i.e. petitioner.

7. In the first judgment relied upon by learned counsel for the petitioner in the case of ***Satyendra Bahadur Singh (Supra)*** the Court has held that on the ground of apprehension, arms licence cannot be cancelled. Paragraphs 10 and 11 of the said judgment are quoted below:-

*"10. I have gone through the entire counter affidavit and in none of the paragraph, it is stated that after giving a show cause notice to the petitioner, the petitioner's fire arms licence has been cancelled. Further in view of Sub-Section 3 (a to e) of Section 17 of the Act, the licensing authority may cancel the licence provided he is satisfied that in case license is not cancelled and fire arms licence is allowed to be in possession of licensee, it may break the public peace and safety but for recording the satisfaction regarding breach of public peace and safety, there must be concrete material to show that there is strong likelihood of breach of public peace and safety.*

*11. The only ground under which petitioner's fire arm licence has been cancelled is apprehension of annoyance of the family of the complainant, in whose family, murder took place and the petitioner has been acquitted in the criminal trial. After acquittal of the petitioner by no stretch of imagination it can be assumed that having license by the petitioner in any manner may lead to disturbance of public peace and public safety or put the members of the complainant family in danger, likelihood of anger and anguish of a third person cannot be ground on which fire arm licence can be cancelled by the licensing authority."*

8. In the matter of Hiramani Singh (supra) the Court has held that mere pendency of criminal case cannot be ground for cancellation of fire arm. Paragraphs 6 and 7 of the said judgment are quoted below:-

*"6. Countering the said submission learned Standing counsel on the other hand contended that rightful view has been taken in the matter and no interference should be made.*

*After respective arguments have been advanced factual position which is emerging in the present case that petitioner has been arrayed as an accused in Case Crime No. 391 of 2008, P.S. Colonelganj district Allahabad under sections 419, 420, 447, 448, 120-B I.P.C. . In the said criminal case charge sheet has been filed and the matter is pending before the concerned court and even before this Court for quashing of the same. Show cause notice was issued to the petitioner to which he submitted his reply. Accepted position is that there has been civil dispute in between the parties and fire arm in question has not at all been used in the criminal case wherein he has been arrayed as accused, then merely on account of pendency of the said criminal case, fire arm could not have been cancelled as has been done in the present case as it is not at reflected as to in what way and manner public peace and public safety has been endangered rather on apprehension such an action has been initiated.*

*7. This Court in the case of Ashok Rao Vs. State of U.P. and others reported in 2010 (68) ACC 441 while considering the authority to be exercised under Section 17 of the Indian Arms Act has taken the view that mere pendency of criminal case cannot be ground for cancellation of fire arm license unless and until finding is returned by the authority concerned that possession of firearm has the tendency of threatening public peace and public safety."*

9. In the case of Rajendra Singh (supra), the Court has taken the same view that mere involvement in a criminal case or pendency of solitary criminal case, cannot be a ground for cancellation of arms licence. Paragraph 6 of the said judgment is quoted below:-

*"6. It is well settled in law that mere pendency of criminal case or apprehension of abuse of arms Act are not sufficient grounds for passing the order of suspension or revocation of licence under Section 17 (3) of the Act. The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a ground for revocation of licence under Arms Act, has been dealt with by a Division Bench of this Court in Sheo Prasad Misra v. The District Magistrate, Basti and others, wherein the Division Bench relying*

*upon the earlier decision of Masiuddin v. Commissioner Allahabad, found that mere involvement in criminal case cannot in any way affect the public security or public interest. The law propounded in the said decisions has been subsequently following in Habib v. State of U.P. 2002 44 ACC 783.*

10. In the matter of ***Mulayam Singh (supra),*** the court has taken the view that mere involvement in a criminal case is no ground for cancelling a arms licence under Section 17 of the Act, 1959. Paragraphs 8 and 12 of the said judgment are quoted below:-

*"8. Even otherwise, it is well settled that mere involvement in a criminal case is no ground for cancelling a licence under Section 17 of the Act."*

11. After considering the fact and judgments relied upon, it is held that only apprehension or pendency of solitary criminal case not coupled with factum of fraud can be a ground for cancellation of arms licence. In the present case, petitioner has neither obtained arms licence fraudulently nor having any criminal history, but it has been cancelled only on the ground of apprehension, which is bad and not sustainable in the eye of law.

12. Therefore, the impugned orders dated 10.5.2016 passed by respondent no. 3-District Magistrate, Gorakhpur and 17.2.2018 passed by Divisional Commissioner, Gorakhpur-respondent no. 2 are hereby quashed. The writ petition is **allowed.** The District Magistrate, Gorakhpur is directed to issue the arms licence in favour of the petitioner within a period of two months from the date of production of computer generated copy of this order after verifying the same from official website of Allahabad High Court. In case term of arms licence has been expired, he shall also renew the same in accordance with law within the same period.

13. After issuance of arms licence his pistol shall also be released from the Malkhana of Police Station Gagaha forthwith.

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**(2021)10ILR A517**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 05.10.2021**

**BEFORE**

**THE HON'BLE ANIL KUMAR OJHA, J.**

Application U/S 482 Cr.P.C. No. 12850 of 2021

**Sher Ali ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Sri A Kumar Srivastava, Sri Anand Kumar Upadhyay, Husnaara Khatoon, Sri Ramesh Prasad

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

**(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Section 323, 504 and 506 - SC/ST (Prevention of Atrocities) Amendment Act, 2015 - Section 3(1)(D), Dha , Section 14A(1) - Appeals - taking cognizance of an offence and summoning the accused is intermediate order. (Para - 6)**

Police submitted charge-sheet against applicant for the offence - cognizance order passed by Special Judge SC/ST Act - summoned applicant to face trial - Application filed U/S 482 to quash entire criminal proceeding .

**HELD:-**If any intermediate order is passed by Special Court or an exclusive Special Court in case relating to an offence in the S.C./S.T. Act, that will come in the category of order as provided under Section 14A(1) of SC/ST Act against which only an appeal shall lie before the High Court, both on facts and on law. Application U/s 482 Cr.P.C. cannot be filed against cognizance order passed by Special Judge, S.C./S.T. Act. (Para - 10,11)

**Application u/s 482 Cr.P.C. disposed of.** (E-7)

**List of Cases cited:-**

1. Girish Kumar Suneja Vs CBI, (2017) 14 SCC 809

2. Madhu Limaye Vs St of Mah., (1997) 4 SCC 551

(Delivered by Hon'ble Anil Kumar Ojha, J.)

1. Heard learned counsel for the applicant, learned A.G.A. for the State and perused the record.

2. This Application U/s 482 Cr.P.C. has been filed with a prayer to quash the entire criminal proceeding of Special S.T. No. 187 of 2020 U/s 323, 504 and 506 I.P.C. and Section 3(1)(D), Dha SC/ST Act, P.S. Naini, District Prayagraj pending before learned Special Judge SC/ST Act, Allahabad (Prayagraj) arising out of Case Crime No. 0223 of 2020 U/s 323, 504, 506 I.P.C. and Section 3(1)(D), Dha SC/ST Act, P.S. Naini, District Prayagraj alongwith charge-sheet dated 09.07.2020 submitted by the police against the applicant for the offence as well as cognizance order dated 2.12.2020 passed by learned Special Judge SC/ST Act, Allahabad (Prayagraj).

3. In ***Girish Kumar Suneja v. CBI, (2017) 14 SCC 809,*** three Judge Bench of Hon'ble Apex Court has made following observations in para nos. 21, 22 and 23:

*"21. The concept of an intermediate order was further elucidated in Madhu Limaye v. State of Maharashtra by contradistinguishing a final order and an interlocutory order. This decision lays down the principle that an intermediate order is one which is interlocutory in nature but when reversed, it has the effect of terminating the proceedings and thereby resulting in a final order. Two such intermediate orders immediately come to mind-an order taking cognizance of an offence and summoning an accused and an order for framing charges. Prima facie these orders are interlocutory in nature, but when an order taking cognizance and summoning an accused is reversed, it has the effect of terminating the proceedings against that person resulting in a final order in his or her favour. Similarly, an order for framing of charges if reversed has the effect of discharging the accused person and resulting in a final order in his or her favour. Therefore, an intermediate order is one which if passed in a certain way, the proceedings would terminate but if passed in another way, the proceedings would continue.*

*22. The view expressed in Amar Nath and Madhu Limaye was followed in K.K. Patel v. State of Gujarat wherein a revision petition was filed challenging the taking of cognizance and issuance of a process. It was said :*

*It is now well-nigh settled that in deciding whether an order challenged is interlocutory or not as for Section 397(2) of the Code, the sole test is not whether such order was passed during the interim stage (vide Amar Nath v. State of Haryana,*

*Madhu Limaye v. State of Maharashtra, V.C. Shukla v. State through CBI and Rajendra Kumar Sitaram Pande v. Uttam. The feasible test is whether by upholding the objections raised by a party, it would result in culminating the proceedings, if so any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code. In the present case, if the objection raised by the appellants were upheld by the Court the entire prosecution proceedings would have been terminated. Hence, as per the said standard, the order was revisable."*

*23. We may note that in different cases, different expressions are used for the same category of orders-sometimes it is called an intermediate order, sometimes a quasi-final order and sometimes it is called an order that is a matter of moment. Our preference is for the expression "intermediate order" since that brings out the nature of the order more explicitly."*

4. From the perusal of the prayer made by applicant, it is clear that applicant has prayed to quash the cognizance order dated 2.12.2020 passed by learned Special Judge SC/ST Act, Allahabad (Prayagraj) which reads as follows:

***"02.12.2019-***

आज विवेचक क्षेत्राधिकारी करछना प्रयागराज अपराध संख्या-223/2020, धारा - 323, 504 व 506 भारतीय दंड संहिता एवं धारा- 8(1) D, Dh अनु0 जाति/अनु0 जन0 अत्याचार नि0 अधि0 थाना नैनी से सम्बंधित समस्त प्रपत्र एवं आरोपपत्र के साथ न्यायलय में उपस्थित हैं। उनके द्वारा अभियुक्त शेर अली के विरुद्ध धारा- 323,504 व 506 भारतीय दंड संहिता एवं धारा-3(2) D, Dh अनु0 जाति/अनु0 जन अत्याचार नि0 अधि0 में आरोपपत्र दाखिल किया गया है ।

अभियुक्त की गिरफ्तारी विवेचना के दौरान नहीं की गयी है। विवेचक द्वारा संकलित किये गए साक्ष्यों का सम्यक परिशीलन किया और संकलित साक्ष्यों के आधार पर अभियुक्त के विरूद्ध प्रसंज्ञान लिया जाता है। दर्ज रजिस्टर हो। अभियुक्त शेर अली के विरुद्ध सम्मन जारी हो। पत्रावली दिनांक 05.01.2021 को पेश हो।"

In ***Re: Provision of Section 14a of SC/ST (Prevention of Atrocities) Amendment Act, 2015***, full Bench of this Court has held as follows:

"B. Whether in view of the provisions contained in Section 14-A of the Amending Act, a petition under the provisions of Article 226/227 of the Constitution of India or a revision under Section 397 of the Code of Criminal Procedure or a petition under Section 482 Cr.P.C., is maintainable. OR in other words, whether by virtue of Section 14-A of the Amending Act, the powers of the High Court under Articles 226/227 of the Constitution or its revisional powers or the powers under Section 482 Cr.P.C. stand ousted?

*We therefore answer Question (B) by holding that while the constitutional and inherent powers of this Court are not "ousted" by Section 14A, they cannot be invoked in cases and situations where an appeal would lie under Section 14A. Insofar as the powers of the Court with respect to the revisional jurisdiction is concerned, we find that the provisions of Section 397 Cr.P.C. stand impliedly excluded by virtue of the special provisions*

*made in Section 14A.* ***This, we hold also in light of our finding that the word "order" as occurring in sub-section(1) of Section 14A would also include intermediate orders."***

5. Perusal of the record reveals that applicant has also prayed to quash cognizance order dated 2.12.2020 passed by Special Judge SC/ST Act, Allahabad (Prayagraj) by which learned Special Judge SC/ST Act has summoned the applicant to face the trial U/s 323, 504 and 506 I.P.C. and Section 3(1)(D), Dha SC/ST Act to face the trial.

6. In ***Girish Kumar Suneja v. CBI (Supra)***, Honble Apex Court in para 21 has specifically stated referring the judgement of ***Madhu Limaye Vs. State of Maharashtra (1997) 4 SCC 551*** that taking cognizance of an offence and summoning the accused is intermediate order, thus impugned cognizance order dated 2.12.2020 is an intermediate order.

7. Now it is to be seen whether Application U/s 482 Cr.P.C. lies against the impugned cognizance order dated 2.12.2020 or appeal will lie under Section 14A(1) of the S.C./S.T. Act.

8. Relevant portion of Section 14A(1) of the S.C./S.T. Act. are quoted below for ready reference:

*"**14A. Appeals.-** (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law."From the perusal of provisions of Section 14A(1) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities Act), 1989, it is clear that an Appeal shall lie from any judgement, cognizance order, order not being interlocutory order of Special Court, or an exclusive Special Court to the High Court, both on facts and on law."*

9. Full Bench of this Court in ***Re: Provision of Section 14a of SC/ST (Prevention of Atrocities) Amendment Act, 2015*** while answering question B has specifically stated- "we hold also in light of our finding that the word "order" as occurring in sub-section(1) of Section 14A would also include intermediate orders."

10. Thus if any intermediate order is passed by Special Court or an exclusive Special Court in case relating to an offence in the S.C./S.T. Act, that will come in the category of order as provided under Section 14A(1) of SC/ST Act against which only an appeal shall lie before the High Court, both on facts and on law.

11. In view of the above discussion, I am of the considered opinion that Application U/s 482 Cr.P.C. cannot be filed against cognizance order dated 2.12.2020 passed by learned Special Judge, S.C./S.T. Act, Allahabad (Prayagraj).

12. This Application U/s 482 Cr.P.C. is disposed of with the observation that applicant is permitted to file fresh petition before the appropriate forum.

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**(2021)10ILR A521**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 21.10.2021**

**BEFORE**

**THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.**
**THE HON'BLE AJAI TYAGI, J.**

Criminal Appeal No. 6279 of 2010

**Teetu ...Appellant(In Jail)**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Sri Govind Saran Hajela, Sri Yogesh Srivastava, Sri Noor Mohammad

**Counsel for the Respondent:**
A.G.A.

**Quantum of Sentence- Principle of Proportionality- While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. The criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system. All measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.**

Settled law that Sentence should be proportionate to the nature and gravity of the offence while taking into account the age and sex of the accused and as the judicial system of India is reformative and not retributive, hence effort should be made to bring back the accused in the social stream.

**Quantum of Sentence- Conviction under section 376 IPC- Sentenced to undergo rigorous imprisonment for life- Appellant already undergone 12 years of incarceration- Sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Appellant is languishing in jail for the last more than 12 years. Since, the appellant has already served 12 years in jail, ends of justice will be met if sentence is reduced to the period already undergone.**

Under the facts of the case, sentence of imprisonment for life held to be too harsh and disproportionate to the offence hence sentence reduced to the period already undergone. ( Para 13, 14, 15, 17, 18, 19)

**Criminal Appeal partly allowed.** (E-3)

**Judgements/ Case law relied upon**:-

1. Mohd. Giasuddin Vs St. of A.P., [AIR 1977 SC 1926],

2. Deo Narain Mandal Vs St. of U.P. [(2004) 7 SCC 257]

3. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

(Delivered by Hon'ble Ajai Tyagi, J.)

1. By way of this appeal, the appellant-Teetu has challenged the Judgment and order 21.08.2010 passed by court of Additional Sessions Judge/FTC 3, Firozabad in Session Trial No.84 of 2010 arising out of Case Crime No.482 of 2009 under Section 376 Indian Penal Code, Police Station-Rasoolpur, District-Firozabad whereby the accused-appellant was convicted under Section 376 IPC and sentenced to imprisonment for life with fine of Rs.5,000/- and in case of default of payment of fine, to undergo further imprisonment for one year.

2. The brief facts as per prosecution case are that on 2.10.2009, a written report was submitted by complainant-Raju Rathore at Police Station-Rasoolpur, District-Firozabad, stating therein that in the midnight of 1/2.10.2009, his 7 years old daughter (victim) and 10 years old son Babloo were sleeping on the roof and the accused-appellant Teetu was also sleeping on the same roof while the complainant was sleeping inside the house with his wife Geeta and two other children. In the morning, when his daughter did not come down from the roof, he and his wife Geeta went on the roof and saw his daughter in almost half fainted condition. When the victim was inquired, she told that Teetu raped her in the night due to which she fainted. The complainant and his wife saw that her undergarment was bood-stained and blood was also oozing from her private-parts.

3. S.I. Felan Singh tookup the investigation, visited the spot, prepared site plan, recorded statements of the prosecutrix and witnesses and after completing investigation submitted charge sheet against the accused. The matter being triable by court of sessions was committed to the sessions court.

4. The learned trial court framed charge under Section 376 IPC, which was read over to the accused. The accused denied the charge and claimed to be tried. The prosecution so as to bring home the charge, examined five witnesses, who are as under:-

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| 1. | Raju Rathaur | P.W.1 |
| 2. | Victim | P.W2 |
| 3. | Geeta | P.W3 |
| 4. | Dr. Praveen Jahan | P.W4 |
| 5. | S.I. Felan Singh | P.W5 |

5. After completion of prosecution evidence, the accused was examined under Section 313 Cr.P.C. The accused did not examine any witness in defence.

6. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

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|---|---|---|
| 1. | F.I.R. | Ext. Ka-7 |
| 2. | Written report | Ext. Ka-1 |
| 3. | Recovery Memo of *'kachha'* | Ext. Ka-2 |
| 4. | Medical Report of Victim | Ext. Ka-3 |
| 5. | Supplementary report | Ext. Ka-4 |
| 6. | Site Plan with Index | Ext. Ka-5 |

7. Heard Shri Yogesh Srivastava, learned Advocate, assisted by Mr.Noor Mohammad, learned counsel for the appellant, Sri Rupak Chaubey, learned AGA for the State and also perused the record.

8. Perusal of record shows that occurrence took place in the night of 1/2.10.2009 and the victim was medically examined on 2.10.2009 at 12:00 (noon) in District Women Hospital, Firozabad. In the medical examination, no marks of external injuries were found on the body of the victim including private-parts. Hymen was found torn at 6 o'clock position and no fresh bleeding was present. Vaginal smear examination and x-ray of right palm including wrist joint was advised. No opinion regarding rape could be given by the doctor. Perusal of supplementary report shows that spermatozoa was not detected. The age of victim girl was found about 7 years. In supplementary report also, it is

stated by the doctor that no definite opinion regarding rape can be given.

9. The victim was examined by prosecution as PW2. In her statement, the victim stated that accused had committed bad-act with her on the roof of the house; it was night at the time of occurrence. She was wearing underwear, which was spotted by blood. She has also stated that blood was discharged from her vagina. She cried, but her mouth was pressed by the accused. The victim was cross-examined by defence in which she has stated that she regularly used to sleep and play on the same roof on which the offence was committed by the accused-appellant. In this way, PW2, the victim, has supported the prosecution case. Likewise, Raju Rathaur (PW1) and Geeta (PW3), father and mother of the victim, respectively, also supported the prosecution version, but the brother of victim, namely, Bablu, who is said to be eye-witness of the occurrence, was not produced by the prosecution even after making application under Section 311 Cr.P.C. by the accused-appellant. Learned trial court convicted the appellant under Section 376 IPC and sentenced him for life imprisonment and Rs.5,000/- fine. It is also directed that in case of default of fine, the accused shall undergo one year additional imprisonment.

10. After some arguments, learned counsel for the appellant submitted that he is not pressing this appeal on its merit, but he prays only for reduction of the sentence as the sentence of life imprisonment awarded to the appellant by the trial court is very harsh. Learned counsel also submitted that appellant is languishing in jail for the past more than 12 years.

11. This case pertains to the offence of 'rape', defined under Section 375 IPC, which is quoted as under:

*[**375. Rape.-** A man is said to commit "rape" if he-*

*(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*

*(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*

*(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*

*(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,*

*under the circumstances falling under any of the following seven descriptions :-*

***First.-** Against her will.*

***Secondly.-** Without her consent.*

***Thirdly.-** With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.*

***Fourthly.-** With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

***Fifthly.-** With her consent when, at the time of giving such consent, by reason of unsoundness of mind of intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.*

***Sixthly.-** With or without her consent, when she is under eighteen years of age.*

***Seventhly.-*** *When she is unable to communicate consent.*

***Explanation 1.-*** *For the purposes of this section, "vagina" shall also include labia majora.*

***Explnation 2.-*** *Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.*

*Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.*

***Exception 1.-*** *A medical procedure or intervention shall not constitute rape.*

***Excpetion 2.-*** *Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]*

12. In ***Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926]***, explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

*"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."*

13. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257]*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

14. I***n Ravada Sasikala vs. State of A.P***. AIR 2017 SC 1166, the Supreme Court referred the judgments in ***Jameel vs State of UP*** [(2010) 12 SCC 532], ***Guru Basavraj vs State of Karnatak***, [(2012) 8 SCC 734], ***Sumer Singh vs Surajbhan Singh,*** [(2014) 7 SCC 323], ***State of Punjab vs Bawa Singh,*** [(2015) 3 SCC 441], and ***Raj Bala vs State of Haryana,*** [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts

which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

15. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

16. Since the learned counsel for the appellant has not pressed the appeal on its merit, however, after perusal of entire evidence on record and judgment of the trial court, we consider that the appeal is devoid of merit and is liable to be dismissed. Hence, the conviction of the appellant is upheld.

17. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

18. Learned AGA also admitted the fact that appellant is languishing in jail for the last more than 12 years. Since, the appellant has already served 12 years in jail, ends of justice will be met if sentence is reduced to the period already undergone.

19. Hence, the sentence awarded to the appellant by the learned trial-court is modified as period already undergone and the fine of Rs.5,000/- imposed upon the appellant is reduced to Rs.500/-. In case of default of fine, the appellant shall undergo additional simple imprisonment of one month.

20. Accordingly, the appeal is **partly allowed** with the modification of the sentence, as above.

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**(2021)10ILR A526**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 01.09.2021**

**BEFORE**

**THE HON'BLE AJAI TYAGI, J.**

Criminal Appeal No. 7419 of 2019

**Bismark Bakuba Guitermbi**
**...Appellant(In Jail)**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellants:**
Sri Anup Kumar Pandey

**Counsel for the Respondent:**
A.G.A.

**The Foreigners Act, 1946- Section 14-A (b)- As no record of appellant's arrival was found at Airport New Delhi and the stamp on visa was fake, the appellant has committed the offence under Section 14-A (b) of the Foreigners Act, 1946. Appellant's Unique Case File (UCF) was also not there at Airport, New Delhi. Along with fax message (Ex.ka3), paper No.15kha/4 was also sent in which it is written that "ARRIVAL- No Record Found". In his statement under Section 313 Cr.P.C., he has just stated that he is innocent, but nothing is said regarding the information provided through aforesaid documents. Therefore, it is clear that there was no record of appellant's arrival at New Delhi as the stamp on visa suggests. Hence, it is very well proved that stamp of arrival on visa was fake.**

As the prosecution proved that the appellant had entered and was staying in India with fake documents, hence offence u/s 14-A(b) of the Act, 1946 was made out against him.

**Criminal Law - Indian Penal Code, 1860- Section 419, 420- Acquittal under but conviction under Section 14-A of the Foreigners Act, 1946- There was no cheating by personation and there was no cheating and dishonestly inducing of delivery of property by appellant. Hence, the learned trial court has rightly acquitted the appellant against the charges levelled under Sections 419 and 420 IPC.**

Merely because the appellant was acquitted u/s 419 and 420 of the IPC, as ingredients of the said offences were missing in the facts of the case, would not mean that the appellant cannot be convicted u/s 14-A(b) of the Act, 1946. ( Para 14, 17, 20)

**Criminal Appeal rejected.** (E-3)

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred by the appellant-Bismark Bakuba Guitermbi against the judgment and order dated 29.8.2019, passed by learned Additional Sessions Judge, Court No.3, Maharajganj, in Sessions Trial No.15 of 2019 (State vs. Bismark Bakuba Guitermbi) arising out of Case Crime No.11 of 2018 under Sections 419, 420 IPC read with Section 14-A of the Foreigners Act, 1946 *(herein after referred to as 'the Act, 1946')*, in which the appellant has been awarded four years rigorous imprisonment with fine of Rs.10,000/-, six months rigorous imprisonment under Section 14-A of the Act, 1946, and the appellant was acquitted under Sections 419 and 420 IPC.

2. The brief facts of the case are that complainant-Tej Pratap Maurya (ACIO-II/Ex) posted in Immigration Office, Sonauli, District-Maharajganj, submitted a report at Police Station-Sonauli that on 13.1.2018, he was posted there with Vipin Kumar Singh. They were on night duty. In the morning at about 5:00a.m., one foreign national-Bismark Bakuba Guitermbi S/o Francosis Guitermbi R/o 67-ST Benoit

Eglise, Bangui, Petevo, Central Africa, reported in the office for going to Nepal from India. At the time of checking his Passport and Visa, it was found that there was stamp affixed on Visa dated 9.12.2017 showing his arrival at Indira Gandhi International Airport, New Delhi. When the concerned authority at Airport, New Delhi was contacted to confirm his arrival, it was informed through letter No.290/RAF/A dated 13th January, 2018, and returned letter No.27/Misc/SNL/18 dated 13.1.2018 that in his UCF data, there was no record available for his arrival/departure and the stamp affixed on passport was fake. Hence, the foreign national-appellant was handed over at Police Station-Sonauli.

3. On the basis of above report of Immigration Office, Case Crime No.11 of 2018 was registered against the appellant under Sections 419, 420 IPC and Section 14 of the Act, 1946. Charge was framed by trial court under Sections 419, 420 IPC and Section 14-A of the Act, 1946. Learned trial court acquitted the appellant under Sections 419 and 420 IPC and convicted him under Section 14-A of the Foreigners Act and awarded sentence of four years RI and Rs.10,000/- fine and six months imprisonment in default of fine. Hence, this appeal.

4. Heard Shri Anup Kumar Pandey, learned counsel for appellant, Shri B.A.Khan, learned AGA for the State and perused the record.

5. At the outset, learned counsel for the appellant submitted that initially, the trial was conducted under Section 14 of the Act, 1946, but when nothing was found against the appellant, charge was amended after recording the statement of appellant under Section 313 Cr.P.C. Amended charge was levelled under Section 14-A of the Act, 1946, and the appellant was convicted in the said charge. It is also submitted by counsel for the appellant that appellant was acquitted under Sections 419, 420 IPC, but convicted under Section 14-A of the Act, 1946. It is also argued that when there was no cheating found and appellant was acquitted under Sections 419, 420 IPC, he could not have been convicted in Foreigners Act, 1946, because it is said by prosecution that the stamp affixed on his passport and visa was fake, but when appellant is acquitted for the offence of cheating, it proves that the stamp was not fake. Hence, the learned trial court has given contradictory findings and the evidence on record is not appreciated in the right perspective. It is also argued that even in entire judgment and order impugned herein, charge under Section 14-A of the Act, 1946, was not considered by trial court. Trial court has also given a finding that appellant's passport was valid. Hence, appellant was having valid passport-visa.

6. Learned counsel for the appellant also argued that Investigating Officer (PW4) before the trial court has stated in his statement that he himself did not verify arrival of appellant from New Delhi Airport; he only relied on the inquiry made by Immigration Office, Sonauli; learned trial court has also given finding that no offence of cheating was proved against the appellant. Lastly, it was submitted that appellant was awarded maximum sentence of four years out of which he has already served three years and seven months of sentence. Therefore, if appeal is dismissed, sentence may be modified as undergone.

7. No other submission or argument was raised by learned counsel for the appellant.

8. Learned AGA appearing for the State has argued that stamp of arrival on the visa of appellant was found fake. At Indira Gandhi International Airport, New Delhi, no arrival record of appellant was found. It is submitted that when there was no arrival record of appellant at New Delhi Airport, it is proved that arrival stamp affixed on visa is fake and forged. He submits that it was burden on appellant to show how he entered India, but he could not discharge his burden; appellant was found in the territory of India without valid visa/permit, therefore, offence is made out under Section 14-A of the Act, 1946, and he was rightly convicted by learned trial court. Hence, the appeal may be liable to be dismissed.

9. Prosecution case is that appellant reported at Immigration Office, Sonauli, District-Maharajganj at Indo-Nepal Border for going to Nepal from India. While checking passport and visa of the appellant, stamp of his arrival was found affixed on visa dated 9.12.2017 pertaining to New Delhi Airport. For verification of his arrival, Immigration Office Sonauli contacted Airport at New Delhi from where it was reported that there was no arrival record of the appellant at New Delhi Airport and stamp of his arrival dated 9.12.2017 was found fake.

10. First of all, it is relevant to clear the position of trial of this case as learned counsel for the appellant has argued that initially trial was conducted under Section 14 of the Act, 1946, and when nothing was found against the appellant, charge was amended under Section 14-A of the Act, 1946, even after, statement of appellant under Section 313 Cr.P.C. I find no force in the aforesaid submission of counsel for the appellant because perusal of record shows that initially trial of this case was conducted by the court of Chief Judicial Magistrate, Maharajganj, wrongly, as this case was triable exclusively by the court of sessions. After the full trial, but before delivering the judgment, learned CJM found that case was triable by court of sessions and in that event, this case was committed to the court of sessions vide order dated 19.1.2019, passed by CJM, Maharajganj. In that event, trial was conducted in court of sessions.

11. To prove its case, the prosecution has produced as many as two witnesses, namely, Tej Pratap Maurya (PW1) and Vipin Kumar Singh (PW2), who were on night duty at Immigration Office, Sonauli, when the appellant reported for going to Nepal. PW1 and PW2 were involved in checking the documents and handing over the appellant to Police Station-Sonauli.

12. PW1 has stated in his statement that for verification of arrival of appellant in India, contact was established with New Delhi Airport because stamp of arrival, affixed on the visa, was showing arrival at New Delhi. A message through fax regarding verification of the arrival of appellant was sent to New Delhi and it was reported by the Airport authority that in Unique Case File (UCF), no record of arrival/departure was found.

13. PW2 has also stated in his statement that he was also posted in Immigration Office, Sonauli, at the relevant point of time with PW1. On the visa of appellant arrival stamp dated 9.12.2017 was found affixed, so verification was made from Indira Gandhi International Airport, New Delhi. It was informed by the authorities that there was no arrival record of appellant at Airport, New Delhi.

14. Perusal of record shows that there are two most relevant and important documents, which are Ex.ka2 and Ex.ka3. Ex.ka3 is a fax message, a reply of inquiry made by Immigration Office, Sonauli. This fax message is of 13th January, 2018. Ex.ka2 is the document on which required information was written by the concerned authority of Indira Gandhi International Airport, New Delhi. In this reply, it was written "checked arrival/departure of said pax for the year 1/17 to till date. No visit has been traced. UCF is also not traced". Hence, in this reply, it is specifically mentioned that UCF is also not traced. Hence, appellant's Unique Case File (UCF) was also not there at Airport, New Delhi. Along with fax message (Ex.ka3), paper No.15kha/4 was also sent in which it is written that "ARRIVAL- No Record Found". Above documents were not rebutted by appellant in any manner. In his statement under Section 313 Cr.P.C., he has just stated that he is innocent, but nothing is said regarding the information provided through aforesaid documents. Therefore, it is clear that there was no record of appellant's arrival at New Delhi as the stamp on visa suggests. Hence, it is very well proved that stamp of arrival on visa was fake.

15. Moreover, it is not only the fact that PW1 and PW2, who were on duty at Immigration Office, Sonuali, got the verification of arrival of appellant at the time of his reporting to the office, but during investigation also, the Investigating Officer enquired about his arrival. Sub Inspector Awadhesh Narain Tiwari-Investigating Officer (PW4) has stated in his statement that verification of arrival of the appellant was made from the office of Counsellor, Passport and Visa Division Ministry of Foreign Affairs, New Delhi. It is also stated by the I.O. that date of issue of visa was 6.12.2017 and date of expiry was 5.6.2018 and then enquiry was also made from the office of Central Foreigners Intelligence Bureau, Ministry of Home Affairs, Government of India, New Delhi, by which it was informed that appellant's arrival/departure record was not traced. Therefore, on the basis of evidence on record, prosecution was succeeded to prove that as suggested by the stamp of arrival affixed on the visa of appellant, no record of appellant's arrival at New Delhi Airport was found.

16. For ready reference, Section 14-A of the Foreigners Act, 1946, provides as under:

***"14A. Penalty for entry in restricted areas, etc.--Whoever--***

*(a) enters into any area in India, which is restricted for his entry under any order made under this Act, or any direction given in pursuance thereof, without obtaining a permit from the authority, notified by the Central Government in the Official Gazette, for this purpose or remains in such area beyond the period specified in such permit for his stay; or*

*(b) enters into or stays in any area in India without the valid documents required for such entry or for such stay, as the case may be, under the provisions of any order made under this Act or any direction given in pursuance thereof, shall be punished with imprisonment for a term which shall not be less than two years, but may extend to eight years and shall also be liable to fine which shall not be less than ten thousand rupees but may extend to fifty thousand rupees; and if he has entered into a bond in pursuance of clause (f) of sub-section (2) of section 3, his bond shall be forfeited, and any person bound thereby*

*shall pay the penalty thereof, or show cause to the satisfaction of the convicting Court why such penalty should not be paid by him."*

17. In light of above, it is proved that no record of appellant's arrival was found at Airport New Delhi and the stamp on visa was fake, the appellant has committed the offence under Section 14-A (b) of the Foreigners Act, 1946.

18. Learned counsel for the appellant has argued that when appellant was acquitted under Sections 419, 420 IPC, how he could have been convicted under Section 14-A of the Act, 1946. I find no force in the submission of counsel for the appellant because Section 419 IPC provides for punishment of cheating by personation and cheating by personation is defined under Section 416 IPC as under:

***"416. Cheating by personation.--***

*A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.*

*Explanation.--The offence is committed whether the individual personated is a real or imaginary person. Illustration*

*(a) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.*

*(b) A cheats by pretending to be B, a person who is deceased. A cheats by personation."*

19. Section 420 IPC, for punishment of cheating and dishonestly inducing delivery of property, is defined as under:

***"420. Cheating and dishonestly inducing delivery of property.--***

*Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

20. In the case at hand, there was no cheating by personation and there was no cheating and dishonestly inducing of delivery of property by appellant. Hence, the learned trial court has rightly acquitted the appellant against the charges levelled under Sections 419 and 420 IPC, but it is not shown that if appellant had been acquitted for the offence under Sections 419 and 420 IPC, no offence is made out under Section 14-A of the Act, 1946, against him. With the evidence on record, it is proved that since there was no record of arrival of appellant in India, as discussed earlier, it is proved that appellant entered India without valid documents required for such entry.

21. Hence, learned trial court has appreciated the evidence in right perspective and rightly convicted and sentenced the appellant for the offence under Section 14-A of the Foreigners Act, 1946. There is no scope for making any interference in the impugned judgment and order passed by trial court and appeal is liable to be dismissed.

22. Accordingly, the appeal is **dismissed.**

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**(2021)10ILR A531**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 24.03.2021**

**BEFORE**

**THE HON'BLE ARVIND KUMAR MISHRA-I, J.**

Criminal Appeal No. 3162 of 2018

**Omvir ...Appellant(In Jail)**
**Versus**
**State of U.P. ...Respondent**

## Counsel for the Appellant:
Shilpa Ahuja, Sri A. Kumar Srivastava, Sri Chandra Bhan Singh, Sri Naseem Ahmad, Sri Salman Ahmad, Sri Sameer Khan, Sri Sanjeev Kumar Tripathee, Sri Suresh Kumar srivastava

## Counsel for the Respondent:
A.G.A.

**Criminal Law - Narcotics Drugs and Psychotropic Substances Act, 1985 - Section 8/18- Conviction- Sentence of five years of rigorous imprisonment- Nothing adverse has come to the fore that may reflect on any violation of Section 50 of the N.D.P.S. Act which is mandatory to be complied with and compliance of two Sections 55 and 57 are merely regulatory and more or less its compliance has also been made, that does not create any dent in the prosecution case, therefore, the trial court was justified in recording conviction against the appellant under Section 8/18 N.D.P.S. Act, for which no infirmity is perceptible in the judgment and order impugned in this appeal. Consequently, the conviction recorded by the trial court is upheld.**

As no violation of Section 50, 55 and 57 of the Act is made out and the procedure of preparing samples and recovery memo of the seized contraband also cannot be faulted with, the conviction of the accused held to be just and proper.

**Quantum of Sentence- Recovery of opium less than commercial quantity- Sentence of five years rigorous imprisonment- Quantum of sentencing part of the judgment is concerned that under prevailing facts and circumstances of this case, appear to be too harsh for which reasons are specific. Imposition of sentence for 5 years rigorous imprisonment is not justified in the prevailing facts and circumstances of this case and it cannot be approved of at this stage and it should commensurate with the offence in question; moreso in proportionate to the degree the offence has been committed. Here only 300 grams of opium which is much below the commercial quantity i.e. 2.5kg. has been recovered in this case. Hence, the sentence of 5 years rigorous imprisonment with fine Rs.20,000/- imposed by the trial court is palliated to three years rigorous imprisonment coupled with fine Rs.10,000/-, in case of default in payment of fine he would have to suffer additional two months imprisonment.**

Settled law that imposition of sentence should be proportionate to the gravity of the offence. Hence, as recovered contraband is much below the commercial quantity therefore sentence held to be excessive and accordingly modified to three years rigorous imprisonment along with enhancement of fine.

**Criminal Appeal partly allowed.** (E-3)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Sri Sanjeev Kumar Tripathi, learned counsel for the appellant and Sri Bhanu Pratap Singh, learned A.G.A. for the State and perused the records.

2. The instant criminal appeal challenges the judgment and order dated 29.05.2018 passed by the Additional Sessions Judge, Court No.2, Amroha, in

Special Session Trial No.14 of 2015 arising out of Case Crime No.177 of 2015 State Vs. Omvir son of Roomal Singh, under Section 8/18 N.D.P.S. Act, Police Station Adampur, District Amroha whereby the appellant Omvir having been convicted under the aforesaid Sections of N.D.P.S. Act has been sentenced to five years rigorous imprisonment coupled with fine Rs.20,000/- with default stipulation for six months additional imprisonment.

3. Relevant facts of this appeal as discernible from record suggest that the appellant was caught by the police patrolling party on the tip off information by some informer near Ojpura bridge / culvert on the road within Police Station Adampur, District Amroha, description of the same indicates that S.I. Amrish Tyagi and S.I. Rohit Sharma were patrolling along with their colleagues within Police Station Adampur and were passing from Dhabarsi and reached village Pashupura where they received tip off information from the informer that some person is coming to the village Pashupura from Ojpura side who is possessing illicit contraband. The police party believed this information and tried to arrange public witness but no one was ready to stand public witness, therefore, the police party inter-se made search for each other and assured that there is no adverse material / contraband in their possession. Because of paucity of time, the police party kept themselves hiding on both sides of the road near Ojpura bridge / culvert. After sometime, one person was sighted coming from Ojpura side who was pointed out by the informer. In the meanwhile, the informer went away. When that person came closer to the police party, the police personnel came out of their hiding and after using necessary force at about 4:30 p.m. apprehended that person.

4. On being asked about his name, he told that he is Omvir son of Roomal Singh, resident of Shibaura, Police Station Didauli. District Amroha. He also informed that he is possessing 300 grams of opium whereupon he was offered choice to be searched before some gazetted officer / Magistrate whereupon he reposed faith in the police party itself for search being made. The search was made out whereupon a green bag was recovered from his right hand wherein some substance was found kept wrapped inside a polythene, it was opium weighing 300 grams. Therefore, Constable Shripal was sent to arrange for scale to the village Dhabarsi from where he obtained scale for weighing the contraband from the shop of some goldsmith. The recovered opium was weighed on the spot whereupon it weighed 300 grams, 10 grams of the recovered opium was taken out for sampling and was kept in separate polythene bag and rest of the recovered opium say 290 grams was also kept in another cloth and both bundles were sealed and specimen seal was prepared, memo of arrest and recovery was prepared under Section 8/18 N.D.P.S. Act.

5. Once the memo of arrest and recovery and the other documents were prepared on the spot and after reading out contents of the same and after informing the appellant, he was arrested for offence under Section 8/18 N.D.P.S. Act. The contents were also read out to the police personnel who also signed on it. Perusal of memo of arrest and recovery memo Ext. Ka-4 also indicates that after it was so signed, a note was appended at the bottom of the second page of the aforesaid Ext. Ka-4 that copy of memo (of arrest and recovery) is being given to the appellant-accused Omvir Singh. Memo of arrest is Ext. Ka-5. Memo of scale whereby recovered contraband was properly weighed and found 300 grams, out of

which 10 grams was taken out for sampling purpose, rest of 290 grams was kept under seal, memo of the same is Ext. Ka-2. Memo of offer to be searched before any gazetted officer or Magistrate is Ext. Ka-3.

6. After completing the necessary exercise, the appellant was taken to the Police Station Adampur where on the basis of Ext. Ka-4, memo of recovery and arrest, report was lodged against the accused by the informant S.I. Amrish Tyagi, at Police Station Adampur, District Amroha which was taken down at 6:30 p.m. at Case Crime No.177 of 2015 under Section 8/18 N.D.P.S. Act. Check F.I.R. is Ext. Ka-8. Relevant entry was also made in the concerned general diary of the aforesaid date and time at Serial No.34 under the aforesaid Sections of N.D.P.S. Act at the aforesaid Police Station, copy of the general diary entry is Ext. Ka-9.

7. The investigation of this case was done by S.I. Devendra Kumar PW-3, he took note of the contents of the Check F.I.R. and recorded statement of the constable concerned who noted entry in the Check F.I.R. and concerned general diary of date 25.04.2015. He also prepared site plan of the place of arrest and recovery Ext. Ka-6 and proceeded to record statement of various witnesses and sample collected by the police party earlier was sent to Forensic Science Laboratory for chemical analysis. After recording statement and after receiving analyst report as above, note of the contents of the same was made in the general diary and charge sheet no.160 of 2015 was filed against the appellant in the court below which is Ext. Ka-7 under Section 8/18 of the N.D.P.S. Act.

8. The trial court heard the appellant on the point of charge and considering the merits of the case and after hearing both the sides, it was of the opinion that prima facie case under Section 8/18 N.D.P.S. Act is made out. Consequently, charge was framed against the appellant under the aforesaid Sections of the N.D.P.S. Act on 27.07.2016 and the same was readover and explained to him who denied the same and claimed to be tried.

9. To prove its case, the prosecution in all produced five prosecution witnesses, a brief sketch of the same is hereinunder:

10. S.I. Amrish Tyagi PW-1 is witness of fact, he has prepared prosecution papers. S.I. Rahul Sharma PW-2 is witness of fact of arrest and recovery. S.I. Devendra Kumar PW-3 is the Investigating Officer, he conducted investigation and filed charge sheet. Head Constable Ganga Ram PW-4 entered relevant entry in the Check F.I.R. and also registered case, entered contents in the relevant general diary against the appellant and proved relevant papers as Ext. Ka-8 and Ext. Ka-9, respectively. Constable Amar Pal Singh PW-5 has proved Ext. Ka-10, relevant entry in the register of Malkhana as entered in the handwriting of Constable Ramdin with whose handwriting, this witness is acquainted with.

11. Thereafter evidence for the prosecution was closed and statement of the accused-appellant was recorded under Section 313 Cr.P.C. wherein he disowned the liability that anything noxious was ever recovered from his possession.

12. No evidence, whatsoever, was led by the defence.

13. As a sequel to it, the case was posted for extending arguments pros and

cons by the parties and after the arguments were concluded the trial Judge vetted the case on merits, returned finding of conviction against the appellant and passed the aforesaid sentence.

14. Consequently, this appeal.

15. Contention, in brief, is that the police party has slapped absolutely false case without any rhyme or reason and fact is that nothing of the sort ever took place on 21.04.2015 on the road near Ojpura bridge / culvert. Nothing was ever recovered from the possession of the appellant and to say that 300 grams of opium was recovered from him is absolutely false and a big lie. No public witness was arranged despite the fact that it was day time and the incident allegedly took place on the road near Ojpura bridge / culvert even then the police party failed to arrange public witness and there is no whisper in the record about any name as to who were the persons who refused to stand as public witness.

16. The mandatory provisions of N.D.P.S. Act - say Section 42, 50, 55, 57 have not been complied with in letter and spirit due to which adverse presumption cannot be drawn against the appellant that he was possessing opium. The appellant is neither previous convict nor has any criminal history except the present case.

17. Lastly on the point of quantum of sentence, it has been urged that that appellant is a young man and the fact is that some altercation took place with the police party which led to his false implication in this case. Considering his young age, he should be given one chance to reform himself and leniency must be shown because the appellant has to support his old father and mother, therefore, sentence should be reduced to the minimum imprisonment to secure the ends of justice otherwise his entire future will be jeopardized.

18. Learned A.G.A. appearing for the State retorted to aforesaid submission and urged that relevant provisions of N.D.P.S. Act have been complied with in letter and spirit in this case. Factum of recovery has been proved, to the hilt, not only by the prosecution witnesses but also by the analyst report that the contraband and the sample sent for chemical examination was on analysis found opium.

19. The prosecution story on the face inspires confidence. The entire episode is coherently stitched in such manner that any possibility of false implication of the appellant in the case, per se, stands ruled out and no worthy argument has been extended on behalf of the appellant as to how and why the real culprit will be spared and in place of him, the accused-appellant will be falsely implicated in this case. There is no anomaly in the entire prosecution case and the charge under Sections 8/18 of N.D.P.S. Act stands proved beyond all reasonable doubt. The trial court after adverting to the aforesaid aspects of the case and vetting the merits rightly recorded the finding of conviction based on material on record.

20. Also considered the above submissions.

21. In the light of rival submissions and the claim of the appellants and the prosecution, the moot point that arises for adjudication of this appeal relates to fact whether the testimony of the prosecution witnesses of fact is innocuous and the

charge framed against the appellants has been proved beyond reasonable doubt or it is case of no evidence as claimed by the appellants?

22. Insofar as the aforesaid contentions are concerned, as per the prosecution story, it is obvious that the prosecution witnesses S.I. Amrish Tyagi PW-1, S.I. Rahul Sharma PW-2, H.C.P. Nasir Ali and Constable Shripal were on patrolling duty on 21.04.2015 around 3:40 p.m., a reference of the same finds mention at Serial No.29 of general diary of the same date 21.04.2015 at 15:40 hours. When the police party reached Pashupura, they received tip off information from informer to the extent that some person possessing opium is coming over to Pashupura from Ojpura side. The police tried to arrange public witness but considering welfare, no one was ready to stand witness for the police party. Thereafter, because of paucity of time, the police party inter-se made out search of each other and assured that no adverse material is possessed by anyone of them.

23. The police party proceeded towards Ojpura and kept themselves hiding on both sides of the road. After a short while, some person was sighted who was pointed out by the informer to be the person possessing contraband. He went away from the scene as that person came nearer to the police party. The police party came out of their hiding and after using necessary force arrested the appellant. On being asked about his name, he told his name Omvir son of Roomal Singh, resident of Shibaura, Police Station Didauli. He also informed that he is possessing 300 grams of opium. On this disclosure, prior to carrying out search, the appellant was offered a choice to be searched either before the gazetted officer or the Magistrate but he refused the same and reposed faith in the police party itself.

24. Thereafter, search was made out and a green bag was recovered from his possession wherein some substance / material was found kept in white polythene which was opium weighing approximately 300 grams. Constable Shripal was sent to arrange for scale who obtained it from goldsmith's shop and the recovered contraband was weighed then it aggregated to 300 grams, out of which 10 grams was kept for sampling purpose and sample so colleced and the recovered substance were kept separate in one polythene bag and in white cloth, under seal and relevant papers were prepared on the spot and meme of arrest and recovery was also prepared and copy of memo of arrest and recovery Ext. Ka-4 was given to the appellant, he was taken to the police station where a case was registered at Case Crime No.177 of 2015 under Sections 8/18 N.D.P.S. Act, relevant entry was also made in the concerned general diary and the investigation followed and 10 grams sample earlier collected was sent to the forensic science laboratory for analysis from where report was obtained to the ambit that the recovered material is opium, the analyst's report is available on record.

25. The aforesaid process has been amply proved by statement of the two prosecution witnesses of fact namely S.I. Amrish Tyagi PW-1 and S.I. Rahul Sharma PW-2. They have narrated the entire incident. They have been cross examined by the defence wherein nothing adverse has come to the fore that may reflect on any violation of Section 50 of the N.D.P.S. Act which is mandatory to be complied with and compliance of two Sections 55 and 57

are merely regulatory and more or less its compliance has also been made, that does not create any dent in the prosecution case, therefore, the trial court was justified in recording conviction against the appellant under Section 8/18 N.D.P.S. Act, for which no infirmity is perceptible in the judgment and order impugned in this appeal. Consequently, the conviction recorded by the trial court is upheld.

26. Thus insofar as the point of quantum of sentencing part of the judgment is concerned that under prevailing facts and circumstances of this case, appear to be too harsh for which reasons are specific. Considering future family liability of the appellant that the appellant is a young man and he has old parents to look after, and he has promised not to repeat similar offence in future and he is repentful to the situation and undertakes that he will reform himself as a good citizen and he will not repeat similar offence in future and prayed that the sentence should be confined to the minimum possible as that would serve ends of justice.

27. Therefore, imposition of sentence for 5 years rigorous imprisonment is not justified in the prevailing facts and circumstances of this case and it cannot be approved of at this stage and it should commensurate with the offence in question; moreso in proportionate to the degree the offence has been committed. Here only 300 grams of opium which is much below the commercial quantity i.e. 2.5kg. has been recovered in this case. Hence, the sentence of 5 years rigorous imprisonment with fine Rs.20,000/- imposed by the trial court is palliated to three years rigorous imprisonment coupled with fine Rs.10,000/-, in case of default in payment of fine he would have to suffer additional two months imprisonment.

28. Accordingly, the sentencing part of the impugned judgment and order dated 29.05.2018 passed by the Additional Sessions Judge, Court No.2, Amroha, in Special Session Trial No.14 of 2015 arising out of Case Crime No.177 of 2015 State Vs. Omvir son of Roomal Singh, under Section 8/18 N.D.P.S. Act, Police Station Adampur, District Amroha, is hereby modified to the aforesaid extent.

29. In this case, the accused-appellant is in jail since 29.05.2018 and sentence of three years rigorous imprisonment shall come to an end on 28.05.2021, if the amount of fine Rs.10,000/- is also paid on or before 28.05.2021 otherwise the appellant shall have to suffer two months imprisonment. Therefore, the appellant shall serve out the aforesaid remaining part of the sentence as above.

30. The instant appeal is allowed, partly accordingly.

31. Let a copy of this order/judgment be certified to the court below for necessary information and follow up action.

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**(2021)10ILR A536**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 18.01.2021**

**BEFORE**

**THE HON'BLE AJIT SINGH, J.**

Criminal Appeal No. 2591 of 2020

**Mukesh Kumar ...Appellant(In Jail)**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Munesh Kumar Upadhyay

**Counsel for the Respondent:**
A.G.A.

**Criminal Law - Indian Penal Code, 1860- Section 308- To secure conviction under Section 308 I.P.C. the prosecution must prove that the accused had requisite 'intention' or 'knowledge' to cause culpable homicide, which in turn can be ascertained from the actual injury as well as from other surrounding circumstances.**

The presence of intention and knowledge with the accused can be inferred from the nature and seat of injury in order to make out an offence u/s 308 of the IPC.

**Indian Penal Code, 1860- Section 308- Section 324- Distinction between- In contrast to Section 308 I.P.C., which necessarily requires proving 'intention' or 'knowledge', to attract Section 324 I.P.C. it is sufficient if a person voluntarily causes hurt by means of an instrument for stabbing or cutting. Under the former (Section 308), injuries must be such as are likely to cause death, but in the latter (Section 324) the injuries may or may not endanger one's life.**

For making out an offence u/s 324 of the IPC, neither intention nor knowledge is required and merely causing voluntary hurt, which may not endanger life, is sufficient.

**Indian Penal Code, 1860- Section 308- The appellant had in a fit of rage inflicted injuries on the person of injured. Similarly, given the facts of this case, it would be far-fetched to hold that the appellant knew that his actions were likely to cause the death of the injured as all the injuries were opined to the simple by the doctor. The evidence on record falls short of establishing the requisite ingredients of Section 304 of Indian Penal Code, though the appellant is undoubtedly guilty of voluntarily causing hurt with a sharp-edged weapon within the meaning of Section 324 I.P.C.**

Where the injuries are simple and inflicted with a sharp edged weapon without intention or knowledge to cause culpable homicide, then the offence would be one u/s 324 of the IPC instead of Section 308 of the IPC.

**Quantum of Sentence- Proportionate Sentence- The appellant has undergone actual sentence of approximately four years. The incident took place more than 22 years ago, and the appellant has admittedly not been involved in any other case. The incident also does not reflect any mental depravity or criminal instincts on part of the appellant. It is on record that the appellant, who appears to be a young boy, has not misused the concession of bail granted more than ten years back. Courts must award punishment in a judicious manner, after taking into account various relevant circumstances including the gravity and nature of offence, motive of the crime and other attendant circumstances. Ends of justice would be adequately met if the sentence of the appellant is reduced to the period which he has already undergone. Conviction of the appellant is modified, from one under Section 308 I.P.C. to section 324 I.P.C. and his sentence is consequently reduced from five years rigorous imprisonment to the period which he has already undergone**.

Where the offence u/s 324 of the IPC is made out instead of Section 308 of the IPC, there is no misuse of bail and the offence does not reflect any mental depravity, it would be just and proper to reduce the sentence to the period undergone by the accused. ( Para 9, 11, 13, 14, 15, 16, 17, 18 )

**Criminal Appeal partly allowed.** (E-3)

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

1. Counter affidavit filed on behalf of State in the Court today is taken on record.

2. Heard learned counsel for the appellant, learned A.G.A. and perused the record.

3. This criminal appeal u/s 374(2) Cr.P.C. has been filed against the judgement and order dated 8.9.2020 passed by learned Additional District and Session Judge, Court No. 5, Hathras in Session Trial No. 351 of 2009 (State vs. Mukesh Kumar) arising out of Case Crime no.104 of 1998, u/s 308 I.P.C., P.S.-Sasani, District-Hathras, whereby the appellant has been convicted and sentenced for the offence u/s 308 I.P.C. for five years imprisonment and a fine of Rs.5000/- and in default of payment for five months additional imprisonment.

4. The prosecution story in brief is that on 4.5.1998 at about 6:00 O'clock in the evening the son of the complainant Ravendra Kumar was going towards the canal, then the accused who used to live in his brother-in-law's house, was coming from the opposite side and having seen the complainant's son alone, went back to his house and returned on bicycle with a knife and started assaulting his son with the knife, as a result of which he became unconscious and fell down on the ground. After seeing the incident Manvendra Kumar, son of Surendra Kumar, resident of Sinamai and Kalicharan, son of Vedram ran towards the son of the complainant and saved his son. Thereafter the accused ran away from the spot on his bicycle.

5. At the very outset, learned counsel for the appellant, on instructions, stated that he does not propose to challenge the impugned judgement and order on its merits. He, however, prayed for modification of the order of the sentence for the period already undergone by the appellant.

6. In furtherance to his submission, the learned counsel for the accused-appellant submits that the act of the appellant was not intentional. He next submits that the injured PW-1 in his examination-in-chief has stated that some altercation took place between him and the accused and it arose due to the collision met to the injured by the accused's bicycle as a result of which the injured fell down on the ground when he fell down on the ground from his bicycle the accused after taking out the knife from his pocket and given repeated knife blow, causing injuries on the chest, neck and other part of the body. He in his cross-examination has also stated that he was attacked from back side and he had not seen the attacker on the spot. He next submits that the doctor in his report has specifically mentioned that the injury sustained by the injured was simple in nature and hence the offence under Section 308 I.P.C. is not made out against the appellant. He also submits that on the question of legality of sentence he is not pressing this appeal and only pressing on the quantum of sentence and he has prayed for taking lenient view considering the age of the accused and his age related ailments.

7. The short question which arises for consideration is whether the offence committed by the appellant falls within the ambit of Section 308 or 324 of Indian Penal Code.

8. Section 308 of Indian Penal code provides that "whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty or culpable homicide not amounting to murder" and in case any hurt is caused to any person by such act, then "the accused is liable to be punished with imprisonment of either description for a term which may

extend to seven years, or with fine, or with both."

9. Therefore the secure conviction under Section 308 I.P.C. the prosecution must prove that the accused had requisite 'intention' or 'knowledge' to cause culpable homicide, which in turn can be ascertained from the actual injury as well as from other surrounding circumstances.

10. Section 324 I.P.C., on the other hand, criminalizes willful infliction of injuries on another and states that whoever "voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death", would be punished with "imprisonment of either description for a term which may extend to three years, or with fine, or with both."

11. In contrast to Section 308 I.P.C., which necessarily requires proving 'intention' or 'knowledge', to attract Section 324 I.P.C. is is sufficient if a person voluntarily causes hurt by means of an instrument for stabbing or cutting.

12. It is thus crucial to determine whether the appellant had 'intention' or 'knowledge' that the injury inflicted on the victim could cause the latter's death and as a result thereto the appellant could be guilty of committing culpable homicide not amounting to murder?

13. The distinction between attempt to commit culpable homicide not amounting to murder, and voluntarily causing hurt with a sharp edged weapon, is subtle and nuanced. Under the former (Section 308), injuries must be such as are likely to cause death, but in the latter (Section 324) the injuries may or may not endanger one's life.

14. Accepting true what the injured has deposed, I find it difficult to hold that the appellant had any intention or knowledge to inflict such injury which could cause the victim's death within the meaning of culpable homicide not amounting to murder. The appellant had in a fit of rage inflicted injuries on the person of injured. Similarly, given the facts of this case, it would be far-fetched to hold that the appellant knew that his actions were likely to cause the death of the injured as all the injuries were opined to the simple by the doctor.

15. This Court is of the opinion that the evidence on record falls short of establishing the requisite ingredients of Section 304 of Indian Penal Code, though the appellant is undoubtedly guilty of voluntarily causing hurt with a sharp-edged weapon within the meaning of Section 324 I.P.C.

16. Resultantly, it must also be considered whether the sentence awarded to the appellant is appropriate. It is not disputed by the learned State counsel that the appellant has undergone actual sentence of approximately four years. The incident took place more than 22 years ago, and the appellant has admittedly not been involved in any other case. The incident also does not reflect any mental depravity or criminal instincts on part of the appellant. It is on record that the appellant, who appears to be a young boy, has not misused the concession of bail granted more than ten years back.

17. It would be trite to note that Courts must award punishment in a judicious manner, after taking into account various relevant circumstances including the gravity and nature of offence, motive of

the crime and other attendant circumstances. Applying these parameters, this Court is of the considered view that ends of justice would be adequately met if the sentence of the appellant is reduced to the period which he has already undergone. I order accordingly.

18. For the reasons aforestated, the appeal is allowed in part; conviction of the appellant is modified, from one under Section 308 I.P.C. to section 324 I.P.C. and his sentence is consequently reduced from five years rigorous imprisonment to the period which he has already undergone. His bail bonds are consequently discharged.

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**(2021)10ILR A540**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 30.09.2021**

**BEFORE**

**THE HON'BLE AJIT SINGH, J.**

Criminal Appeal No. 2465 of 1988

**Faqir Mohd. & Ors. ...Appellants(In Jail)**
**Versus**
**The State of U.P. ...Respondent**

**Counsel for the Appellants:**
Sri Braham Singh, Sri Abhai Saxena

**Counsel for the Respondent:**
A.G.A.

**Reformative Theory of Punishment- Proportionate Sentence- Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive. This Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.**

The judicial trend is that Sentence must be proportionate to the offence committed but at the same time effort should be made to reform the convict so that he is aligned with the social mainstream.

**Proportionate Sentence - The alleged incident which took place in the year 1983 about 38 years ago and now accused-appellants are more than 60 and 70 years of age respectively, it would not be proper to sent the accused-appellants to jail at the fag end of their life and the accused were on bail since 27.10.1988 and the accused persons have suffered the agony of conviction for more than 38 years and no criminal antecedents have been shown-It would be appropriate and proper that the accused be sentenced with the period already undergone and the amount of fine be enhanced instead of sending them to jail.**

The long time that has elapsed since the occurrence, the age of the convicts and their not misusing the period of bail would be some of the mitigating circumstances entitling them to be sentenced with the period undergone along with enhancement of fine. (Para 17,18)

**Criminal Appeal partly allowed.** (E-3)

**Judgements/ Case law relied upon**:-

1. Mohd. Giasuddin Vs St. of AP, AIR 1977 SC 1926

2. Sham Sunder Vs Puran, (1990) 4 SCC 731

3. St. of MP Vs Najab Khan, (2013) 9 SCC 509

4. Deo Narain Mandal Vs St. of UP (2004) 7 SCC 257

5. Shyam Narain Vs St. (NCT of delhi), (2013) 7 SCC 77

6. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

7. St. of Punj. Vs Bawa Singh, (2015) 3 SCC 441

8. Raj Bala Vs St. of Har., (2016) 1 SCC 463.

9. Kokaiyabai Yadav Vs St. of Chhattis.(2017) 13 SCC 449

10. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

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

1. As per order of this Court dated 28.9.2021, the appeal in respect of appellant no. 1 Faqir Mohd son of Imam Bux and appellant no. 4 Banney son of Mola Bux is abated.

2. Sri Abhai Saxena, learned Advocate is pressing this appeal on behalf of surviving appellant no. 2 Abdul Majid and appellant no. 3 Mushtaq.

3. This criminal appeal has been filed against the judgement and order dated14.10.1988 passed by Spl. Judge & Addl. Session Judge, Moradabad in S.T. No. 42 of 1985 (State vs. Faqir Mohammad and others), under Sections 379, 411, 307 I.P.C. and Section 25 Arms Act, P.S. Bilari, district-Moradabad, whereby learned Judge convicted and sentenced the appellants to 3 years rigorous imprisonment each under Section 411 I.P.C. and appellant no. 1 was convicted to 5 years rigorous imprisonment under Section 307 I.P.C. and appellant no. 2 was convicted to 2 years rigorous imprisonment under Section 25 Arms Act.

4. It was also directed that all the sentences shall run concurrently.

5. The prosecution story in brief is that on the intervening night of 20/21.9.1983 at about 3:00 A.M. the police had arrested four accused persons from the jungle of Village-Raipur, P.S. Bilari, while they were committing theft of electric wire. When S.H.O. Bhim Sen along with his team raided at the jungle, after seeing the police party, accused Faqir Mohammad with the intention to kill the police personal, fired at the police party with his pistol. Thereafter, he was caught by the police team and one country made pistol, live cartridges were allegedly recovered from his possession. The police team has also recovered stolen electric wire from the possession of the other accused persons.

6. At the very outset, learned counsel for the appellant, on instructions, stated that he does not propose to challenge the impugned judgement and order on its merits. He, however, prayed for modification of the order of the sentence for the period already undergone by the appellant.

7. In furtherance to his submission, the learned counsel for the accused-appellants submits that the incident had taken place on 20/21.9.1983 and the accused-appellants were convicted for three years Rigorous Imprisonment under Section 411 I.P.C. Appellant no. 1 Faqir Mohammad was also convicted for five years R.I. under Section 307 I.P.C. and three years R.I. Under section 25 Arms Act. At present accused appellant no. 2 Abdul Majid is aged about 75 years and accused-appellant no. 3 Mushtaq is aged about 62 years. He next submits that it was the first offence of the accused and after conviction the accused had not indulged in any other criminal activity. He next submits that although the trial court has convicted the accused-appellants on the basis of mere conjuncture while the appellants are absolutely innocent and have been falsely implicated in this case. Further submission

is that accused-appellants are on bail since 27.10.1988 and prior to that they were in jail for sometime and therefore, he has requested that a lenient view may be adopted and the sentence may be converted either undergone or the sentence may be substantially reduced. He also submits that on the question of legality of sentence he is not pressing this appeal and only pressing on the quantum of sentence and he has prayed for taking lenient view considering the age of the accused and his age related ailments.

8. Learned A.G.A. has vehemently opposed the submission made by learned counsel for the appellant. He has however, submits that if slight reduction in sentence is made, he has no objection.

9. I have perused the entire material available on record and the evidence as well as judgment of the trial court. The learned counsel for the accused-appellants does not want to press the appeal on its merit and requests to take a lenient view of the matter.

10. In ***Mohd. Giasuddin Vs. State of AP, AIR 1977 SC 1926***, explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization.Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

11. In ***Sham Sunder vs Puran, (1990) 4 SCC 731,*** where the high court reduced the sentence for the offence under section 304 part I into undergone, the supreme court opined that the sentence needs to be enhanced being inadequate. It was held:

"The court in fixing the punishment for any particular crime should take into consideration the nature of offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of offence."

12. In ***State of MP vs Najab Khan, (2013) 9 SCC 509,*** the high court, while upholding conviction, reduced the sentence of 3 years by already undergone which was only 15 days. The supreme court restored the sentence awarded by the trial court. Referring the judgments in ***Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734,*** the court observed as follows:-

"In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on

factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of court to award proper sentence having regard to the nature of offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of victim of the crime but also the society at large while considering the imposition of appropriate punishment."

13. Earlier, "Proper Sentence" was explained in ***Deo Narain Mandal Vs. State of UP (2004) 7 SCC 257*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the principle of proportionately. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

14. In subsequent decisions, the supreme court has laid emphasis on proportional sentencing by affirming the doctrine of proportionality. In ***Shyam Narain vs State (NCT of delhi), (2013) 7 SCC 77,*** it was pointed out that sentencing for any offence has a social goal. Sentence is to be imposed with regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of just punishment is that the society may not suffer again by such crime. The principle of proportionality between the crime committed and the penalty imposed are to be kept in mind. The impact on the society as a whole has to be seen. Similar view has been expressed in ***Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463.***

15. In ***Kokaiyabai Yadav vs State of Chhattisgarh(2017) 13 SCC 449,*** it has been observed that reforming criminals who understand their wrongdoing, are able to comprehend their acts,have grown and nartured into citizens with a desire to live a fruitful life in the outside world, have the capacity of humanising the world.

16. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166,*** the Supreme Court referred the judgments in Jameel vs State of UP (2010) 12 SCC 532, ***Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734, Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463*** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for

commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system."

17. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive. This Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

18. After considering the rival submissions made by learned counsel for the appellants, considering the facts and circumstance of the case, considering that the alleged incident which took place in the year 1983 about 38 years ago and now accused-appellants are more than 60 and 70 years of age respectively, at this stage, this Court feels that it would not be proper to sent the accused-appellants to jail at the fag end of their life and the accused were on bail since 27.10.1988 and the accused persons have suffered the agony of conviction for more than 38 years and no criminal antecedents have been shown to their credit after passing of so much long period out of jail. It has been pointed out by learned counsel for the accused-appellants that the accused-appellants had remained in jail for sometime during trial and after conviction. Considering section 411 I.P.C., which says that whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

19. Considering all these facts, it would be appropriate and proper that the accused be sentenced with the period already undergone and the amount of fine be enhanced.

20. Considering all the facts and circumstances of the case, the accused-appellants are sentenced to the period already undergone by them in jail during trial and an amount of fine of Rs. 1,000/-

each be imposed instead of sending them to jail.

21. Accused-appellant is directed to deposit the fine of Rs. 1,000/- each before learned lower court within two months from the date of passing of the judgement and in default of payment of fine accused-appellants shall further undergo 15 days simple imprisonment.

22. Appeal is partly allowed in the above terms.

23. Copy of this order be transmitted to the concerned lower court forthwith for compliance.

24. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad, self attested by the learned counsel for the applicant alongwith a self attested identity proof of the said persons (preferably Aadhar Card) mentioning the mobile number (s) to which the said Aadhar Card is linked before the concerned Court/Authority/Official.

25. 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.

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**(2021)10ILR A545**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 28.09.2021**

**BEFORE**

**THE HON'BLE SURYA PRAKASH KESARWANI, J**
**THE HON'BLE GAUTAM CHOWDHARY, J.**

Criminal Misc. Writ Petition No. 7446 of 2021

**Smt. Sita Devi ...Petitioner**
**Versus**
**State of U.P. & Ors. ....Respondents**

**Counsel for the Petitioner:**
Sri Chandra Shekhar Singh, Sri Vinay Singh

**Counsel for the Respondents:**
A.G.A., Sri Brijendra Kumar, Sri V.K. Ojha

**Petitioner eeceived a notice dated 27.03.2014 to show cause how she is raising construction without obtaining permission-Petitioner submitted componding bulding plan-instead of assisting Petitioner and ascertaining distance of plot from required area-building plan was rejected-after four years of rejection of aforesaid building plan, the Respondent no.3 through building inspector lodged impugned FIR-Harrasment of a common man by public authorities is socially abhorring and legally impermissible.**

**Held,** The officers of the respondent – Development Authorities are not expected to act as hounds smelling a rat everywhere and put an undesirable restraint or hindrances in granting permission or sanction of building map filed by an individual, particularly in matters of small houses, like the present one and to harass further lodge first information report to book the applicant/ petitioner to initiate malafidely criminal proceedings**. (para 21)**

**Stay of Petitioner's arrest.** (E-9)

**List of Cases cited:**

1. N. Nagendra Rao & Co. Vs St. of A.P. (1994) 6 SCC 205

2. Common Cause, A Registered Society Vs U.O.I. & ors., (1996)6 SCC 530 (Para 26)

3. Shivsagar Tiwari Vs U.O.I. & ors. (1996) 6 SCC 558

4. Delhi Development Authority Vs Skipper Construction & anr. AIR 1996 SC 715

5. Mohammad Iqbal & anr. Vs St. of U.P. & ors. 2016 (9) ADJ 593

6. Natural Resources Allocation, In re, Special Reference No. 1 of 2002, (2012) 10 SCC 1

7. M/s Transport Corporation of India Ltd., Hyderabad Vs Commissioner of Trade Tax, U.P., 1998 UPTC 950

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Gautam Chowdhary, J.)

1. On oral request of learned counsel for the petitioner, Principal Secretary Urban Planning and Development, Government of Uttar Pradesh, Lucknow, is allowed to be impleaded as respondent no. 4.

2. Necessary correction in the array of parties be carried out during the course of the day.

3. Heard Sri Chandra Shekher Singh, learned counsel for the petitioner, Sri Patanjali Mishra, learned A.G.A. for respondent nos. 1 and 2 and Sri V.K. Ojha, learned counsel for respondent no. 3.

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

*"i. To issue a writ, order or direction in the nature of certiorari quashing the impugned First Information Report dated 08.03.2021 registered against the petitioner as Case Crime No. 0219 of 2021, P.S. Naini, Prayagraj, under section 447 I.P.C. and 28(1) U.P. Urban Planning and Development Act, 1973, (Annexure No. 1 to this Writ Petition).*

*ii. To issue a writ, order or direction in the nature of mandamus commanding the Respondent no. 4 not to arrest the Petitioner during the pendency of this writ petition."*

5. The petitioner is the wife of a retired army personnel. It appears that in the year 2013-2014, she started constructions over the plot of 153.36 square meters being part of Arazi No. 107/1, Village- Chaka, Tehsil- Karchana, District- Allahabad, which fall within regulatory area of the respondent no. 3, i.e., Prayagraj Development Authority, District- Prayagraj. However, she received a notice dated 27.03.2014, issued by the Zonal Officer of the respondent no. 3, requiring her to show cause as to how she is raising construction without obtaining permission from the respondent no. 3. It appears that, thereafter, the petitioner submitted a compounding building plan vide application dated 21.08.2017 and also deposited the requisite fees vide receipt no. 1829, book no. 219, dated 21.08.2017, Rs. 1,880/-. Again a notice dated 26.08.2017 was issued by the Zonal Officer, Allahabad Development Authority, Allahabad, to the petitioner, which is reproduced below:-

*"प्रेषक,*
*जोनल अधिकारी,*
*इलाहाबाद विकास प्राधिकरण,*
*इलाहाबाद।*
*सेवा में,*
*श्रीमती सीता देवी,*
*पत्नी श्री राम लाल सरोज,*
*निवासिनी- ग्राम अर्जुनपुर, तहसील पट्टी,*
*जिला प्रतापगढ़।*
*पत्रांकः- ०7/जोन-4/उप०-4 सी/शमन/वि०प्रा०/2०17-18 दिनांक 26.०8.2०17*

*विषयः- आफ आराजी संख्या 107/ए, मौजा चाका अरैल करछना, इलाहाबाद में दाखिल शमन मानचित्र के सम्बन्ध में।*

*महोदय,*

*उपर्युक्त विषयक के सम्बन्ध में अवगत कराना है कि आप द्वारा आराजी संख्या 107, मौजा चाका अरैल, करछना, इलाहाबाद का शमन मानचित्र स्वीकृति हेतु दाखिल किया गया है।* ***मानचित्र मे दर्शित Key Plan में स्थल की दूरी स्पष्ट नहीं हो पार रही है। Key Plan में पुराना यमुना ब्रिज रीवा रोड एंव नया यमुना ब्रिज रोड जहां पर मिलती है, उसके क्रासिंग से रीवा रोड की दूरी एंव रीवा रोड से स्थल की दूरी प्रमुख Land Mark को दिखाते हुए अंकित कराना होगा, जिससे भू- उपयोग आख्या प्राप्त करना सम्भव होगा।***

*अतः आप पत्र प्राप्ति के एक सप्ताह के भीतर उपरोक्तानुसार शमन मानचित्र में संशोधन करना सुनिश्चित करें।*

*भवदीय,*
*ह० अप०*
*जोनल अधिकारी,*
*इलाहाबाद विकास प्राधिकरण,*
*इलाहाबाद।"*

6. The aforesaid notice was allegedly sent by the Zonal Officer to the petitioner at the address "Village-Arjanpur, Tehsil-Patti, Pratapgarh".

7. It appears that, thereafter, instead of assisting the petitioner and ascertaining the distance of the plot from Reeva Road, New Yamuna Bridge Road crossing and also from Reeva Road as main land mark, the respondent no. 3 rejected the building plan by order dated 28.09.2017, which is reproduced below:-

*"प्रेषक,*
*जोनल अधिकारी,*
*इलाहाबाद विकास प्राधिकरण,*
*इलाहाबाद।*

*सेवा में,*
*श्रीमती सीता देवी,*
*पत्नी श्री राम लाल सरोज,*
*निवासिनी- ग्राम अर्जुनपुर, तहसील पट्टी,*
*जिला प्रतापगढ़।*

*पत्रांकः- 24/जोन-4/उप०-4 बी/शमन/वि०प्रा०/2017-18 दिनांक 28.09.2017*

*विषयः- पार्ट आफ आराजी संख्या 107/ए, मौजा चाका परगना अरैल, तहसीन करछना, इलाहाबाद में दाखिल शमन मानचित्र के सम्बन्ध 0 में।*

*महोदया,*

*कृपया आपके द्वारा पार्ट आफ आराजी संख्या 107/ए,मौजा चाका, अरैल, करछना, इलाहाबाद के दाखिल शमन मानचित्र की आपत्तियों के निराकरण एंव संशोधित शमन मानचित्र दाखिल करने हुते पत्र दिनांक 26.8.2017 के द्वारा सूचित किया गया, किन्तु आप द्वारा आपत्ति का निराकरण कराकर संशोधित शमन मानचित्र दाखिल नहीं किया गया।* ***आपत्ति निराकरण के अभाव में उपरोक्तानुसार दाखिल शमन मानचित्र अस्वीकृत किया जाता है।*** *आप स्थल पर किसी प्रकार का निर्माण प्रारम्भ न करें, अन्यथा निर्माण के विरूद्ध उत्तर प्रदेश नगर नियोजन एंव विकास अधिनियम 1973 की सुसंगत धाराओं के अन्तर्गत ध्वस्तीकरण की कार्यवाही की जायेगी, जिसकी सम्पूर्ण जिम्मेदारी आपकी होगी।*

*भवदीय,*
*ह० अप०*
*जोनल अधिकारी,*
*इलाहाबाद विकास प्राधिकरण,*

*इलाहाबाद।"*

8. After four years of rejection of the aforesaid building plan, the respondent no. 3 through building inspector, lodged the impugned First Information Report No. 0219 / 2021, dated 08.03.2021, under Sections 447 I.P.C. and Section 28 (1) of the Uttar Pradesh Urban Planning and Development Act, 1973 (hereinafter referred to as "Act of 1973"), alleging that the construction has been completed by the petitioner which has resulted in commission of a cognizable offence.

9. From perusal of the counter affidavit/personal affidavit dated 27.09.2021, filed today by respondent no. 3, it appears that the order dated 10.10.2017 was passed by the Zonal Officer granting **sanction for prosecution against the petitioner** under Section 49 of the Act of 1973. **The counter affidavit filed by respondent no. 3 is totally silent on the point as to whether after granting sanction for prosecution vide order dated 10.10.2017, a complaint under the Act of 1973 was filed by respondent no. 3?**

10. **Section 48** of the Act of 1973 provides that "No Court inferior to that Magistrate of the first class shall try an offence punishable under this Act". However, the impugned F.I.R. has been lodged by the building inspector for alleged commission of offence under Section 28 (1) of the Act of 1973.

11. **From the facts as briefly noted above, it prima facie appears to us that no defect was found by respondent no. 3 in the building plan, submitted by the petitioner. By notice dated 26.08.2017, respondent no. 3, merely, required the petitioner to give details of distances so as to show land mark. For this purpose, respondent no. 3 / its officers could have assisted the petitioner and could have ascertained the distance even from their own records or on the field and thus, could assist the petitioner to remove the objection.** Unfortunately, even after 75 years of independence, public servants could not realize their responsibilities to assist public and not to create hindrance and obstructions in getting the building plan sanctioned.

12. At this juncture, we are reminded of the observations made by Hon'ble Supreme Court in the case of ***N. Nagendra Rao & Co. v. State of Andhra Pradesh (1994) 6 SCC 205,*** which is reproduced below:-

*"25. But there the immunity ends.* ***No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign.*** *The concept of public interest has changed with structural change in the society.* ***No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy****. From sincerity, efficiency and dignity of State as a juristic person, propounded in nineteenth century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government on a par with any other juristic legal entity. Any watertight compartmentalization of the functions of*

*the State as "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modem jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligent.* ***Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a Welfare State is not shaken.*** *Even in America where this doctrine of sovereignty found its place either because of the "financial instability of the infant American States rather than to the stability of the doctrine's theoretical foundation", or because of "logical and practical ground", or that "there could be no legal right as against the State which made the law" gradually gave way to the movement from, "State irresponsibility to State responsibility". In Welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity. The determination of vicarious liability of the State being linked with negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable the State cannot be sued. The liability of the officer personally was not doubted even in Viscount Canterbury4. But the Crown was held immune on doctrine of sovereign immunity. Since the doctrine has become outdated and sovereignty now vests in the people, the State cannot claim any immunity and if a suit is maintainable against the officer personally, then there is no reason to hold that it would not be maintainable against the State."*

(Emphasis supplied by me)

13. In **Common Cause, A Registered Society v. Union of India and others, (1996)6 SCC 530 (Para 26)**, Hon'ble Supreme Court held as under:

*"No public servant can say "you may set aside an order on the ground of malafide but you cannot hold me personally liable". No public servant can arrogate to himself the power to act in a manner which is arbitrary".*

14. In **Shivsagar Tiwari Vs. Union of India and others (1996) 6 SCC 558,** Hon'ble Supreme Court quoted with approval of the observations of Edmund Burke, as under:

*"An arbitrary system indeed must always be a corrupt one. There never was a man who thought he had no law but his own will, who did not soon find that he had no end but his own profit."*

15. In **Delhi Development Authority Vs. Skipper Construction and Another**

**AIR 1996 SC 715 (Para 6)** Hon'ble Supreme Court observed as under:

*"A democratic Government does not mean a lax Government. The rules of procedure and/or principles of natural justice are not meant to enable the guilty to delay and defect the just retribution. The wheel of justice may appear to grind slowly but it is duty of all of us to ensure that they do grind steadily and grind well and truly. The justice system cannot be allowed to become soft, supine and spineless."*

16. In **Mohammad Iqbal and Anr. v. State of U.P. and others 2016 (9) ADJ 593 (Para 11 and 17)**, this Court held as under:

*"11. In a democratic system governed by rule of law, Government does not mean a lax Government. The public servants hold their offices in trust and are expected to perform with due diligence particularly so that their action or inaction may not cause any undue hardship and harassment to a common man. Whenever it comes to the notice of this Court that Government or its officials have acted with gross negligence and unmindful action causing harassment of a common and helpless man, this Court has and never would be a silent spectator but always react to bring authorities within rule book or to make them accountable."*

*17. We, therefore dispose of this writ petition with cost of Rs.2 lacs which shall be paid at the first instance by respondent-1 since respondent-3 is the official and agent of respondent-1, but it shall have liberty to recover such amount from authority concerned who is responsible for such illegal action of detention of petitioner's vehicle on 3.10.2014 and onwards."*

17. In **Natural Resources Allocation, In re, Special Reference No. 1 of 2002, (2012) 10 SCC 1 (Para 172 and 184)** Hon'ble Supreme Court held, as under:

*"172.The judgment in LDA case brings out the foundational principle of executive governance. The said foundational principle is based on the realisation that sovereignty vests in the people. The judgment, therefore, records that every limb of the constitutional machinery is obliged to be people oriented. The fundamental principle brought out by the judgment is that a public authority exercising public power discharges a public duty, and, therefore has to subserve general welfare and common good. All power should be exercised for the sake of society. The issue which was the subject-matter of consideration, and has been noticed along with the citation was decided by concluding that compensation shall be payable by the State (or its instrumentality) where inappropriate deprivation on account of improper exercise of discretion has resulted in a loss, compensation is payable by the State ( or its instrumentality).* ***But where the public functionary exercises his discretion capriciously, or for considerations which are malafide, the public functionary himself must shoulder the burden of compensation held as payable.*** *The reason for shifting the onus to the public functionary deserves notice. This Court felt that when a court directs payment of damages or compensation against the State, the ultimate sufferer is the common man, because it is taxpayers' money out of which damages and costs are paid.*

*184. Another aspect which emerges from the judgments (extracted in paras 159 to 182, above) is that, the State,*

*its instrumentalities and their functionaries, while exercising their executive power in matters of trade or business, etc. including making of contracts, should be mindful of public interest, public purpose and public good. This is so, because* ***every holder of public office by virtue of which he acts on behalf of the State, or its instrumentalities, is ultimately accountable to the people in whom sovereignty vests.*** *As such, all powers vested in the State are meant to be exercised for public good and in public interest. Therefore, the question of unfettered discretion in an executive authority, just does not arise.* ***The fetters on discretion are clear, transparent and objective criteria or procedure which promotes public interest, public purpose and public good.*** *A public authority is ordained, therefore to act, reasonably and in good faith and upon lawful and relevant grounds of public interest."*

(Emphasis supplied by me)

18. **The respondents are State within the meaning of Article 12 of the Constitution of India. They are public functionary. As per Constitution, the sovereignty vests in people. Every government functionary including the public authorities are obliged to be people oriented. The public officers are public servants and they have been employed to serve people. They are accountable for their illegal acts and for violating the Constitutional and Statutory provisions. They cannot be a cause for harassment to the people. An ordinary citizen or a common man is hardly equipped to match such might of the officers of the State or instrumentalities of the State-Governments. Harassment of a common man by public authorities is socially abhorring and legally impermissible.**

19. No civilized system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The public servants hold their offices in trust and are expected to perform with due diligence particularly so that their action or inaction may not cause any undue hardship and harassment to a common man. Every holder of public office by virtue of which he acts on behalf of the State, or its instrumentalities, is ultimately accountable to the people in whom sovereignty vests. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally. No public servant can say you may set aside an order on the ground of malafide but you cannot hold me personally liable. No public servant can arrogate to himself the power to act in a manner which is arbitrary. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a Welfare State is not shaken. A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. Harassment of a common man by public authorities is socially abhorring and legally impermissible. In a modern society no authority can arrogate to itself the power to act in a manner which is arbitrary. It is unfortunate that matters which require immediate attention linger on and the man in the street is made to run from one end to other with no result. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. Where the public functionary exercises his discretion capriciously, or for

considerations which are malafide or where there is flagrant abuse of power the public functionary himself must shoulder the burden of costs or compensation held as payable.

20. In the case of **M/s Transport Corporation of India Ltd., Hyderabad vs. Commissioner of Trade Tax, U.P., 1998 UPTC 950** (para-5), learned Single Judge of this Court has observed in the matter of interception of truck by Trade Tax Authorities that drivers need help and guidance and officers at the check post, are expected to render them the necessary help and guidance and any minor deficiency should be ignored or got rectified. They are not expected to act as hounds smelling a rat everywhere and put undesirable restraint on the movements of goods.

21. The observations made in the aforesaid judgment, in principle, applies on the facts of the present case also. The officers of the respondent - Development Authorities are not expected to act as hounds smelling a rat everywhere and put an undesirable restraint or hindrances in granting permission or sanction of building map filed by an individual, particularly in matters of small houses, like the present one and to harass further lodge first information report to book the applicant/ petitioner to initiate malafidely criminal proceedings.

22. **Although, we intended to conclude this judgment today but the learned A.G.A. and respondent no. 3 made statements on instruction that the respondents themselves will examine the matter for taking appropriate decision/action and, therefore, the case may be adjourned for the day.**

23. As prayed by learned A.G.A. and respondent no. 3, put up as a fresh case on 25.10.2021 for further hearing.

24. On the next date fixed, respondent nos. 3 and 4 shall file their personal affidavits.

25. Considering the facts and circumstances of the case, as briefly noted/discussed above, as well as the provisions of Section 48 of the Act of 1973, as an interim measure, it is provided that till next date fixed, the petitioner shall not be arrested.

26. This order has been passed in presence of Sri Arvind Chauhan, Vice Chairman, Prayagraj Development Authority and Sri R.S. Verma, Law Officer, Prayagraj Development Authority, who are present in Court.

27. It is made clear that both the aforesaid officers are not required to remain personally present before this Court on the next date fixed.

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**(2021)10ILR A552**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 26.08.2021**

**BEFORE**

**THE HON'BLE SURYA PRAKASH KESARWANI, J**
**THE HON'BLE PIYUSH AGRAWAL, J.**

Criminal Misc. Writ Petition No. 5477 of 2021
with
Criminal Misc. Writ Petition No. 5439 of 2021
with
Criminal Misc. Writ Petition No. 5521 of 2021

**Faheem ...Petitioner**
**Versus**
**State of U.P. & Ors. ....Respondents**

**Counsel for the Petitioner:**
Sri Mohammad Akram

**Counsel for the Respondents:**
A.G.A.

**U.P. Control of Goonda Act, 1970-Section 3 (1) - Impugned show cause notice issued-on single criminal case on account of matriminial dispute-Single act cannot bring him within the meaning of "Goonda"-notice issued is illegal. Cost awarded to each Petitioner.**

**W.P. disposed.** (E-9)

**List of Cases cited:**

1.Bhim Sain Tyagi Vs St. of U.P. & ors. 1999 (39) ACC 321 (FB)

2. Imran @ Abdul Quddus Khan Vs St. of U.P. reported in 2000 (1) ACC 171

3.Suresh Tewari Vs St. of U.P. & ors., reported in 2018 (5) ALJ 1

4.Vijay Narain Singh Vs St. of Bihar, 1984 (3) SCC 14

5.Criminal Misc. Writ Petition No. - 347 of 2021 (Rahul Yadav Vs State Of U.P. & 2 ors.)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Piyush Agrawal, J.)

1. Heard Sri Mohammad Akram, learned counsel for the petitioners and Sri Roopak Chaubey, learned AGA for State-respondents.

2. On oral request of learned counsel for the petitioners, Superintendent of Police, Bijnor is allowed to be impleaded as respondent no. 3 in Criminal Misc. Writ Petition Nos. 5439 of 2021 and 5521 of 2021 writ petitions. Necessary correction be carried out in the array of parties during course of the day.

3. Notice on behalf of respondent no. 3 has been accepted by the learned AGA.

4. All the above noted writ petitions involving challenge to the similar notices dated 5.10.2020 issued by Additional District Magistrate (Administration), Bijnor, under Section 3 (1) of UP Control of Goondas Act, 1970 (hereinafter referred to as "the Act of 1970').

5. Since the facts and controversy involved in all the above writ petitions are similar, therefore, with the consent of learned counsel for the parties, all these writ petitions are being finally decided together, treating Criminal Misc. Writ Petition No. 5477 of 2021 as leading writ petition and facts therein are being noted.

6. The leading writ petition was heard on 17.8.2021, 18.8.2021, 19.8.2021 and 25.8.2021. On 17.8.2021, this Court has passed the following order :-

*"This writ petition has been filed praying to quash the notice dated 05.10.2020 issued by the Additional District Magistrate (Administration), Bijnor under Section 3(1) of U.P. Control of Goondas Act, 1970.*

*Learned counsel for the petitioner submits that the impugned notice has been issued merely on the basis of Case Crime No.130/2020 dated 05.04.2020 under Sections 330, 354(kha) and 506, I.P.C., P.S. Najibabad, District Bijnor which arises from the matrimonial dispute between brother of the petitioner, namely Sikandar and his wife, in which the petitioner being brother was falsely implicated. He further submits that subsequently, the aforesaid husband and wife have also entered into a compromise on 29.08.2020 and resolved their dispute.*

*Prima facie, the impugned notice appears to be an abuse of process of law by the respondent No.2.*

*Learned A.G.A. prays for and is granted a day's time to obtain instructions.*

*Put up tomorrow as a fresh case at 10 A.M. "*

7. On 18.8.2021, this Court has passed the following order :-

*"On the oral request of learned counsel for the petitioner, the Superintendent of Police, Bijnor is allowed to be impleaded as respondent no. 3 during the course of the day.*

*Notice on behalf of respondent no. 3 has been accepted by the learned AGA.*

*Pursuant to the order dated 17.08.2021, learned AGA has received written instructions and states that pursuant to the impugned notice dated 05.10.2020, the petitioner appeared on 23.10.2020 and 01.03.2021, submitted reply on 19.07.2021 and the next date fixed is 20.08.2021.*

*As prayed, put up tomorrow, i.e., on 19.08.2021 at 10.00 a.m. for further hearing to enable the respondents to file counter affidavit.*

*In the counter affidavit, the respondents shall show cause as to why exemplary costs be not imposed upon them, as the impugned notice under section 3(1) of the Uttar Pradesh Control of Goondas Act, 1970, prima facie, appears to be abuse of the process of law by the respondents for brief reasons noted in our order dated 17.08.2021."*

8. On 25.8.2021, this Court has passed the following order :-

*"Heard Sri Mohammad Akram, learned counsel for the petitioner and Sri Roopak Chaubey, learned A.G.A. for the State-respondents.*

*Counter affidavit on behalf of the respondent nos. 2 and 3 dated 18.08.2021 and an affidavit in the form of the counter affidavit dated 23.08.2021 of Paramachandra Srivastava, Naib Tehsilder, Dhampur, District Bijnor (who is not respondent in the present writ petition) have been filed today, which are taken on record.*

*Learned counsel for the petitioner states that against the similar show cause notices relating to the same FIR No. 130 of 2020, dated 05.04.2020, the other accuseds have filed Criminal Misc. Writ Petition No. 5439 of 2021 (Mukarram Versus State of U.P. and another) and Criminal Misc. Writ Petition No. 5521 of 2021 (Waseem Versus State of U.P. and another), which have not yet come up for hearing as a fresh case.*

*Learned A.G.A. states on instructions that show cause notices in cases of other accuseds have also been withdrawn. He undertakes to produce the relevant orders on the next date.*

*Put up tomorrow as fresh case for further hearing at 10.00 A.M. along with record of Criminal Misc. Writ Petition Nos. 5439 of 2021 (Mukarram Versus State of U.P. and another) and Criminal Misc. Writ Petition No. 5521 of 2021 (Waseem Versus State of U.P. and another)."*

9. In paragraph nos. 5, 6, 7 and 8 of the counter affidavit dated 18.8.2021, the Additional District Magistrate (Administration) District Bijnor, respondent no. 2 (who issued the impugned notice) has stated as under:-

*"5. That it is stated that the petitioner is an accused of case crime no. 130 of 2020 under sections 323, 354 B, 506 IPC, Police Station Nazibabad, District Bijnore. As section 354 B IPC relates with the offence against women and preventive*

*actions are being taken in such type of coses, therefore inadvertently, in the present case also, the notice under Section 3 (1) of UP Control of Goondas Act was issued, whereas the dispute between the parties was infact matrimonial dispute.*

*6. That the deponent admits that the issuing of the notices under section 3 (1) of UP Control of Goondas Act is not required under the law in such type of matrimonial disputes.*

*7. That the deponent tenders his unconditional and unqualified apology for the inconvenience caused to this Hon'ble Court, though the same was inadvertent and the deponent undertakes to be more cautious and vigilant in future in respect of his duties and action.*

*8. That it is further submitted that in the aforesaid case, the next date fixed is 20.8.2021 and on that date, the notices under Section 3 (1) of UP Control of Goondas Act issued against the petitioner shall be withdrawn."*

10. In paragraph nos. 4, 5 and 6 of the counter affidavit dated 18.8.2021, the Superintendent of Police, District Bijnor, respondent no. 3 has stated as under:-

*"4. That it is stated that the deponent / respondent no. 3 had recommended the proceedings under Section 3 91) of UP Goondas Act, against the petitioner on the basis of the first information report registered against the petitioner in Case Crime No. 130 of 2020 under Section 323, 354 B, 506 IPC, Police Station Nazibabad, District Bijnore and beet informations as the offence in Case Crime No. 130 of 2020 was related to crime against women, therefore, inadvertently, in the present case, the deponent had recommended for initiation of proceeding under Section 3 (1) of UP Goondas Act, whereas the dispute between the parties was infact matrimonial dispute.*

*5. That the deponent admits that his recommendation for issuing the notices under Section 3 (1) of UP Control of Goondas Act is not required under the law in such type of matrimonial disputes. On 18.8.2021, the deponent had recommended for withdrawal of notices issued under Section 3 (1) of UP Control of Goondas Act against the petitioner before the competent authority i.e. respondent no. 2.*

*6. That the deponent tenders his unconditional and unqualified apology for the inconvenience caused to this Hon'ble Court, though the same was inadvertent and the deponent undertakes to be more cautious and vigilant in future in respect of his duties and action particularly in recommending for issuance of notices under section 3 (1) of UP Goondas Act."*

11. In paragraph no. 5 of the counter affidavit dated 23.8.2021 filed by Naib Tehsildar, Dhampur, District Bijnor, it has been stated as under :-

*"5. That on 20.8.2021 was the date fixed in the present matter before the respondent no. 2 but as 20.8.2021 was declared holiday, therefore, the matter was heard by respondent no. 2 on 21.8.2021. On that date after hearing the parties and after perusing the matter on record the respondent no. 2 had withdrawn his show cause notice dated 05.10.2020 issued to the petitioner."*

12. Learned AGA has produced before us the copies of two orders, both dated 21.8.2021 passed in the matter of show cause notice issued to the co-accused namely Waseem and Mukarram, which are the subject matter of above noted Criminal Misc. Writ Petition Nos. 5521 of 2021 and

5439 of 2021 and it shows that the show cause notices issued to aforesaid two petitioners have also been withdrawn by the Additional District Magistrate (Administration), Bijnor by two separate orders dated 21.8.2021. Learned AGA has also produced a copy of the order dated 21.8.2021 issued to another co-accused under Section 3 (1) of the Act of 1970, passed by Additional District Magistrate, (Administration), Bijnor, which shows that similar notices under Section 3 (1) of the Act of 1970 has been withdrawn.

13. **Perusal of the counter affidavits filed by the respondents as afore-quoted itself shows that it is admitted case of the respondents that impugned show cause notice under Section 3 (1) of the Act of 1970 was issued to the petitioner merely on the ground of single criminal case registered against him on account of some matrimonial dispute.**

14. Section 2 (b) of UP Control of Goondas Act, 1970 defines the word "Goonda", as under:-

*"2 (b). 'Goonda' means a person who-*

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

15. Perusal of the definition of the word "Goonda" as afore-quoted shows that a competent authority may initiate proceeding under the Act of 1970, only if the person is "Goonda" as defined under the Act. Section 2 (b) provides that "Goonda" means a person who 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 has been convicted for an offence punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956; or 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 is generally reputed to be a person who is desperate and dangerous to the community; or has been habitually passing indecent remarks or teasing women or girls; or is a tout.

16. In the case of **Bhim Sain Tyagi v. State of U.P. And others 1999 (39) ACC 321 (FB),** a Full Bench of this court has held as under:

*"17. The aforesaid anxiety of the Division Bench should be taken due note by*

*the Executive and whenever a show cause notice is issued, it should strictly comply with the provisions of the Act and rules. Once the decision of Ramji Pandey has held the field in this State for more than 18 years, there does not seem to be any necessity of taking a contrary view for the simple reason that all that the District Magistrate was expected by that decision to do is that the proposed Goonda should be made aware of "general nature of material allegation" against him, which is the requirement of the law. By asking the respondents to furnish to the proposed Goonda the general nature of material allegations against him, the Full Bench in Ramji Pandey only required the law to be followed. None should doubt that once in the show cause notice, the general nature of the material allegations exists, no Court interference with such a show cause notice is called for. Challenge to a valid show cause notice complying with the requirement of law has always failed and no scope of exercising provisions under Article 226 of the Constitution of India exists in such matters. On the contrary,* ***whenever general nature of material allegations are absent and the proposed goonda raises a grievance through a petition under Article 226 of the Constitution of India, this Court's interference to the extent of the illegality of the notice being examined has been rightly upheld in Ramji Pandey but simultaneously it must be added that, always ensuring that, fresh notice may be issued by the District Magistrate in accordance with law.*** *It has already been noticed above that in Subas Singh (supra), the respondents' right to issue fresh notice in accordance with law was upheld and even in Harsh Narain (supra), subsequent proceedings alone were quashed due to the defective notice.*

*18. In the administration of criminal law in our country, one comes across two very important terms (1) charge and (ii) statement of accused. In fact, these two are fundamental requirements of the principles of natural justice which have to be followed before an accused is condemned. One would shudder at the idea that an accused shall have stood condemned when the charge would only narrate that there is an F.I.R. against him registered under Section 302, I.P.C. at a police station or that in the statement of the accused, only one question is put to him that an F.I.R. has been lodged against him under Section 302 at a police station and that alone is held sufficient compliance of law. For action against a proposed goonda, the provisions contained in Section 3 of the Act, bereft of the technicalities and broader legal necessities in a trial of an accused under the Criminal Procedure Code, combine not only the "charge" and the "statement of the accused", but also requires his "defence evidence". Thus, the proposed goonda must get the fullest opportunity to defend himself. Therefore, the general nature of the material allegations must be disclosed to him by the District Magistrate.*

*19....*

*20. In view of the aforesaid discussion, the combined answer to the aforesaid three questions is that the decision in Ramji Pandey is good law,* ***a show cause notice which fails to indicate general nature of material allegations may be challenged and quashed on that ground under Article 226 of the Constitution of India*** *with liberty to the respondents always to issue fresh notice in accordance with law."*

*(Emphasis supplied by us)*

17. In **Imran Alias Abdul Quddus Khan Vs. State of U.P.** reported in **2000**

**(1) ACC 171** (paras-11, 12, 13 and 14), a Division Bench of this Court explained the provisions of Section 2(b) of the Act, 1990 and held as under:

*"11. Ex facie, a person is termed as a 'goonda' if he is a habitual criminal. The provisions of section 2 (b) of the Act are almost akin to the expression 'anti social element' occurring in section 2 (d) of Bihar Prevention of Crimes Act, 1981. In the context of the expression 'anti social element'* ***the connotation 'habitually commits' came to be interpreted by the apex court in the case of Vijay Narain Singh V. State of Bihar and others (1984) 3 SCC-14.*** *The meaning put to the aforesaid expression by the apex court would squarely apply to the expression used in the Act, in question. The majority view was that the* ***word 'habitually' means 'repeatedly' or 'persistently'. It implies a thread of continuity stringing together similar repetitive acts. Repeated, persistent and similar but not isolated, individual and dissimilar acts are necessary to justify an inference of habit. It connotes frequent commission of acts or omissions of the same kind referred to in each of the said sub-clauses or an aggregate of similar acts or omissions.*** *Even the minority view which was taken in Vijay Narain's case (supra) was that the word 'habitually' means 'by force of habit'. It is the force of habit inherent or latent in an individual with a criminal instinct with a criminal disposition of mind, that makes a person accustomed to lead a life of crime posing danger to the society in general. If a person with criminal tendencies consistently or persistently or repeatedly commits or attempts to commit or abets the commission of offences punishable under the specified chapters of the Code, he should be considered to be an 'anti social element'. There are thus two views with regard to the expression 'habitually' flowing from the decision of Vijay Narain's case (supra). The majority was inclined to give a restricted meaning to the word 'habitually' as denoting 'repetitive' and that on the basis of a single act cannot be said to be forming the habit of the person. That is to say, the act complained of must be repeated more than once and be inherent in his nature. The minority view is that a person in habitual criminal who by force of habit or inward disposition inherent or latent in him has grown accustomed to lead a life of crime. In simple language, the minority view was expressed that the word 'habitually; means 'by force of habit'. The minority view is based on the meaning given in stroud's Judicial Dictionary, Fourth Ed. Vol. II-1204-habitually requires a continuance and permanence of some tendency, something that has developed into a propensity, that is, present from day to day.* ***Thus, the word- 'habitual' connotes some degree of frequency and continuity.***

*12.* ***The word 'habit' has a clear well understood meaning being nearly the same as 'accustomed' and cannot be applied to single act.*** *When we speak of habit of a person, we prefer to his customary conduct to pursue, which he has acquired a tendency from frequent repetitions. In B.N. Singh V. State of U.P. AI.R. 1960-Allahabad 754 it was observed that it would be incorrect to say that a person has a habit of anything from a single act. In the Law Lexicon ? Encyclopedic Law Dictionary, 1997 Ed. by P. Ramanatha Aiyer, the expression 'habitual' has been defined to mean as constant, customary and addicted to a specified habit; formed or acquired by or resulting from habit; frequent use or custom formed by repeated impressions.*

*The term 'habitual criminal', it is stated may be applied to any one, who has been previously more than twice convicted of crime, sentenced and committed to prison. The word 'habit' means persistence in doing an act, a fact, which is capable of proof by adducing evidence of the commission of a number of similar acts. '**Habitually' must be taken to mean repeatedly or persistently.** It does not refer to frequency of the occasions but rather to the invariability of the practice.*

*13. The expression 'habitual criminal' is the same thing as the 'habitual offender' within the meaning of section 110 of the Code of Criminal Procedure, 1973. This preventive Section deals for requiring security for good behavior from 'habitual offenders'. The expression 'habitually' in the aforesaid section has been used in the sense of depravity of character as evidenced by frequent repetition or commission of offence. It means repetition or persistency in doing an act and not an inclination by nature, that is, commission of same acts in the past and readiness to commit them again where there is an opportunity.*

*14. **Expressions like 'by habit' 'habitual' 'desperate' 'dangerous' and 'hazardous' cannot be flung in the face of a man with laxity or semantics. The court must insist on specificity of facts and a consistent course of conduct convincingly enough to draw the rigorous inference that by confirmed habit, the petitioner is sure to commit the offence if not externed or say directed to take himself out of the district.** It is not a case where the petitioner has ever involved himself in committing the crime or has adopted crime as his profession. There is not even faint or feeble material against the petitioner that he is a person of a criminal propensity. The case of the petitioner does not come in either of the clauses of Section 2 (b) of the Act, which defines the expression 'Goonda'. Therefore, to outright label bona fide student as 'goonda' was not only arbitrary capricious and unjustified but also counter productive. A bona fide student who is pursing his studies in the Post Graduate course and has never seen the world of the criminals is now being forced to enter the arena. **The intention of the Act is to afford protection to the public against hardened or habitual criminals or bullies or dangerous or desperate class who menace the security of a person or of property.** The order of externment under the Act is required to be passed against persons who cannot readily be brought under the ordinary penal law and who for personal reasons cannot be convicted for the offences said to have been committed by them. **The legislation is preventive and not punitive. Its sole purpose is to protect the citizens from the habitual criminals and to secure future good behavior and not to punish the innocent students. The Act is a powerful tool for the control and suppression of the 'Goondas'; it should be used very sparingly in very clear cases of 'public disorder' or for the maintenance of 'public order'. If the provisions of the Act are recklessly used without adopting caution and desecretion, it may easily become an engine of operession.** Its provisions are not intended to secure indirectly a conviction in case where a prosecution for a substantial offence is likely to fail. Similarly t**he Act should not obviously be used against mere innocent people or to march over the opponents who are taking recourse to democratic process to get their certain demands fulfilled or to wreck the private vengeance."***

*(Emphasis supplied by us)*

18. In the case of **Suresh Tewari Vs. State of U.P. and others, reported in 2018 (5) ALJ 1,** a Division Bench of this

Court considered the judgment of Hon'ble Supreme Court in the case of **Vijay Narain Singh Vs. State of Bihar, 1984 (3) SCC 14** and a Full Bench judgement of this Court in **Bhim Sain Tyagi's** case as well as provisions of Section 2(b) of the Act and held as under:

*"The Hon'ble Apex Court in the case of Vijay Narain Singh versus State of Bihar and others (1984) 3 SCC 14 has been pleased to hold that it is essential to refer to at least two incidents of commission of crime for applicability of Clause (i) of section 2(b) of the Act.* ***Since there is reference of one incident only in the notice, it falls short of the legal requirement as provided in Clause (i) of section 2(b)*** *and in this way the notice being illegal could be challenged before this Court as laid down by the Full Bench of this Court in the case of Bhim Sain Tyagi v. State of U.P. And others 1999 (39) ACC 321.* ***If there had been reference of two or more incidents in the impugned notice, then the minimum legal requirement of section, 2(b) Clause (i) would have been satisfied, and then in that case sufficiency of the material on merits could not be challenged before this Court,*** *but before the authority concerned as laid down in the Division Bench ruling in the case of Jaindendra @ Chhotu Singh Versus State of U.P. (supra). But since the impugned notice in the present case is short of the legal requirement, it could be challenged in this Court. The observations in para 12 of the ruling in the case of Jaindendra (supra) which have been quoted above, also support this conclusion."*

*(Emphasis supplied by us)*

19. In a recent judgment **dated 03.02.202**1 in **Criminal Misc. Writ Petition No. - 347 of 2021 (Rahul Yadav vs. State Of U.P. And 2 Others),** a Division Bench of this Court has observed as under:

*"Learned A.G.A. is also not in a position to dispute the legal position that for bringing a person under the clutches of the Act, he should be a habitual criminal/offender and a single or sporadic incident would not bring him within the purview of the Act."*

20. Thus, a person is termed as "Goonda" if he is a habitual criminal. The word "habitually" means "repeatedly" or "persistently". It implies a thread of continuity stringing together similar repetitive acts to justify an inference of "habitual". Frequent commission of acts or omissions of the same kind referred to in sub-Section 2(b) of the Act, 1970 or an aggregate of similar acts or omissions would bring a person within the definition of the word "Goonda" under Section 2(b) of the Act, 1970. Therefore, a single act of an accused constituting a criminal case, cannot bring him within the meaning of the definition of the word "Goonda" under Act, 1970. To bring him within the definition of the word "Goonda", he must be a habitual criminal or/ habitual offender. A notice issued with reference to only one incident, falls short of legal requirement as provided in Clause (i) of Section 2(b) and thus, the authority issuing such notice would be acting without jurisdiction. Such a notice being illegal, may be challenged before this court. If there had been reference to two or more incidents in an impugned notice, then the minimum legal requirement of Section 2(b)(i), would be satisfied and then in that case, sufficiency of the material on merit may be challenged before the authority concerned.

21. The definition of "Goonda" under the Act, 1970 clearly reveals that a person

may be said to be "Goonda", if he is habitual in committing crime. **An accused in a criminal case arising out of matrimonial dispute does not indicate that such a person, is a habitual offender**. Thus the notices issued by respondent no. 2 to the petitioners were wholly without jurisdiction and a glaring example of abuse of power. **It is only after we passed the orders dated 17.8.2021 and 18.8.2021, the respondent no. 2 withdrawn the impugned notices by orders dated 21.08.2021 to escape from the consequences of his illegal and unauthorized action.**

22. However **the question still remains as to whether the respondents may escape from their responsibilities for acting arbitrarily, illegally and unauthorisely ?** In our view they cannot escape from the consequences. The officer who unauthorisely, illegally and without jurisdiction issued the impugned show cause notices caused harassment, compelling the petitioners to file the present writ petitions incurring expenses.

23. Therefore, considering the facts and circumstances of the case, in its entirety, we **dispose of** all the above noted three writ petitions with costs of Rs. 10,000/- (ten thousand) awarded to each petitioners. It is made clear that each petitioner shall get cost of Rs. 10,000/- (ten thousand), which shall be paid by the respondents within **six weeks from today.**

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**(2021)10ILR A561**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 29.09.2021**

**BEFORE**

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

Matters Under Article - 227 No. 3268 of 2020 (Civil)

**Sardar Garneet Singh & Anr. ...Petitioners**
**Versus**
**Smt. Raj Katyal ...Respondent**

**Counsel for the Petitioners:**
Sri Mohd. Aqueel Khan, Sri Chandra Bhan Gupta

**Counsel for the Respondent:**
Sri C.M. Rai

**Order declaring vacancy and rejecting a review of vacancy order and granting release of demised premises-challenged-shops in dispute was let out to one Sundar Singh-who died issue less and unmarried-thereupon application was made for declaration of deemed vacancy-objection by petitioners claiming they carried business jointly with the deceased-no will executed in their favour-tenancy cannot be bequeathed to them-further claim of application being barred by the limitation-no conclusive evidence to indicate at what point of time Petitioners came to occupy the shops-impugned orders are flawless.**

**Held,** This Court must also remark that the RC & EO has very validly taken note of the fact that there is not a solitary rent receipt placed on record to show that the petitioners ever paid rent for the shops in dispute to the respondent-landlady. This Court also finds that there is no material to show that at any stage in point of time, the petitioners paid rent to whoever was the landlord for the time being. Until his death, it was Sardar Sundar Singh alone who was the lawful and recorded tenant of the shops in dispute. His heirs entitled to inherit having not come forward to claim it, the finding of a vacancy must logically follow. If the petitioners' occupation at some point of time after Sardar Sundar Singh fell ill is to be taken note of, where they claim to carrying of business separately in the two shops, the finding of deemed vacancy is inescapable, as the petitioners are not members of Sardar Sundar Singh's family.**(para 35).**

**W.P. dismissed.** (E-9)

**List of Cases cited:**

1. Hazi Naseem Ahmad Vs R.C.E.O./A.D.M. (C.S.), Varanasi & ors.,2009 4 AWC 4174

2. Durga Prasad Vs Narayan Ramchandaani (Dead) through Legal Representatives, (2017) 5 SCC 69

3. Om Prakash & ors. Vs The Prescribed Authority & ors., 1984 (2) ARC 634

4. Man Singh Vs Machau Lal & ors., 1989 (1) ARC 364

5. Ishwar Chand Vs Additional District Magistrate (Civil Supply)/R.C.E.O., Kanpur Nagar & anr., 2000 (1) ARC 386

6. Ratan Lal Vs The Additional District Judge, Bulandshahr & ors., 1979 AWC 404 All

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

This petition under Article 227 of the Constitution is directed against an order declaring vacancy dated 30.10.2018 followed by an order, rejecting a review of the vacancy order and granting release of the demised premises, passed under Section 15(1) of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 of 1972)1. Also impugned is a revisional affirmation of both these orders by the Additional District Judge, Court No. 13, Kanpur Nagar vide judgment and order dated 11.09.2020 passed in Rent Revision No. 36 of 2018.

2. The issue in this petition is about two adjoining shops located in a house bearing Premises No. 122/229, Sarojini Nagar, Kanpur Nagar. The said shops are hereinafter referred to as the 'shops in dispute'. The two shops were let out to one Sundar Singh, who died issue-less. He was unmarried. The owner and the landlady of the demised premises, Smt. Raj Katyal made an application dated 20.12.2017 before the Rent Control and Eviction Officer, Kanpur Nagar, seeking a declaration of deemed vacancy of the shops in dispute on ground that the tenant Sardar Sundar Singh had died on 21.10.2017 and after his death, his nephews, Gurmeet Singh and Ranjeet Singh had illegally occupied the said shops. It was stated that Gurmeet Singh and Ranjeet Singh were not members of the deceased-tenant's family. It was also said that Sardar Sundar Singh was unmarried, and, therefore, had neither left behind a wife or children. The occupation of the shops in dispute by Gurmeet Singh and Ranjeet Singh was claimed to be unlawful, giving rise to a deemed vacancy.

3. It was also asserted that the landlady required the shops in dispute bona fide for her need and that of her family. It was also said that at the appropriate stage, the landlady would make an application seeking release of the shops in dispute under Section 16(1)(b) of the Act of 1972. The Rent Control and Eviction Officer2 directed an inquiry to be made in the matter of vacancy by the Rent Control Inspector. The Rent Control Inspector submitted a report dated 25.01.2018 to the RC & EO. Gurmeet Singh and Ranjeet Singh, who are the petitioners here and faced prospects of the shops in dispute in their possession being declared vacant, filed objection dated 30.04.2018 in the vacancy matter. It was in substance said in the objection that the shops in dispute were rented out to the petitioners' uncle in the year 1967 by the then landlord. The late Sundar Singh, during his lifetime, had admitted the petitioners, his nephews, as partners in his business. In one of the shops, Ranjeet Singh was carrying on trade in watches

along with his uncle whereas in the other, Gurmeet Singh was carrying on the trade of dealing in scrap, also along with his uncle. Thus, both the petitioners were in occupation of the two shops as partners with the deceased and lawful tenant thereof, the late Sundar Singh.

4. It was also asserted in the objections that the landlords have never raised any objection to the petitioners occupying and doing business in the shops in dispute over a period as long as 45 years. It was also asserted that after 20.12.2017, when Sardar Sundar Singh suffered from indifferent health, the petitioners had paid rent to the landlady, Smt. Katyal in the sum of Rs.25,000/-, though no receipt for the said rent was issued under the pretext of the plaintiff's receipt book not being by then available. It was also the petitioners' case set out in the objection that both of them had their electricity meters installed on the shop that each was doing business in showing the length and the settled character of their possession as the lawful occupants.

5. Parties exchanged pleadings and evidence in the vacancy matter and the RC & EO vide order dated 30.10.2018 passed in Case No. 2 of 2018, under Section 15(1) of the Act of 1972, declared the shops in dispute to be vacant. He ordered publication of the vacancy in a Hindi and English Daily, directing the matter to come up on 12.11.2018 for consideration of the release/ allotment matter. At this stage, the landlady made an application under Section 16(1)(b) of the Act of 1972 with a prayer to release the shops in dispute in favour of her daughter, Km. Charu Katyal.

6. Pending the release application, the petitioners moved an application for review before the RC & EO, seeking a review of the vacancy order dated 30.10.2018. The RC & EO rejected the review by means of his order dated 04.12.2018 and directed release of the shops in dispute in favour of the landlady. The petitioners challenged both the orders dated 30.10.2018 and 04.12.2018, last mentioned, by carrying a revision under Section 18 of the Act of 1972 to the District Judge, Kanpur Nagar. The revision aforesaid was registered on the file of the learned District Judge as Revision no.36 of 2018. The revision, on assignment, came up before the Additional District Judge, Court no.13, Kanpur Nagar, who proceeded to dismiss the same by his judgment and order dated 11.09.2020.

7. Aggrieved, Gurmeet Singh and Ranjeet Singh have instituted the present petition under Article 227 of the Constitution.

8. Pending this petition, Gurmeet Singh died and his heirs and legal representatives have been substituted as petitioner nos. 1/1, 1/2 and 1/3.

9. Heard Mr. Mohd. Aqueel Khan, learned Counsel for the petitioners and Mr. C.M. Rai, learned Counsel appearing on behalf of the sole respondent-landlord. He waived his right to file a counter affidavit.

10. It appears from a wholesome detail of the case that the petitioners pleaded before the two Courts below that Sardar Sundar Singh and the petitioners' father, Sardar Kesar Singh, who were brothers, were joint tenants of the shops in dispute. Since Sardar Sundar Singh was the elder of the two brothers, rent receipts were issued in his name, but both brothers carried on business jointly in the shops in dispute. Sardar Sundar Singh was unmarried and had no issues. The

petitioners' father and the petitioners looked after Sundar Singh, taking care of his needs, including lodging, board, facilitating medical treatment etc. Sardar Sundar Singh died on 21.10.2017. It was after that event that the respondent launched the present proceedings seeking to declare a vacancy and asking for release of the shops in dispute. It was said that the Rent Control Inspector served notice under Rule 8(2) of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 19723. Both parties, including the petitioners made their statements before the Rent Control Inspector. The Inspector found the petitioners to be in possession of the shops in dispute. The Inspector was informed that the shops in dispute were earlier owned by one Jagat Ram Thakur, who had rented them out to Sardar Sundar Singh. The petitioners along with Sardar Sundar Singh carried on business jointly in the shops in dispute.

11. There are assertions about the petitioners being paid compensation in the year 1986, on account of their property housed in the shops in dispute along with Sardar Sundar Singh being pillaged, during the 1984 anti-Sikh riots. It is on the basis of collateral evidence, like the compensation that the petitioners received from the Government for the loss sustained during the 1984 riots, the electricity meters installed in their name in the shops in dispute, that the petitioners seek to show that they were into some kind of a partnership business with Sardar Sundar Singh, who was nominally or formally the tenant of the shop along with the petitioners and their father, being the family elder.

12. In substance, it is the endeavour of the petitioners to establish that they, along with Sardar Sundar Singh, were carrying on business in partnership, where their father too was a partner ever since inception of the tenancy. They urged that the shops in dispute were the business premises of a partnership enterprise comprising Sardar Sundar Singh, the petitioners' father Sardar Kesar Singh and the petitioners. This case is urged in order to place the shops in dispute beyond the mischief of the provisions of Section 12(2) of the Act of 1972. Section 12(2) reads :

"12. Deemed vacancy of building in Certain cases.- (1) A, landlord or tenant of a building shall be deemed to have ceased to occupy the building or part thereof if-

(a) he has substantially removed his effects therefrom, or

(b) he has allowed it to be occupied by any person who is not a member of his family, or

(c) in the case of a residential building, he as well as members of his family have taken up residence, not being temporary residence, elsewhere.

(2) In the case of a non-residential building, where a tenant carrying on business in the building admits a person who is not a member of his family as a partner or a new partner, as the case may be, the tenant shall be deemed to have ceased to occupy the building.

(3) In the case of a residential building, if the tenant or any member of his family builds or otherwise acquires in a vacant state or gets vacated a residential building in the same city, municipality, notified area or town area in which the

building under tenancy is situate, he shall be deemed to have ceased to occupy the building under his tenancy :

Provided that if the tenant or any member of his family had built any such residential building before the date of commencement of this Act, then such tenant shall be deemed to have ceased to occupy the building under his tenancy upon the expiration of a period of one year from the said date.

(4) Any building or part which a landlord or tenant has ceased to occupy within the meaning of sub-section (1), or sub-section (2) , or sub-section (3), shall, for the purposes of this Chapter, be deemed to be vacant."

13. The petitioners want this Court to accept that their family comprising their father, Sardar Kesar Singh, Sardar Sundar Singh and the two petitioners, were tenants of the shops in dispute jointly from the inception of the tenancy. It is not that Sardar Sundar Singh alone was the tenant of the shops in dispute but also had the petitioners as partners in his business, housed in the two shops. It is also urged on behalf of the petitioners that they being tenants in occupation of the shops in dispute, with the consent of the landlady much before the commencement of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) (Amendment) Act, 1976 w.e.f. 05.07.1976, against whom no suit or proceedings for eviction were pending before any Court or Authority on the date of such commencement, their tenancy would stand regularized under Section 14 of the Act of 1972, even if it is otherwise in breach of Section 12(2). It is also urged that proceedings for declaration of vacancy are time barred as the respondent was aware, since 1998 about the business being carried on by the petitioners in the shops in dispute, whereas the application for declaration of vacancy was moved much after 12 years, that is to say, on 12.12.2017. In support of this rule of limitation, vis-a-vis the right of the landlady to initiate proceedings for declaration of vacancy, reliance has been placed on the decision of this Court in **Hazi Naseem Ahmad v. R.C.E.O./A.D.M. (C.S.), Varanasi & Others4.** The said decision lays down a rule of limitation barring proceedings for declaration of vacancy being initiated after lapse of a period of 12 years from the date of accrual of the cause of action. In **Hazi Naseem Ahmad** *(supra)*, it has been held:

"6. On a plain reading of the relevant provision of the Act, it does appear that no period of limitation for declaration of a vacancy actually or deemed has been prescribed under the Act. The question, then, arises if no period of limitation has been prescribed, an application for declaration of vacancy can be filed within a reasonable period. It has been held in Abdul Khaliq v. Additional District Magistrate, Varanasi, 2007 (2) ARC 629, that with respect to the proceedings under Section 12 of the Act, a period of 12 years should be taken as reasonable time for initiating the proceedings under the Statute from the date of cause of action arises. In this case, the Court has relied upon a decision of the Apex Court in the case of Mansha Ram v. S. P. Pathak and others, AIR 1983 SC 1239. In Anil Kumar Dixit v. Smt. Maya Tripathi and another, 2006 (1) ARC 377 : 2006 (1) AWC 649, the above view has been reiterated.

7. The aforesaid pronouncements have been constantly followed by this

Court as is apparent from Sarla Devi v. Shailesh Kumar and Ors. 2008 (3) ARC 632 and Jamuna Devi v. District Judge, Kanpur Nagar and others, 2009 (1) ARC 266. There is, thus, no reason for me to take a contrary view.

8. In Shambhu alias Shambhu Dayal (supra) it has been held by this Court that a conjoint reading of Sections 11 and 13 of the U.P. Act No. 13 of 1972 prohibits the letting without order of allotment and it can safely be concluded that the Act restrains the landlord for giving the accommodation on rent without a valid order or allotment and none can occupy without issuance of valid allotment order in his favour.

9. It appears that the attention of the Court was not drawn to the earlier decision of this Court in the case of Anil Kumar Dixit v. Smt. Maya Tripathi (supra). Nor the attention of the Court was invited towards the judgment of the Apex Court in the case of Mansha Ram v. S. P. Pathak (supra). Therefore, the decision laid down therein should be read and understood in the context of the fact of that case."

14. The learned Counsel for the respondent, on the other hand, has opposed the submissions made by the petitioners and said that given the provisions of Sections 12(1) and 12(2) of the Act of 1972, the petitioners, who are not members of the tenant's family, cannot be inducted as partners or new partners in any business, nor can the tenant permit occupation of a tenanted premises by a person, who is not a member of his family. It is urged that the brother's son does not fall within the definition of family in relation to a tenant of a building as defined under Section 3(g) of the Act of 1972. Therefore, occupation by the petitioners clearly attracts the fiction under Sections 12(1) and 12(2) of the Act of 1972 leading to a deemed vacancy in the shops in dispute. It is also argued that there is no evidence led on behalf of the petitioners to show that they were carrying on business in the shops in dispute as a partnership from inception of the tenancy, along with Sardar Sundar Singh.

15. I have considered rival submissions advanced by the learned Counsel for parties and perused the record.

16. The petitioners' case that the two along with their father and the tenant, late Sardar Sundar Singh, were all tenants together in the shops in dispute, where they were doing business as partners, is difficult to accept. Admittedly, the tenancy stood in the name of late Sardar Sundar Singh alone, about which the petitioners say that the tenancy was recorded formally in his name as he was the senior most member of the family. They want this Court to accept that Sardar Sundar Singh was a karta of sorts of a joint family, where all the four persons were carrying on business in partnership; and, this partnership of "four' was the tenant in the shops in dispute. There is no rent deed or rent note or rent receipt in the name of the petitioners, their father and Sardar Sundar Singh. There is no document either to show that there was any partnership firm, comprising these men in existence, let alone being that the partnership firm was inducted as a tenant in the year 1967.

17. To the contrary, it is accepted that it was Sardar Sundar Singh who contracted a tenancy of the shops in dispute in the year 1967 with the then owner/ landlord. There is also no municipal assessment record that may show the tenancy to stand jointly in

the name of Sardar Sundar Singh, his brother Kesar Singh and the petitioners. There is also no case that there was an order of allotment issued by the competent Authority way back in the year 1967, allotting the shops in dispute to Sardar Sundar Singh, his brother Kesar Singh and the petitioners together, as joint tenants or as a partnership for the purpose of doing business. To the contrary, the tenor of the evidence shows that the shops in dispute were in the exclusive tenancy of Sardar Sundar Singh for the purpose of carrying on his business, that he had divided into two departments, one relating to some kind of a trade in watches and the other in scrap.

18. Evidence is also eloquent about the fact that Sardar Sundar Singh was an unmarried and issue-less man. The two petitioners being his brother's sons, helped him with his business. The petitioners appear to have grown dominant in that business with an aging Sundar Singh. They later on divided the business in the two shops between them with Sundar Singh occupying the back seat until his demise on 21.10.2017. What does not appear to be in doubt is the fact that till the end of his life, it was Sardar Sundar Singh, who was the lawful tenant of the shops in dispute. Tenancy, even in case of one that is regulated or governed by Statute, is a matter of contract between the landlord and the tenant. Unless there be evidence to show that there is an underlying contract between the tenant and the landlord that constitutes a demise of the tenanted premises, it is difficult to infer tenancy from mere incidents of occupation of a premises by one who claims that status.

19. The evidence offered by the petitioners about receiving compensation in the year 1986 for the 1984 Anti-Sikh Riots on ground of their business and property being damaged, that was placed in the shops in dispute, cannot lead to an inference of tenancy of any kind in favour of the petitioners. All that would show is that the petitioners were lending a helping hand to Sardar Sundar Singh in his business, who was their father's brother. One inference could be that taking advantage of this fortuitous circumstance, they claimed compensation for damages to property, that were lawfully the effects of their uncle's business. The other would lead to a result hardly favourable to the petitioners, and that would be that the petitioners indeed entered into a partnership with Sardar Sundar Singh, when their property was destroyed during Anti-Sikh Riots, for which they received compensation from the Government. If that be so, it brooks little doubt that the petitioners not being members of Sardar Sundar Singh's family as defined under Section 3(g) of the Act of 1972, the act of Sardar Sundar Singh in permitting the petitioners, constitutes admission of persons as partners or new partners, who were not members of Sundar Singh's family. It would clearly attract the fiction under Section 12(2) of the Act of 1972, leading to a deemed vacancy. On the evidence that has figured on record, if it is held that Sundar Singh did not admit the petitioners as partners to his business, but with aging years, allowed them to occupy the shops in dispute to carry on their own business, the tenant would still be deemed to have ceased to occupy the shops in dispute under Section 12(1)(b) of the Act of 1972. Section 3(g) of the Act of 1972 enlists, who would be members of the tenant's family for the purposes of the Act. It reads:

"3. Definitions.--In this Act, unless the context otherwise requires--

(g) "family", in relation to a landlord or tenant of a building, means, his or her--

(i) spouse,

(ii) male lineal descendants,

(iii) such parents, grandparents and any unmarried or widowed or divorced or judicially separated daughter or daughter of a male lineal descendant, as may have been normally residing with him or her,

and includes, in relation to a landlord, any female having a legal right of residence in that building;"

20. Clearly, the petitioners, who are collaterals of Sardar Sundar Singh and not his lineal descendants, do not qualify as members of his family. Whichever way, the petitioners' entry in the shops in dispute is viewed during the lifetime of Sardar Sundar Singh, the inference of a deemed vacancy is inescapable.

21. It is alternatively argued that the petitioners being brother's sons of Sundar Singh, who was an issue-less man, were entitled to inherit his tenancy, upon his demise as they are his heirs under the law of succession applicable to parties. In this connection, it is emphasized that for the purpose of inheriting the tenancy, Section 3(g) of the Act of 1972 is not at all relevant. The definition of "family' there with reference to the provisions of Sections 12(1) and 12(2) would apply, if the petitioners' rights are to be determined as tenants, entering the shops in dispute during the lifetime of Sundar Singh. If they are to be regarded as mere helping hands during Sundar Singh's lifetime, but his heirs entitled to inherit the tenancy upon his demise, Section 3(g) is not at all relevant. In that case, their rights would be governed by Section 3(a)(2) of the Act of 1972. Section 3(a) reads:

"3. Definitions.--In this Act, unless the context otherwise requires--

(a) "tenant", in relation to a building, means a person by whom its rent is payable, and on the tenant's death--

(1) in the case of a residential building, such only of his heirs as normally resided with him in the building at the time of his death;

(2) in the case of a non-residential building, his heirs];

Explanation.--An occupant of a room in a hotel or a lodging house shall not be deemed to be a tenant;"

22. In support of their contention, reliance has been placed by Mr. Mohd. Aqueel Khan on behalf of the petitioners on the decision of the Supreme Court in **Durga Prasad v. Narayan Ramchandaani (Dead) through Legal Representatives5** where it has been held:

"9. A careful analysis of the above provisions indicates that Section 3(a) uses the word "heir". Definition in Section 3(a) deals with the contingency when a tenant dies. It is significant to note that the words "family member" are absent in Section 3(a). "Family member" are defined under Section 3(g) of U.P. Act 13 of 1972 and is also referred to in Section 12 of U.P. Act 13 of 1972. The word "heir" in Section 3(a) is used in relation to a "tenant" who has to succeed as "tenant on the tenant's death"; while "family" is used in Section 12 which deals with a situation of an existing tenant. The definition of "family" as occurring in Section 3(g) may not be relevant for the purposes of determining the

question as to who would become tenant on the death of the original tenant, since Section 3(a) uses the word "heir".

10. In the present case, we are dealing with the case as to who would become "tenant" on the death of Lalita. Hence, the definition of "family" is not relevant for the purposes of determining as to who would become tenant on the death of tenant Lalita. The only question falling for consideration is whether the appellant brother of the tenant Lalita is an "heir" under Section 3(a) of U.P. Act 13 of 1972. The word "heir" is not defined in the Act. "Heir" is a person who inherits or may inherit by law. Section 3(1)(f) of the Hindu Succession Act defines "heir" as--

"3. (1)(f) "heir" means any person, male or female, who is entitled to succeed to the property of an intestate under this Act;"

The word "heir" has to be given the same meaning as would be applicable to the general law of succession. In the present case, as pointed out by the High Court, the deceased tenant Lalita being a Hindu female, the devolution of tenancy will be determined under Section 15 of the Hindu Succession Act."

23. The aforesaid guidance of their Lordships in **Durga Prasad** shows without doubt that in the event the tenancy is regarded as one that was exclusively held by Sundar Singh until his death, Section 3(g) of the Act of 1972 would not be relevant to decide, who would inherit the tenancy. That would be governed by Section 3(a) of the Act of 1972. A perusal of Section 3(a) (2) shows that in case of of a non-residential building, it would be the heirs of the tenant. The decision in **Durga Prasad** clearly holds that the word 'heir' under Section 3(a) of the Act of 1972 has to be given the same meaning as would be applicable under the general law of succession. Admittedly, the parties being Sikhs, their right to succession would be governed by the Hindu Succession Act, 19566. Section 8 of the Act of 1956 provides that the property of a male Hindu dying intestate shall firstly devolve upon his heirs, specified in Class I of the Schedule and if there be none in Class I, upon the heirs, specified in Class II of the Schedule. Section 9 of the Act of 1956 provides for the order of succession amongst heirs in the Schedule. It lays down the rule that various heirs in Class II shall take in the manner that an heir placed in the higher entry, shall be preferred to those in the lower entry. Now, Sundar Singh died intestate leaving behind his brothers, Sardar Kesar Singh and Sardar Balbir Singh. The fact that these two brothers of Sundar Singh were alive at the time of his death, had been recorded for a finding of fact by the learned Additional District Judge in the order impugned. There is no issue about it for a fact. Brothers and brother's sons, both qualify as Class II heirs under the Schedule appended to the Act of 1956. Brothers of a deceased Hindu male instate are placed in Entry II, whereas brother's son is placed in Entry IV. Clearly, therefore, upon death of Sardar Sundar Singh, if any one would have inherited his tenancy, it would be his brothers, Kesar Singh and Balbir Singh. Though, there is a case to begin with that Kesar Singh, Sundar Singh and the petitioners, together had entered the shop in dispute as joint tenants doing business in partnership, it has already been held that there is absolutely no evidence about it. There is no case that Sardar Kesar Singh or for that matter Sardar Balbir Singh, ever laid a claim to succeed to the tenancy of the

late Sundar Singh. It is not the case of the petitioners either that they claim through Sardar Kesar Singh in any way. The unexceptionable inference is, therefore, that during lifetime of Sardar Kesar Singh and Sardar Sundar Singh, the petitioners could not have succeeded to the tenancy of Sardar Sundar Singh.

24. It was urged on behalf of the petitioners that Sardar Sundar Singh and Sardar Balbir Singh, being Class II heirs in Entry II of the Schedule, if they did not claim rights to the tenancy they inherited from Sardar Sundar Singh, it would pass to the next available Class II heirs, that is to say, the petitioners, who figure in Entry IV. This submission is not tenable. The correct position of the law is that so long as the heir entitled to inherit is alive, the heir lower down in the order of inheritance cannot inherit. There is no passing over of the heir entitled in the order of priority under the Schedule appended to the Act of 1956, as if it were, if the heir immediately entitled on the death of a Hindu intestate does not assert his right. In this regard, reference may be made to the proposition about a tenancy being inherited by a person lower in order of priority than the heir available and entitled to inherit, that fell for decision of this Court in **Om Prakash & Others v. The Prescribed Authority & Others7. In Om Prakash** *(supra)* it was held :

"12. In view of the clear and specific meaning of the word "heir" what has to be seen is whether the petitioners would inherit the properties of Ganpat Ram (assuming that he was the original tenant). Succession to the property of a Hindu dying intestate has been indicated in the Hindu Succession Act, 1956. Section 8 of the said Act provides that the property shall devolve upon the heirs specified in Class I of the Schedule and if there was no heir of Class I then upon the heirs specified in Class II and so on. A grandson in the life-time of his father would not inherit the properties of the grandfather dying intestate. Tenancy right is immovable property. It is heritable as any. other immovable property.

13. On the death of Ganpat Ram (assuming that he was the original tenant), the tenancy right would devolve upon his heir in accordance with the provisions of the Hindu Succession Act and consequently Chhotu Ram alone, in his capacity as son and heir of Ganpat Ram, would become the tenant of the premises in question. The petitioners in their capacity as grand children of Ganpat Ram would not inherit the tenancy right in the presence of their father, Chhotu Ram. In any case since it was at no time pleaded that the petitioners along with their father and grand father constituted a joint Hindu family, it is not required of me to look to the provisions of Section 6 of the Hindu Succession Act under which the interest of the deceased devolves upon the surviving members of coparcenary, The Prescribed Authority, therefore, does not appear to have committed any error in rejecting the application of the petitioners on the ground that they have not inherited tenancy rights and that they were not necessary parties to the proceedings under Section 21 of the Act."

25. This question whether an heir lower down in order of preference was entitled to inherit the tenancy, arose in the context of Act of 1972 in **Man Singh v. Machau Lal & Others8.** The facts giving rise to the issue in **Man Singh** are succinctly narrated in paragraph nos. 2 and 3 of the report, which read :

"2. The facts found by the Courts below and which are not in dispute, lie

within a narrow compass. One Smt. Kashi Devi was admittedly residing in the accommodation in dispute as its tenant. The Plaintiff-Respondents were the landlords of the same. At the time of her death in the year 1973, the Appellant who is the son of the brother of Smt. Kashi Devi's husband, was residing with Smt. Kashi Devi. The Appellant's father Gopal Singh, though alive at that time, was, however, not residing with Smt. Kashi Devi. Gopal Singh also died in 1975. On the death of Smt. Kashi Devi the present suit was brought by the Plaintiff-Respondents against the Appellant on the ground that the Appellant was residing with Smt. Kashi Devi only as the latter's licensee and inasmuch as he was not an heir of Kashi Devi he did not inherit her tenancy rights. With the result that after her death the Appellant had ceased to have any legal claim to remain in possession over the disputed accommodation.

3. The defence of the Appellant, on the other hand, was that, firstly, he had legally inherited the tenancy rights of Kashi Devi as one residing with her normally and also being an heir and consequently till his tenancy was determined the Plaintiff could not seek a decree for dispossession; and, secondly, he having been adopted by Nanhe Singh and his wife Smt. Kashi Devi, he became a tenant of the disputed accommodation after the death of Smt. Kashi Devi, Nanhe Singh the original tenant having predeceased Kashi Devi."

26. In the context of the said facts, it was held in **Man Singh** *(supra)* dealing with a similar contention as the one now raised before us thus :

"10. The question that, however, falls , for determination is whether we should import the considerations of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, as suggested by Sri. S.M. Dayal, in determining the question as to who was the heir of Smt. Kashi Devi entitled to claim the tenancy rights after the death of Kashi Devi. Sri. Dayal submitted that as Gopal Singh was not residing with Smt. Kashi Devi, he did not inherit her tenancy rights. Consequently this Court should hold that there was no heir available among those mentioned in the second entry of Class II. That being so, the heirs mentioned in the fourth entry of Class II should be deemed to have inherited the tenancy rights of Smt. Kashi Devi.

11. I find it difficult to accept the contention. The submission can be accepted only by stretching the language of the statute, viz. Section 3(a)(1) of U.P. Act No. 13 of 1972 beyond permissible limits. In fact, what the learned Counsel wants this Court to hold is that in construing the term 'heirs' in Clause (1) we should read further that if a preferential heir was not residing with the deceased tenant then the heir next in order of preference as prescribed under the Hindu Succession Act who was residing with the tenant, should be deemed to be the heir of the tenant within the meaning of that clause. Such a construction is not warranted either by the language or the scheme or purpose of U.P. Act No. 13 of 1972. On a plain and simple construction of Section 3(a)(1) of this Act, only that heir would be entitled to inherit the tenancy rights in respect of residential accommodation who was actually residing with the tenant and the heir would be one who is entitled under the personal law to inherit the rights of the deceased....."

27. The question again came up for consideration before this Court in a much later decision in **Ishwar Chand v.**

**Additional District Magistrate (Civil Supply)/R.C.E.O., Kanpur Nagar & Another9**. It was, again, a case where a grandson laid claim to the inheritance of the grandfather's tenancy, because he was living with him, whereas the tenant's son was not. The question that arose, therefore, was whether the grandson, who was living with the tenant in the residential building, was entitled to inherit as his heir, because the tenant's son was not normally residing with him. In **Ishwar Chand** *(supra)* is was held :

"6. The contention of the learned counsel for the petitioner is that after the death of the tenant, any of his heirs who normally resided with him at the time of his death is entitled to inherit the tenancy rights and where a person who is entitled to inherit the tenancy was not normally residing with the tenant at the time of his death, such other person who comes in the category of an heir under the law is entitled to Inherit the tenancy if he was residing with the tenant at the time of his death. The personal law will determine as to who is the person under the law to inherit the tenancy. Section 8 of the Hindu Succession Act. 1956 provides that the property of a male Hindu dying intestate shall devolve according to the provisions mentioned under the Act-

(a) firstly, upon the heirs, being the relatives specified in class 1 of the Schedule ;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule ;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased ; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.

7. Section 9 of the Act provides that among the heirs specified in the Schedule, those in class I shall take simultaneously and to the exclusion of all other heirs ; those in the first entry in class II shall be preferred to those in the second entry ; those in the second entry shall be preferred to those in the third entry ; and so on in succession.

8. The son has preference to succeed to the exclusion of grandson. The inheritance takes place on the death of the tenant. In case he is survived by four sons, such son shall inherit the tenancy who was residing with his father but in case the tenant dies leaving behind him the only son but he was not residing and shifted elsewhere but his grandson is living, he will not inherit the tenancy as for inheritance two conditions are required to be fulfilled ; firstly, that he inherits the rights of the deceased tenant to the property under the personal law and secondly, he was residing at the time of death of the tenant in such residential building....."

28. It must be remarked that the decisions in **Man Singh** *(supra)* and **Ishwar Chand** *(supra)* and the earlier one in **Om Prakash** *(supra)* proceed on the principle that in the presence of various heirs of the deceased-tenant under the Act of 1956, tenancy would not go to an heir lower in order of preference, whether the heir immediately entitled to inherit, according to the order of preference, accepts the tenancy or not, or is otherwise not entitled under the Act of 1972. In no case, in the presence of an heir of a tenant higher in order of preference or class, an heir in a lower class or lower category of

preference would take the tenancy. It is, thus, held that the petitioners would not inherit the tenancy of the late Sardar Sundar Singh during the lifetime of Sardar Kesar Singh and Sardar Balbir Singh, whether they claimed the tenancy or forsook it.

29. As a corollary to the submission that the petitioners have inherited the tenancy, learned Counsel for the petitioner has made another point, which depends upon a testamentary succession to the tenancy. The attention of the Court has been drawn to the fact that the late Sardar Sundar Singh had executed a will dated 04.07.2011, that is on record as Paper No. 170 before the Court of first instance, according to which, the testator left all his movable and immovable property to the wives of the petitioners. Learned Counsel for the petitioners has urged that this point was mooted before the Courts below, particularly the Court of Revision, where the learned Additional District Judge looked into the will dated 04.07.2011 propounded by the petitioners to claim tenancy. It is submitted by the learned Counsel that the learned Additional District Judge committed an error by accepting another and a later will dated 29.01.2013, said to be left by the deceased Sardar Sundar Singh, revoking his earlier will as one based on fraud and by the later device, bequeathing all his movable and immovable properties to his niece, Km. Harmeet Kaur, daughter of his brother Sardar Balbir Singh. Learned Counsel for the petitioners submits that the learned Additional District Judge committed an error in accepting the subsequent will, because the landlord could not have propounded the said will. He was neither the executor of the will nor its beneficiary. Km. Harmeet Kaur, the beneficiary of the will, never came forward to propound the will dated 19.01.2013 that derogated from the earlier will dated 04.07.2011 left in favour of the petitioners' wives. Learned Counsel for the petitioners submits that based on the will dated 04.07.2011, the petitioners would inherit the tenancy as testamentary heirs of the tenant, the late Sardar Sundar Singh.

30. There are many fallacies to this submission, the one most obvious being that the will of the year 2011 did not bequeath the tenancy to the petitioner, but to their wives. If the will of 2011 is to be accepted as a valid source of acquisition of tenancy rights, the tenancy would go to the petitioners' wives, and not the petitioners. But, that is not a reason that should, at all, weigh with this Court to dispose of this part of the submission urged on behalf of the petitioners. The reason is to be found in the principle of law that is attracted to the inheritance of tenancy rights under Section 3(a) of the Act of 1972. The principle appears to be that heirs entitled to inherit the tenancy referred to under Section 3 (a) are the heirs of the deceased tenant, according to intestate succession; not his testamentary heirs. While the testamentary heirs may be entitled to take all that has been bequeathed to them, according to the deceased-tenant's will, the tenancy would be governed not by the bequest, but by intestate succession, under the Act of 1956. The principle aforesaid, which does not appear to have been doubted or overturned, was laid down by this Court in **Ratan Lal v. The Additional District Judge, Bulandshahr & Others10.** In **Ratan Lal** *(supra)* it was held :

"20. This gives rise to the question about the scope of the word 'heirs' used in Section 3 of U.P. Act No. 13 of

1972. Counsel contended that the word 'heirs', would include testamentary heirs as well. The word 'heir' has several meanings. In some of the cases this word has been interpreted as including the testamentary heirs whereas in some other cases it has been held as confining its operation only to the heirs of the deceased to be determined in accordance with the personal law. The word 'heirs' does, I think, connote an idea of succession as well as an idea of consanguinity. In the light of the various provisions of the Act, it appears that the word 'heirs' in relation to a tenant should be construed as referring to the persons entitled to the property under the law of intestate succession applicable on the date when the testator dies.

21. Counsel for both the parties have referred to the various dictionary meanings in support of their respective contentions. It is not necessary to refer to those inasmuch as I have already said above that in the context in which the word 'heir' has been used, it is amply clear that this expression must be confined to the persons receiving the property if a tenant dies intestate. In Wealth-tax Commissioner, A.P. v. Courts of Wards, AIR 1977 SC 113, the Supreme Court has laid down the principle which would apply to such matters as follows:

We think that it is not correct to give as wide a meaning as possible to terms used in a statute simply because the statute does not define an expression. The correct rule is that we have to endeavour to find out the exact sense in which the words have been used in a particular context. We are entitled to look at a statute as a whole and give an interpretation in consonance with the purpose of the statute and what logically follows from the terms used. We are to avoid obscure and absurd results....."

31. Thus, some for added reasons and others, for very different, this Court concurs in the conclusions that the learned Additional District Judge has reached, to wit, that the petitioners are not entitled to inherit the tenancy of Sardar Sundar Singh, either as his heirs intestate or testamentary, under the Act of 1972. A *fortiori*, this Court must also concur with the conclusion of the learned Additional District Judge that after the death of Sardar Sundar Singh, the shops in dispute have fallen vacant.

32. The other submission advanced on behalf of the learned Counsel for the petitioners based on the principle in Hazi Naseem to the effect that the application for declaration of vacancy, in regard to the shops in dispute being moved in the year 2017, it would be barred by limitation, inasmuch as the petitioners were carrying on business in the said shops since the year 1998, is also without substance. This is for the reason that there is precisely no evidence to indicate at what point of time the petitioners came to occupy the shops in dispute, either exclusively or together with Sardar Sundar Singh, to do business in their own right, as contrasted to their position as nephews of Sardar Sundar Singh, who would help him in one way or the other with his business, without any kind of right or occupation of their own. It has not been indicated as to when the electricity meters in the petitioners' name were installed, or other evidence to show the petitioners' occupation of the shops in dispute in their own right, exclusively or together with the late Sardar Sundar Singh. In the absence of a precise date, by the time at or about which the petitioners came to occupy the shops in their own right, exclusively or

along with Sardar Sundar Singh to do their own business, it is very difficult to apply the bar of limitation of 12 years against the landlady, seeking a declaration of vacancy.

33. Still another submission that has been pressed in aid by learned Counsel for the petitioners to defend the validity of their possession as lawful tenants is the right of regularization of existing tenants under Section 14 of the Act of 1972. Section 14 is extracted below :

"Section 14 - Regularisation or occupation of existing tenants- Notwithstanding anything contained in this Act or any other law for the time being in force, any licensee (within the meaning of Section 2-A) or a tenant in occupation of a building with the consent of the landlord immediately before the commencement of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) (Amendment) Act, 1976, not being a person against whom any suit or proceeding for eviction is pending before any Court or authority on the date of such commencement shall be deemed to be an authorised licensee or tenant of such building."

34. A perusal of the provisions under Section 14 of the Act of 1972 makes it pellucid that in order to attract the creation of a valid tenancy by regularization under this provision of the Statute, the person in occupation of a building must be in occupation on the date of enforcement of the Act No. 28 of 1976, that is, before 05.07.1976 either as a licensee or as a tenant, with the consent of the landlord. There is absolutely no evidence on record to show that the petitioners were ever in occupation of the shops in dispute before 05.07.1976 or that they were in such occupation either as licensees or tenants and with the consent of the landlord. About this fact, there is an eloquent finding by the Revisional Court recorded in the impugned order, which reads :

"पुनरीक्षणकर्तागण प्रश्नगत दुकान में किस तिथि से कब्जे में हैं, इस तथ्य का उल्लेख न तो अवर न्यायालय की पत्रावली में किया गया है और न ही प्रश्नगत पुनरीक्षण की पत्रावली में। अवर न्यायालय में दिए गए बयान दिनांकित-16/01/2018 कागज संख्या 10 में रंजीत सिंह द्वारा अपने बयान में मात्र यह कहा गया है कि मुझे इस व्यापार में लगभग 45 (पैंतालिस) वर्ष हो चुके हैं। इसी प्रकार गुरमीत सिंह द्वारा बयान कागज संख्या 15 में कहा गया है कि मुझे व्यापार में 30 (तीस) वर्ष हो चुके हैं। पत्रावली पर उपलब्ध कागज संख्या 43ग, 44ग तथा 45ग आदि से मात्र इतना स्पष्ट हो रहा है कि गुरमीत सिंह सन 1984 के दंगो में प्रभावित होने के कारण क्षतिपूर्ति प्राप्त करने के अधिकारी पाए गए थे। रंजीत सिंह का नाम उक्त प्रपत्रों में कहीं नहीं है। इस प्रकार 5 जुलाई 1976 के पूर्व पुनरीक्षणकर्तागण का कब्जा साबित नहीं है। ऐसी स्थिति में अवर न्यायालय द्वारा पुनरीक्षणकर्तागण को धारा 14 यू0पी0 एक्ट नंबर 13 सन 72 का लाभ प्रदान न कर कोई त्रुटि कारित नहीं की गई है।"

35. There is indeed nothing on record to indicate that the petitioners were in occupation of the shops in dispute before 05.07.1976, either as licensees or tenants, with the landlord's consent. The findings of the Revisional Court, as above recorded, are well borne out from the evidence and there is no reason for this Court to take a different view, in exercise of our jurisdiction under Article 226 of the Constitution. This Court must also remark that the RC & EO has very validly taken note of the fact that there is not

a solitary rent receipt placed on record to show that the petitioners ever paid rent for the shops in dispute to the respondent-landlady. This Court also finds that there is no material to show that at any stage in point of time, the petitioners paid rent to whoever was the landlord for the time being. Until his death, it was Sardar Sundar Singh alone who was the lawful and recorded tenant of the shops in dispute. His heirs entitled to inherit having not come forward to claim it, the finding of a vacancy must logically follow. If the petitioners' occupation at some point of time after Sardar Sundar Singh fell ill is to be taken note of, where they claim to carrying of business separately in the two shops, the finding of deemed vacancy is inescapable, as the petitioners are not members of Sardar Sundar Singh's family.

36. The impugned orders passed by the RC & EO and the learned Additional District Judge are flawless, both in law and equity - equity this Court says because after all, the petitioners never contracted a tenancy of the shops in dispute with the landlady or an earlier landlord. They have tried to attempt a backdoor entry to claim their uncle's tenancy, to which they are not entitled under the law. They have never paid rent to the respondent-landlady or any earlier landlord, which decisively tips the scale of equity against the petitioners.

37. In the result, this petition fails and stands dismissed with costs. The RC & EO is free to enforce the impugned order of release dated 14.12.2018 passed in favour of respondent no. 3.

38. Let this order be communicated to the RC & EO/Additional City Magistrate-VII, Kanpur Nagar through the District Magistrate, Kanpur Nagar by the Registrar (Compliance).

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**(2021)10ILR A576**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 20.09.2021**

**BEFORE**

**THE HON'BLE PRAKASH PADIA, J.**

Matters Under Article - 227 No. 3825 of 2021 (Civil)

**Smt. Archana Kanaujia & Anr....Petitioners**
**Versus**
**Pooja Educational & Social Devp. Trust, Gorakhpur & Ors. ...Respondents**

**Counsel for the Petitioners:**
Sri Raj Kumar Pandey

**Counsel for the Respondents:**
Sri Kamlesh Kumar Mishra, Sri A.P. Tiwari

**Civil Law - Code of Civil Procedure, 1908 - In the original suit-an application under Order XXXIX Rule 1 CPC filed for grant of interim injunction & anr. application was filed for interim injunction-during pendency-defendant filed application under Order 7 rule 11 (D) of C.P.C.-lower court rejected the Application of injunction without considering the Application under Order VII Rule 11 (D)-impugned order bad-Court below directed to pass appropriate orders on Application under Order 7 Rule 11(d) of CPC and thereafter any order in application for interim injunction be passed.**

**W.P. allowed.** (E-9)

**List of Cases cited:**

1. Azhar Hussain Vs Rajiv Gandhi reported in 1986 (Supp) SCC 315

2.R.K. Roja Vs Rayudu reported in (2016) 14 SCC 275

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

**Order on the Recall Application No.2 of 2021**

1. Civil Misc. Recall Application No. 2 of 2021 has been filed by the contesting respondent nos. 1 & 2 to recall the order dated 11.8.2021 passed by this Court in the present petition.

2. Today when the matter is taken up, a prayer has been made by Sri Kamlesh Kumar Mishra, learned counsel appearing on behalf of the respondent nos. 1 & 2 that the respondent nos. 1 & 2 do not want to press the present recall application.

3. The recall application is dismissed as not pressed.

**Order on the Petition**

1. The affidavit of service filed in the Court today is taken on record.

2. It is stated by learned counsel for the respondent nos. 1 & 2 that he does not propose to file counter affidavit in the present petition.

3. Heard learned counsel for the petitioners and Sri A.P. Tiwari Advocate along with Sri Kamlesh Kumar Mishra, learned counsel for the contesting respondent nos. 1 & 2.

4. The petitioners have preferred the present petition under Article 227 of the Constitution of India inter-alia with the following prayer :

*"(1) Set aside impugned order dated 12.7.2021 passed by the learned Civil Judge, Senior Division, Gorakhpur in Original Suit No. 298 of 2021 (Pooja Educational and others vs. Rajesh Kumar Raina and others) only to the extent it observes that the application '49Ga' jointly filed by the petitioner no. 1/defendant no. 2 and respondent no. 3/defendant no. 3 under Order 7 Rule 11(d) of C.P.C. shall be heard and decided after hearing and disposal of interim injunction application '7C' filed on behalf of the respondents/plaintiffs under Order 39 Rule 1 of C.P.C. on the next date fixed in the case."*

5. Facts in brief as contained in the petition are that an Original Suit No.298 of 2021 (Pooja Educational and others Vs. Rajesh Kumar Raina and others) has been filed by Pooja Educational and Social Development Trust and others in the Court of Civil Judge (S.D.) Gorakhpur. In the aforesaid suit, an application under Order XXXIX Rule 1 CPC being Application No.7 C for grant of interim injunction was also filed on 13.04.2021. Subsequently, another application was also filed on 22.6.2021 for grant of interim injunction till the disposal of application No.7C. During the pendency of the aforesaid application, defendants preferred an application as provided under Order 7 Rule 11 (D) of C.P.C. stating therein that the suit is barred by Order VII Rule (IV-A)) as per Suit Valuation Act as well as Court Fees Act. The aforesaid application was marked as Paper No.49 Ga. The aforesaid application was rejected by the Trial Court vide judgement and order dated 12.07.2021. Aggrieved against the aforesaid order, the petitioners have preferred the present petition.

6. It is argued by learned counsel for the defendants/petitioners that once an application has been preferred under Order VII Rule 11 (D) C.P.C. it is settled law that the court should decide the said application

first and only thereafter to proceed with the injunction application. Learned counsel for the petitioners relied upon a Division Bench judgement of this Court in the case of Arun Kumar Tiwari Vs. Deep Sharma (First Appeal From Order No.3481 of 2004) decided on 15.2.2006. In support of his argument, learned counsel for the petitioners relied upon paragraph 11 of the aforesaid judgement, the same is quoted below:-

*"11. It was contended that that in view of the spirit of the aforesaid provision it was very much necessary for the court to have first decided the matter of court fees ( when it had been raised ) and then it should have considered the injunction application. It was further submitted that it is virtually a dummy suit which has been filed at the instance of previous owners of the house by the plaintiff tenants because otherwise there was no necessity for the plaintiff tenants to challenge the sale deed executed by defendant no.1 in favour of defendant no. 5. He pointed out that no service could yet be effected upon the previous owners (defendants no. 1 to 4 ) inspite of the fact that the suit was filed in the year 2003 and the only purpose of the suit filed by the tenant is to raise the un-necessary dispute of ownership of the property among the defendants inter se so that the matter may not be considered and decided early, and the plaintiff tenants may be able to continue in the disputed rooms for a long period. There appears some force in these contentions of the defendant appellant."*

7. On the other hand, it is argued Sri A.P. Tiwari, learned counsel for the respondent Nos.1 and 2 that order passed by the court below is absolutely perfect and valid and does not call for any interference by this Court. He further argued that there is no illegality or irregularity cause by the Court below while directing that the application No.7C should be decided first.

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

9. From perusal of the record, it is clear that during the pendency of the suit in which injunction application was filed, an application under Order VII Rule 11(D) C.P.C. was also filed by the defendants.

10. The power conferred by Order VII Rule 11 is primarily to ensure that a suit which discloses no cause of action or is otherwise barred in law is brought to an end at the threshold. This obviates the courts from undertaking a full fledged trial and then ultimately coming to a conclusion either that the plaint discloses no cause of action or that the jurisdiction of the court stands ousted by law. The legislative policy underlying Order VII Rule 11 was pithily explained by the Supreme Court in ***Azhar Hussain Vs. Rajiv Gandhi reported in 1986 (Supp) SCC 315*** in the following terms:-

*"12. Learned counsel for the petitioner has next argued that in any event the powers to reject an election petition summarily under the provisions of the Code of Civil Procedure should not be exercised at the threshold. In substance, the argument is that the court must proceed with the trial, record the evidence, and only after the trial of the election petition is concluded that the powers under the Code of Civil Procedure for dealing appropriately with the defective petition which does not disclose cause of action should be exercised. With respect to the learned counsel, it is an argument which it is difficult to comprehend. The whole*

*purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court and exercise the mind of the respondent. The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose. Even in an ordinary civil litigation the court readily exercises the power to reject a plaint if it does not disclose any cause of action. Or the power to direct the concerned party to strike out unnecessary, scandalous, frivolous or vexatious parts of the pleadings. Or such pleadings which are likely to cause embarrassment or delay the fair trial of the action or which is otherwise an abuse of the process of law. An order directing a party to strike out a part of the pleading would result in the termination of the case arising in the context of the said pleading. The courts in exercise of the powers under the Code of Civil Procedure can also treat any point going to the root of the matter such as one pertaining to jurisdiction or maintainability as a preliminary point and can dismiss a suit without proceeding to record evidence and hear elaborate arguments in the context of such evidence, if the court is satisfied that the action would terminate in view of the merits of the preliminary point of objection. The contention that even if the election petition is liable to be dismissed ultimately it should be so dismissed only after recording evidence is a thoroughly misconceived and untenable argument. The powers in this behalf are meant to be exercised to serve the purpose for which the same have been conferred on the competent court so that the litigation comes to an end at the earliest and the concerned litigants are relieved of the psychological burden of the litigation so as to be free to follow their ordinary pursuits and discharge their duties. And so that they can adjust their affairs on the footing that the litigation will not make demands on their time or resources, will not impede their future work, and they are free to undertake and fulfil other commitments. Such being the position in regard to matter pertaining to ordinary civil litigation, there is greater reason for taking the same view in regard to matters pertaining to elections. .....To wind up the dialogue, to contend that the powers to dismiss or reject an election petition or pass appropriate orders should not be exercised except at the stage of final judgment after recording the evidence even if the facts of the case warrant exercise of such powers, at the threshold, is to contend that the legislature conferred these powers without point or purpose, and we must close our mental eye to the presence of the powers which should be treated as non-existent. The court cannot accede to such a proposition. The submission urged by the learned counsel for the petitioner in this behalf must therefore be firmly repelled." (emphasis supplied)*

11. The aforesaid proposition of law has been reiterated by the Hon'ble Apex Court in the case of ***R.K. Roja Vs. Rayudu reported in (2016) 14 SCC 275***. In the aforesaid judgement, following observations were made by the Hon'ble Apex Court :-

*"5. Once an application is filed under Order 7 Rule 11 CPC, the court has to dispose of the same before proceeding with the trial. There is no point or sense in proceeding with the trial of the case, in case the plaint (election petition in the present case) is only to be rejected at the threshold. Therefore, the defendant is entitled to file the application for rejection before filing his written statement. In case*

*the application is rejected, the defendant is entitled to file his written statement thereafter (see Saleem Bhai v. State of Maharashtra [Saleem Bhai v. State of Maharashtra, (2003) 1 SCC 557] ). But once an application for rejection is filed, the court has to dispose of the same before proceeding with the trial court. To quote the relevant portion from para 20 of Sopan Sukhdeo Sable case [Sopan Sukhdeo Sable v. Charity Commr., (2004) 3 SCC 137]: (SCC pp. 148-49)*

*"20. ... Rule 11 of Order 7 lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word "shall" is used, clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant."*

*6. In Saleem Bhai v. State of Maharashtra, (2003) 1 SCC 557, this Court has also held that: (SCC p. 560, para 9)*

*"9. ... a direction to file the written statement without deciding the application under Order 7 Rule 11 cannot but be a procedural irregularity touching the exercise of jurisdiction by the trial court."*

*However, we may hasten to add that the liberty to file an application for rejection under Order 7 Rule 11 CPC cannot be made as a ruse for retrieving the lost opportunity to file the written statement.*

*7. Apparently, in the present case, it is seen that Annexure P-4, affidavit dated 15-3-2015, with a prayer ... "to dismiss the present election petition under Order 7 Rule 11 CPC...", was filed within thirty days of the receipt of the summons in the election petition. However, the court was not inclined to consider the same in the absence of a formal application, and thus, Annexure P-5, Application No. EA No. 222 of 2016 was filed on 22-2-2016 leading to the impugned order, posting the application for consideration at the time of final hearing.*

*8. The procedure adopted by the court is not warranted under law. Without disposing of an application under Order 7 Rule 11 CPC, the court cannot proceed with the trial. In that view of the matter, the impugned order is only to be set aside. Ordered accordingly." (emphasis supplied)*

12. From the discussion made above as well as the decisions as stated above, it is clear that the court below has committed a manifest and grave error of law. A litigation which is vexatious or is otherwise contended to be barred by law cannot be permitted to proceed to a full length trial. This would clearly be contrary to the legislative intendment underlying under Order VII Rule 11. Adoption of a course of action as has been done by the court below in the facts of the present case would clearly do injustice to a valuable right conferred upon a defendant by the aforementioned provision.

13. Considering the facts and circumstances of the case and also in the interest of justice, the Court is of the opinion that the order passed by the court below dated 12.7.2021 is liable to be set aside and is hereby set aside. The court

below is directed to pass appropriate orders on the application filed under Order 7 Rule 11(d) of C.P.C. most expeditiously, preferably within a period of three months from the date of presentation of a copy of this order. It is made clear that the court below shall pass an order on the application for interim injunction only after order is passed on the application filed under Order 7 Rule 11(d) of C.P.C.

14. The petition is allowed with the aforesaid directions.

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**(2021)10ILR A581**
**REVISIONAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 13.09.2021**

**BEFORE**

**THE HON'BLE RAJEEV MISRA, J**

Criminal Revision No. 987 of 2021

**Punit Yadav ...Revisionist**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Revisionist:**
Sri Rajiv Lochan Shukla, Sri Abhishek Narayan Pandey

**Counsel for the Opposite Parties:**
A.G.A., Sri Mool Chandra Maurya, Sri Anil Srivastava (Senior Adv.)

**Criminal Law - Code of Criminal Procedure, 1973 - Section 319 - Revisionist summoned to face the trial-summoning order impugned-Revisionist was named in FIR-not chargesheeted-complicity of Revisionist in crime stands established-he damaged teh car-eye witness-two Pws deposed Revisionist's pressence-summoning order legal.**

**Revision dismissed.** (E-9)

**List of Cases cited:**

1. Hardeep Singh Vs St. of Punj.& ors., (2014) 3 SCC 92,

2. S. Mohammed Ispahani Vs Yogendra Chandak & ors., (2017) 16 SCC 226

3. Brijendra Singh & ors. Vs St. of Raj., (2017) SCC 706.

4. Dharam Pal & ors. Vs St. of Har. & anr., (2014) 3 SCC 306 (Constitution Bench)

5. Hardeep Singh Vs St. of Punj. & ors., (2014) 3 SCC 92 (Constitution Bench)

6. Babubhai Bhimabhai Bokhiria & anr. Vs St.of Guj. & ors., (2014) 5 SCC 568

7. Jogendra Yadav & ors. Vs St. of Bihar & anr., (2015) 9 SCc 244

8. Brijendra Singh & ors. Vs St.of Raj., (2017) SCC 706

9. S Mohammed Ispahani Vs Yogendra Chandak & ors., (2017) 16 SCC 226

10. Deepu @ Deepak Vs Sta. of M.P., (2019) 2 SCC 393

11. Dev Wati & ors. Vs St. of Har. & anr. (2019) 4 SCC 329

12. Periyasamai & ors. Vs S.Nallasamy, (2019) 4 SCC 342

13. Sunil Kumar Gupta & ors. Vs St. of U.P. & ors., (2019) 4 SCC 556

14. Rajesh & ors. Vs St of Har, (2019) 6 SCC 368

15. Sukhpal Singh Khaira Vs St of Punj, (2019) 6 SCC 638

16. Mani Pushpak Joshi Vs St of Uttarakhand & anr., (2019) 9 SCC 805

17. Sugreev Kumar Vs St of Punj & ors., (2019) SCC Online Sc 390

18. Labhuji Amratji Thakor Vs St of Guj, (2019) 12 SCC 644

19. Shiv Prakash MMishra Vs St of U.P. & anr., (2019) 7 SCC 806

20. Sartaj Singh Vs St. of Har. & anr., (2021) 5 SCC 337

21. Manjeet Singh Vs St. of Har. & ors., 2021 SCC Online SC 632

22. Labhuji Amratji Thakor Vs St. of Guj., (2019) 12 SCC 644

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

1. Heard Mr. Rajiv Lochan Shukla, learned counsel for revisionist, Mr. Prashant Kumar, learned A.G.A. along with Mr. P.K. Sahi, learned brief holder for State and Mr. M.C. Maurya, learned counsel for opposite party-2.

2. Perused the record.

3. This criminal revision has been filed challenging order dated 15.2.2021, passed by Second Additional District and Sessions Judge, Kasganj, in Sessions Trial No. 329 of 2018 (State Vs. Vineet Yadav and Others), under sections 307, 427, 506 and 325 IPC, Police Station- Sidhpura, District Kasganj, arising out of Case Crime No. 150 of 2018, under sections 307, 427, 506 and 325 IPC, Police Station- Sidhpura, District Kasganj, whereby application under section 319 Cr.P.C. filed by first informant/opposite party-2 Rajesh Kumar has been allowed. Consequently, applicant has been summoned to face trial in above mentioned case.

4. Record shows that in respect of an incident, which is alleged to have occurred on 5.7.2018, first informant/opposite party-2 Rajesh Kumar lodged a prompt F.I.R. dated 5.7.2018, which was registered as Case Crime No. 0150 of 2018 under sections 307, 427, 506 IPC, P.S. Sidhpura, District Kasganj. In the aforesaid F.I.R., as many as four persons namely, Vineet Yadav, Khavendra, Pintu and Punit Yadav have been nominated as named accused.

5. In brief prosecution story as unfolded in F.I.R dated 5.7.2018, alleges that five persons namely, Rajesh Kumar, Sandeep, Om Prakash, Babu Ram and Ram Chandra Gola were travelling in a car having Registration No. DL1ZA7581 (Tata Indigo) belonging to Ram Chandra Gola. When the car reached at the culvert near village Sunvai accused persons namely, Vineet Yadav, Khavendra, Pintu and Puneet Yadav came from the front and damaged the vehicle by using Lathi and Danda. It is also alleged that one of the named accused, Vineet Yadav fired at Ram Chandra Gola from behind on account of which, he sustained gun-shot injury on his head.

6. After registration of above mentioned F.I.R., injured Raju Sakya, Ram Chandra, Shekher and Sandeep were medically examined. Their medico legal reports are on record as Annexure-2 to the affidavit collectively. Perusal of aforesaid medical report goes to show that injured Raju Sakya has sustained injury on his left thumb, caused by blunt object, injured Ram Chandra has sustained one lacerated wound on his skull caused by fire arm, injured Shekhar has sustained two contusions and one abrasion, caused by hard and blunt object, injured Om Prakash has sustained traumatic swelling on lateral aspects of right forearm caused by hard and blunt object. Thereafter, Investigating Officer proceeded with statutory investigation of

concerned case crime number in terms of Chapter XII Cr.P.C. During course of investigation, Investigating Officer examined first informant and other witnesses, who have supported the prosecution story, as unfolded in F.I.R. On the basis of above, as well as other material collected by Investigating Officer, during course of investigation, which is substantially adverse to named accused, Investigating Officer opined to submit a charge sheet. Accordingly, Investigating Officer submitted charge sheet dated 15.9.2019, whereby and whereunder three of the named accused namely, Vineet Yadav, Khavendra and Pintu have been charge sheeted under sections 307, 427, 506 and 325 IPC, whereas one named accused, Punit Yadav, i.e., (applicant herein) has been exculpated. Perusal of charge sheet further goes to show that as many as 17 prosecution witnesses have been nominated therein.

7. After submission of above mentioned charge sheet, cognizance was taken upon same by concerned Magistrate. Since offence complained of was triable by court of Sessions, accordingly, concerned Magistrate, committed the case to the Court of Sessions. Resultantly, Sessions Trial No. 329 of 2018 (State Vs. Vineet Yadav and Others), under sections 307, 427, 506 and 325 IPC, Police Station- Sidhpura, District Kasganj, came to be registered.

8. Trial commenced. Charges were framed against charge sheeted accused who denied the same. Consequently, burden fell upon prosecution to establish the charges so framed by leading evidence.

9. In discharge of aforesaid burden, prosecution adduced first informant, Rajesh Kumar as P.W. 1. His statement-in-chief and examination-in-chief were recorded. After statement-in-chief/examination-in-chief of P.W.1 had been recorded, first informant/opposite party-2, who is also P.W.1, filed an application dated 2.3.2019, in terms of Section 319 Cr.P.C., praying therein, that since complicity of non charge sheeted but named accused Puneet Yadav is also established in the crime in question, as per his testimony therefore, he be also summoned under section 319 Cr.P.C. to face trial in above mentioned case.

10. While aforesaid application was pending, statement-in-chief/examination-in-chief of P.W.2 Sandeep was also recorded.

11. Application under section 319 Cr.P.C. filed by first informant/opposite party-2 was opposed by charge sheeted accused by filing objections to the same. However, copy of objection so filed has not been brought on record. Ultimately, court below by means of order dated 5.2.2021, allowed the application under section 319 Cr.P.C. and consequently, summoned revisionist Punit Yadav to face trial in above mentioned criminal case.

12. Feeling aggrieved by above, revisionist- Punit Yadav has now approached this Court by means of present criminal revision.

13. Mr. Rajiv Lochan Shukla, learned counsel for revisionist submits that order impugned in present criminal revision is manifestly illegal and without jurisdiction. Same is unsustainable in law and fact. It is then contended by learned counsel for revisionist that revisionist was nominated as one of the named accused in F.I.R. dated 5.7.2018. However, during investigation, no such material was gathered by

Investigating Officer on the basis of which, complicity of present applicant was found to be established in the crime in question. Resultantly, applicant has been exculpated in the charge sheet dated 15.9.2018. He, further, submits that Investigating Officer of concerned case crime number has not yet been examined by Court below. In such circumstance, court below ought to have deferred the disposal of application under section 319 Cr.P.C. filed by first informant/opposite party-2, till statement-in-chief of Investigating Officer was recorded as he will be the best person to demonstrate as to under what circumstances, complicity of present applicant was not found to be established in the crime in question. As court below has pre-empted the disposal of application under Section 319 Cr.P.C., serious prejudice has been caused to applicant. It is lastly submitted that no cast iron case is made out for summoning present applicant as per testimonies of P.W.1 Rajesh Kumar and P.W.2 Sandeep. Nothing new has been stated by P.W.1 and P.W.2 in their deposition before Court below than what was stated in their statements under section 161 Cr.P.C. before Investigating Officer. Impugned order passed by Court below is, thus, in teeth of Constitution Bench judgement in **Hardeep Singh Vs. State of Punjab and Others, (2014) 3 SCC 92,** as well as law laid down in **S. Mohammed Ispahani Vs. Yogendra Chandak and Others, (2017) 16 SCC 226** and **Brijendra Singh and Others Vs. State of Rajasthan, (2017) SCC 706**. Court below has thus failed to exercise its jurisdiction "diligently" and has summoned revisionist in a "casual and cavalier manner", inasmuch as, there is no "strong nor cogent evidence" against revisionist, which is a pre-condition for summoning a prospective accused under Section 319 Cr.P.C.

14. On the cumulative strength of above, Mr. Rajiv Lochan Shukla, learned counsel for revisionist vehemently contends that present criminal revision is liable to be allowed and impugned order be set aside.

15. Per contra, learned A.G.A. has opposed this criminal revision. Learned A.G.A. contends that statement-in-chief of P.W.1- Rajesh Kumar is alone material for deciding the application under Section 319 Cr.P.C. as he is a prosecution witnesses of fact,. as per law laid down by Constitution Bench in **Hardeep Singh (Supra)**. However, in the present case, P.W.1 has also been cross-examined. Apart from above, P.W.2 has also deposed before court below. His examination-in-chief has also been recorded. No illegality has been committed by court below in placing reliance upon testimonies of P.W.1 and P.W.2, who have been cross-examined. Statements of P.W.1 and P.W.2- thus falls in the realm of legal evidence. Therefore court below has rightly proceeded to pass order dated 21.01.2021 by placing reliance upon same. No irregularity or illegality has been committed by court below in passing impugned order dated 21.01.2021. From perusal of testimonies of P.W.1 and P.W.2 complicity of present applicant in the crime in question is fully established. P.W.1 and P.W.2 are eye witnesses of the occurrence. P.W.2 is also an injured witness. His testimony has to be held to be more credible and reliable. As such Court below has exercised its jurisdiction "diligently" and not in a "casual and caviliar manner". Applicant has been summoned on the basis of "strong and cogent" evidence that has emerged against him during course of above mentioned sessions trial. It cannot be said at this stage that "applicants cannot be tried along with other accused" and further that "if the evidence which has been

recorded up to this stage goes unrebutted would not lead to conviction of revisionist". Police report submitted by Investigating Officer is not conclusive proof of innocence of revisionist. Even though, revisionist has been exculpated by Investigating Officer, same cannot be taken as a ground to urge that revisionist cannot be subsequently summoned to face trial. Revisionist will have adequate opportunity to prove his innocence before court below during course of trial by adducing Investigating Officer as a defence witness also. No attempt has been made to draw a parallel between the statements of P.W.1 and P.W.2 as recorded under Section 161 Cr.P.C. and their depositions made before court below. No ground has been raised in the grounds of revision that P.W.1 and P.W.2 have not stated anything new in their depositions before Court below than what was stated by them in their statements under Section 161 Cr.P.C. On the aforesaid premise, it is, thus, urged by learned A.G.A. that revisionist is not entitled to any indulgence by this Court. Consequently, present criminal revision is liable to be dismissed.

16. Having heard learned counsel for revisionist, learned A.G.A. for State and upon perusal of record, this Court finds that the issue, which arises for determination in present criminal revision is: What are the parameters for exercise of jurisdiction under section 319 Cr.P.C As a corollary to above, whether the order impugned is within the established parameters or not.

17. Parameters regarding exercise of jurisdiction by Courts under section 319 Cr.P.C. has been considered time and again by Supreme Court. The chronology of same is as under:

**(i) Dharam Pal and Others Vs. State of Haryana and Another, (2014) 3 SCC 306 (Constitution Bench)**

**(ii) Hardeep Singh Vs. State of Punjab and Others, (2014) 3 SCC 92 (Constitution Bench)**

**(iii) Babubhai Bhimabhai Bokhiria and Another Vs. State of Gujarat and Others, (2014) 5 SCC 568**

**(iv) Jogendra yadav and Others Vs. State of Bihar and Another, (2015) 9 SCc 244**

**(v) Brijendra Singh and Others Vs. State of Rajasthan, (2017) SCC 706**

**(vi) S Mohammed Ispahani Vs. Yogendra Chandak and Others, (2017) 16 SCC 226**

**(vii) Deepu @ Deepak Vs. State of Madhya Pradesh, (2019) 2 SCC 393**

**(viii) Dev Wati and Others Vs. State of Haryana and Another (2019) 4 SCC 329**

**(ix) Periyasamai and Others Vs. S.Nallasamy, (2019) 4 SCC 342**

**(x) Sunil Kumar Gupta and Others Vs. State of Uttar Pradesh and Others, (2019) 4 SCC 556**

**(xi) Rajesh and Others Vs. State of Haryana, (2019) 6 SCC 368**

**(xii) Sukhpal Singh Khaira Vs. State of Punjab, (2019) 6 SCC 638**

**(xiii) Mani Pushpak Joshi Vs. State of Uttarakhand and Another, (2019) 9 SCC 805**

**(xiv) Sugreev Kumar Vs. State of Punjab and Others, (2019) SCC Online Sc 390**

**(xv) Labhuji Amratji Thakor Vs. State of Gujarat, (2019) 12 SCC 644**

**(xvi) Shiv Prakash Mishra Vs. State of Uttar Pradesh and Another, (2019) 7 SCC 806**

**(xvii) Sartaj Singh Vs. State of Haryana and Another, (2021) 5 SCC 337**

**(xviii) Manjeet Singh Vs. State of Haryana and Others, 2021 SCC Online SC 632**

18. To begin with, a constitution Bench of Supreme Court in **Dharam Pal (Supra)** considered the provisions of Sections 193, 190, 319, 209, 173(2) and 200 to 204 Cr.P.C. and held that Sessions Judge has power to summon non charge sheeted accused after the case has been committed to Court of Sessions under section 193 Cr.P.C and for this purpose need not wait for evidence to be recorded so that non charge sheeted accused could be summoned under section 319 Cr.P.C.

19. Subsequently, in **Hardeep Singh (Supra)**, another constitution Bench of Supreme Court considered the parameters for exercise of jurisdiction under section 319 Cr.P.C. The Constitution Bench upon consideration of various provisions of Indian Evidence Act, Code of Criminal Procedure as well as underlying principles of Section 319 Cr.P.C. framed five questions for defining the parameters for exercising jurisdiction under Section 319 Cr.P.C. Thereafter, Court held as under in paragraphs 4, 5, 6, 6.5, 7, 11, 55, 56, 57, 85, 92, 105, 106, 116, 117.1 to 117.6:

***"4. Reference made in Dharam Pal (Supra) came to be answered in relation to the power of a Court of Sessions to invoke Section 319 Cr.P.C. at the stage of committal of the case to a Court of Sessions. The said reference was answered by the Constitution Bench in the case of Dharam Pal & Ors. v. State of Haryana & Anr., AIR 2013 SC 3018 [hereinafter called 'Dharam Pal (CB)'], wherein it was held that a Court of Sessions can with the aid of Section 193 Cr.P.C. proceed to array any other person and summon him for being tried even if the provisions of Section 319 Cr.P.C. could not be pressed in service at the stage of committal.***

***5.Thus, after the reference was made by a three-Judge Bench in the present case, the powers so far as the Court of Sessions is concerned, to invoke Section 319 Cr.P.C. at the stage of committal, stood answered finally in the aforesaid background.***

***6. On the consideration of the submissions raised and in view of what has been noted above, the following questions are to be answered by this Bench:***

***6.1 (i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?***

***6.2 (ii) Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?***

***6.3 (iii) Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?***

***6.4 (iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319(1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood convicted?***

***6.5 (v) Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR***

*but not charged or who have been discharged?*

*7. In this reference what we are primarily concerned with, is the stage at which such powers can be invoked and, secondly, the material on the basis whereof the invoking of such powers can be justified. To add as a corollary to the same, thirdly, the manner in which such power has to be exercised, also has to be considered.*

*11. Section 319 Cr.P.C. as it exists today, is quoted hereunder:*

*"319 Cr.P.C. -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-*

*(5) (a) the proceedings in respect of such person shall be commenced afresh, 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."*

*55. Accordingly, we hold that the court can exercise the power under Section 319 Cr.P.C. only after the trial proceeds and commences with the recording of the evidence and also in exceptional circumstances as explained herein above.*

*56. There is yet another set of provisions which form part of inquiry relevant for the purposes of Section 319 Cr.P.C. i.e. provisions of Sections 200, 201, 202, etc. Cr.P.C. applicable in the case of Complaint Cases. As has been discussed herein, evidence means evidence adduced before the court. Complaint Cases is a distinct category of criminal trial where some sort of evidence in the strict legal sense of Section 3 of the Evidence Act 1872, (hereinafter referred to as the 'Evidence Act') comes before the court. There does not seem to be any restriction in the provisions of Section 319 Cr.P.C. so as to preclude such evidence as coming before the court in Complaint Cases even before charges have been framed or the process has been issued. But at that stage as there is no accused before the Court, such evidence can be used only to corroborate the evidence recorded during the trial for the purpose of Section 319 Cr.P.C., if so required. What is essential for the purpose of the section is that there should appear some evidence against a person not proceeded against and the stage of the proceedings is irrelevant. Where the complainant is circumspect in proceeding against several persons, but the court is of the opinion that there appears to be some evidence pointing to the complicity of some other persons as well, Section 319 Cr.P.C. acts as an empowering provision enabling the*

***court/Magistrate to initiate proceedings against such other persons. The purpose of Section 319 Cr.P.C. is to do complete justice and to ensure that persons who ought to have been tried as well are also tried. Therefore, there does not appear to be any difficulty in invoking powers of Section 319 Cr.P.C. at the stage of trial in a complaint case when the evidence of the complainant as well as his witnesses is being recorded.***

***57. Thus, the application of the provisions of Section 319 Cr.P.C., at the stage of inquiry is to be understood in its correct perspective. The power under Section 319 Cr.P.C. can be exercised only on the basis of the evidence adduced before the court during a trial. So far as its application during the course of inquiry is concerned, it remains limited as referred to hereinabove, adding a person as an accused, whose name has been mentioned in Column 2 of the charge sheet or any other person who might be an accomplice***

***85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C. The 'evidence' is thus, limited to the evidence recorded during trial.***

***92. 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 which can be gathered from the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence.***

***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 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not 'for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused.***

***116. Thus, it is evident that power under Section 319 Cr.P.C. can be exercised against a person not subjected to investigation, or a person placed in the***

*Column 2 of the Charge-Sheet and against whom cognizance had not been taken, or a person who has been discharged. However, concerning a person who has been discharged, no proceedings can be commenced against him directly under Section 319 Cr.P.C. without taking recourse to provisions of Section 300(5) read with Section 398 Cr.P.C.*

*117. We accordingly sum up our conclusions as follows:*

*Questions (i) and (iii)*

*- What is the stage at which power under Section 319 Cr.P.C. can be exercised?*

*AND*

*- Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?*

*Answer*

*117.1. In Dharam Pal case, the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of investigation. Such cognizance can be taken under Section 193 Cr.P.C. and the Sessions Judge need not wait till 'evidence' under Section 319 Cr.P.C. becomes available for summoning an additional accused.*

*117.2. Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the charge-sheet.*

*117.3. In view of the above position the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.*

*Question (ii)- Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?*

*Answer*

*117.4. Considering the fact that under Section 319 Cr.P.C. a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) Cr.P.C. the proceeding against such person is to commence from the stage of taking of cognizance, the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.*

*Question (iv)- What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319 (1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?*

*Answer.*

*117.5. Though under Section 319(4)(b) Cr.P.C. the accused*

***subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for ?framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial - therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.***

***Question (v)- Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charge-sheeted or who have been discharged?***

***Answer***

***117.6. A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned the requirement of ?Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh."***

20. After aforesaid Constitution Bench judgement, the issue as involved in present application again came up for consideration before Supreme Court in **Babubhai Bhimabhai Bokhiria (Supra)**, wherein Court dealt with the issue of summoning of a non charge sheeted accused under section 319 Cr.P.C. who was alleged to be involved in the crime in question on the basis of dying declaration. The issue that arose for consideration was whether on the basis of dying declaration an inference of guilt could be drawn against non-charge sheeted accused sought to be summoned in a case, which arose out of an F.I.R. registered at Kalambaug Police Station Porbandar under Sections- 302, 201, 34, 120B, 465, 468, 471 I.P.C. and Section- 25 of Arms Act. Court took notice of paragraphs 105 and 106 of the Constitution Bench judgement in **Hardeep Singh's case (Supra)** and deduced as follows in paragraphs 7, 8, 9, 15, 20, 21 and 22:

***"7. Before we proceed to deal with the evidence against the appellant and address whether in light of the evidence available, power under Section 319 of the Code was validly exercised, it would be expedient to understand the position of law in this regard. The issue regarding the scope and extent of powers of the court to arraign any person as an accused during the course of inquiry or trial in exercise of power under Section 319 of the Code has been set at rest by a Constitution Bench of this Court in Hardeep Singh v. State of Punjab[(2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86 : (2014) 1 Scale 241] . On a review of the authorities, this Court summarised the legal position in the following words: (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."*

*8. Section 319 of the Code confers power on the trial court to find out whether a person who ought to have been added as an accused has erroneously been omitted or has deliberately been excluded by the investigating agency and that satisfaction has to be arrived at on the basis of the evidence so led during the trial. On the degree of satisfaction for invoking power under Section 319 of the Code, this Court observed that though the test of prima facie case being made out is same as that when the cognizance of the offence is taken and process issued, the degree of satisfaction under Section 319 of the Code is much higher.*

*9. Having summarised the law on the degree of satisfaction required by the courts to summon an accused to face trial in exercise of power under Section 319 of the Code, we now proceed to consider the submissions advanced by the learned counsel.*

*15. In the present case, except the apprehension expressed by the deceased, the statement made by him does not relate to the cause of his death or to any circumstance of the transaction which resulted in his death. Once we hold so, the note does not satisfy the requirement of Section 32 of the Act. The note, therefore, in our opinion, is not admissible in evidence and, thus, cannot be considered as such to enable exercise of power under Section 319 of the Code.*

*20. Now we revert to the authority of this Court in Rattan Singh [Rattan Singhv. State of H.P., (1997) 4 SCC 161 : 1997 SCC (Cri) 525] relied on by Dr Singhvi. In the said case, the deceased immediately before she was fired at, spoke out that the accused was standing nearby with a gun. In a split second the sound of firearm shot was heard and in a trice her life snuffed off. In the said background, this Court held that the words spoken by the deceased have connection with the circumstance of transaction which resulted into death. In the case in hand, excepting apprehension, there is nothing in the note. No circumstance of any transaction resulting in the death of the deceased is found in the note. Hence, this decision in no way supports the contention of Dr Singhvi.*

*21. The other evidence sought to be relied for summoning the appellant is the alleged conversation between the appellant and the accused on and immediately after the day of the occurrence. But, nothing has come during the course of trial regarding the content of the conversation and from the call records alone, the appellant's complicity in the crime does not surface at all.*

*22. From what we have observed above, it is evident that no evidence has at all come during the trial which shows*

***even a prima facie complicity of the appellant in the crime. In that view of the matter, the order passed by the trial court summoning the appellant, as affirmed by the High Court, cannot be allowed to stand."***

21 Subsequently in **Jogendra yadav (Supra)**, Court considered the issue as to whether a non-charge sheeted accused summoned under section 319 Cr.P.C. can claim discharge under section 227 Cr.P.C. Court referred to observations contained in paragraphs 105 and 106 of the Constitution Bench judgement in **Hardeep Singh's case** in paragraph 10 of the judgement and delineated the rights of an accused summoned under section 319 Cr.P.C. to claim discharge in paragraph-13 of the judgement, which reads as under:

***"13. We are not unmindful of the fact that the interpretation placed by us on the scheme of Sections 319 and 227 makes Section 227 unavailable to an accused who has been added under Section 319 CrPC. We are of the view, for the reasons given above, that this must necessarily be so since a view to the contrary would render the exercise undertaken by a court under Section 319 CrPC, for summoning an accused, on the basis of a higher standard of proof totally infructuous and futile if the same court were to subsequently discharge the same accused by exercise of the power under Section 227 CrPC, on the basis of a mere prima facie view. The exercise of the power under Section 319 CrPC, must be placed on a higher pedestal. Needless to say the accused summoned under Section 319 CrPC, are entitled to invoke remedy under law against an illegal or improper exercise of the power under Section 319, but cannot have the effect of the order undone by seeking a discharge under Section 227 CrPC. If allowed to, such an action of discharge would not be in accordance with the purpose of Criminal Procedure Code in enacting Section 319 which empowers the Court to summon a person for being tried along with the other accused where it appears from the evidence that he has committed an offence."***

22. Inspite of above noted judgements, issue did not come to rest, but again cropped up for consideration in **Brijendra Singh (supra)** wherein Court considered the observations made in paragraphs 8, 12, 13, 19, 105 and 106 of Constitution Bench judgement in **Hardeep Singh (Supra)** and applying the ratio as mentioned in aforesaid paragraphs widened the scope of parameters regarding exercise of jurisdiction under section 319 Cr.P.C. In this case, Court was examining the summoning of a non-charge-sheeted accused in a Sessions Trial under Sections-147, 148, 149, 323, 448, 302/149 I.P.C. and Section- 3 and 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Court went a step further. A parallel was drawn with the deposition of prosecution witnesses before court and their statements recorded under section 161 Cr.P.C. to find out whether something new has come out in their depositions or not. Having done so, Court summed up as follows in paragraphs 13, 14, 15:-

***"13. In order to answer the question, some of the principles enunciated in Hardeep Singh's case may be recapitulated: power under Section 319 Cr.P.C. 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 offence. The 'evidence' herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the I.O. 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 Cr.P.C. 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 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. 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 chargesheet 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 kms. 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 Cr.P.C. 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 appellants plea of alibi was correct.*

*15. This record was before the trial court. Notwithstanding the same, the trial court went by the deposition of 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 was already there under Section 161 Cr.P.C. 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 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 agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny."***

23. Inspite of law having been settled by Apex Court in Constitution Bench judgement in **Hardeep Singh (Supra)** and two Judges Bench judgement in **Brijendra Singh (Supra)** which made substantial advancement in favour of prospective accused, the issue as noted above, again arose for consideration in **S Mohammed Ispahani (Supra)**. In this case, Court was considering the summoning of non charge-sheeted accused in a case under Sections- 379, 427, 341, 379/34 read with Section 3(1) of Tamil Nadu Property Prevention of Damage and Loss Act, 1992. Court again took notice of observations made in paragraphs 19 as well as paragraphs 10 to 13 of **Brijendra Singh's Case** and by making departure from the settled meaning of evidence for the purpose of exercise of jurisdiction under section 319 Cr.P.C. opined that prospective accused can be summoned only when "strong and cogent evidence" occurs against him during course of trial and not in a "casual and cavalier manner". Ultimately, Court opined as follows in paragraphs 31, 32, 33, 34, 35, 36 and 37:

***"31. The order of the learned Chief Metropolitan Magistrate reveals that while dismissing the application of the complainant under Section 319 CrPC, the Chief Metropolitan Magistrate was swayed by two considerations:***

***(a) The complainant (PW 1) in his examination-in-chief had not spoken anything with regard to the alleged conspiracy entered into between the appellants i.e. the landlords and the bailiff. Also other witnesses i.e. PWs 2, 3 and 4, who were working in the company of the de facto complainant had not spoken anything with regard to the appellants. There was no documentary evidence produced by the complainant. Therefore, the available "evidence" was not sufficient to implead the appellants/proposed accused as accused in the case.***

***(b) The police, after thorough investigation, had filed the charge-sheet in which the appellants were not implicated. However, the complainant never filed any protest petition at that stage.***

***32. Taking the aforesaid grounds as their arguments, the learned counsel for the appellants have argued that there is no "evidence" within the meaning of Section 319 CrPC. The argument advanced is that the application filed by the complainant under Section 319 CrPC was an afterthought and belated effort on the part of the complainant, which was filed much after the recording of evidence of PW 1, that too when the prosecution evidence had already been concluded.***

***33. As against the above, the High Court, in the impugned judgment, has been influenced by the fact that names of the appellants were mentioned in the FIR and even in the statement of witnesses recorded under Section 161 CrPC these appellants were named and such statements under Section 161 CrPC would constitute "documents". In this***

*context, the High Court has observed that "evidence" within the meaning of Section 319 CrPC would include the aforesaid statements and, therefore, the appellants could be summoned.*

*34. The aforesaid reasons given by the High Court do not stand the judicial scrutiny. The High Court has not dealt with the subject-matter properly and even in the absence of strong and cogent evidence against the appellant, it has set aside the order of the Chief Metropolitan Magistrate and exercised its discretion in summoning the appellants as accused persons. No doubt, at one place the Constitution Bench observed in Hardeep Singh case [Hardeep Singh v.State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] that the word "evidence" has to be understood in its wider sense, both at the stage of trial and even at the stage of inquiry. In para 105 of the judgment, however, it is observed that "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". This sentence gives an impression that only that evidence which has been led before the Court is to be seen and not the evidence which was collected at the stage of inquiry. However there is no contradiction between the two observations as the Court also clarified that the "evidence", on the basis of which an accused is to be summoned to face the trial in an ongoing case, has to be the material that is brought before the Court during trial. The material/evidence collected by the investigating officer at the stage of inquiry can only be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 CrPC.*

*35. It needs to be highlighted that when a person is named in the FIR by the complainant, but police, after investigation, finds no role of that particular person and files the charge-sheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court finds that a particular person should be summoned as accused, even though not named in the charge-sheet, it can do so. At that stage, chance is given to the complainant also to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge-sheet. Once that stage has gone, the Court is still not powerless by virtue of Section 319 CrPC. However, this section gets triggered when during the trial some evidence surfaces against the proposed accused.*

*36. In view of the above, it was not open to the High Court to rely upon the statements recorded under Section 161 CrPC as independent evidence. It could only be corroborative material. In the first instance, "evidence" led before the Court had to be taken into consideration. As far as deposition of PW 1 which was given in the Court is concerned, on going through the said statement, it becomes clear that he has not alleged any conspiracy on the part of the appellant landlords. In fact, none of the witness has said so. In the absence thereof, along with the important fact that these appellant landlords were admittedly not present at the site when the alleged incident took place, we do not find any "evidence" within the meaning of Section 319 CrPC on the basis of which they could be summoned as accused persons. PW 1 and PW 4 have deposed about the incident that took place at the site and the manner in which the persons who are present allegedly behaved. In the statement of PW 4, he has alleged that "Subsequently I came to know the said*

***people is not police officials the people was sent by landlords of the building...". That statement may not be enough for roping in the appellants/landlords to face the charge under those provisions of IPC with which others are charged. The standard of evidence mentioned in Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , namely, "strong and cogent evidence", is lacking."***

24. In **Deepu @ Deepak (Supra),** Court considered the issue regarding summoning of a charge sheeted accused, who had been discharged by trial court, in ignorance of supplementary charge sheet. Division Bench considered the observations made in paragraph 112 of Constitution Bench judgement in **Hardeep Singh (Supra)** and ultimately expressed its views in paragraph 7 of the judgment as under:

***"7. In the matter on hand, the Sessions Court, as aforementioned, has found that the earlier order of discharge was without reference to the supplementary charge-sheet, though the supplementary charge-sheet was in existence then. Only after applying its mind judiciously to the facts of the case and on verifying the details of the supplementary charge-sheet as well as other material on record, mentioned supra, the trial court concluded that it is a fit case to proceed against the appellant-accused under Section 319 of the Code of Criminal Procedure. The said order is confirmed by the High Court. The procedure as contemplated under Section 319 CrPC as well as the procedure as laid down by this Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] is fully satisfied by the trial court."***

25. In **Dev Wati (Supra)**, Court considered the correctness of an order passed by the High Court, whereby it upheld the order passed by Sessions Court allowing an application under section 319 Cr.P.C. in a case under Sections- 302/34 I.P.C. Court took notice of the Constitution Bench judgement in **Hardeep Singh's case**. Court referred to the words "appeal" and 'proved' as interpreted by Constitution Bench, with reference to Section 319 Cr.P.C. and on basis thereof examined the veracity of order impugned. Following was determined in paragraphs- 8 and 9 of the judgement:

***"8. Section 319(1) CrPC empowers the court to proceed against other persons who "appear" to be guilty of an offence, though not accused before the court. A Constitution Bench 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] has ruled that the word "appear" means "clear to the comprehension", or a phrase near to, if not synonymous with "proved", and imparts a lesser degree of probability than proof. Though only a prima facie case is to be established from the evidence led before the Court, it requires much stronger evidence than a mere probability of the complicity of the persons against whom the deponent has deposed. The test that has to be applied is of a degree of satisfaction which is more than that of a 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, may lead to conviction of the proposed accused. In the absence of such satisfaction, the Court should refrain from exercising the power under Section 319 CrPC. In our considered opinion, the impugned judgment has been passed by the High Court keeping the***

***aforementioned principle in mind, though the said judgment has not been cited before the High Court.***

***9. On considering the deposition of PW 9, we do not find any valid ground to take a different view from that of the High Court and the Sessions Court. Additionally, though the advocate for the appellants raised certain issues on facts, the same cannot be considered at this stage, inasmuch as such factors will have to be considered by the Sessions Court while deciding the matter before it on merits."***

26. In spite of law relating to summoning of a non-charge sheeted accused having been fairly settled, the issue regarding summoning of a non charge sheeted accused under section 319 Cr.P.C. to face trial for offences under Sections-147, 448, 294B and 506 I.P.C., on the basis of statements of witnesses examined under section 161 Cr.P.C. came to be considered in **Periyasamai (Supra)**. Here again Court took notice of paragraphs 105 and 106 of Constitution Bench judgement in **Hardeep Singh's case** as well as paragraph 12 of the judgement in **Labhuji Amratji Thakor Vs. State of Gujarat, (2019) 12 SCC 644**, which provides the nature of evidence, required to summon a non charge sheeted accused. Upon evaluation of statements of prosecution witnesses who had deposed before Court in the light of above Court expressed itself as follows in paragraphs 13, 14, 15 and 16:

***"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 inHardeep 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.***

***15. The High Court has set aside the order passed by the learned Magistrate only on the basis of the statements of some of the witnesses examined by the complainant. Mere disclosing the names of the appellants cannot be said to be***

***strong and cogent evidence to make them to stand trial for the offence under Section 319 of the Code, especially when the complainant is a husband and has initiated criminal proceedings against the family of his in-laws and when their names or other identity were not disclosed at the first opportunity.***

***16. Consequently, the order passed by the learned High Court is set aside and that of the trial court is restored and the application under Section 319 of the Code is dismissed. The appeal is allowed."***

27. In **Sunil Kumar Gupta (Supra)**, Court considered the issue regarding summoning of a prospective accused under section 319 Cr.P.C. to face trial under Sections- 498A, 304B/302 I.P.C. and Sections- ¾ Dowry Prohibition Act, on the strength of an oral dying declaration even when his name was not mentioned in F.I.R, dying declaration or the statements of P.W.1 and P.W.3. In this case also, Court noticed the observations made in paragraphs 21 to 23 and 105 to 106 by Constitution Bench in **Hardeep Singh's case**. Having noticed the ratio laid down in above judgment, Court proceeded to apply the principles laid down therein and ultimately decided as follows in paragraphs 13 and 14:

***"13. Applying the above principles to the case in hand, in our considered view, no prima facie case is made out for summoning the appellants and to proceed against the appellants for the offence punishable under Section 302 IPC. As pointed out earlier, in the dying declaration, deceased Shilpa has only mentioned the name of Chanchal alias Babita; but she has not mentioned the names of others. In his complaint lodged before the police on the next day i.e. 20-8-2012, Sudhir Kumar Gupta PW 1 has stated that his daughter Shilpa told him that Chanchal alias Babita and all other people set her on fire after pouring kerosene. PW 1 has neither stated the names of the appellants nor attributed any overt act. Likewise, in their evidence before the court, PWs 1 and 3 have only stated that Shilpa told them that Chanchal alias Babita and all others have set fire on deceased Shilpa. Neither the complaint nor the evidence of witnesses indicates as to the role played by the appellants in the commission of the offence and which accused has committed what offence. Under such circumstances, it cannot be said that the prosecution has shown prima facie material for summoning the accused for the offence punishable under Section 302 IPC.***

***14. Under Section 319 CrPC, a person can be added as an accused invoking the provisions not only for the same offence for which the accused is tried but for "any offence"; but that offence shall be such that in respect of which all the accused could be tried together. It is to be seen whether the appellants could be summoned for the offence under Section 498-A IPC and under Sections 3 and 4 of the Dowry Prohibition Act. The statement of PW 1 both in the complaint and in his evidence before the court is very general stating that he had given sufficient dowry to Shilpa according to his status and that the groom side were not satisfied with the dowry and that they used to demand dowry each and every time. Insofar as the demand of dowry and the dowry harassment, there are no particulars given as to the time of demand and what was the nature of demand. The averments in the complaint and the evidence is vague and***

***no specific demand is attributed to any of the appellants. In such circumstances, there is no justification for summoning the appellants even under Section 498-A IPC and under Sections 3 and 4 of the Dowry Prohibition Act. It is also pertinent to point out that upon completion of investigation, the investigating officer felt that no offence under Sections 498-A, 304-B IPC and under Sections 3 and 4 of the Dowry Prohibition Act is made out. Charge-sheet was filed for the offence punishable only under Section 302 IPC against Chanchal alias Babita. As held in the Constitution Bench judgment in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , for summoning an accused under Section 319 CrPC it requires much stronger evidence than mere probability of his complicity which is lacking in the present case. The trial court and the High Court, in our considered view, has not examined the matter in the light of the well-settled principles and the impugned order is liable to be set aside."***

28. In **Rajesh and Others (Supra)**, Court again considered the principles governing the exercise of jurisdiction under section 319 Cr.P.C in a situation, where a person is named in F.I.R., and specific allegations are made against him yet not charge sheeted nor any protest petition having been filed in Court by first informant after submission of charge sheet. Here again Court took notice of the law laid down by Apex Court in **Hardeep Singh (Supra)** and **Brijendra Singh (Supra)** and then evaluated oral testimony of P.W.1 and P.W.2 whose testimonies did implicate the non charge sheeted accused in a case under Sections-302, 307, 148, 149, 323, 324, 325 and 506 I.P.C. Ultimately, Court settled the issue as follows in paragraphs 6.8, 6.9, 6.10, 7 and 8:

***"6.8. Considering the law laid down by this Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] and the observations and findings referred to and reproduced hereinabove, it emerges that (i) the Court can exercise the power under Section 319 CrPC even on the basis of the statement made in the examination-in-chief of the witness concerned and the Court need not wait till the cross-examination of such a witness and the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination; and (ii) a person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 CrPC, provided from the evidence (may be on the basis of the evidence collected in the form of statement made in the examination-in-chief of the witness concerned), it appears that such person can be tried along with the accused already facing trial.***

***6.9. In S. Mohammed Ispahani v. Yogendra Chandak [S. Mohammed Ispahani v.Yogendra Chandak, (2017) 16 SCC 226 : (2018) 2 SCC (Cri) 138] , SCC para 35, this Court has observed and held as under : (SCC p. 243)***

***"35. It needs to be highlighted that when a person is named in the FIR by the complainant, but police, after investigation, finds no role of that particular person and files the charge-sheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court finds that a particular person should be summoned as accused, even though not named in the charge-sheet, it can do so. At that stage, chance is given to the complainant also to file a protest petition urging upon the trial***

***court to summon other persons as well who were named in the FIR but not implicated in the charge-sheet. Once that stage has gone, the Court is still not powerless by virtue of Section 319 CrPC. However, this section gets triggered when during the trial some evidence surfaces against the proposed accused."***

***6.10. Thus, even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 CrPC and even those persons named in the FIR but not implicated in the charge-sheet can be summoned to face the trial provided during the trial some evidence surfaces against the proposed accused.***

***7. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, we are of the opinion that, in the facts and circumstances of the case, neither the learned trial court nor the High Court have committed any error in summoning the appellants herein to face the trial along with other co-accused. As observed hereinabove, the appellants herein were also named in the FIR. However, they were not shown as accused in the challan/charge-sheet. As observed hereinabove, nothing is on record whether at any point of time the complainant was given an opportunity to submit the protest application against non-filing of the charge-sheet against the appellants. In the deposition before the Court, PW 1 and PW 2 have specifically stated against the appellants herein and the specific role is attributed to the appellant-accused herein. Thus, the statement of PW 1 and PW 2 before the Court can be said to be "evidence" during the trial and, therefore, on the basis of the same and as held by this Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , the persons against whom no charge-sheet is filed can be summoned to face the trial. Therefore, we are of the opinion that no error has been committed by the courts below to summon the appellants herein to face the trial in exercise of power under Section 319 CrPC.***

***8. Now, so far as the submissions made on behalf of the appellants herein relying upon the orders passed by the learned Magistrate dated 1-9-2016 and 28-10-2016 that once the appellants herein were discharged by the learned Magistrate on an application submitted by the investigating officer/SHO and, therefore, thereafter it was not open to the learned Magistrate to summon the accused to face the trial in exercise of power under Section 319 CrPC is concerned, it appears that there is some misconception on the part of the appellants. At the outset, it is required to be noted that the orders dated 1-9-2016 and 28-10-2016 cannot be said to be the orders discharging the accused. If the applications submitted by the investigating officer/SHO and the orders passed thereon are considered, those were the applications to discharge/release the appellants herein from custody as at that stage the appellants were in judicial custody. Therefore, as such, those orders cannot be said to be the orders of discharge in stricto sensu. Those are the orders discharging the appellants from custody. Under the circumstances, the submission on behalf of the accused that as they were discharged by the learned Magistrate and therefore it was not open to the learned Magistrate to exercise the***

***power under Section 319 CrPC and to summon the appellants to face the trial, cannot be accepted."***

29. Inspite of above noted judgements of Apex Court, wherein parameters regarding exercise of jurisdiction under section 319 Cr.P.C. and the nature of evidence required to summon a prospective accused has been fairly crystallized, yet the necessity to refer the matter again to a Constitution Bench for re-consideration arose in **Sukhpal Singh Khaira (Supra)** . In aforesaid case, court was considering the summoning of a non charge-sheeted accused to face trial in a Sessions Trial under Sections- 302 read with Sections-149 and 323 I.P.C. and Section 27 of Arms Act. Court noticed the observations made in paragraph 47 of Constitution Bench in **Hardeep Singh's case** but still opined that the matter requires consideration by a Constitution Bench as certain questions still remain unanswered in **Hardeep Singh's case** and further the parameters regarding the exercise of jurisdiction under section 319 Cr.P.C. need to be re laid down. Following was observed by the Court in paragraphs 22, 23, 24, 25, 26 and 27:

***"22. It was contended that the question of law herein is unique to the present case, and the earlier judgment of Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] did not have an opportunity to cast any light about the validity of summoning orders pronounced after the passing of the judgment. They further argued that, Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , treats Section 319 in an isolated manner without taking into consideration the spirit and the mandate of the Code.***

***23. To strengthen the aforesaid submission, the State further contended that Section 465 CrPC was introduced to provide for a balanced mechanism under the Criminal Justice System and to stop the courts from getting into hypertechnicalities and committing serious violations. This Court in Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] has not considered the above principles or the issues which could possibly arise before the trial court while dealing with applications under Section 319 CrPC. The State therefore submitted that, Section 319 CrPC should not be treated as an isolated island and should instead be given a pragmatic interpretation by keeping in view the entire mandate of the Code to render complete justice.***

***24. Furthermore, it needs to be determined whether the trial is said to be fully concluded even if the bifurcated trial in respect of the absconded accused is still pending consideration.***

***25. The appellant herein contended that, the observations made in Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , cannot be diluted by a Bench of this strength. We have considered the averments made by the counsel on behalf of both parties, we feel that it would be appropriate to place the same for consideration before a larger Bench. However, we are of the considered opinion that, power under Section 319 CrPC being extraordinary in nature, the trial courts should be cautious while summoning the accused to avoid complexities and to ensure fair trial. We must remind ourselves that, timely disposal of the matters furthers the interest of justice.***

***26. After pursuing the relevant facts and circumstances, the following substantial questions of law arise for further consideration--***

***26.1.(i) Whether the trial court has the power under Section 319 CrPC for summoning additional accused when the trial with respect to other co-accused has ended and the judgment of conviction rendered on the same date before pronouncing the summoning order?***

***26.2.(ii) Whether the trial court has the power under Section 319 CrPC for summoning additional accused when the trial in respect of certain other absconding accused (whose presence is subsequently secured) is ongoing/pending, having been bifurcated from the main trial?***

***26.3.(iii) What are the guidelines that the competent court must follow while exercising power under Section 319 CrPC?***

***27. In the light of the same, we direct the Registry to place these matters before the Hon'ble the Chief Justice of India for constitution of a Bench of appropriate strength for considering the aforesaid questions."***

30. In **Mani Pushpak Joshi (Supra)**, Court was considering correctness of an order passed by High Court refusing to set aside an order passed by trial Court allowing an application under section 319 Cr.P.C. in a case under Sections- 376(2) I.P.C. and Sections- 5/6 POCSO Act. In this case, Court noticed the observations made by Constitution Bench in **Hardeep's Singh case** in paragraphs 100, 105 and 106 of the judgement and paragraph 13 of the judgement in **Labhuji Amratji Thakor Vs State of Gujarat, (2019) 12 SCC 644**, which is regarding the nature of evidence required for summoning of a non charge sheeted accused and applying the principles laid down therein, Court ultimately resolved as follows in paragraphs 12, 13, 14, 15 and 16:

***"12. In Labhuji Amratji Thakor v. State of Gujarat [Labhuji Amratji Thakor v. State of Gujarat, (2019) 12 SCC 644 : AIR 2019 SC 734] , this Court held that the Court has to consider substance of the evidence, which has come before it and 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. It was held as under: (SCC p. 649, paras 13-14)***

***"13. The High Court [Meruji Jesuji Thakore v. State of Gujarat, 2018 SCC OnLine Guj 4765] does not even record any satisfaction that the evidence on record as revealed by the statement of victim and her mother even makes out a prima facie case of offence against the appellants. The mere fact that the Court has power under Section 319 CrPC to proceed against any person who is not named in the FIR or in the charge-sheet does not mean that whenever in a statement recorded before the Court, name of any person is taken, the Court has to mechanically issue process under Section 319 CrPC. 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'.***

***14. Although, the High Court has not adverted to the test laid down by the Constitution Bench in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] nor has***

***given any cogent reasons for exercise of power under Section 319 CrPC, but for our satisfaction, we have looked into the evidence, which has come on record before the trial court ... The observations of the trial court while rejecting the application having that the application appears to be filed with mala fide intention, has not even been adverted to by the High Court."***

***13. Having heard the learned counsel for the parties at some length, we find that the order summoning the appellant for the offences under Section 376(2) of the Penal Code, 1860 (for short "IPC") read with Sections 5/6 of the Protection of Children from Sexual Offences Act, 2012 (for short "the Pocso Act") is not sustainable in law.***

***14. The prosecutrix is a small child. It is parents of the child who have taken the photographs either from the website of the school or from Facebook to introduce a person with spectacles as an accused. The initial version of the father of the prosecutrix and of the prosecutrix herself, as disclosed by her father in the FIR, is assault by one person. But in view of statement of Gauri Vohra (PW 11), the anger was directed against the management of the school of which the appellant is a part. Even if the father of the child has basis to be angry with the management of the school but, we find that no prima facie case of any active part on the part of the appellant is made out in violating the small child. The involvement of other persons on the statement of the child of impressionable age does not inspire confidence that the appellant is liable to be proceeded under Section 319 CrPC. In fact, it is suggestive role of the family which influences the mind of the child to indirectly implicate the appellant.***

***15. Obviously, the father of the child must have anger against the management of the school as his child was violated when she was studying in the school managed by the appellant but, we find that the anger of the father against the management of the school including the appellant is not sufficient to make him to stand trial for the offences punishable under Section 376(2) IPC read with Sections 5/6 of the Pocso Act.***

***16. The statement of the child so as to involve a person wearing spectacles as an accused does not inspire confidence disclosing more than prima facie to make him to stand trial of the offences. Therefore, we hold that the order of summoning the appellant under Section 319 CrPC is not legal. The fact, that the prosecution after investigations has found no material to charge the present appellant also cannot be ignored. The heinous crime committed should not be led into prosecuting a person only because he was part of the management of the school. We have extracted the evidence led by the prosecution only to find out if there is any prima facie case against the appellant. We are satisfied that there is no prima facie case against the appellant, which warrants his trial for the offences pending before the Court."***

31. In **Sugreev Kumar (Supra)**, Court was examining correctness of an order passed by High Court, whereby order passed by trial Court allowing an application under section 319 Cr.P.C. in a case under Sections- 302, 307, 341, 34 I.P.C. and Sections- 25, 54 and 59 Arms Act, was upheld by the High Court. In this case also, Court considered the ratio laid down by Constitution Bench in **Hardeep Singh's Case** in paragraphs 95, 105 and

106 and thereafter Court formulated its view as follows in paragraphs 18, 19, 20, 21, 22 and 23:

***"18. Thus, the provisions contained in Section 319 CrPC sanction the summoning of any person on the basis of any relevant evidence as available on record. However, it being a discretionary power and an extraordinary one, is to be exercised sparingly and only when cogent evidence is available. The prima facie opinion which is to be formed for exercise of this power requires stronger evidence than mere probability of complicity of a person. The test to be applied is the one which is more than a prima facie case as examined at the time of framing charge but not of satisfaction to the extent that the evidence, if goes uncontroverted, would lead to the conviction of the accused.***

***19. While applying the abovementioned principles to the facts of the present case, we are of the view that the consideration of the application under Section 319 CrPC in the orders impugned had been as if the existence of a case beyond reasonable doubt was being examined against the proposed accused persons. In other words, the trial court and the High Court have proceeded as if an infallible case was required to be shown by the prosecution in order to proceed against the proposed accused persons. That had clearly been an erroneous approach towards the prayer for proceeding against a person with reference to the evidence available on record.***

***20 The appellant (PW 1) has made the statement assigning specific roles to the proposed accused persons. At the stage of consideration of the application under Section 319 CrPC, of course, the trial court was to look at something more than a prima facie case but could not have gone to the extent of enquiring as to whether the matter would ultimately result in conviction of the proposed accused persons.***

***21. The other application moved by the prosecution after leading of further evidence in the matter has been rejected by the trial court essentially with reference to the impugned orders dated 24-7-2014 and 2-7-2018 [Sugreev Kumar v. State of Punjab, 2018 SCC OnLine P&H 1848] , which are the subject-matter of challenge in this appeal.***

***22. In the totality of the circumstances of this case, rather than dilating further on the evidence, suffice it would be to observe for the present purpose that the prayer of the prosecution for proceeding against other accused persons, having not been examined in the proper perspective and with due regard to the applicable principles, deserves to be restored for reconsideration of the trial court.***

***23. Accordingly, this appeal is allowed in part, to the extent and in the manner that the impugned orders are set aside and the applications made by the prosecution under Section 319 CrPC are restored for reconsideration of the trial court. In the interest of justice, it is made clear that we have not pronounced on the merits of the case either way and it would be expected of the trial court to reconsider the prayer of prosecution for proceeding against the proposed accused persons totally uninfluenced by any observation herein regarding facts of the case but with due regard to the evidence on record and to the law applicable."***

32. In **Labhuji Amratji Thakor (Supra)**, a three Judges Bench of Supreme

Court considered correctness of an order passed by High Court, whereby order passed by trial court rejecting an application under section 319 Cr.P.C in a case under Sections- 363, 366 I.P.C. and Sections- 3/4 POCSO Act, was set aside. Again Court took notice of paragraphs 105 and 106 of judgement in **Hardeep Singh's case**, and then applied the principles laid down therein to the facts of the case. Upon evaluation of facts in the light of above, Court concurred with the view of the trial court by observing as under in paragraphs 10, 11 and 12:

***"10. In the present case, there are not even suggestions of any act done by the appellants amounting to an offence referred to in Sections 3 and 4 of thePocso Act. Thus, there was no occasion to proceed against the appellants under the Pocso Act.***

***11. Now, we come back to the reasons given by the High Court in allowing the criminal revision and setting aside the order of the Pocso Judge. The judgment of the High Court runs into four paragraphs and the only reason given by the High Court for allowing the revision is contained in para 3, which is to the following effect:***

***"3. On going through the depositions of the victim as well as her mother, some overtact and participation on the part of Respondents 3 to 5 are clearly revealing. But, this Court is not inclined to opine either way as the said fact was not stated before the police at the time of recording of their statements. But, taking into consideration the provision of Section 319 of the Criminal Procedure Code, this Court deems it appropriate to summon them and put them to trial...."***

***12. The High Court does not even record any satisfaction that the evidence on record as revealed by the statement of victim and her mother even makes out a prima facie case of offence against the appellants. The mere fact that the Court has power under Section 319 CrPC to proceed against any person who is not named in the FIR or in the charge-sheet does not mean that whenever in a statement recorded before the Court, name of any person is taken, the Court has to mechanically issue process under Section 319 CrPC. 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." Although, the High Court has not adverted to the test laid down by the Constitution Bench in Hardeep Singh[Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] nor has given any cogent reasons for exercise of power under Section 319 CrPC, but for our satisfaction, we have looked into the evidence, which has come on record before the trial court as statements of PW 3 and PW 4. PW 3 is mother of the victim, who has clearly stated that her daughter has informed that she was abducted by the appellants and Natuji, who had taken her to the Morbi in the vehicle of Labhuji. The statement of the mother of the victim was a hearsay statement and could not have been relied for proceeding against the appellants. Now, coming to the statement of the victim, PW 4, she has only stated that Natuji, the accused had come along with his three friends, i.e. appellants and she***

***was taken in the jeep to Morbi. She does not even allege complicity of the appellants in the offence. Her further statement was that she was taken to Morbi in the jeep driven by Labhuji and subsequently was taken to Modasa from Morbi in the jeep of Labhuji which also could not furnish any basis to proceed against the appellants. The mere fact that the jeep, in which she was taken to Modasa, the appellants were also present cannot be treated to be any allegation of complicity of the appellants in the offence. The observations of the trial court while rejecting the application holding that the application appears to be filed with mala fide intention, has not even been adverted to by the High Court."***

33. In **Shiv Prakash Mishra (Supra)**, Court again considered the veracity of an order passed on an application under section 482 Cr.P.C., whereby High Court refused to interfere with the order passed by trial Court declining to exercise jurisdiction under section 319 Cr.P.C. in a case arising out of Case Crime No. 328A/2013, under Sections- 148, 148, 149, 302, 307, 323 and 504 I.P.C. Again observations made by Constitution Bench in paragraphs 105 and 106 of judgement in **Hardeep Singh's case** as explained in paragraphs 13 of **Brijendra Singh's case** were noticed and on basis thereof court considered the nature of evidence required for summoning a non charge sheeted accused. It was in aforesaid background that Court examined the testimonies of P.W.1 and P.W.2 therein and summarized its views as follows in paragraphs 13, 14, 15, 16 and 17 of the judgement:

***"13. In the light of the above principles, considering the present case, having regard to the contradictory statements of the witnesses and other circumstances, in our view, the trial court and the High Court rightly held that Respondent 2 cannot be summoned as an accused. The FIR in Case Crime No. 328-A/2013 was registered on 6-9-2013 at 1815 hours. The name of the second respondent is no doubt mentioned in the FIR and overt act is attributed to him. It is clear from the record that during the course of investigation, the investigating officer recorded the statements of witnesses, namely, Rajesh Kumar, Nizamuddin, Nand Kishore, Tribhuwan Singh, Bintu Rai and Nageshwar Kumar and other seven witnesses who have stated that Respondent 2 was not present at the place of occurrence at the time of the incident. The investigating officer has also recorded the statement of one Shiv Kumar Gupta and Sandeep Gupta who are working in the same office in which Respondent 2 was employed who had stated that Respondent 2 was in the office at the time of incident. Based on the statements recorded from the witnesses, the investigating officer found that the second respondent was posted on the post of Junior Engineer in the Bridge Construction Unit of Bridge Corporation, Lucknow and he usually resided there and on 6-9-2013, he was present at his workplace and discharging his official duties. Based on the materials collected during the investigation, the investigating officer recorded the finding that on the date and time of incident, Subhash Chandra Shukla was not present at the place of occurrence. Accordingly, the name of Subhash Chandra Shukla was dropped when the first charge-sheet was filed on 19-9-2014. The supplementary charge-sheet was filed against Rahul Shukla on 15-10-2014. Though the name***

***of the second respondent was mentioned in the FIR, during investigation, it was thus found that the second respondent was not present in the place of incident and on the basis of the findings of the investigating officer, he was not charge-sheeted. Be it noted that the appellant complainant has not filed any protest petition then and there. During investigation, when it was found that the accused was not present at the place of incident, the courts below were right in refusing to summon Respondent 2 as an accused.***

***14. As pointed out by the trial court, PW 1 was examined on various dates from 22-10-2016 to 2-8-2017 and examined on nine hearing dates. Though, in his chief-examination on 22-10-2016, PW 1 has stated about the presence of Subhash Chandra Shukla and attributing overt act to him that he had beaten the deceased Sangam Lal Mishra with butt of home-made pistol, on 28-2-2017, PW 1 in his cross-examination stated that Subhash Chandra Shukla was on duty at that time. The relevant portion of the statement of PW 1 reads as under:***

***"... Subhash Chandra Shukla does not live in the house. He does service/job. At the same time in Jigna Police Station, District Mirjapur he was making bridge and due to this reason, he was on duty there...."***

***15. As pointed out by the trial court and the High Court, PW 1 has made contradictory statements in the course of his examination in connection with the presence of Subhash Chandra Shukla.***

***16. Anand Kumar Mishra (PW 2) has been examined who is stated to be the eyewitness. PW 2 has been working as Assistant Teacher (Shiksha Mitra). His duty time is from 7.00 a.m. till 12.00 noon. PW 2 though stated that he was on leave on the date of occurrence i.e. 6-9-2013, the trial court expressed doubts about his presence at the time of occurrence. Considering the fact that PW 2 is working as a teacher and that PW 2 is a co-accused in the cross-case, the trial court and the High Court expressed doubts about the evidence of PW 2 as to the presence of the second respondent. The evidence brought on record during trial does not prima facie show the complicity of Respondent 2 in the occurrence and the High Court was justified in refusing to summon Respondent 2 as an accused.***

***17. The High Court and the trial court concurrently held that the materials brought on record are not sufficient to summon the second respondent as an accused in the present case. No substantial ground is made out warranting interference and the appeal is liable to be dismissed."***

34. In **Sartaj Singh (Supra)**, Court was examining correctness of an order passed by the High Court, whereby High Court allowed the revision and set-aside the order passed by trial court on an application under Section 319 Cr.P.C., whereby non charge sheeted accused were summoned to face trial in a sessions case, arising out of an F.I.R. under Sections- 148, 149, 341, 323, 324, 307 and 506 I.P.C. Court noticed the Constitution Bench judgement in **Hardeep Singh's case** as well as the judgement in **S. Mohammed Ispahani (Supra)**. After applying the law laid down therein, Court proceeded to deduce the nature of evidence that is required for summoning of a non charge-sheeted accused and upon evaluation, disagreed with the view expressed by High Court by drawing its disagreement as follows in paragraphs 14, 15, 16 and 17 of the judgement:

*"14. Applying the law laid down by this Court in the aforesaid decisions to the case of the accused on hand, we are of the opinion that the learned trial court was justified in summoning the private respondents herein to face the trial as accused on the basis of the deposition of the appellant--injured eyewitness. As held by this Court in the aforesaid decisions, the accused can be summoned on the basis of even examination-in-chief of the witness and the court need not wait till his cross-examination. If on the basis of the examination-in-chief of the witness the court is satisfied that there is a prima facie case against the proposed accused, the court may in exercise of powers under Section 319 CrPC array such a person as accused and summon him to face the trial.*

*15. At this stage, it is required to be noted that right from the beginning the appellant herein-injured eyewitness, who was the first informant, disclosed the names of private respondents herein and specifically named them in the FIR. But on the basis of some enquiry by the DSP they were not charge-sheeted. What will be the evidentiary value of the enquiry report submitted by the DSP is another question. It is not that the investigating officer did not find the case against the private respondents herein and therefore they were not charge-sheeted. In any case, in the examination-in-chief of the appellant-injured eyewitness, the names of the private respondents herein are disclosed. It might be that whatever is stated in the examination-in-chief is the same which was stated in the FIR. The same is bound to be there and ultimately the appellant herein-injured eyewitness is the first informant and he is bound to again state what was stated in the FIR, otherwise he would be accused of contradictions in the FIR and the statement before the court. Therefore, as such, the learned trial court was justified in directing to issue summons against the private respondents herein to face the trial.*

*16. Now, so far as the impugned judgment and order [Manjeet Singh v. State of Haryana, 2020 SCC OnLine P&H 2782] passed by the High Court is concerned, it appears that while quashing and setting aside the order passed by the learned trial court, the High Court has considered/observed as under: (Manjeet Singh case [Manjeet Singh v. State of Haryana, 2020 SCC OnLine P&H 2782] , SCC OnLine P&H paras 29-30)*

*"29. No evidence except the statement of Sartaj Singh, which has already been investigated into by the DSPs concerned was relied upon by the trial court to summon, which was not sufficient for exercising power under Section 319 CrPC.*

*30. As per statement of Sartaj Singh, Palwinder Singh and Satkar Singh gave him lathi-blows on the head. Manjeet Singh, Amarjeet Singh, Rajwant Singh, Narvair Singh and Sukhdev Singh were holding gandasi. Manjeet Singh, Amarjeet Singh and Rajwant Singh gave him gandasi-blows on the head and face. All the injuries are stated to fall in the offence under Sections 323, 324, 326, 341 read with Section 149 IPC. In case, so many people as mentioned above were giving gandasi and lathis blows on the head, Sartaj Singh was bound to have suffered more injuries, which would not have left him alive and probably he would have been killed on the spot. He seems to have escaped with only such injuries as have invited offence only under Sections 323, 324, 326, 341 read with Section 149 IPC. Therefore, the trial court erred in exercising his jurisdiction summoning the*

***other accused where exaggeration and implication is evident on both sides."***

***17. The aforesaid reasons assigned by the High Court are unsustainable in law and on facts. At this stage, the High Court was not required to appreciate the deposition of the injured eyewitness and what was required to be considered at this stage was whether there is any prima facie case and not whether on the basis of such material the proposed accused is likely to be convicted or not and/or whatever is stated by the injured eyewitness in his examination-in-chief is exaggeration or not. The aforesaid aspects are required to be considered during the trial and while appreciating the entire evidence on record."***

35. In **Manjeet Singh (Supra)**, Court was considering the correctness of an order passed by High Court dismissing the revision preferred against an order passed by Sessions Judge allowing the application under Section 319 Cr.P.C. filed in a case under Sections 363, 366, 376 IPC and Sections 3/4 Protection of Children From Sexual Offences, (POCSO) Act, 2012 Court again examined the issue relating to parameters for exercise of jurisdiction under section 319 Cr.P.C. Court took notice of the constitution Bench judgement in **Hardeep Singh (Supra)** and **S. Mohammed Ispahani (Supra)** and on basis of ratio laid down therein evolved the ambit and scope of powers of Court under section 319 Cr.P.C. in paragraphs 34 of judgement. Having done so, Court examined the testimony of P.W.1 Manjeet who is an injured witness and on basis thereof tested the veracity of orders passed by High Court as well as trial court whereby summoning of non charge sheeted accused was declined. Court upon evaluation of evidence on record disagreed with the view taken by High Court as well as trial court. Following disagreement was expressed by court in paragraphs 34, 35, 36, 37 and 38 of the judgement:

***"34. The ratio of the aforesaid decisions on the scope and ambit of the powers of the Court under Section 319 CrPC can be summarized as under:***

***(i) That while exercising the powers under Section 319 CrPC and to summon the persons not charge-sheeted, the entire effort is not to allow the real perpetrator of an offence to get away unpunished;***

***(ii) for the empowerment of the courts to ensure that the criminal administration of justice works properly;***

***(iii) the law has been properly codified and modified by the legislature under the CrPC indicating as to how the courts should proceed to ultimately find out the truth so that the innocent does not get punished but at the same time, the guilty are brought to book under the law;***

***(iv) to discharge duty of the court to find out the real truth and to ensure that the guilty does not go unpunished;***

***(v) where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial;***

***(vi) Section 319 CrPC allows the court to proceed against any person who is not an accused in a case before it;***

***(vii) the court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by***

***manipulating the investigating and/or the prosecuting agency;***

***(viii) Section 319 CrPC is an enabling provision empowering the court to take appropriate steps for proceeding against any person not being an accused for also having committed the offence under trial;***

***(ix) the power under Section 319(1) CrPC can be exercised at any stage after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 CrPC, committal, etc. which is only a pre-trial stage intended to put the process into motion;***

***(x) the court can exercise the power under Section 319 CrPC only after the trial proceeds and commences with the recording of the evidence;***

***(xi) the word "evidence" in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents;***

***(xii) it is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation;***

***(xiii) if the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, it can exercise the power under Section 319 CrPC and can proceed against such other person(s);***

***(xiv) that the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, powers under Section 319 CrPC can be exercised;***

***(xv) that power under Section 319 CrPC can be exercised even at the stage of completion of examination-in-chief and the court need not has to wait till the said evidence is tested on cross-examination;***

***(xvi) even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 CrPC and even those persons named in FIR but not implicated in the charge-sheet can be summoned to face the trial, provided during the trial some evidence surfaces against the proposed accused (may be in the form of examination-in-chief of the prosecution witnesses);***

***(xvii) while exercising the powers under Section 319 CrPC the Court is not required and/or justified in appreciating the deposition/evidence of the prosecution witnesses on merits which is required to be done during the trial.***

***35. Applying the law laid down in the aforesaid decisions to the facts of the case on hand we are of the opinion that the Learned trial Court as well as the High Court have materially erred in dismissing the application under Section 319 CrPC and refusing to summon the private respondents herein to face the trial in exercising the powers under Section 319 CrPC. It is required to be noted that in the FIR No. 477 all the private respondents herein who are sought to be arraigned as additional accused were specifically named with specific role attributed to them. It is specifically mentioned that while they were returning back, Mahendra XUV bearing no. HR-40A-4352 was standing on the road which belongs to Sartaj Singh and Sukhpal. Tejpal, Parab Saran Singh, Preet Samrat and Sartaj were standing. Parab Sharan***

***was having lathi in his hand, Tejpal was having a gandsi, Sukhpal was having a danda, Sartaj was having a revolver and Preet Singh was sitting in the jeep. It is specifically mentioned in the FIR that all the aforesaid persons with common intention parked the Mahendra XUV HR-40A-4352 in a manner which blocks the entire road and they were armed with the weapons. Despite the above specific allegations, when the charge-sheet/final report came to be filed only two persons came to be charge-sheeted and the private respondents herein though named in the FIR were put/kept in column no. 2. It is the case on behalf of the private respondents herein that four different DSPs inquired into the matter and thereafter when no evidence was found against them the private respondents herein were put in column no. 2 and therefore the same is to be given much weightage rather than considering/believing the examination-in-chief of the appellant herein. Heavy reliance is placed on the case of Brijendra Singh (Supra). However none of DSPs and/or their reports, if any, are part of the charge-sheet. None of the DSPs are shown as witnesses. None of the DSPs are Investigating Officer. Even on considering the final report/charge-sheet as a whole there does not appear to be any consideration on the specific allegations qua the accused the private respondents herein who are kept in column no. 2. Entire discussion in the charge-sheet/final report is against Sartaj Singh only.***

***36. So far as the private respondents are concerned only thing which is stated is "During the investigation of the present case, Shri Baljinder Singh, HPS, DSP Assandh and Shri Kushalpal, HPS, DSP Indri found accused Tejpal Singh, Sukhpal Singh, sons of Gurdev Singh, Parab Sharan Singh and Preet Samrat Singh sons of Mohan Sarup Singh caste Jat Sikh, residents of Bandrala innocent and accordingly Sections 148, 149 and 341 of the IPC were deleted in the case and they were kept in column no. 2, whereas challan against accused Sartaj has been presented in the Court."***

***37. Now thereafter when in the examination-in-chief the appellant herein - victim - injured eye witness has specifically named the private respondents herein with specific role attributed to them, the Learned trial Court as well as the High Court ought to have summoned the private respondents herein to face the trial. At this stage it is required to be noted that so far as the appellant herein is concerned he is an injured eye-witness. As observed by this Court in the cases of State of MP v. Mansingh(2003) 10 SCC 414 (para 9); Abdul Sayeed v. State of MP (2010) 10 SCC 259; State of Uttar Pradesh v. Naresh (2011) 4 SCC 324, the evidence of an injured eye witness has greater evidential value and unless compelling reasons exist, their statements are not to be discarded lightly. As observed hereinabove while exercising the powers under Section 319 CrPC the Court has not to wait till the cross-examination and on the basis of the examination-in-chief of a witness if a case is made out, a person can be summoned to face the trial under Section 319 CrPC.***

***38. Now so far as the reasoning given by the High Court while dismissing the revision application and confirming the order passed by the Learned trial Court dismissing the application under Section 319 CrPC is concerned, the High Court itself has observed that PW1 Manjeet Singh is the injured witness and therefore his presence cannot be doubted***

***as he has received fire arm injuries along with the deceased. However, thereafter the High Court has observed that the statement of Manjeet Singh indicates over implication and that no injury has been attributed to either of the respondents except they were armed with weapons and the concerned injuries are attributed only to Sartaj Singh even for the sake of arguments someone was present with Sartaj Singh it cannot be said that they had any common intention or there was meeting of mind or knew that Sartaj would be firing. The aforesaid reasonings are not sustainable at all. At the stage of exercising the powers under Section 319 CrPC, the Court is not required to appreciate and/or enter on the merits of the allegations of the case. The High Court has lost sight of the fact that the allegations against all the accused persons right from the very beginning were for the offences under Sections 302, 307, 341, 148 & 149 IPC. The High Court has failed to appreciate the fact that for attracting the offence under Section 149 IPC only forming part of unlawful assembly is sufficient and the individual role and/or overt act is immaterial. Therefore, the reasoning given by the High Court that no injury has been attributed to either of the respondents except that they were armed with weapons and therefore, they cannot be added as accused is unsustainable. The Learned trial Court and the High Court have failed to exercise the jurisdiction and/or powers while exercising the powers under Section 319 CrPC."***

36. With the aid of above, Court now proceeds to examine the correctness of impugned order dated 15.02.2021, passed by Second Additional District and Sessions Judge, Kasganj, in Sessions Trial No.329 of 2018, (State Vs. Vineet Yadav and Others), under Sections- 307, 427, 506 and 325 I.P.C., Police Station- Sidhpura, District- Kasganj, whereby revisionist has been summoned under Section 319 Cr.P.C. to face trial in above-mentioned sessions trial.

37. Before proceeding to do so, it must be noticed that following issues stand settled as per the judgements mentioned herein above and, therefore, they are not required to be dealt with.

38. The ambit and scope of powers under Section 319 Cr.P.C. now stands crystalized by Supreme Court in paragraph-34 of the judgement in **Manjeet Singh (supra)**.

39. The summoning of a non charge-sheeted accused in exercise of power under Section 319 Cr.P.C. cannot be done in a "casual and cavalier manner". Power under Section 319 Cr.P.C. is "an extraordinary discretionary power which should be exercised sparingly". Vide paragraphs- 34 and 36 of the judgement in **S. Mohammed Ispahani (supra)** and paragraph- 105 of the Constitution Bench judgement in **Hardeep Singh (supra)**.

40. The nature of evidence required for summoning a non charge-sheeted accused to face trial, has been summarized in paragraph- 106 of the Constitution Bench judgement in **Hardeep Singh (supra)** wherein Constitution Bench has held that a prospective accused can be summoned on the basis of Statement-in-Chief of prosecution witness of fact. The only requirement is that such statement discloses 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. The second test laid down

therein is that such person could be tried with other accused. In paragraph- 36 of the judgement in **S. Mohammed Ispahani (supra)** Court held that a non charge sheeted accused can be summoned only on the basis of "strong and cogent evidence".

41. The evidence of an injured eye witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly. Vide paragraph 37 of judgement in **Manjeet Singh (Supra)**.

42. Having noted the settled position, the Court is now required to consider whether on the testimonies of P.W.1 and P.W.2, revisionist could have been summoned by court below. As an ancillary issue, Court will also have to consider as to whether court below has exercised it's jurisdiction "diligently" or as termed by Apex Court in a "casual and cavalier manner."

43. P.W.1 Rajesh Kumar is first informant. He is also an eye-witness of the occurrence. This witness was travelling along with others in the car which was damaged by named accused. His statement-in-chief as well as examination-in-chief have been recorded. As such his testimony falls in the realm of legal evidence. While considering an application under Section 319 Cr.P.C., Court can rely upon the statement-in-chief of a witness, vide paragraph- 92 of the Constitution Bench judgement in **Hardeep Singh (supra)**. Therefore, no illegality has been committed by court below in relying upon statement-in-chief as well as examination-in-chief of this witness.

44. Statement-in-chief/examination-in-chief of P.W.1 Rajesh Kumar is on record as Annexure-14 to the affidavit filed in support of present revision.

45. Perusal of same goes to show that P.W.1 has categorically stated about the time, place and manner of occurrence. This witness has clearly implicated revisionist alongwith others in the crime in question. His presence at the time and place of occurrence along with others has been categorically stated by this witnesses. This witness in his deposition has clearly stated that revisionist was present at the time and place of occurrence alongwith other accused. As such, complicity of revisionist in crime in question is established. P.W.1 has also been cross-examined. However, upon perusal of examination-in-chief of P.W.1, Court does not find that any such material was culled out from this witness, on the basis of which his testimony could be discarded at this stage. Testimony of P.W.1 clearly satisfies the test as noted in paragraph- 106 of the Constitution Bench judgement in **Hardeep Singh (supra)**, wherein Court has noticed Section 319 Cr.P.C. and has laid emphasis on the term "for which such person could be tried together with the accused". His testimony also satisfies the other test laid down in aforesaid paragraphs of above-noted judgement which is as follows: ***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 view of fact that P.W.1 has been cross examined, wherein presence of revisionist at the time and place of occurrence stands established, as such, his testimony falls in the realm of "strong and cogent evidence." As such, testimony of this witness also satisfies the test laid down in **S. Mohammaed Ispahani (Supra).**

46. P.W.2, Sandeep is also an eye-witness of the occurrence. He was also travelling in the same car which was damaged by named accused. As such, his presence at the time and place of occurrence, cannot be doubted. This witness is also an injured witness. He has categorically detailed the manner of occurrence and how subsequently injured, Ram Chandra Gola was taken by police. Medico Legal report of this witness which is on record at page- 51 of the paper book clearly shows that this witness has sustained injuries. As such, credibility of this witness is higher. This witness has also been cross-examined by charge-sheeted accused, but they could not cull out any such statement on the basis of which, it can be said that his testimony is neither "strong nor cogent". Defence could not establish upto this stage that this injured witness has sustained injuries in another incident. As such, there is nothing on record to disbelieve this witness. The nature of evidence required for summoning an accused under Section 319 Cr.P.C. as noted herein above is also satisfied in respect of this witness also.

47. In view of above, submission urged by Mr. Rajiv Lochan Shukla, learned counsel for revisionist that court below has pre-empted the disposal of application under Section 319 Cr.P.C., inasmuch as, the Investigating Officer has not yet been examined and he was the best person to disclose the circumstances on the basis of which, revisionist was exculpated in the charge-sheet, though appears fanciful at the first flush, but is misconceived in view of law laid down by Constitution Bench in **Hardeep Singh (supra)**.

48. The second submission urged by Mr. Rajiv Lochan Shukla, learned counsel for revisionist that nothing new has been stated by P.W.1 and P.W.2 in their depositions before Court than what was stated before Investigating Officer in their statements under section 161 Cr.P.C., the Court finds that no ground regarding above has been raised in the memo of revision. However, upon perusal of statements of P.W.1 and P.W.2 as recorded under section 161 Cr.P.C. which are on record as Annexure-4 and Annexure-8 to the affidavit, the Court finds that aforesaid witnesses in their statements as well as depositions before Court below have supported the prosecution story as unfolded in F.I.R. In their cross examination, defence has failed to cull out any such fact on the basis of which their testimonies could be discarded being unworthy of acceptance at this stage. For the conclusion drawn regarding nature of evidence of P.W.1 and P.W.2 herein above, submission urged by learned counsel for revisionist is by itself unable to dislodge the credibility and reliability of P.W.1 and P.W.2 at this stage, wherein complicity of revisionist in the crime in question stands established.

49. Apex Court in **Rajesh and Others (Supra)**, **Sugreev Kumar (Supra)**, **Shiv Prakash Mishra (Supra)** and **Sartaj Singh (Supra)** considered the veracity of order passed on an application under section 319 Cr.P.C. wherein prospective accused were summoned in cases under section 302, 307 IPC or both. In all the cases referred to above, Court has meticulously examined the testimonies of prosecution witnesses in each of above mentioned case in the light of tests laid down by Apex Court in **Hardeep Singh (Supra)** and **S.Mohammed Ispahani(Supra)** and after undertaking aforesaid exercise has proceeded to decide whether on the testimony of prosecution

witnesses, prospective accused could be summoned or not.

50. The same procedure as adopted by Court in judgements referred to above in preceding paragraph has been applied in present case. Court has not come across any such material to conclude that Court below has not exercised its jurisdiction "diligently" and revisionist has been summoned by Court below in a "casual and caviliar manner". Deposition of P.W.1 and P.W.2 falls in the realm of "strong and cogent evidence" and satisfies the twin test laid down by Constitution Bench in paragraph 105 of the judgement in **Hardeep Singh (Supra)**. It clearly establishes complicity of revisionist in the crime in question.

51. For the facts and reasons noted above, this Court does not find any good ground to interfere in this revision. Revision lacks merit. Same is, therefore, liable to be dismissed.

52. It is, accordingly, dismissed.

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**(2021)10ILR A615**
**REVISIONAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 05.10.2021**

**BEFORE**

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

Criminal Revision No. 1629 of 2021

**Vidya Nand Yadav ...Revisionist**
**Versus**
**State of U.P. ...Opposite Party**

**Counsel for the Revisionist:**
Sri Akhilesh Singh, Sri Shivam Yadav

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

**Criminal Law - Code of Criminal Procedure, 1973 - Section 457 - Application filed by Revisionist for release of truck seized transporting certain minor minerals--rejected -truck seized by Mines Inspector-approached the District Officer for compounding-he passed order directing release of vehicle upon depositing requisite amount-did not deposited the amount-nor filed any Appeal-thereafter moved application u/s 457 Cr.P.C. before CJM-Application rightly rejected-to attract provision of section 457 Cr.P.C. seizure of property has to be made by a police officer-not by Mine Inspector.**

**Revision dismissed.** (E-9)

**List of Cases cited:**

1. Sunderbhai Ambalal Desai Vs St. of Guj., 2005 (46) ACC 223

2. Rajendra Singh Vs St. of U.P. & ors., AIR 2015 Allahabad 93

3. Smt. Sudha Kesarwani Vs St. of U.P. & anr., 2011 (1) ADJ 498

4. Smt. Manu Devi Vs St.of U.P. & ors., Criminal Misc. Writ Petition No. 20111 of 2020; dt. 18.8.2015

5. Jayant & ors. Vs St. of M.P., (2021) 2 SCC 670

6. The St.of Punj. Vs Barkat Ram, AIR 1962 SC 276

7. Badaku Joti Svant Vs St. of Mysore, AIR 1966 SC 1746

8. Haru v St. of M.P., 1980 Cr LJ 762

9. The St. of Punj. v Barkat Ram, AIR 1962 SC 276

10. Jagabandhu Mahanta Vs Bijay Kumar Kar & anr., 2003 CrLJ 2679 (Ori)

11. Assistant Collector of Customs v Smt. Maria Rege & anr., 1991 Cri LJ 229 (Bom)

12. Babulal Lodhi v St. of M.P. & anr., 1987 Cri LJ 1709 (MP, D.B.)

13. Balkishan A. Devidayal Vs St.of Mah., (1980) 4 SCC 600

14. Rajendra Singh Vs St. of U.P., AIR 2015 Allahabad 93

15. Awadhesh Tripathi Vs St. of U.P., 2016 130 RD 343

16. Smt. Sudha Kesarwani Vs St. of U.P. & anr., 2011 (1) ADJ 498

17. Smt. Manu Devi Vs St. of U.P. & ors., Criminal Misc. Writ Petition No. 20111 of 2020; dt. 18.8.2015

18. Mohammad Raza Vs St. of U.P. & anr., 2017 (2) ALJ 9

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

1. Heard Sri Shivam Yadav, learned counsel for the revisionist and Sri Pankaj Saxena, learned Additional Government Advocate-I appearing along with Ms. Sushma Soni, learned Additional Government Advocate for the State-opposite party.

2. Present criminal revision has been preferred seeking to set-aside the order dated 7.7.2021, passed by the Chief Judicial Magistrate, Kushinagar at Padrauna, whereby the application filed by revisionist under Section 457 of the Code of Criminal Procedure, 19731, for release of truck seized under Section 21(4) of the Mines and Minerals (Development and Regulation) Act, 19572, has been rejected.

3. Pleadings of the case indicate that the vehicle owned by the revisionist, a truck carrying *gitti* (a minor mineral), was seized by the Mines Inspector, Kushinagar on 19.4.2021, and a report was forwarded to the District Officer for further proceedings under Rule 74 of the Uttar Pradesh Minor Minerals (Concession) Rules, 19633. The revisionist claims to have approached the District Officer and thereafter he filed an application under Section 457 of the Code before the Chief Judicial Magistrate, Kushinagar at Padrauna, on 3.6.2021, seeking release of the vehicle. The Chief Judicial Magistrate, after calling for a report from the Mines Inspector, passed an order on 7.7.2021, rejecting the application filed under Section 457 of the Code.

4. Learned counsel for revisionist has sought to assail the aforesaid order dated 7.7.2021, passed by the Chief Judicial Magistrate, by seeking to contend that since the vehicle of the revisionist had been seized, learned Magistrate has committed an error in rejecting the application seeking release of the vehicle, despite the necessary powers in regard to the same being available under Section 457 of the Code. It is submitted that order passed by the Magistrate is based on non-application of mind and is illegal and unsustainable. Learned counsel further submits that the vehicle, which is lying with the authorities, is liable to be released. In support of his submissions, learned counsel has placed reliance upon the decisions in the case of **Sunderbhai Ambalal Desai vs. State of Gujarat4, Rajendra Singh vs. State of U.P. and Others5, Smt. Sudha Kesarwani vs. State of U.P. and Another6, and Smt. Manu Devi vs. State of U.P. and Others7.**

5. Learned Additional Government Advocate-I has controverted the aforesaid contention by submitting that the vehicle/truck in question, of which the revisionist claims ownership, was intercepted while illegally transporting *gitti* (a minor mineral) and was seized by the Mines Inspector on 19.4.2021, in exercise of powers under Section 21(4) of the MMDR Act and a report was forwarded to the District Officer for initiation of proceedings under Rule 74 of the Concession Rules. In the meantime, the revisionist submitted an application dated 23.4.2021 to the District Magistrate, seeking compounding of the offence, and an order dated 28.05.2021 was passed directing the revisionist to deposit the requisite amount towards compounding fee as per the relevant Government Order, whereupon the compounding was to be made and the release of the vehicle would have followed. It has been pointed out that the revisionist did not deposit the requisite compounding fee and moved an application under Section 457 of the Code, before the Chief Judicial Magistrate, which has been rightly rejected as being not entertainable.

6. Learned Additional Government Advocate-I points out that the revisionist having applied for compounding and an order having also been passed thereon by the District Magistrate, in case he was aggrieved, it was open to him to avail the statutory remedy of filing an appeal under Rule 77 and thereafter a revision under Rule 78 of the Concession Rules. It is submitted that the necessary ingredients for invocation of powers under Section 457 of the Code having not been made out, the Magistrate has rightly refused to entertain the said application.

7. The question, thus, falls for consideration is as to whether at the stage where the vehicle has been seized in exercise of powers under Section 21(4) of the MMDR Act with an order having been passed upon an application seeking compounding of the offence, and no complaint having been made by the person authorised before the jurisdictional Magistrate, the provisions under Section 457 of the Code, seeking release of the vehicle, could have been invoked.

8. In order to appreciate the rival contentions on the aforesaid legal issue, the relevant statutory provisions under the MMDR Act, which is an Act to provide for the development and regulation of mines and minerals under the control of the Union, may be referred to.

**"4. Prospecting or mining operations to be under licence or lease.**--"(1) No person shall undertake any reconnaissance, prospecting or mining operations in any area, except under and in accordance with the terms and conditions of a reconnaissance permit or of a prospecting licence or, as the case may be, of a mining lease, granted under this Act and the rules made thereunder" ;

Provided that nothing in the sub-section shall effect any prospecting or mining operations undertaken in any area in accordance with the terms and conditions of a prospecting licence or mining lease granted before the commencement of this Act which is in force at such commencement:

Provided further that nothing in this sub-section shall apply to any prospecting operations undertaken by the Geological Survey of India, the Indian Bureau of Mines, the Atomic Minerals Directorate for Explorations and Research of the Department of Atomic Energy of the Central Government, the Directorate of Mining and Geology of any State

Government (by whatever name called), and the Mineral Exploration Corporation Limited, a Government company within the meaning of Clause (45) of Section 2 of the Companies Act, 2013 (18 of 2013), and any such entity that may be notified for this purpose by the Central Government.

(1-A) No person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with the provisions of this Act and the rules made thereunder.

(2) No reconnaissance permit, prospecting licence or mining lease shall be granted otherwise than in accordance with the provisions of this Act and the rules made thereunder.

(3) Any State Government may, after prior consultation with the Central Government and in accordance with the rules made under Section 18, undertake reconnaissance, prospecting or mining operations with respect to any mineral specified in the First Schedule in any area within that State which is not already held under any reconnaissance permit, prospecting licence or mining lease.

**21. Penalties.**-- (1) Whoever contravenes the provisions of sub-section (1) or sub-section (1-A) of Section 4 shall be punishable with imprisonment for a term which may extend to five years and with fine which may extend to five lakh rupees per hectare of the area.

(2) Any rule made under any provision of this Act may provide that any contravention thereof shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to five lakh rupees, or with both, and in the case of a continuing contravention, with additional fine which may extend to fifty thousand rupees for every day during which such contravention continues after conviction for the first such contravention.

(3) Where any person trespasses into any land in contravention of the provisions of sub-section (1) of Section 4, such trespasser may be served with an order of eviction by the State Government or any authority authorised in this behalf by that Government and the State Government or such authorised authority may, if necessary, obtain the help of the police to evict the trespasser from the land.

(4) Whenever any person raises, transports or causes to be raised or transported, without any lawful authority, any mineral from any land and for that purpose, uses any tool, equipment, vehicle or any other thing, such mineral, tool, equipment, vehicle or any other thing shall be liable to be seized by an officer or authority specially empowered in this behalf.

(4-A) Any mineral, tool, equipment, vehicle or any other thing seized under sub-section (4), shall be liable to be confiscated by an order of the court competent to take cognizance of the offence under sub-section (1) and shall be disposed of in accordance with the directions of such court.

(5) Whenever any person raise, without any lawful authority, any mineral from any land, the State Government may recover from such person the mineral so raised, or where such mineral has already been disposed of, the price thereof, and may also recover from such person rent, royalty or tax, as the case may be, for the period during which the land was occupied by such person without any lawful authority.

(6) Notwithstanding anything contained in the Code of Criminal

Procedure, 1973 (2 of 1974), an offence under sub-section (1) shall be cognizable.

**22. Cognizance of offences.--** No court shall take cognizance of any offence punishable under this Act or any rules made thereunder except upon complaint in writing made by a person authorised in this behalf by the Central Government or State Government.

**23-A. Compounding of offences.**--(1) Any offence punishable under this Act or any rule made thereunder may, either before or after the institution of the prosecution, be compounded by the person authorised under Section 22 to make a complaint to the court with respect to that offence, on payment to that person for credit to the Government, of such sum as that person may specify:

Provided that in the case of an offence punishable with fine only, no such sum shall exceed the maximum amount of fine which may be imposed for that offence.

(2) Where an offence is compounded under sub-section (1), no proceeding or further proceeding, as the case may be, shall be taken against the offender in respect of the offence so compounded, and the offender, in custody, shall be released forthwith."

9. Section 4 of the MMDR Act, and in particular, sub-section (1-A) thereof, puts a total restriction on the transportation or storage of any mineral, otherwise than in accordance with the provisions of the Act and the Rules made thereunder. Section 21 provides for penalties in respect of contravention of the provisions of sub-section (1-A) of Section 4. As per terms of sub-section (4) of Section 21, whenever any person raises, without any lawful authority, any mineral from any land and for that purpose, uses any mineral, tool, equipment, vehicle or any other thing, such mineral tool, equipment, vehicle or any other thing, shall be liable to be seized by an officer or authority especially empowered in this behalf. Sub-section (4-A) provides that the things seized under sub-section (4) shall be liable to be confiscated by an order of the Court competent to take cognizance of the offence under sub-section (1) and shall be disposed of in accordance with the directions of such Court.

10. Section 22 relates to cognizance of offence and in terms thereof no court shall take cognizance of any offence punishable under the MMDR Act or any rules made thereunder except upon complaint in writing by a person authorised in this behalf by the Central Government or the State Government.

11. Section 23-A is in respect of compounding of offences wherein any offence punishable under the Act or any rules made thereunder, may, either before or after the institution of the prosecution, be compounded by the person authorised to make a complaint, on payment to that person for credit to the Government of such sum as that person may specify. As per terms of sub-section (2), where an offence is compounded under sub-section (1) no proceeding or further proceeding, as the case may be, shall be taken against the offender in respect of offence so compounded and the offender, in custody, shall be released forthwith.

12. Under the Concession Rules, the subject matter relating to contraventions, offences and penalties are dealt with under Chapter VII, and Chapter VIII contains miscellaneous provisions. The provisions of the Concession Rules, which are relevant

for the purpose of the controversy at hand, may be adverted to.

**"74. Cognizance of offences.**--(i) No court shall take cognizance of any offence punishable under these rules except on a complaint in writing of the facts constituting such offences by the District Officer or by any officer authorised by him in this behalf.

(ii) No court inferior to that of a Magistrate of the first class, shall try any offence under these rules.

**75. Compounding of offence.--** (1) Any offence punishable under these rules may, either before or after the institution of the prosecution be compounded by the District Officer or by such officer as the State Government may by general or special order authorise in this behalf on payment to the State Government of such sum as such officer may specify:

Provided that in the case of an offence punishable with fine only no such sum shall exceed the maximum amount of fine which may be imposed for that offence.

(2) Where an offence is compounded under sub-rule (1), no proceeding or further proceeding, as the case may be, shall be taken against the offender in respect of the offence so compounded and the offender if in custody, shall be released forthwith.

(3) The officer compounding the offence under sub-rule (1) shall maintain a register showing the following details:

(a) Serial number (by financial year).

(b) Name and address of the offender.

(c) Date and details of offence.

(d) Sum of compounding amount and date of its payment.

(e) Signature of the officer with date and seal.

**77. Appeal.--** An appeal against an order passed under these rules by the District Officer or the Committee shall lie to the Divisional Commissioner within a period of sixty days from the date of communication of such order to the party aggrieved.

**78. Revision.--** The State Government may, either suo moto at any time or on an application made within ninety days from the date of communication of the order, call for an examination of the record relating to any order passed or proceeding taken by the District Officer Committee, Director or the Divisional Commissioner under these rules and pass such orders as it may think fit."

13. Rule 74 relates to cognizance of offence and as per terms thereof, no court shall take cognizance of any offence punishable under the rules except on a complaint in writing of the facts constituting such offence by the District Officer or by any officer authorised by him in this behalf.

14. Rule 75 is in respect of compounding of offence which provides that any offence punishable under the rules made before or after institution of the prosecution, be compounded by the District Officer or by any such officer as the State Government may authorise in this behalf on payment to the State Government of such sum as such officer may specify. Sub-rule (2) mandates that where an offence is compounded under sub-rule (1), no proceeding or further proceeding shall be taken against the offender in respect of offence so compounded.

15. Rule 77 provides for an appeal to a Divisional Commissioner against an order passed under the rules by the District

Officer or the Committee and Rule 78 contains the revisional powers of the State Government.

16. Section 457, which falls under Chapter XXXIV of the Code and pertains to disposal of property, may also be referred to, and the same reads as follows :-

"**457. Procedure by police upon seizure of property.--(1)** Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

17. In the case at hand, the truck stated to be owned by the revisionist was intercepted for illegally transporting certain minor minerals in contravention with the provisions of the MMDR Act and was accordingly, seized by the Mines Inspector on 19.4.2021, and a report in regard to same was forwarded to the District Officer for initiation of prosecution under Rule 74 of the Concession Rules. The revisionist at this stage moved an application dated 23.4.2021 for compounding, on which the District Magistrate passed an order dated 28.5.2021 directing release of the vehicle upon deposit of the requisite amount towards compounding as per the relevant government order.

18. It appears that since the revisionist had sought compounding of the offence, proceedings for prosecution by filing a complaint under Section 22/Rule 75 were not initiated and also no order for confiscation under sub-section (4-A) of Section 21 of the MMDR Act was made.

19. The revisionist did not make the requisite deposit pursuant to the order passed by the District Officer on his application seeking compounding of the offence, nor did he seek the statutory remedy of an appeal under Rule 77, in case he was aggrieved with the order passed by the District Officer. The revisionist, instead, moved an application before the Chief Judicial Magistrate, seeking to invoke the provisions under Section 457 of the Code and it was turned down as not being entertainable.

20. As already noted above, the vehicle owned by the revisionist had been intercepted for illegally transporting certain minor minerals in contravention with the provisions of the MMDR Act and accordingly, the same was seized by the Mines Inspector in exercise of powers referable to sub-section (4) of Section 21 of the Act. Upon seizure of the vehicle under sub-section (4), the same was liable to be confiscated as per terms of sub-section (4-A), by an order of the court competent to take cognizance of the offence under sub-section (1) and was to be disposed of in

accordance with the directions to be passed by such court. The cognizance of the offence punishable under the Act or the rules thereunder, in respect of contraventions made, could be taken by the court concerned upon complaint by the District Officer or any officer authorised by him in this behalf.

21. As per the provisions relating to compounding of offence under Section 23-A read with Rule 75, any offence punishable under the Act/Rules, could be compounded, before or after the institution of prosecution, by the District Officer/officer authorised. Further, as per the provisions contained under sub-section (2) of Section 23-A read with sub-rule (2) of Rule 75 upon the offence being compounded no proceedings/further proceedings are to be taken against the offender in respect of offences so compounded.

22. In the instant case, consequent to the vehicle having been seized under sub-section (4) of Section 21, and before a complaint could be moved by the officer authorised before the Magistrare concerned whereupon an order of cognizance or confiscation could be passed, the revisionist sought compounding of the offence by moving an application before the District Officer which was allowed and an order was passed directing him to deposit the requisite sum whereupon the compounding was to be made and the vehicle was to be released.

23. The revisionist neither deposited the requisite compounding fee to get the offence compounded and the vehicle released, nor availed the statutory remedy of appeal under Rule 77 and a revision under Rule 78 of the Concession Rules, in case he was aggrieved with the order passed by the District Officer upon the application seeking compounding. The revisionist, instead moved an application before the Chief Judicial Magistrate seeking to invoke the provisions under Section 457 of the Code.

24. The facts as noticed above would go to show that upon the vehicle having been seized and before any complaint could be filed by the authorised officer for cognizance of the offence whereupon the competent court could have passed an order of confiscation, the revisionist moved an application seeking compounding of offence and in view of the bar contained under sub-section (2), no proceeding/further proceeding could be taken against him in respect of offence of which compounding had been sought.

25. It may be apposite to refer to the decision in the case of **Jayant and Others vs. State of Madhya Pradesh8,** for the proposition that in a case where the violator is permitted to compound the offences on payment of penalty as per sub-section (1) of Section 23-A of the MMDR Act, in view of sub-section (2) thereof, there shall not be any proceedings or further proceedings against the offender in respect of the offences punishable under the MMDR Act or any rules made thereunder. The observations made in the judgement, in the context of Section 23-A, are being extracted below:

"5.4. Section 23-A of the MMDR Act contemplates the compounding of offence under the MMDR Act. Therefore, the Rules made under the MMDR Act contain provisions for compounding of offence. Sub-section (2) of Section 23-A places a bar on proceedings or further

proceedings, when the offences have been compounded under sub-section (1). Therefore, once the proceedings have been compounded under the Act or Rules made thereunder, no further proceedings can lie. ...

17.1. Section 23-A as it stands today has been brought on the statute in the year 1972 on the recommendations of the Mineral Advisory Board which provides that any offence punishable under the MMDR Act or any Rules made thereunder may, either before or after the institution of the prosecution, be compounded by the person authorised under Section 22 to make a complaint to the court with respect to that offence, on payment to that person, for credit to the Government, of such sum as they person may specify. Sub-section (2) of Section 23-A further provides that where an offence is compounded under sub-section (1), no proceeding or further proceeding, as the case may be, shall be taken against the officer in respect of the offence so compounded, and the offender, if in custody, shall be released forthwith. Thus, the bar under sub-section (2) of Section 23-A shall be applicable with respect to the offences under the MMDR Act or any Rules made thereunder.

21.5. In a case where the violator is permitted to compound the offences on payment of penalty as per sub-section (1) of Section 23-A, considering sub-section (2) of Section 23-A of the MMDR Act, there shall not be any proceedings or further proceedings against the offender in respect of the offences punishable under the MMDR Act or any Rules made thereunder so compounded. ..."

26. It would be in the backdrop of the aforestated fact situation that the question with regard to maintainability/ entertainability of the application filed by the revisionist before the Magistrate under Section 457 of the Code, would be required to be considered.

27. As noted above, the power of the Magistrate seeking release of the vehicle under Section 457 of the Code was sought to be invoked at a stage, where no complaint had yet been moved by the authorised officer before the competent court and neither any cognizance had been taken, nor the court had passed any order of confiscation.

28. Section 457 of the Code empowers the Magistrate to pass orders for disposal of property which is seized by the police and not produced in court during inquiry or trial whenever the seizure of property by the police has to be reported to a Magistrate under the provisions of the Code. The section would be applicable only if the following two conditions are satisfied: (i) the seizure of property by a police officer is reported to a Magistrate under the provisions of the Code; and (ii) such property is not produced before a criminal court during an enquiry or trial.

29. It is therefore, seen that in order to attract the provisions of Section 457, it is essential that the seizure of property is by a "police officer', and the same is reported to a Magistrate under the provisions of the Code.

30. The question which therefore arises would be as to whether seizure of the vehicle by a Mines Inspector exercising powers under the MMDR Act can be held to be "seizure of property by a police officer'.

31. The Police Act, 1861 (Act V of 1861), which is an Act for the regulation of

police, would be required to be looked into so as to understand as to the kind of officers who would come within the meaning of the word "police'. The Preamble of the Act indicates that the enactment was made considering that it was expedient to reorganise the police and to make it a more efficient instrument for prevention and detection of crime. Section 1 of the Police Act, which is the interpretation clause, defines the word "police' as including all persons who shall be enrolled under the Act. Looking to the object of the Act, the police force would primarily be seen to have been organised as an instrument for the prevention and detection of crime and in view thereof the term "police officer' would refer to those officers who are conferred with the powers for the effective prevention and detection of crime in order to maintain law and order.

32. It can, therefore, be said that a person who is a member of the police force can be said to be a "police officer', and a person can be held to be a member of the police force only when he holds his office under any of the enactments dealing with the police. There being no statutory definition of the expression "police officer', it can be stated that a police officer is a person whom any statute or other provison of law calls such, or, on whom it confers all, or, substantially all the powers and imposes the duties of a police officer.

33. The meaning of the expression "police officer' in the context of Section 25 of the Evidence Act and the question as to whether a customs officer can be held to be a police officer were subject matter of consideration in **The State of Punjab v. Barkat Ram9**, and it was held that though the expression "police officer' is not to be construed in a narrow way; however, the same cannot be given such a wide meaning as to include such other persons who may have been conferred with certain powers. It was held that merely because some powers with regard to detection of infractions of customs laws have been conferred on officers of the customs department, the same would not be a sufficient ground for holding them to be "police officer' within the meaning of the term. The observations made in the judgment, relevant to the controversy at hand, are as follows:

"8. The Police Act, 1861 (Act V of 1861), is described as an Act for the regulation of police, and is thus an Act for the regulation of that group of officers who come within the word 'police' whatever meaning be given to that word. The preamble of the Act further says: 'whereas it is expedient to re-organise the police and to make it a more efficient instrument for the prevention and detection of crime, it is enacted as follows'. This indicates that the police is the instrument for the prevention and detection of crime which can be said to be the main object and purpose of having the police. Sections 23 and 25 lay down the duties of the police officers and S. 20 deals with the authority they can exercise. They can exercise such authority as is provided for a police officer under the Police Act and any Act for regulating criminal procedure. The authority given to police officers must naturally be to enable them to discharge their duties efficiently. Of the various duties mentioned in S. 23, the more important duties are to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances and to detect and bring offenders to justice and to apprehend all persons whom the police officer is legally authorised to apprehend. It is clear, therefore, in view of the nature of

the duties imposed on the police officers, the nature of the authority conferred and the purpose of the police Act, that the powers which the police officers enjoy are powers for the effective prevention and detection of crime in order to maintain law and order.

9. The powers of customs officers are really not for such purpose. Their powers are for the purpose of checking the smuggling of goods and the due realisation of customs duties and to determine the action to be taken in the interests of the revenues of the country by way of confiscation of goods on which no duty had been paid and by imposing penalties and fines

12. ... the duties of the Customs Officers are very much different from those of the police officers and that their possessing certain powers, which may have similarity with those of police officers, for the purpose of detecting the smuggling of goods and the persons responsible for it, would not make them police officers.

13. There seems to be no dispute that a person who is a member of the police force is a police officer. A person is a member of the police force when he holds his office under any of the Acts dealing with the police. ..."

34. A similar qustion came up for consideration before a Constitution Bench of the Supreme Court in **Badaku Joti Svant v. State of Mysore10**, and while considering the powers conferred upon a Central Excise Officer in matters relating to investigating a cognizable case, it was held that a Central Excise Officer can only make a complaint under clause (a) of Section 190(1) of the Code, and his report is not a report made by a police officer. It was held that even if a broad view is taken mere conferment of powers of investigation into a criminal offence under Section 9 would not make the Central Excise Officer a "police officer'. The observations made in the judgment, in this regard, are as follows:

"6. There has been difference of opinion among the High Courts in India as to the meaning of the words "police officer" used in S. 25 of the Evidence Act. One view has been that those words must be construed in a broad way and all officers whether they are police officers properly so-called or not would be police officers within the meaning of those words if they have all the powers of a police officer with respect to investigation of offences with which they are concerned. The leading case in support of this view is Nanoo Sheikh Ahmed v. Emperor, AIR 1927 Bom 4 (FB). The other view which may be called the narrow view is that the words "police officer" in S. 25 of the Evidence Act mean a police officer properly so-called and do not include officers of other departments of government who may be charged with the duty to investigate under special Acts special crimes thereunder like excise offences or customs offences, and so on. The leading case in support of this view is Radha Kishun Marwari v. Emperor, AIR 1932 Pat 293 (SB). The other High Courts have followed one view or the other, the majority being in favour of the view taken by the Bombay High Court.

7. ... We shall proceed on the assumption that the broad view may be accepted and that requires an examination of the various provisions of the Act...

10. ... we are of the opinion that mere conferment of powers of investigation into criminal offences under S. 9 of the Act does not make the Central Excise Officer a

police officer in the broader view mentioned above. Otherwise any person entrusted with investigation under S. 202 of the Cr.P.C. would become a police officer.

11. ... in these circumstances we are of opinion that even though the Central Excise Officer may have when making enquiries for purposes of the Act powers which an officer-in-charge of a police station has when investigating a cognizable offence, he does not thereby become a police officer even if we give the broader meaning to those words in S. 25 of the Evidence Act."

35. The expression "police officer' as held in various judicial authorities, does not include officers of other department on whom certain powers of a police officer are conferred under a particular enactment for certain specific purposes. (See **Haru v State of MP11, The State of Punjab v Barkat Ram9)**

36. In a case where confiscation proceeding under Section 52 of the Indian Forest Act, 1927 in respect of a vehicle seized for a forest offence had been initiated, it was held that the Magistrate exercising powers under the Code would have no jurisdiction to order for delivery of the vehicle or to entertain an application for release of the vehicle. (See **Jagabandhu Mahanta v. Bijay Kumar Kar and Another12)**

37. Considering the applicability of the provisions of Section 457 to a seizure by a customs officer, in the case of **Assistant Collector of Customs v Smt. Maria Rege and another13,** it was held that unless the property in question had been seized by a police officer during inquiry or trial, the criminal court would not get jurisdiction under the section to deal with such seizure and that the customs officer being not a "police officer' the seizure of property effected by him and disposal thereof, cannot be taken cognizance of by a criminal court under the section.

38. The seizure by a Forest Range Officer under the Wild Life (Protection) Act, 1972 was also held not to attract the provisions of Section 457 of the Code as such officer is not a police officer. (See **Babulal Lodhi v State of Madhya Pradesh and another14)**

39. The question as to whether an officer of the Railway Protection Force making inquiry under the Railway Property (Unlawful Possession) Act, 1966, could be covered within the meaning of the expression "police officer' under Section 25 of the Evidence Act or Section 162 of the Code was subject matter of consideration in **Balkishan A. Devidayal v. State of Maharashtra15,** and it was held that an officer of the Railway Protection Force would not be a police officer, so also would be the position of a Customs or Excise Officer. In this regard, the test evolved in **Badaku Joti Svant (supra)** by the Constitution Bench was referred to, which is : whether the officer concerned under the special Act, has been invested with all the powers exercisable by the officer- in-charge of a Police Station under Chapter XIV of the Code, qua investigation of offences under that Act, including the power to initiate prosecution by submitting a report (charge sheet) under Section 173 of the Code and it would not be enough to show that he exercises some or even many of the powers of a police officer conducting an investigation under the Code. It was stated thus:-

"54. It may be recalled that the primary test evolved in *Badku Joti Savant* case by the Constitution Bench, is: Whether

the officer concerned under the special Act, has been invested with all the powers exercisable by an officer-in-charge of a police station under Chapter XIV of the Code, qua investigation of offences under that Act, including the power to initiate prosecution by submitting a report (charge-sheet) under Section 173 of the Code. In order to bring him within the purview of a "police officer" for the purpose of Section 25, Evidence Act, it is not enough to show that he exercises some or even many of the powers of a police officer conducting an investigation under the Code.

57. In *State of U.P. v. Durga Prasad* (1975) 3 SCC 210, after carefully examining and comparing the powers of arrest, inquiry and investigation of an officer of the Force under the 1966 Act with those of a police officer under the Code, it was pointed out that such an officer of the RPF does not possess all the attributes of an officer-in-charge of a police station investigating a case under Chapter XIV of the Code. He possesses but a part of those attributes limited to the purpose of holding the inquiry under the Act. On these premises, it was held that an officer of the RPF making an inquiry under the 1966 Act, cannot be equated with an investigating police officer. In reaching this conclusion, Chandrachud, J. (as he then was), speaking for the court, appears to have applied the same test which was adopted in *Badku Joti* Savant case, when he observed:

The right and duty of an investigating officer to file a police report or a charge-sheet on the conclusion of investigation is the hallmark of an investigation under the Code. Section 173(1)(a) of the Code provides that as soon as the investigation is completed the officer-in-charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government. The officer conducting an inquiry under Section 8(1) cannot initiate court proceedings by filing a police report. ...

The decision in *Raja Ram Jaiswal v. State of Bihar,* AIR 1964 SC 828 case, on which Shri Garg relies, was distinguished, as was done in *Badku Joti Savant* case, on the ground that Jaiswal case involved the interpretation of Section 78(3) of the Bihar and Orissa Excise Act, 1915.

58. In the light of the above discussion, it is clear that an officer of the RPF conducting an enquiry under Section 8(1) of the 1966 Act has not been invested with all the powers of an officer-in-charge of a police station making an investigation under Chapter XIV of the Code. Particularly, he has no power to initiate prosecution by filing a charge-sheet before the Magistrate concerned under Section 173 of the Code, which has been held to be the clinching attribute of an investigating "police officer". Thus, judged by the test laid down in *Badku Joti Savant*, which has been consistently adopted in the subsequent decisions noticed above, Inspector Kakade of the RPF could not be deemed to be a "police officer" within the meaning of Section 25 of the Evidence Act, and therefore, any confessional or incriminating statement recorded by him in the course of an inquiry under Section 8(1) of the 1966 Act, cannot be excluded from evidence under the said section."

40. Under the scheme of the MMDR Act and the rules made thereunder, as noticed earlier, consequent to a seizure made under sub-section (4) of Section 21, a complaint in writing is to be made by the authorized officer before the jurisdictional court for taking cognizance of the offence

as required under Section 22/Rule 74. Sub-section (4-A) provides that anything seized under sub-section (4), shall be liable to be confiscated by an order of the court competent to take cognizance and shall be disposed of in accordance with the directions of such court.

41. It would, therefore, be seen that in terms of the provisions contained under the MMDR Act and the rules made thereunder, the officer exercising powers under sub-section (4) of Section 21, (the Mines Inspector, in the present case) upon making seizure of a vehicle or any other thing, on account of unlawful transportation, is required to submit a report to the District Officer/Officer authorised for the purpose of making a complaint before the Court concerned for taking cognizance of the offence.

42. The Mines Inspector or the Officer exercising powers of seizure under sub-section (4) of Section 21 cannot in any manner be deemed to be a "police officer' having not being conferred with any such powers which may be said to be attributable to an investigating "police officer'. The primary test laid down in the Constitution Bench decision in the case of **Badaku Joti Svant (supra)**, which has been followed in the subsequent judicial authorities, is clearly not satisfied in the facts of the present case.

43. Section 457 of the Code contemplates exercise of jurisdiction by a Magistrate in a case where seizure of the property is by any police officer. The right and duty of an investigating officer to file a police report or a charge sheet on the conclusion of an investigation has been held to be the hallmark of an investigation under the Code and a clinching attribute of an investigating police officer. The aforementioned clinching attribute being lacking in the present case, the seizure made by the Mines Inspector under Section 21(4) of the MMDR Act, cannot be held to be seizure by a "police officer' so as to bring it within the ambit of Section 457 of the Code. It may be reiterated that mere conferment of certain powers relating to seizure under a particular enactment for certain specific purposes would not make the officer concerned a "police officer'.

44. In the present case, as noted earlier, before the District Officer/officer authorised could have acted upon the report submitted by the Mines Inspector, consequent to seizure of the vehicle and could have proceeded to make a complaint before the Magistrate for taking cognizance, the revisionist sought compounding of the offence as per the provisions contained under Section 23-A/Rule 75 and an order was passed by the District Officer directing payment of the requisite fee whereupon the offence was to be compounded and the vehicle was to be released. It was in these set of facts that neither any complaint was filed before the concerned Magistrate nor any order of confiscation was passed by the competent court under sub-section (4A) of Section 21.

45. It would therefore be seen that there being no complaint and no cognizance of the offence having been taken, no proceeding could be said to be pending nor could it be said that seizure of the property in question had been reported by any "police officer' to the competent jurisdictional Magistrate under the provisions of the Code. The necessary ingredients for invocation of the powers under Section 457 of the Code having thus not been fulfilled, the provisions of the

section cannot be said to be attracted, and in view thereof the Magistrate has rightly declined to exercise the jurisdiction conferred under the section.

46. In the case of **Sunderbhai Ambalal Desai (supra)**, which is sought to be relied upon on behalf of the revisionist, the subject matter of consideration was a challenge which had been raised to an order of police remand granted to the prosecuting agency for the petitioners therein, who were police personnel involved in offences punishable under Sections 429, 420, 465, 468, 477-A and 114 of the Indian Penal Code, 186016 on allegations that they had committed offences during a period of time by replacing of valuable articles retained as case property by other spurious articles, misappropriation of the amount which was kept at the police station, unauthorised auction of the property which was seized and kept in the police custody pending trial and tampering with the records of the police station. The offences which were subject matter of the case were under the Penal Code. The judgment in the case Sunderbhai Ambalal Desai (supra), which is an authority relating to release of vehicles seized in connection with criminal proceedings under general law would not be applicable under the facts of the present case, wherein the seizure of the property has not been reported by any police officer or by any officer authorised competent to file a complaint before the jurisdictional Magistrate.

47. In case of **Rajendra Singh vs. State of U.P.5** which is sought to be relied upon by counsel for revisionist, the order passed by the District Magistrate, directing release of the seized minor mineral, was subject matter of consideration and upon taking note of the provision contained under sub-section (4-A) of Section 21 of the MMDR Act, which empowers the Court competent to take cognizance, pass an order of confiscation and also direct disposal of the seized item, it was held that the release order by the District Magistrate was without authority. In the instant case, the revisionist having applied for compounding of the offence soon after seizure of vehicle, proceedings for initiation of prosecution were not initiated and also no order for confiscation was made by the Court concerned. In view of same, the facts of the present case being distinguishable, the judgment in the case of **Rajendra Singh** would be of no help to the revisionist.

48. The decisions in the case of **Awadhesh Tripathi v. State of U.P.17, Smt. Sudha Kesarwani vs. State of U.P. and Another6, Smt. Manu Devi vs. State of U.P. and Others7** and **Mohammad Raza vs. State of U.P. and Another18,** are all based on distinct facts as in all these cases subsequent to the seizure, a report had been made to the jurisdictional Magistrate whereafter the application for release was made. The fact situation in the present case is entirely distinguishable inasmuch as no report by a District Officer/ Authorised Officer had been placed before the jurisdictional Magistrate for taking cognizance in view of compounding having been sought by revisionist.

49. Having regard to the aforestated facts and in the absence of any material error or illegality having been pointed out in the order passed by the Magistrate declining to exercise its powers under Section 457 of the Code, there is no reason

which may persuade the court to exercise its revisional jurisdiction.

50. The revision is accordingly, **dismissed.**

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**(2021)10ILR A630**
**REVISIONAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 15.09.2021**

**BEFORE**

**THE HON'BLE VIVEK AGARWAL, J**

Criminal Revision No. 1703 of 1998
alongwith
Criminal Revision No. 2034 of 1998

**Brij Pal ...Revisionist**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Revisionist:**
Sri Onkar Singh

**Counsel for the Opposite Parties:**
Govt. Advocate, Sri Manav Chaurasia, Sri Pramod Kumar Srivastava, Sri S.S. Malik, Sri Shiv Singh

**Criminal Law - Code of Criminal Procedure, 1973 - Section 202- Cognizance taken on account of evidence of PW2 -there were 9 witnesses-not mandatory for the complainant to examine all the witnesses named in the complainnat.**

**Held,** The meaning of words "All his witnesses" is to be understood in the light of the fact that word 'His' is adjective according to grammar qualifying word 'Witnesses'. 'His' means of himself, or belonging to him, or associated with him. **(para 4)**

**Revision dismissed.** (E-9)

**List of Cases cited:**

1. Satyadeo Pandey & ors. Vs St. of U.P. & anr., 1987 (1) Crimes 637
2. Dudh Nath Mishra Vs St. of U.P., 2003 Allahabad Law Journal 55

3. Chhotey Lal s/o Parmanand Vs St. of U.P. & Smt. Rati Basor w/o Hasmukh Basoi, 2006 Cr.L.J. 2265

4. Abdul Hamidkhan Pathan & Others Vs St. of Guj. & ors. , 1989 Cr.L.J. 468 (Guj. DB)

5. Kishor Singh & Etc. Vs Sudama Prasad & ors. 2002 Cr.L.J. 802 (MP)

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

1. Heard Sri Onkar Singh, learned counsel for revisionists and Sri Shiv Singh, learned counsel for opposite party.

2. Sri Onkar Singh submits that impugned order has been passed only upon taking evidence of a solitary witnesses whereas as per the provisions contained in Section 202(2), it is provided that if it appears to the Magistrate that the offence complained of, is triable exclusively by the Court of Sessions, he shall call upon the complainant to produce all his witnesses and examine them on oath.

3. Reading impugned order dated 05.09.1998, it is submitted that as per the evidence of PW2, cognizance has been taken whereas fact of the matter is that there are as many as nine witnesses, as is evident from Annexure-7 to the revision and they all should have been examined in terms of the Proviso below Sub-Section 2 of Section 202 Cr.P.C.

4. After hearing learned counsel for the revisionists and going through the record so also the available case law on the subject, it is evident that in case of ***Satyadeo Pandey & Others vs. State of U.P. & Another, 1987 (1) Crimes 637,*** it is held that the meaning of words "All his witnesses" is to be understood in the light of the fact that word 'His' is adjective according to grammar qualifying word 'Witnesses'. 'His' means of himself, or belonging to him, or associated with him. According to the Websters, third new internal dictionary, the word 'His' connotes, associated or connected with, of relating to him, that he is capable of. In the present context, the words "All his witnesses" connotes that all the witnesses of the complainant associated or connected with his interest and those witnesses who are material and relevant to prove prosecution case. The words "All his witnesses" under the proviso to this Section do not refer literally to all the prosecution witnesses in number, rather to all his witnesses (i.e., of the complainant) and to whom he considers material to prove his case.

5. In case of ***Dudh Nath Mishra vs. State of U.P., 2003 Allahabad Law Journal 55*** so also in case of ***Chhotey Lal s/o Parmanand vs. State of U.P. & Smt. Rati Basor w/o Hasmukh Basoi, 2006 Cr.L.J. 2265,*** it is held that it is not necessary to examine all the witnesses named in the complaint petition. In fact, it is the discretion of the complainant to examine some witnesses and to give up rest of the witnesses. He is not required to examine even those persons whom he/she does not want to place reliance.

6. In case of ***Abdul Hamidkhan Pathan & Others vs. State of Gujarat & Others, 1989 Cr.L.J. 468 (Guj. DB),*** it is held that non examination of all the witnesses named in the complaint case exclusively triable by the court of sessions, the order of issuing process to the accused is not illegal.

7. Thus, the legal position is well settled as has been laid down in case of Satyadev Pandey (supra), Dudh Nath Mishra (supra), Chhote Lal (supra) by the Allahabad High Court and also in case of Abdul Hamidkhan Pathan (supra) by the Gujarat High Court and so also in case of ***Kishor Singh & Etc. vs. Sudama Prasad & Others, 2002 Cr.L.J. 802 (MP)***, wherein it is held that it is not mandatory for the complainant to examine all the witnesses named in complaint, he has choice in the matter and, therefore, this issue being already settled by several pronouncements of this High Court and other High Courts, is to be answered accordingly that there is no need to examine all the witnesses in terms of the Proviso below Sub-Section 2 of Section 202 Cr.P.C., if a case is triable by sessions court especially having regard to the import and meaning of word 'His' used in the proviso.

8. Accordingly, criminal revisions fail and are ***dismissed.***

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**(2021)10ILR A632**
**REVISIONAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 08.09.2021**

**BEFORE**

**THE HON'BLE SHAMIM AHMED, J**

Criminal Revision No. 1786 of 2021

**Atul Pandey ...Revisionist**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Revisionist:**
Sri Ali Hasan, Sri Istiyaq Ali

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

**Criminal Law - Code of Criminal Procedure, 1973 - Section 156 - Allegation-opposite party prepared a forged referral letter -to lodge false FIR against the revisionist--learned Magistrate converted it into a complaint case - Magistrate not applied judicious mind-as offence made out a cognizable offence and is offence of forgery-impugned order set aside.**

**Matter remanded back to pass fresh order.** (E-9)

**List of Cases cited:**

1. 'Lalita Kumari Vs Govt. of India & ors.', reported in 2014(2) SCC 1;

2. Jitendra Kumar Vs St.of U.P. & 2 ors., Criminal Revision No.1768 of 2018, decided on 29.05.2018;

3. 'Shiv Mangal Singh Vs St. of U.P. & ors.', Criminal Revision No.715 of 2019, decided on 25.02.2019

4.Ashok Kumar Pathak Vs St. of U.P. & anr.', passed in application under Section 482 Cr.P.C. No.43271 of 2018, decided on 30.11.2018.

5. Sukhwasi Vs St. of U.P. & ors.' 2007 (59) ACC 739

6. Suresh Chandra Jain Vs State of M.P. & anr. (2001) 2 SCC 628;

7. Mohd. Yousuf Vs Smt. Afaq Jahan & anr. (2006) 1 SCC 627;

8. Ram Babu Gupta Vs St. of U.P. & ors. [2001 (43) ACC 50 (FB);

9. Sukhwasi Vs St. of U.P. & ors. [2007 (9) ADJI (DB)

10. Ram Dev Food Products Vs St. of Guj. (2015) 6 SCC 439

11. Lalita Kumari Vs Govt. of India & ors. reported in 2014 (2) SCC 1

12. Gulab Chand Upadhyay Vs St. of U.P. & ors. 2002 SCC OnLine All 1221

13. 'Lalaram Vs St. of U.P. & 13 ors. passed in Criminal Revision No.1611 of 2020

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri Ali Hasan, learned counsel for the revisionist and learned A.G.A. appearing for the State and perused the material brought on record.

2. This revision has been filed challenging the order dated 16.10.2020 passed by learned Judicial Magistrate-II, Bhadohi at Gyanpur in Criminal Misc. Application No.3597 of 2020 (Atul Pandey @ Param Pragyan Pandey versus Janardan Pandey) under Section 156(3) Cr.P.C. Police Station-Oonjh, District- Bhadohi after summoning the record from the trial court and remand the case before the learned Magistrate for fresh consideration of the application moved by the revisionist under Section 156(3) CrPC for registration

of the FIR against the opposite party no.2 and investigation of the case.

3. The facts of the case are that the revisionist lodged an FIR against the opposite party no.2 in respect of a dispute that arose on 8.1.2020 as case crime no.2/2020 under Sections 323, 504, 506 and 427 IPC. It is alleged that in order to create a false version of a cross case against the revisionist, opposite party no.2 Janardan Pandey fraudulently got himself referred for medical examination by preparing a forged referral letter dated 12.1.2020, on the basis of which the concerned CMO wrote a letter dated 25.1.2020 to the Chief Medical Superintendent of District Hospital, Prayagraj for conducting the CT Scan of Janardan Pandey. The revisionist informed about this act of forgery by the revisionist to the concerned CMO through a letter dated 4.2.2020, taking note of which the concerned CMO requested CMS, Tej Bahadur Saprtu Hospital, Prayagraj for cancellation of CT Scan report through a letter No.Medical/CT Scan/Nirastikaran/2019-20 dated 25.1.2020 for being obtained on furnishing false referral certificate and a copy of the said letter was directed to be sent to the concerned SP, SHO and the revisionist for the necessary action. But even after an application was sent before the SP Bhadohi, no action has been taken, therefore the revisionist has moved an application under Section 156(3) CrPC for registration of the FIR and the investigation of the case for the offence of forgery committed by the opposite party no.2. The Judicial Magistrate II, Bhadohi at Gyanpur vide order dated 16.10.2020 converted the said application under Section 156(3) CrPC into a complaint case and fixed the date on 2.1.2021 for statement of the revisionist under Section 200 CrPC.

4. Learned counsel for the revisionist submits that the application under Section 156(3) Cr.P.C. discloses commission of cognizable offence and as such the Magistrate must have directed the registration of the first information report and investigation by police, instead of treating the application as a complaint case. He further submits that the order under challenge has been passed mechanically and in a routine manner, which does not manifest the application of judicious mind to the facts of the case and law applicable therein. He has placed reliance on the cases of **'Lalita Kumari Vs. Government of India and others'**, reported in **2014(2) SCC 1; 'Jitendra Kumar Vs. State of U.P. and 2 others',** Criminal Revision No.1768 of 2018, decided on 29.05.2018; **'Shiv Mangal Singh Vs. State of U.P. and others',** Criminal Revision No.715 of 2019, decided on 25.02.2019 and **'Ashok Kumar Pathak Vs. State of U.P. and another'**, passed in application under Section 482 Cr.P.C. No.43271 of 2018, decided on 30.11.2018.

5. Learned AGA has submitted that the Magistrate has the jurisdiction to direct the police to register the F.I.R. and make investigation without taking cognizance. But, he has also the jurisdiction to take cognizance and proceed to inquire the matter by himself, registering the application as a complaint case. In such circumstance he has to follow the procedure prescribed for complaint case. He has submitted that the Magistrate while proceeding as a complaint case has still the power to direct for police investigation, in view of Section 202(1) Cr.P.C. If the Magistrate in his discretion has adopted the option of registering the application as a complaint case, no illegality has been committed by the Magistrate. Learned A.G.A. has placed reliance on the case of **'Sukhwasi Vs. State of U.P. and others'** 2007 (59) ACC 739 (Allahabad) (D.B.) in

support of his contention that it is in the discretion of the Magistrate to direct for police investigation before taking cognizance under Section 156(3) Cr.P.C., or after taking cognizance to proceed with the application as a complaint case.

6. After considering the arguments as advanced by the learned counsel for the parties and after perusal of the record, this Court is of the view that in the cases of **Suresh Chandra Jain vs State of M.P. and another (2001) 2 SCC 628; Mohd. Yousuf Vs. Smt. Afaq Jahan & another another (2006) 1 SCC 627; Ram Babu Gupta Vs. State of U.P. & others [2001 (43) ACC 50 (FB); Sukhwasi Vs. State of U.P. & others [2007 (9) ADJI (DB) & Ram Dev Food Products Vs. State of Gujarat (2015) 6 SCC 439** it has been laid down that the Magistrate empowered under section 190 Cr.P.C. may order an investigation by police under section 156 (3) but he need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance he has to follow the procedure envisaged in Chapter XV of the code. The magistrate should apply judicial mind while exercising his powers under Section 156 (3) Cr.P.C. He could not act in a mechanical or casual manner and go on with the complaint after getting the report. The course adopted by the Magistrate i.e. direction to the police for registration of FIR and making investigation or to treat the application as a complaint case, must be supported by reasons. The order must also reflect that the Magistrate on relevant considerations has adopted one of these two modes open to him. Mere mention in the order that he has gone through the complaint and the police investigation is not required or otherwise, would not be sufficient compliance of application of judicial mind while deciding application under Section 156(3) Cr.P.C.

7. In the case of **Lalita Kumari Vs. Government of India and others reported in 2014 (2) SCC 1** the Hon'ble Supreme Court has held as under:

*"120) In view of the aforesaid discussion, we hold:*

*"i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.*

*ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.*

*iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.*

*iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.*

*v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.*

*vi) As to what type and in which cases preliminary inquiry is to be*

*conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:*

*a) Matrimonial disputes/ family disputes*

*b)Commercial offences*

*c) Medical negligence cases*

*d) Corruption cases*

*e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.*

*The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.*

*vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.*

*viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."*

8. The case of **Lalita Kumari (supra)** came to be considered in Ramdev Food Products Private Ltd. Vs. State of Gujarat (2015) 6 SCC 439 the first question as framed therein was "whether the discretion of the Magistrate to call for a report under Section 202 Cr.P.C. instead of directing investigation under Section 156(3) Cr.P.C. is controlled by any defined parameters? The Hon'ble Supreme Court answered the first question by holding that the direction under Section 156(3) Cr.P.C. is to be issued only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone issuance of process and finds that a case is made out to proceed forthwith, direction under the provision is issued. In other words, where on account of credibility of information available or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued. The cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate is yet to determine existence of sufficient ground to proceed. The category of cases falling under para 120.6 in Lalita Kumari may fall under section 202 Cr.P.C. Subject to these broad guidelines available from the scheme of the Court, exercise of discretion by the Magistrate is guided by interest of justice from case to case. Para Nos. 22 to 22.3 of **Ramdev Food Products (P) Ltd. (supra)** is being reproduced as under:

*"22. Thus, we answer the first question by holding that:*

*22.1. The direction under Section 156 (3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone the issuance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway*

*direct investigation, such a direction is issued.*

*22.2. The cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine "existence of sufficient ground to proceed". Category of cases falling under para 120.6 in Lalita Kumar may fall under Section 202 Cr.P.C..*

*22.3. Subject to these broad guidelines available from the scheme of the Code, exercise of discretion by the Magistrate is guided by interest of justice from case to case."*

9. It would also be appropriate to refer to the judgment of this Court in the case of **Gulab Chand Upadhyay Vs State of U.P. and others 2002 SCC OnLine All 1221** in which this Hon'ble Court has held as under:

*"20. In these circumstances, the question arises that when a Magistrate is approached by a complainant with an application praying for a direction to the police under Section 156 (3) to register and investigate an alleged cognizable offence, why should he*

*(A) grant the relief of registration of a case and its investigation by the police under Section 156 (3) Cr.P.C. and when should he*

*(B) treat the application as a complaint and follow the procedure of Chapter XV of Cr.P.C.*

*21. The scheme of Cr.P.C. and the prevailing circumstances require that the option to direct the registration of the case and its investigation by the police should be exercised where some investigation is required, which is of a nature that is not possible for the private complainant, and which can only be done by the police under whom statute has conferred the powers essential for investigation, for example*

*(1) where the full details of the accused are not known to the complainant and the same can be determined only as a result of investigation, or*

*(2) where recovery of abducted person or stolen property is required to be made by conducting raids or searches of suspected places or persons, or*

*(3) where for the purpose of launching a successful prosecution of the accused evidence is required to be collected and preserved. To illustrate by example cases may be visualised where for production before Court at the trial (a) sample of blood soaked soil is to be taken and kept sealed for fixing the place of incident; or*

*(b) recovery of case property is to be made and kept sealed; or (c) recovery under Section 27 of the Evidence Act; or (d) preparation of inquest report; or (e) witnesses are not known and have to be found out or discovered through the process of investigation.*

*22. But where the complainant is in possession of the complete details of all the accused as well as the witnesses who have to be examined and neither recovery is needed nor any such material evidence is required to be collected which can be done only by the police, no "investigation" would normally be required and the procedure of complaint case should be adopted. The facts of the present case given below serve as an example. It must be kept in mind that adding unnecessary cases to the diary of the police would impair their efficiency in respect of cases genuinely requiring investigation. Besides even after taking cognizance and proceeding under Chapter XV the Magistrate can still under Section 202 (1) Cr.P.C. order investigation, even thought of a limited nature (see para 7 of JT (2001) 2 (SC) 81: ((2001) 2 SCC 628: AIR 2001 SC 571)."*

10. Recently, in the case of '**Lalaram Vs. State of U.P. and 13 others'** passed in Criminal Revision No.1611 of 2020,

decided on 18.12.2020, this Court has summarized the well settled proposition of law on the scope of Section 156(3) Cr.P.C., the power and jurisdiction of the Magistrate while deciding such an application. It would be appropriate to reproduce paragraph no.40 of the case of **Lalaram (Supra)**, as under:-

*"40. From the aforesaid judgments, some of the following proposition of law, well settled, may be summarized as under:-*

*(40.01). Under Section 154 of the Code, if the information discloses commission of a cognizable offence it is the mandatory duty of the police officer in charge to register the FIR. He cannot avoid his duty of registering offence, if cognizable offence is made out.*

*(40.02). If FIR is not registered, the person aggrieved by a refusal to record the information has remedy to approach the Superintendent of Police by submitting an application in writing and by post to enable him to satisfy if such information discloses the commission of a cognizable offence and in case of such satisfaction, either to investigate himself or direct an investigation to be made by any police officer subordinate to him.*

*(40.03). If the person still feels aggrieved from inaction of the police authorities he has the remedy to approach the Magistrate by way of application under Section 156(3) Cr.P.C.,*

*(40.04). On such an application having been made, if, the Magistrate finds that a cognizable offence is made out, the Magistrate may direct the police to register the FIR and investigate the matter, without taking cognizance.*

*(40.05). The other option open to the Magistrate is to take cognizance on the complaint, register it as a complaint case and proceed as per the procedure prescribed under Chapter XV Cr.P.C. The Magistrate would record the statement of the complainant and the witnesses if any present, under Section 200 Cr.P.C. He may, if he thinks fit and shall in cases where accused resides out side the area of exercise of jurisdiction of the Magistrate concerned, either enquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, under Section 202(1) Cr.P.C. Thereafter, he shall pass order, either under Section 203 dismissing the complaint, for brief reasons to be recorded, or he shall issue process under Section 204 Cr.P.C.*

*(40.06). In either case, i.e. issuing direction for investigation by the police officer under Section 156(3) Cr.P.C. or taking cognizance and registering it as a complaint case, the Magistrate has to apply judicial mind. There cannot be mechanical exercise of jurisdiction or exercise in a routine manner. Mere statement in the order that he has gone through the complaint, documents and heard the complainant will not be sufficient. What weighed with the Magistrate to order investigation or to take cognizance should be reflected in the order, although a detailed expression of his view is neither required nor warranted.*

*(40.07). The exercise of discretion by the Magistrate is basically guided by interest of justice, from case to case.*

*(40.08). However, where some investigation is required which is of a nature that is not possible for the private complainant and which can only be done by the police officer upon whom statute has conferred the powers essential for investigation, the option to direct the registration of the FIR and its investigation*

*by the police officer should be exercised, for example:-*

*(i) where the full details of the accused are not known to the complainant and the same can be determined only as a result of investigation, or*

*(ii) where recovery of abducted person or stolen property is required to be made by conducting raids or searches of suspected places or persons, or*

*(iii) where for the purpose of launching a successful prosecution of the accused evidence is required to be collected and preserved, and to illustrate this, by few example cases may be visualised where for production before Court at the trial*

*(a) sample of blood soaked soil is to be taken and kept sealed for fixing the place of incident; or*

*(b) recovery of case property is to be made and kept sealed; or*

*(c) recovery under Section 27 of the Evidence Act; or*

*(d) preparation of inquest report; or*

*(e) witnesses are not known and have to be found out or discovered through the process of investigation.*

*(40.09). Where the complainant is in possession of the complete details of all the accused and the witnesses who have to be examined and neither recovery is needed nor any such material evidence is required to be collected which can be done only by the police, no "investigation" would normally be required and the procedure of complaint case should be adopted.*

*(40.10). Category of cases falling under para 120.6 in Lalita Kumari (Supra) i.e.*

*(a) Matrimonial disputes/family disputes*

*(b) Commercial offences*

*(c) Medical negligence cases,*

*(d) Corruption cases*

*(e) Cases where there is abnormal delay in filling criminal complaint etc. may fall under Section 202 Cr.P.C .*

*(40.11). The Magistrate should also keep in view that primarily, it is the duty of the State/police to investigate the cases involving cognizable offence. Generally, the burden of proof to bring the guilt of the accused is on the State and this burden is a heavy burden to prove the guilt beyond all reasonable doubts. This burden should not unreasonably be shifted on an individual/complainant from the State by treating the application under Section 156(3) Cr.P.C. as a complaint case.*

*(40.12). The investigation which the police officer or such other person makes in pursuance of the direction of the Magistrate under Section 202(1) Cr.P.C. is the same kind of investigation as is required to be conducted by police officer, under Chapter XII Cr.P.C. which ends with submission of the report as per Section 173(2) Cr.P.C.*

*(40.13). The distinction between the investigation by the police officer under Section 156(3) and under Section 202(1) Cr.P.C. is that the former is at the pre-cognizance stage and the latter is at post cognizance stage, when the Magistrate is seisin of the case. The investigation under Section 202(1) Cr.P.C. is for the purpose of ascertaining the truth or false hood of the complaint for helping the Magistrate to decide, whether or not there is sufficient ground, for him to proceed further against the accused by issuing process, whereas, the inquiry report under Section 173(2) Cr.P.C. of the investigation made by the police of its own or under the directions of the Magistrate under Section 156(3) Cr.P.C. is for the purpose of enabling the*

*Magistrate to take cognizance of an offence under Section 190(1)(a) Cr.P.C.*

*(40.14). Once cognizance is taken on the application under Section 156(3) Cr.P.C. by the Magistrate and he embarks upon the procedure embodied in Chapter XV, he would not be competent to revert to the pre-cognizance stage under Section 156(3) Cr.P.C.*

*(40.15). If the Magistrate did not order for police investigation under Section 156(3) Cr.P.C. and took cognizance of the case, that would not be bar to the exercise of the power of the Magistrate for directing the police investigation under Section 202(1) Cr.P.C."*

11. In **'Jitendra Kumar'** (Supra), **'Shiv Mangal Singh'** (Supra) and **'Ashok Kumar Pathak'** (Supra) relied upon by the learned counsel for the revisionist also it was held that the Magistrate shall pass order with due application of judicious mind.

12. It is true that every application under Section 156(3) Cr.P.C. disclosing commission of a cognizable offence may not be directed for investigation by police and the Magistrate has jurisdiction to treat the same as a complaint case but in exercise of such jurisdiction the Magistrate has to keep in view various factors as laid down in **Lalaram** (supra), which are only illustrative and not exhaustive. The exercise of jurisdiction is basically guided by interest of justice, from case to case.

13. Perusal of the order clearly shows that the Magistrate has not applied judicious mind to the facts of the case, which not only made out commission of a cognizable offence but an offence of forgery against opposite party no.2. The application clearly stated that the opposite party no.2 has manufactured the referral letter of Medical Officer Incharge C.H.C. Deegh, Bhadohi for getting X-ray of his injury done from District Hopsital, Beli, Prayagraj which was found after enquiry conducted by the Department. The gravity/seriousness of the offence; the requirement of the evidence for the purpose of launching a successful prosecution, and basically the interest of justice depending on the facts of each case, need be considered in passing the order under Section 156(3) Cr.P.C. The offence, as per the contents of the application is not a matrimonial, commercial or family dispute, etc. The order does not assign any valid reason nor reflects application of judicious mind to relevant considerations and does not stand the test of the law as laid down in the cases of **'Ram Deo Food Products' (Supra) and 'Gulab Chand Upadhyay'** (Supra).

14. The present revision is, therefore, **allowed**. The order dated 16.10.2020 passed by learned Judicial Magistrate-II, Bhadohi at Gyanpur in Criminal Misc. Application No.3597 of 2020 (Atul Pandey @ Param Pragyan Pandey versus Janardan Pandey) under Section 156(3) Cr.P.C. Police Station-Oonjh, District- Bhadohi is hereby set aside and the case is remanded back with the direction to the learned Magistrate to pass fresh orders on the application of the applicant after affording opportunity of hearing to parties concerned, in accordance with law, in the light of the observations made herein above, within a period of two months from the date of production of computerized copy of this judgment before him.

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

Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

16. 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.

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**(2021)10ILR A640**
**REVISIONAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 07.10.2021**

**BEFORE**

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

Criminal Revision No. 1981 of 2021

**Upendra @ Mohit ...Revisionist**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Revisionist:**
Sri Anil Kumar Shukla

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

**Criminal Law - Code of Criminal Procedure, 1973-Section 319 - Revisionist named in FIR-assigned a role -testimony of PW-1 and PW-2- indicative of complicity of Revisionist-though not arraigned in charge sheet-summoning order u/s 319 legal.**

**Held,** The power under Section 319 of the Code to summon even those persons who are not named in the chargesheet to appear and face trial, being unquestionable and the object of the provision being not to allow a person who deserves to be tried to go scot-free by being not arraigned in the trial in spite of possibility of his complicity which can be gathered from the evidence during the course of trial, the order passed under Section 319 of the Code summoning the revisionist does not contain any material error so as to warrant inference.**(para 20)**

**Revision dismissed.** (E-9)

**List of Cases cited:**

1. Hardeep Singh & ors. Vs St. of Punj., (2014) 3 SCC 92

2. S. Mohammed Ispahani Vs Yogendra Chandak & ors., (2017) 16 SCC 226

3. Rajesh & ors. Vs St. of Har., (2019) 6 SCC 368

4. Saeeda Khatoon Arshi Vs St. of U. P. & anr., (2020) 2 SCC 323

5. Adesh Tyagi Vs St. of U.P. & anr., Application u/s 482 No.8478 of 2021, decided on 04.08.2021

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

1. Heard Sri Anil Kumar Shukla, learned counsel for the revisionist and Sri Pankaj Saxena, learned Additional Government Advocate-I appearing alongwith Ms. Sushma Soni, learned Additional Government Advocate, for the State-opposite party.

2. The present criminal revision has been filed against the order dated 18.03.2021 passed by the Additional District and Sessions Judge, Court no.4, Hathras in S.T. No.396 of 2015 (State vs. Girendrapal and Others), arising out of Case Crime No.700 of 2014, under Sections 308, 323, 504, 506 IPC, Police Station- Sasni, District Hathras, whereby the revisionist has been summoned by the court below in exercise of powers under Section 319 of the Code of Criminal Procedure, 19731.

3. Learned counsel for the revisionist has sought to assail the order passed by the court below by referring to the factual aspects of the case to contend that the revisionist has been falsely implicated in the criminal case. He has submitted that the jurisdiction under Section 319 of the Code is to be exercised in an extra-ordinary situation where there is a strong possibility of the conviction of the accused, who is proposed to be summoned, and the powers are not to be exercised in a routine manner. It is further pointed out that the Investigating Officer did not find any material against the revisionist and no charge-sheet having been submitted against him, there was no further material on the basis of which the trial court could have summoned the revisionist.

4. Learned Additional Government Advocate-I has controverted the assertions made by the counsel for the revisionist by drawing attention to the fact that the revisionist herein was named in the FIR and as per the FIR version he was assigned a specific role. Attention has been drawn to the fact that the testimony of PW-1 and PW-2 during the course of trial have pointed to the complicity of the revisionist and his clear role in the incident. It is also contended that the testimony before the trial judge would have to be given more weight than the report submitted by the Investigating Officer pursuant to the investigation.

5. Rival contentions fall for consideration.

6. The ambit and scope of the powers of the Magistrate under Section 319 of the Code were considered in the Constitution Bench judgment of the Supreme Court in **Hardeep Singh and Others vs. State of Punjab2**. Referring to the object of the provision it was held that the object of the provision is that the real culprit should not get away unpunished and in a situation where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. It was stated thus :-

"8.The constitutional mandate under Articles 20 and 21 of the Constitution of India, 1950 provides a protective umbrella for the smooth administration of justice making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence but at the same time also gives equal protection to victims and to society at large to ensure that the guilty does not get away from the clutches of law. For the empowerment of the courts to ensure that the criminal administration of justice works properly, the law was appropriately codified and modified by the legislature under CrPC indicating as to how the courts should proceed in order to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to book under the law. It is these ideals as enshrined under the Constitution and our laws that have led to several decisions, whereby innovating methods and progressive tools have been forged to find out the real truth and to ensure that the guilty does not go unpunished.

9.The presumption of innocence is the general law of the land as every man is presumed to be innocent unless proven to be guilty. Alternatively, certain statutory presumptions in relation to certain class of offences have been raised against the

accused whereby the presumption of guilt prevails till the accused discharges his burden upon an onus being cast upon him under the law to prove himself to be innocent. These competing theories have been kept in mind by the legislature. The entire effort, therefore, is not to allow the real perpetrator of an offence to get away unpunished. This is also a part of fair trial and in our opinion, in order to achieve this very end that the legislature thought of incorporating provisions of Section 319 Code of Criminal Procedure. It is with the said object in mind that a constructive and purposive interpretation should be adopted that advances the cause of justice and does not dilute the intention of the statute conferring powers on the court to carry out the abovementioned avowed object and purpose to try the person to the satisfaction of the court as an accomplice in the commission of the offence that is the subject matter of trial.

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

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

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17. Section 319 CrPC allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the chargesheet filed under Section 173 Code of Criminal Procedure or a person whose name has been disclosed in any material before the court that is to be considered for the purpose of trying the offence, but not investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence.

18. The legislature cannot be presumed to have imagined all the circumstances and, therefore, it is the duty of the court to give full effect to the words used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scot free by being not arraigned in the trial in spite of possibility of his complicity which can be gathered from the documents presented by the prosecution.

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

7. As regards the degree of satisfaction required for invoking the powers under Section 319 of the Code, it

was held that 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. It was observed as follows :-

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

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Code of Criminal Procedure. In Section 319 Code of Criminal Procedure 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 Code of Criminal Procedure to form any opinion as to the guilt of the accused.

8. The question as to in what situations the power under the section can be exercised in respect of persons not named in the FIR or named in the FIR, but not charge-sheeted or discharged was also considered, and it was held that a person whose name does not appear even in the FIR or in the charge-sheet or whose name appears in the FIR and not in the charge-sheet, can still be summoned by the court provided the conditions under the section stand fulfilled. It was observed as follows :-

"111. Even the Constitution Bench in Dharam Pal (CB) has held that the Sessions Court can also exercise its original jurisdiction and summon a person as an accused in case his name appears in Column 2 of the chargesheet, once the case had been committed to it. It means that a person whose name does not appear even in the FIR or in the chargesheet or whose name appears in the FIR and not in the main part of the chargesheet but in Column 2 and has not been summoned as an accused in exercise of the powers under Section 193 Code of Criminal Procedure can still be summoned by the court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled.

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117.6 A person not named in the FIR or a person though named in the FIR but has not been chargesheeted or a person who has been discharged can be summoned under Section 319 Code of Criminal Procedure provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has

been discharged is concerned the requirement of Sections 300 and 398 Code of Criminal Procedure has to be complied with before he can be summoned afresh. "

9. The word 'evidence' as used under Section 319(1) of the Code was also considered and it was held as follows :-

"84. The word "evidence" therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 Code of Criminal Procedure.The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.

85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Code of Criminal Procedure. The "evidence" is thus, limited to the evidence recorded during trial. "

10. The principles with regard to exercise of power by the court to summon an accused under Section 319 of the Code were reiterated in **S. Mohammed Ispahani Vs. Yogendra Chandak and others3,** and it was held that the power under Section 319 to summon even those persons who are not named in the charge-sheet to appear and face trial, is unquestionable. It was observed thus:-

"28.Insofar as power of the Court Under Section 319 of the Code of Criminal Procedure, to summon even those persons who are not named in the charge sheet to appear and face trial is concerned, the same is unquestionable. Section 319 of the Code of Criminal Procedure, is meant to rope in even those persons who were not implicated when the charge sheet was filed but during the trial the Court finds that sufficient evidence has come on record to summon them and face the trial. In Hardeep Singh's case, the Constitution Bench of this Court has settled the law in this behalf with authoritative pronouncement, thereby removing the cobweb which had been created while interpreting this provision earlier. As far as object behind Section 319 of the Code of Criminal Procedure, is concerned, the Court had highlighted the same as under:

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

11. The power to proceed against persons named in FIR with specific allegations against them, but not charge-sheeted, was reiterated in **Rajesh and others Vs. State of Haryana,4** and it was held that persons named in the FIR but not

implicated in charge-sheet can be summoned to face trial, provided during the trial some evidence surfaces against the proposed accused.

12. The exercise of powers under Section 319 of the Code for summoning an additional accused again came up for consideration in **Saeeda Khatoon Arshi Vs. State of Uttar Pradesh and another5** and it was held that it is the duty of the court to give full effect to the words used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scot-free by being not arraigned in the trial inspite of the possibility of his complicity which can be gathered from the documents presented by the prosecution.

13. In the case at hand the court below has taken note of the fact that the revisionist was not only named in the FIR but he was also assigned a role in the incident. The testimony of P.W.1 and P.W.2 as being indicative of the complicity of the revisionist have also been referred. Upon considering the settled legal position with regard to the exercise of powers under Section 319, the court below has passed the order summoning the revisionist.

14. The FIR version as also the evidence before the trial judge being indicative of the complicity of the revisionist, though not arraigned as an accused in the charge-sheet, it was open to the trial court to form a view that the revisionist be tried together with the other accused, and for the said purpose summon the revisionist in exercise of powers under Section 319 of the Code.

15. The broad principles which have been laid down for exercise of powers under Section 319 of the Code underline the object of the enactment that the real perpetrator of the offence should not get away unpunished and in a situation where the investigating agency for any reason does not array any culprit as an accused the court would not be powerless in calling the accused to face trial; rather it would be duty of the court to do justice by punishing the real culprit.

16. The test which has been laid down with regard to the degree of satisfaction required for invoking the powers under Section 319 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.

17. The power to proceed under Section 319 has also been held to be exerciseable in respect of persons though named in the FIR but not charge-sheeted provided the court is satisfied that the conditions provided under the section stand fulfilled.

18. Section 319 (1) of the Code envisages that 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.

19. The word evidence used under Section 319 (1) of the Code has been held to be understood to refer to the evidence recorded during trial, and also any material that has been received by the court after cognizance is taken and before the trial commences, to be utilized for corroboration

and to support the evidence recorded by the court.

20. The evidence recorded by the court during trial is thus to be accorded primacy and for the purpose of exercise of power under Section 319 of the Code would have to be given weight over the material which was collected during the course of investigation. The contention which has been sought to be raised placing reliance upon the material collected by the investigating officer during the course of investigation, for the purpose of exercise of powers under Section 319 of the Code, thus cannot be accepted.

21. The power under Section 319 of the Code to summon even those persons who are not named in the charge-sheet to appear and face trial, being unquestionable and the object of the provision being not to allow a person who deserves to be tried to go scot-free by being not arraigned in the trial inspite of possibility of his complicity which can be gathered from the evidence during the course of trial, the order passed under Section 319 of the Code summoning the revisionist does not contain any material error so as to warrant inference.

22. The aforementioned legal position has been considered in detail in a recent decision of this Court in **Adesh Tyagi vs. State of U.P. and Another6**

23. Counsel for the revisionist at this stage submits that he does not dispute the aforementioned legal position with regard to the scope of exercise of powers under Section 319 of the Code and states that the revisionist would submit to the jurisdiction of the court below and seek bail.

24. Needless to say that in case any such application for bail is moved by the revisionist, the court below would be expected to dispose of the same in accordance with the settled principles of law.

25. Subject to aforesaid observation the revision stands dismissed.

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**(2021)10ILR A646**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:ALLAHABAD 06.09.2021**

**BEFORE**

**THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.**
**THE HON'BLE SUBHASH CHAND, J.**

FAFO No. 3400 of 2011
(CIVIL MISC. REVIEW APPLICATION No. 340686 of 2011)

**Regional Manager U.P.S.R.T.C., Bareilly ...Appellant**

**Versus**

**Smt. Sabari Begum ...Respondent**

**Counsel for the Appellant:**
Sri Nripendra Mishra

**Counsel for the Respondent:**

**Review application filed-virtually an attempt to re argue the matter-not permissible in review application.**

**Reargument on merits cannot be allowed in a review application.** (E-9)

**List of Cases cited:**

1. Thungabhadra Industries Ltd. Vs The Government of Andhra Pradesh AIR 1964 SC 1372

2. Meera Bhanja Vs Nirmala Kumari Choudhury AIR 1995 SC 455 w

3. Parsion Devi & ors. Vs Sumitri Devi & ors. 1997 (8) SCC 715

4. Rajendra Kumar Vs Rambai, AIR 2003 SC 2095

5. Lily Thomas Vs U.O.I. AIR 2000 SC 1650

6. Inderchand Jain Vs Motilal (2009) 4 SCC 665

7. Kamlesh Verma Vs Mayawati & ors. 2013 (8) SCC 320

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

(Ref: Civil Misc. Review Application No. 340686 of 2011)

1. By way of this Review Application, applicant, Regional Manager U.P.S.R.T.C. has sought review of the judgment and order dated 18.10.2011 passed by this Court (Coram: Justice Sunil Ambwani and Justice Kashi Nath Pandey) in First Appeal From Order No. 3400 of 2011 (Regional Manager U.P.S.R.T.C. Vs. Smt. Sabari Begum).

2. It is submitted by learned counsel for the review-applicant that the Court has not properly appreciated the matter and judgment is not correct.

3. Having heard the learned counsel for the petitioner (review) and gone through the grounds taken in the Review Application, we find that virtually there is an attempt to re-argue the matter which is not permissible in a Review Application. An application for review cannot be treated to be an opportunity to argue the case on merits afresh. In the garb of a review application reargument on merits of the case cannot be allowed. We are even fortified in our view by the following authoritative pronouncements.

4. In **Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh AIR 1964 SC 1372** the Court said:

*"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error."*

5. In **Aribam Tuleshwar Sharma Vs. Aribam Pishak Sharma 1979 (4) SCC 389** the Court said:

*"... there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate powers which*

*may enable an A*ppellate Court to correct all manner of errors committed by the Subordinate Court."

6. Again, in **Meera Bhanja v. Nirmala Kumari Choudhury AIR 1995 SC 455** while quoting with approval the above passage from **Abhiram Taleshwar Sharma Vs. Abhiram Pishak Shartn (supra),** the Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

7. In **Parsion Devi and others Vs. Sumitri Devi and others 1997 (8) SCC 715** it was held that an error, which is not self evident and has to be detected by process of reasoning, can hardly be said to be error apparent on the face of the record justifying the court to exercise powers of review in exercise of review jurisdiction.

8. In **Rajendra Kumar Vs. Rambai, AIR 2003 SC 2095, t**he Apex Court has observed about limited scope of judicial intervention at the time of review of the judgment and said:

*"The limitations on exercise of the power of review are well settled. The first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will lead to failure of justice. In the absence of any such error, finality attached to the judgement/order cannot be disturbed."*

9. Thus, Review is not an appeal in disguise. Rehearing of the matter is impermissible in the garb of review. It is an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. In **Lily Thomas Vs. Union of India AIR 2000 SC 1650,** the Court said that power of review can be exercised for correction of a mistake and not to substitute a new. Such powers can be exercised within limits of the statute dealing with the exercise of power. The aforesaid view is reiterated in **Inderchand Jain Vs. Motilal (2009) 4 SCC 665.**

10. In **Kamlesh Verma Vs. Mayawati and others 2013 (8) SCC 320**, the Court said:

*"19. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 of CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction.*

**Summary of the Principles:**

*20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:*

*20.1. When the review will be maintainable:-*

*(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;*

*(ii) Mistake or error apparent on the face of the record;*

*(iii) Any other sufficient reason.*

*The words "any other sufficient reason" has been interpreted in* **Chhajju Ram vs. Neki, AIR 1922 PC 112** *and approved by this Court in* **Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulose Athanasius & Ors., AIR 1954 SC 526**, *to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in* **Union of India vs. Sandur Manganese & Iron Ores Ltd. & Ors., 2013 (8) SCC 337.**

*22.2. When the review will not be maintainable:-*

*(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.*

*(ii) Minor mistakes of inconsequential import.*

*(iii) Review proceedings cannot be equated with the original hearing of the case.*

***(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.***

***(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.***

***(vi) The mere possibility of two views on the subject cannot be a ground for review.***

***(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.***

*(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.*

***(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived." (emphasis supplied)***

11. In the case in hand, grounds for review, as above, and the review application do not satisfy the contours of entertaining the review petition, hence, we find no reason to interfere with the well reasoned order of this Court dated 18.10.2011.

12. This review application is, therefore, dismissed.

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**(2021)10ILR A649**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:ALLAHABAD 18.08.2021**

**BEFORE**

**THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.**
**THE HON'BLE VIVEK VARMA, J.**

FAFO No. 3830 of 2009

**Radhika Devi & Ors. ...Appellants**
**Versus**
**Rajendra Prasad Daruka & Anr. ...Respondents**

**Counsel for the Appellants:**
Sri Amit Kumar Sinha, Deepali Srivastava

**Counsel for the Respondents:**
Sri Santosh Kumar Singh

**Only issue to be decided is quantum of compensation awarded-amount under non-pecuniary heads granted and interest awarded are on lower side-salary certificate shows Rs. 35,758/- but wrongly considered as Rs.18,315/-30% of income to be added as future prospects-deduction towards personal expenses to be 1/4 as deceased had 4 persons to feed.**

**Appeal partly allowed.** (E-9)

**List of Cases cited:**

1. National Insurance Company Limited Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

2. Sunil Sharma & ors. Vs Bachitar Singh & ors., (2011) 11 SCC 425

3. Manasvi Jain Vs Delhi Transport Corp. Ltd. & ors., (2014) 13 SCC 22

4.National Insurance Company Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050.

5. A.Vs Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442

6. Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291

7. First Appeal From Order No.23 of 2001 (Smt. Sudesna & ors. Vs Hari Singh & anr.)

8. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Vivek Varma, J.)

1. Heard Shri Amit Kumar Sinha, learned counsel for the appellants; Shri Santosh Kumar Singh, learned counsel for the respondents; and perused the record.

2. This appeal, at the behest of the claimants, challenges the judgment dated 27.3.2009 passed by Motor Accident Claims Tribunal/Additional District Judge/Additional District Judge, Court No.12, Allahabad (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No.473 of 2004 awarding a sum of Rs.19,11,760/- with interest at the rate of 6% as compensation.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The respondent concerned has not challenged the liability imposed on them. The only issue to be decided is, the quantum of compensation awarded.

4. It is submitted by learned counsel for the appellants that the Tribunal has not granted any amount towards future loss of income of the deceased which is required to be granted in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.** It is further submitted that amount under non-pecuniary heads granted and the interest awarded by the Tribunal are on the lower side and require enhancement and learned counsel submitted the salary certificate of the deceased, which is shown the income of the deceased was Rs.35,758/- and after deduction income tax, income of the deceased was Rs.31,182/- per month. It is also submitted that as the deceased was survived by his wife, one son and three daughter and hence the deduction towards personal expenses of the deceased as 1/4 and not 1/3. The multiplier has to be as

per that of deceased. Learned counsel for the appellants has cited the following judgments of the Apex Court:

**(i) Sunil Sharma and others v. Bachitar Singh and Others, (2011) 11 SCC 425.**

**(ii) Manasvi Jain v. Delhi Transport Corporation Limited and Others, (2014) 13 SCC 22.**

5. Learned counsel for the respondents, has vehemently objected the contentions raised by the learned counsel for the appellants and has submitted that the compensation awarded by the Tribunal is just and proper and does not call for any enhancement.

6. Having heard the learned counsel for the parties and considered the factual data, this Court found that the accident occurred on 9.11.2003 causing death of Subedar Ram who was 48 years of age and left behind him, wife (now died), one son and two daughters. The Tribunal has assessed the income of the deceased to be Rs.18,315/- per month. The deceased was a Senior Engineer in N.T.P.C. by profession. The tribunal has erred itself in not considering the income of the deceased and has deducted amount which he could not deduct holding that they were personal benefits to the deceased. All that could have been deducted would be the tax benefit and, therefore, we cannot concur with the tribunal as far as holding that the deceased was entitled to that the income was Rs.18,315/- per month. The income has to be considered Rs.31,000/-as the salary slip categorically showed the income of the deceased to his income categorically shows that it was Rs.35,758/- per month even if we deduct Rs.4,000/- as tax amount, Rs.31,000/- per month would be the income which would be admissible to the family. We are considering to be Rs.31,000/- per month (rounded figure) which we feel is just and proper. As per the judgements cited by Shri Sinha, the deductions made by the tribunal could not have been made. To which as the deceased was age bracket of 46-50 years, 30% of the income will have to be added as future prospects in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.** As far as deduction towards personal expenses of the deceased is concerned, it should be 1/4 as the deceased had four persons to feed.

7. Hence, the total compensation payable to the appellants in view of the decision of the Apex Court in Pranay Sethi (Supra) is computed herein below:

i. Income Rs.31,000/- p.m.

ii. Percentage towards future prospects : 30% namely Rs.9,300/-

iii. Total income : Rs. 31000 + 9300 = Rs.40,300/-

iv. Income after deduction of 1/4 : Rs.30,225/-

v. Annual income : Rs.30,225 x 12 = Rs.3,62,700/-

vi. Multiplier applicable : 13(as the deceased was in the age bracket of 46-50 years)

vii. Loss of dependency: Rs.3,62,700 x 13 = Rs.47,15,100/-

viii. Amount under non pecuniary heads : Rs.70,000/-

ix. Total compensation : **Rs.47,85,100/-**.

8. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442,** the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

9. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291,** total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 **(Smt. Sudesna and others Vs. Hari Singh and another)** while disbursing the amount.

10. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and not blindly apply the judgment of A.V. Padma (supra). The same is to be applied looking to the facts of each case.

11. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

*"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason t*o allow the interest in this matter at any rate higher than that allowed by High Court."

12. 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 along with additional 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.

13. As far as claimant No.1 is concerned, the widow has passed away and hence, the amount to be disbursed in equal proportion to legal representations.

14. This Court is thankful to both the counsels to see that the matter is disposed of.

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**(2021)10ILR A653**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 25.10.2021**

**BEFORE**

**THE HON'BLE VIVEK CHAUDHARY, J**

Election Petition No. 1 of 2019

**Dr. Lal Bahadur ...Petitioner**
**Versus**
**Ritesh Pandey ...Respondent**

**Counsel for the Petitioner:**
Akhilesh Kumar Kalra, Amit Tripathi, Asheesh Agnihotri, Avinash Chandra, Badrus Sahar, Kali Prasad Singh, Prashant Kumar, Sarvesh Kumar Tiwari, Shakti Vikram Srivastava

**Counsel for the Respondent:**
G.A.

**The Representation of the People Act, 1951 – Sections 861, 82 & 117 - Application filed by Petitioner for exempting from publishing notice in Hindi daily Dainik Jagran-non compliance of section 861, 82 or 117 of RP Act-liable to be dismissed u/s 86 -Petitioner admittedly not filed original election petition-copy filed along with court fee is a true copy attested-such declaration is made on each and every page-cannot be said to be a bonafide mistake.**

**W.P. dismissed.** (E-9)

**List of Cases cited:**

1.Dr. Mohammad Ismail Faruqui Vs Shri Rajnath Singh: Election Petition No.5 of 2014

2. R.K. Roja Vs U.S. Rayudu & anr., (2016) 14 SCC 275

3. K. Venkateswara Rao & anr. Vs Bekkam Narsimha Reddy & ors., AIR 1969 SC 872,

4. Hukumdev Narain Yadav Vs Lalit Narain Mishra (1974) 2 SCC 133

5. G.Vs Sreerama Reddy & anr. Vs Returning Officer & ors. (2009) 8 SCC 736

6. K. Venkateswara Rao & anr. Vs Bekkam Narsimha Reddy & ors., AIR 1969 SC 872

7. Hukumdev Narain Yadav Vs Lalit Narain Mishra (1974) 2 SCC 133

8. G.Vs Sreerama Reddy & anr. Vs Returning Officer & ors. (2009) 8 SCC 736

9. Uday Shankar Triyar Vs Ram Kalewar Prasad Singh & anr. (2006) 1 SCC 75;

10. Sheo Sadan Singh Vs Mohan Lal Gautam, 1969(1) SCC 408;

11. Mairembam Prithviraj alias Prithviraj Singh Vs Pukhrem Sharatchandra Singh (2017) 2 SCC 487;
12. Ajay Maken Vs Adesh Kumar Gupta & anr. (2013) 3 SCC 489;

13. U.S. Sasidharan Vs K. Karunakaran & anr. (1989) 4 SCC 482; C.P. John Vs Babu M. Palissery & ors. (2014) 10 SCC 547

14. Saritha S. Nair Vs Hibi Eden, 2020 SCC Online SC 1006 (SLP (Civil) No.10678 of 2020 dated 9.12.2020)

15. F.A. Sapa & ors. Vs Singora & ors. (1991) 3 SCC 375

16. Abdulrasakh Vs K.P. Mohammed & ors. (2018) 5 SCC 59; Anil Vasudev Salgaonkar Vs Naresh

17. Kushali Shigaonkar (2009) 9 SCC 310 and Tej Bahadur Vs Narendra Modi, AIROnline 2019ALL 2004

18. Uday Shankar Triyar Vs Ram Kalewar Prasad Singh & anr. (2006) 1 SCC 75

(Delivered by Hon'ble Vivek Chaudhary, J.)

***(C.M. Application No.115252 of 2021**-Application for exemption from publication of notice in Newspaper)*

***(C.M. Application No.118492 of 2021**-Application for extension of time to file reply to the application for exemption from publication filed by petitioner)*

***(C.M. Application No.118015 of 2021**-Reply/Objection to aforesaid application no. 11252 of 2021)*

1. C.M. Application No.115252 of 2021 is filed by the petitioner praying that he may be exempted from publishing notice in Hindi daily Dainik Jagran, Ambedkar Nagar Edition, as was directed by the Court by it's orders dated 18.7.2019 and 23.9.2019.

2. Against the aforesaid application, objections are filed on behalf of respondent, which bears C.M. Application No.118015 of 2021 and an Application for condoning delay in filing objections is C.M. Application no.118492 of 2021.

3. I have heard the petitioner, who appears in person, and Sri Sudeep Seth, learned Senior Advocate, assisted by Sri Sarvesh Kumar Tiwari, Advocate, appearing for the respondent.

4. The facts with regard to publication of notice in newspaper are, that, notices on the election petition were issued by order-dated 18.7.2019. The Court directed that notices shall be issued by ordinary post, registered A.D. and shall also be published simultaneously in a newspaper having wide circulation in the area to be selected by the Registry of the Court. The petitioner deposited an amount of Rs.250/- on 22.07.2019, as required under Rule 6(b) of Chapter XV-A of the Allahabad High Court Rules, 1952 (for short "the High Court Rules'). The Senior Registrar of this Court by order-dated 23.7.2019 permitted the publication in Hindi daily Dainik Jagran widely circulated in the area. Thereafter, office by its report-dated 4.9.2019 reported that notices were provided to the petitioner for publication in Hindi daily Dainik Jagran. Notices were also sent to the respondent by other modes as directed by the court, which stand served upon the respondent. However, the petitioner has returned the notice for publication through his letter dated 8.8.2019, stating his inability to get the notice published in local Dainik Jagran, with request to the office to get the same published. The report also notes that a letter is sent to the Editor/Manager, Advertisement, Hindi daily newspaper "Dainik Jagran' for providing quotation/charges for publication of notice and its reply is still awaited. The matter was placed before the Court; whereon the Court considered the office report dated 4.9.2019 and directed the matter to be placed on 23.9.2019. On 23.9.2019, the Court found that quotation is received from the Manager (Marketing), Dainik Jagran and directed that notice be published in newspaper as per order of the Senior Registrar on deposit of necessary charges and directed the case to be listed on 31.10.2019. On 30.10.2019, office submitted a report that "in compliance of Hon. Court order dated 23.9.2019, a letter was sent to the petitioner but petitioner has not deposited the necessary charges for publication of notice, hence notice could not be published in the news paper'. Thereafter the matter came up before the Court on 31.10.2019. On the said date, the petitioner appeared but the case was adjourned on the illness slip of learned counsel for respondent. On the dates fixed thereafter, learned counsel for the

respondent took time for filing the written statement or otherwise filed adjournment applications. The case was also delayed on certain dates due to COVID pandemic situation. It was taken up on 6.9.2021 and an oral objection was raised by the counsel for the respondent that despite order of this court dated 23.9.2021 petitioner has not deposited the money for publication of notice in newspaper. On the said objection petitioner took two days time for filing appropriate application.

5. In furtherance of the said order, petitioner on 8.9.2021 filed the present application for exemption from publication of notice. Petitioner in Para-5 of the application has disclosed the material facts with regard to non-deposit of money by him. It states, that, the petitioner had deposited the initial amount of Rs.250/- for publication of notice as per Rule 6(b) of Chapter XV-A of the High Court Rules. The said notice was to be published through the Senior Registrar, but the concerned office gave notice for publication to the petitioner, which was duly received by him on 27.09.2019. The petitioner ignored the irregularity committed by the office and approached the Dainik Jagran, Ambedkar Nagar Office on 3.8.2019 for publication. Despite the fact that he fulfilled all the formalities notice was not published either on 4th or 5th of August 2019, and was returned to the petitioner on 6.8.2019 by Dainik Jagran, Ambedkar Nagar Office. In the said background, petitioner returned the said notice along with covering letter to the Deputy Registrar, High Court, Lucknow by registered post dated 8.8.2019. Thereafter, on 11.9.2019, the sole respondent had put in appearance through counsel. Again, the court by order-dated 23.9.2019 directed the office to take steps for publication of notice. The Senior Registrar on 28.09.2019 obtained a quotation of Rs. 23,717/- from Dainik Jagran, Lucknow instead of Dainik Jagran, Ambedkar Nagar. Since the quotation was wrongly obtained from Dainik Jagran, Lucknow office, hence, the petitioner did not deposit Rs.23,717/- in the Registry. Since the sole respondent had already appeared in the matter and filed written statement along with an application for condoning the delay, hence, the objection raised by the respondent is unwarranted and is only for delaying the proceedings. In the aforesaid background, the petitioner should be exempted from depositing further cost for publication of notice.

6. During the course of argument, the petitioner again referred to the contents of his application and submitted that since service upon the sole respondent has already taken place, there is no need for publication of notice. He further submits that since the Senior Registrar had wrongly taken the quotation from Dainik Jagran, Lucknow office, therefore also, he did not deposit the money. He fairly admitted that he never moved any application before the Senior Registrar or before the Court objecting to the amount of quotation or office from where quotation was taken. His submission is that in the given circumstances, petitioner is not required to deposit money, as service upon respondent has already taken place, and objection raised by the respondent is only to delay the proceedings.

7. Sri Sudeep Seth, learned Senior Advocate, appearing for the respondent, submits that the Court had repeatedly asked the petitioner to publish the notice in the news paper and if he had any objection with regard to the amount or any other

issue, the only course open for the petitioner was to move an appropriate application, either before the Court or before the Senior Registrar. He never moved any such application either before the Court or before the Senior Registrar. Therefore, he has knowingly and willingly failed to comply with the direction of the Court. The objection raised now by the petitioner with regard to amount in quotation is an afterthought, only to cover up his failure to comply with the direction of this Court. The law with regard to requirement of publication of notice is settled by number of judgments of the Supreme Court and this Court. Reliance is placed upon the judgment of this Court dated 17.7.2015 in the case of ***Dr. Mohammad Ismail Faruqui vs. Shri Rajnath Singh: Election Petition No.5 of 2014.***

8. I have considered the submissions made by the parties. In case of ***Dr. Mohammad Ismail Faruqui*** also, the Court directed for service of notice by other modes as well as by publication in a newspaper. The petitioner in the said case took steps for service through ordinary post as well as by registered post. He was informed the cost of publication in chosen newspaper to be Rs. 9024/-. The petitioner moved an application dated 8.4.2015, supported by an affidavit, with the prayer that publication of notice in the news paper may be dispensed with, on the ground that it was not possible for him to arrange such huge amount of money. In the said case also a ground was taken that the respondent otherwise also stands served with the notice sent by registered post AD and, thus, there is no necessity of publication. This Court after considering the submissions and the earlier settled law held:

*"The submissions advanced by the petitioner and learned counsel for the contesting respondent have been considered by the Court.*

*The first submission of the petitioner that as the dispute is between the petitioner and the sole respondent, the Court should dispense with the publication of the notice in the newspaper since the respondent is represented by a counsel cannot be accepted.*

*As noticed above, Rule 3 contained in Chapter XV-A of the Rules provides that every election petition shall be presented to the Registrar. Rule 5 provides that the Bench may direct issue of notice to the respondent. Such notice shall also direct that if the respondent wishes to put up a defence he shall file his written statement together with a list of all documents, whether in his possession or power or not, upon which he intends to rely as evidence in support of his defence on or before the date fixed; and further, that in default of appearance being entered on or before the date fixed in the notice the election petition may be heard and determined in his absence. Sub-rule (a) of Rule 6 provides that notice for the respondent shall be issued by ordinary process and simultaneously by registered post. Sub-rule (b) of Rule 6, however, provides that the notice of the election petition* ***shall also be simultaneously published in a newspaper selected by the Registrar.*** *The Registrar had selected a newspaper and the petitioner was duly informed of this fact and the amount that he was required to deposit for publication of the notice. It is at that stage that the petitioner moved an application for dispensation of the publication of the notice in the newspaper.*

*Dispute in an election petition is not restricted to the petitioner and the*

*respondent alone but involves the entire constituency and every interested person should have notice of the presentation of the election petition. This is what was observed by the Supreme Court in* ***Inamati Mallappa Basappa vs. Desai Basavaraj Ayyappa and others, AIR 1958 SC 698*** *(supra). The Supreme Court considered this issue in the light of the unamended provisions where the election petition was required to be presented before the Election Commission. The Supreme Court, after placing reliance upon its earlier decisions, observed that by publication of notice in the official gazette not only the respondents to the petition get notice but the entire constituency as a whole receives such a notice so that each and every voter of the constituency and all parties interested become duly aware of the presentation of the election petition. The whole constituency is thus alive to the fact that the result of the election duly declared has been questioned on various grounds with the likely result that the election of all or any of the returned candidates may be declared void and the petitioner or any other candidate declared duly elected in place of the returned candidate. The constituency, therefore, has a vital interest in the proceedings before the Tribunal which have a characteristic of their own different from the ordinary civil proceedings. Paragraphs 10 and 11 of the judgment are reproduced below:*

*"10. It is necessary at the outset, therefore, to understand the nature and scope of an Election Petition. As has been observed by us in the judgment just delivered in Kamaraja Thevar v. Kunju Thevar, Civil Appeals No.763 & 764 of 1957 and Civil Appeal No.48 of 1958 : (A.I.R. 1958 S.C. 687) (A):-*

*"An election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power."*

*.....*

*"An election petition is not a matter in which the only persons interested are candidates who strove against each other at the elections. The public also are substantially interested in it and this is not merely in the sense that an election has news value. An election is an essential part of the democratic process."*

*.....*

*"An election petition is not a suit between two persons, but is a proceeding in which the constituency itself is the principal party interested."*

*.....*

*11. An Election Petition presented to the Election Commission is scrutinised by it and if the Election Commission does not dismiss it for want of compliance with the provisions of Section 81, Section 82 or Section 117 of the Act, it accepts the same* ***and causes a copy thereof to be published in the official gazette and a copy thereof to be served by post on each respondent. The respondents to the petition not only get notice of the same but the constituency as a whole receives such notice by publication thereof in the official gazette so that each and every voter of the constituency and all parties interested become duly aware of the fact of such Election Petition having been presented.*** *A copy of the Election Petition published in the official gazette would also show to all of them that the petitioner in a particular Election Petition, in addition to claiming a declaration that the election of all or any of the returned candidates is void, has also claimed a further declaration that he himself or any other candidate has been duly elected.* ***The whole constituency is thus alive to the fact***

***that the result of the election duly declared is questioned on various grounds permitted by law with the likely result that the election of all or any of the returned candidates may be declared void and the petitioner or any other candidate may be declared duly elected, in place and stead of the returned candidate.*** *The constituency may have an interest in either maintaining the status quo or if perchance the election of the returned candidate is set aside, in seeing that some other deserving candidate is declared elected in his place and stead and not necessarily the petitioner or any other candidate sponsored by him whose election could be challenged on any of the grounds mentioned in Section100 (1).* ***It is this interest of the constituency as a whole which invests the proceedings before the Election Tribunals with a characteristic of their own and differentiates them from ordinary civil proceedings. ....."***

*(emphasis supplied)*

*This view was reiterated by the Supreme Court in* ***Dr. P. Nalla Thampy Thera vs. B.L. Shanker and others, AIR 1958 SC 135*** *(supra) and the contention that the view taken by the Supreme Court in* ***Inamati Mallappa Basappa*** *(supra) that the election dispute involves the entire constituency was not correct was not accepted. The relevant paragraph 22 of the decision in* ***Dr. P. Nalla*** *(supra) is reproduced below :*

*"22.* ***The ratio of this decision as also the observations in Basappa's case (AIR 1958 SC 698), the appellant contends are, wrong in view of the earlier decisions of this Court taking the view that an election dispute involves the entire constituency because of the paramount necessity of having purity of an election in a democracy safeguarded. We do not think the appellant's contention can be accepted.*** *The earlier decisions of this Court do not in any way militate against the view taken in Dhoom Singh's case (supra) and the observations made in Basappas's case (supra). Those decisions were not concerned with the question as to whether an election petition can be dismissed for default. The consensus of judicial opinion in this Court has always been that the law in regard to elections has to be strictly applied and to the extent provision has not been made, the Code wold be applicable. About eight years back this Court had occasion to point out that if the intention of the legislature was that a case of this type should also be covered by special provision, this intention was not carried out and there was a lacuna in the Act. We find that even earlier in Sheodhan Singh v. Mohan Lal Gautam, (1969) 3 SCR 417 at p. 421: (AIR 1969 SC 1024 at p. 1026), this Court had stated:*

*"From the above provisions it is seen that in an election petition, the contest is really between the constituency on the one side and the person or persons complained of on the other. Once the machinery of the Act is moved by a candidate or an elector, the carriage of the case does not entirely rest with the petitioner. The reason for the elaborate provisions noticed by us earlier is to ensure to the extent possible that the persons who offend the election law are not allowed to avoid the consequences of their misdeeds"*

*(emphasis supplied)*

*In view of the aforesaid observations made by the Supreme Court in* ***Inamati Mallappa Basappa*** *(supra) and* ***Dr. P. Nalla*** *(supra) that dispute in an election petition is not centered around merely between the petitioner and the respondents but the entire constituency, the publication of the notice in the newspaper is necessary. The contention of the*

*petitioner that the publication of the notice in the newspaper should be dispensed with since the respondent has been served cannot, therefore, be accepted.*

*The second contention of the petitioner is that since the petitioner does not have the means to pay the cost for publication in the newspaper selected by the Registrar of the Court, the Court can order for deferred payment as was done in Election Petition No.4 of 2014.*

*It is not possible to accept this contention of the petitioner. Rule 6(b), clearly requires notices of the election petition to be simultaneously published in the newspaper selected by the Registrar. Rule 6(c) also requires that notices, process fee, charges and a sum of Rs.250/- as an initial deposit on account of cost of publication in the newspaper shall be supplied by the petitioner within seven days of the order directing notice to issue. Even this amount was not deposited by the petitioner. Rule 6(d) also requires that where the cost of publication in the newspaper exceeds Rs.50/-, the Registrar shall call upon the petitioner to deposit the excess amount in the Court within the time fixed by him. The Registrar had called upon the petitioner to deposit Rs.9024/-.*

*As noticed above, while dealing with the first contention of the petitioner, it has been found that publication in the newspaper is to ensure that the entire constituency is made aware of the pendency of the election petition. In this view of the matter deferred payment would not serve any purpose. The submission of the petitioner that even the amount of Rs.250/- which is required to be deposited in terms of Rule 6(c) is on higher side, cannot also be accepted as this is certainly less than the amount that is actually required for publication of the notice.*

*This election petition was presented before the Registrar of the Court on 27 June 2014. Notice was issued on 6 February 2015. The Court has to be satisfied that the grounds mentioned by the petitioner in the application filed for dispensing the publication of the notice in the newspaper are bona fide grounds and the intention behind moving of the application is not to merely avoid the deposit of the amount for publication in the newspaper. Rule 6(c) provides that notices, process fee, charges and a sum of Rs.250/- as an initial deposit on account of the cost of publication in a newspaper shall be supplied by the petitioner within seven days of the order directing notice to issue. Rule 6(c) further provides that in default, the election petition shall be laid before the Bench for orders and the Bench may reject the election petition unless for sufficient cause it grants further time. The Court is of the opinion that sufficient cause has neither been placed nor does it exist for dispensing with the publication of the notice in the newspaper and that by filing the application, the petitioner is merely avoiding the deposit of amount for publication in the newspaper.*

*The application filed by the petitioner for dispensation with the publication of the notice in the newspaper is, therefore, without any substance and deserves to be rejected.*

*Thus, for all the reasons stated above, Civil Misc. Application No.32181 of 2015 filed by the petitioner for dispensing with the publication of the notice in the newspaper is rejected.*

*As a result of the rejection of the application, the election petition stands dismissed."*

9. The aforesaid case squarely covers the present case. The necessity of publication is duly considered by the Supreme Court and is reiterated by this

Court. The failure in publication goes to the root of the matter.

10. In the present case, the petitioner has failed to take steps for publication of notice. The first ground taken by the petitioner for seeking exemption from publication of notice is that the respondent stands served. The said aspect is fully covered by the judgment in the case of ***Dr. Mohammad Ismail Faruqui*** (supra), as discussed above.

11. So far as the next submission of the petitioner, that, the Senior Registrar had taken the quotation from Dainik Jagran, Lucknow office instead of Dainik Jagran, Ambedkar Nagar office, is concerned, in case the petitioner had any such objection, he ought to have raised the same at appropriate time before the Senior Registrar or moved an appropriate application before the Court. He failed to take any such steps. Even now, when it was pointed out by the respondent, the petitioner has only moved an application for exemption from publication. There is no prayer made by the petitioner that he is ready and willing to deposit the money for publication. Even during the course of arguments, the petitioner, submitting his case in person, did not reply to the query of the Court, whether he is now willing to deposit the money for publication of notice. His only reply has been that now there is no need for publication of notice.

12. In the given facts and circumstances of the case, I find that the petitioner has failed to comply with the orders dated 18.7.2019 and 23.9.2019 of this Court for publication of notice. He has not sought any condonation of delay in complying with the said orders of the court or shown willingness to make publication even now. Rather he has only sought an exemption from publication of notice. The said exemption cannot be granted by this Court as is already settled by this Court in the case of ***Dr. Mohammad Ismail Faruqui*** (supra) and judgments of the Supreme Court referred to in the said case.

13. Therefore, the application for exemption is liable to be rejected and is hereby ***rejected.***

14. In view thereof, the other two applications also stand ***disposed of.***

***(C.M. Application No.118050 of 2021****-Application for extension of time to file an application under Order VII Rule 11 of Code of Civil Procedure, 1908 on behalf of the respondent/returned candidate)*

***(C.M. Application No.118019 of 2021****-Application under Order VII Rule 11 of Code of Civil Procedure, 1908 on behalf of the respondent/returned candidate)*

15. The respondent has filed these two applications. The first application is for condonation of delay and the second is an application under Order VII Rule 11 of CPC. The facts with regard to delay are that on 6.9.2021, when before the Court respondent orally raised his objections that petitioner has failed to make publication of notice in the news paper and other preliminary objections for rejecting the election petition, petitioner prayed for two days' time to file appropriate application for the publication purposes. While granting the said time to the petitioner, the Court also granted two days' time to the respondent to file reply to such an application filed by the petitioner and also permitted respondent to file his preliminary objections within two days. Permission was also granted to the petitioner to file reply to

such preliminary objections. The case was fixed for 13.9.2021. On that date, Court again permitted all applications to be filed by the next day and 15.9.2021 was fixed in the case. The applications were duly filed on 14.9.2021.

16. Sri Sudeep Seth, learned Senior Advocate, on the above facts submits; (i) there is no delay in filing of the applications as the applications are filed within the time extended by the Court by order dated 13.9.2021; (ii) there is no period of limitation in filing the application under Order VII Rule 11 of CPC; (iii) even presuming there is delay of a day or two, the same may be condoned as the same is not intentional. He submits that the Photo Affidavit Centre operated by the High Court was opened for a limited period and the Oath Commissioner was not available and hence there was delay in filing the applications.

17. Elaborating his argument, Mr. Seth submits, that, the law with regard to Order VII Rule 11 of CPC is settled since long and an application under Order VII Rule 11 of CPC can be filed at any stage of the proceedings. Once such an application is filed, the Court is bound to dispose of the same before proceeding with the trial. Therefore, the fact that respondent has already filed his written statement along with a delay condonation application would not in any manner impact his right to file an application under Order VII Rule 11 of CPC. Reliance is placed upon the judgment of the Supreme Court in ***R.K. Roja vs. U.S. Rayudu and another, (2016) 14 SCC 275.***

18. On the other hand, the petitioner strongly objects to the delay and submits that the election laws are held to be strict in nature and the respondent should not be granted any relaxation. The time initially given by the court was two days and any objections could only be filed within the said two days only. The Limitation Act is not applicable and thus the application for condonation of delay, filed under Section 5 of the same, is also not maintainable. The petitioner also submits that since the respondent has already filed his written statement along with a delay condonation application, therefore, now the application under Order VII Rule 11 of CPC cannot be filed. In support of his submissions petitioner has relied upon ***K. Venkateswara Rao and another vs. Bekkam Narsimha Reddy and others, AIR 1969 SC 872, Hukumdev Narain Yadav vs. Lalit Narain Mishra (1974) 2 SCC 133 and G.V. Sreerama Reddy and another vs. Returning Officer and others (2009) 8 SCC 736.***

19. In the case of ***R.K. Roja*** (supra), also arising from an election petition, Supreme Court considered the manner and stage of filing an application under Order VII Rule 11 CPC. Relevant portion of the said judgment reads:

*"2. .....On receipt of notice in the election petition, the appellant filed Annexure P-4, application for rejection of the petition, under Order 7 Rule 11 CPC by way of a counter-affidavit. It appears that the Court declined to consider the same on the ground that there was no formal application and hence proceeded with the trial. At that stage, the appellant filed Annexure P-5, formal application for rejection of the election petition on the ground that the election petition did not disclose any cause of action. That application as per the impugned order dated 27-4-2016 was posted along with the main petition, and thus, the appeal.*

*3. The High Court has taken the view that the same "was not filed at the earliest opportunity" and that the appellant was not diligent in prosecuting the application. Therefore, the Court took the view that "... this application filed by the first respondent shall be decided at the time of final hearing ...".*

*4. We are afraid that the stand taken by the High Court in the impugned order cannot be appreciated. An application under Order 7 Rule 11 CPC can be filed at any stage, as held by this Court in Sopan Sukhdeo Sable v. Charity Commr. [Sopan Sukhdeo Sable v. Charity Commr., (2004) 3 SCC 137] : (SCC p. 146, para 10)*

*"10. ... The trial court can exercise the power at any stage of the suit - before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial."*

*The only restriction is that the consideration of the application for rejection should not be on the basis of the allegations made by the defendant in his written statement or on the basis of the allegations in the application for rejection of the plaint. The court has to consider only the plaint as a whole, and in case, the entire plaint comes under the situations covered by Order 7 Rules 11(a) to (f) CPC, the same has to be rejected.*

*5. Once an application is filed under Order 7 Rule 11 CPC, the court has to dispose of the same before proceeding with the trial. There is no point or sense in proceeding with the trial of the case, in case the plaint (election petition in the present case) is only to be rejected at the threshold."*

20. The law thus is settled that an application under Order VII Rule 11 can be filed at any stage of the proceedings. There is no limitation applicable in filing of an application under the said rule. The defendant can also file such an application even after filing of the written statement. So far as the judgments of the Supreme Court relied upon by the petitioner in the case of ***K. Venkateswara Rao and another vs. Bekkam Narsimha Reddy and others, AIR 1969 SC 872,*** wherein the Supreme Court has held in para-14: *"in our opinion however the Limitation Act cannot apply to proceedings like an election petition inasmuch as the Representation of the People Act is a complete and self-contained code which does not admit of the introduction of the principles or the provisions of law contained in the Indian Limitation Act.'* and ***Hukumdev Narain Yadav vs. Lalit Narain Mishra (1974) 2 SCC 133***, in Para-25 of which the Supreme Court again held that *"the provisions of Section 5 of the Limitation Act do not govern the filing of election petitions or their trial and in this view, it is necessary to consider whether there are any merits in the application for condonation of delay'*, both of which are again followed by the Supreme Court in ***G.V. Sreerama Reddy and another vs. Returning Officer and others (2009) 8 SCC 736*** are concerned, suffice is to say that since the law is long settled and again reiterated in ***R. K. Roja*** (supra) that there is no time limit provided for filing an application under Order VII Rule 11 of the CPC and the court is bound to decide the same before proceeding with the trial of the case, thus, there is no force in the submission of the petitioner that the application of respondent under Order VII Rule 11 CPC should be rejected on ground of delay. There was no need for the respondent to file the delay condonation application along with his application filed under Order VII Rule 11 CPC. Even otherwise the applications are filed within

time finally allowed by the court by order dated 13.9.2021 and thus, on facts also, there is no delay in filing the applications by the respondent. Accordingly, C.M. Application No.118050 of 2021 stands ***disposed of.***

21. In view of above, this Court is bound to consider the application filed by the respondent under Order VII Rule 11 of CPC on its merits.

22. The respondent in his application under Order VII Rule 11 of CPC has taken the following objections:

(i) The election petition lacks any specific paragraph stating when and how the cause of action arose and more particularly, the petitioner has no cause of action against the respondent;

(ii) The petition is neither signed nor verified in the manner prescribed in Order VI Rule 15 of C.P.C.

(iii) There are allegations of corrupt practice in Para 6(32) and Ground 7(R) of the election petition. However, there is no affidavit filed by the petitioner in support of the election petition, as is mandatorily required by Section 83 of Representation of People Act (for short "the RP Act').

(iv) There is no original petition filed before this Court and the election petition filed by the petitioner, on which he has affixed the Court fee and office has submitted its report, is only a true copy, so attested by the petitioner.

(v) The petitioner has failed to publish notice in the newspaper as is mandatorily required under law and hence, the petition is barred by law and is not maintainable. (This issue is already considered above while deciding the application filed by the petitioner for exemption from making publication)

23. On the aforesaid grounds, learned counsel for the respondent submits that election petition is liable to be dismissed at this stage only. The petitioner has refused to file any reply to the application filed under Order VII Rule 11 of CPC submitting that he would only make oral submission against the same.

24. On ground (i), submission of learned counsel for the respondent is that there is no paragraph in the entire election petition specifying when the cause of action arose to the petitioner to file the petition. It was incumbent upon the petitioner to put such a specific paragraph in the petition. In reply, petitioner submits that though technically such a specific paragraph may be missing, but a reading of the entire election petition shows that cause of action arose when his nomination was illegally rejected and when election was held and result was declared without permitting him to contest the election. The said facts are narrated at length in the election petition. To understand the cause of action entire petition is to be taken into consideration and the argument of the counsel for the respondent, that court should find one paragraph in the petition with regard to cause of action and ignore the pleadings in their entirety, is not sustainable in law. I do not find force in the submission of the respondent with regard to cause of action. To find out the cause of action pleadings of the petitioner in their entirety are to be considered. There is no such law that requires that the petition should have a specific paragraph stating specifically the dates on which cause of action accrued to the petitioner. For the said purposes, the petition in its entirety has to be read. A reading of the election petition shows that there are sufficient pleadings detailing cause of action to the

petitioner for filing the election petition and the dates when the cause of action accrued to the petitioner. The said submission of the respondent is rejected.

25. Ground (ii) raised by learned counsel for the respondent is that the verification made by the petitioner is in violation of provision of Order VI Rule 15 of CPC. It is submitted by him that verification is neither made at the foot of the plaint, but is made on a separate sheet, nor it is made paragraph-wise, as prescribed under Order VI Rule 15 of CPC, therefore, the same is in violation of Section 83(1)(c) of the RP Act. As per the respondent, under Order VI Rule 15(2) of CPC, the verification shall be by reference to numbered paragraphs of the pleadings, which must be verified either on personal knowledge or upon information received or believed to be true. In the present case, verification states that; "contents made in material facts as well as grounds of the present election petition are true to me in my personal knowledge and nothing material herein has been concealed and no part of it is false". Reliance is also placed upon Section 83(1)(c) of the RP Act, which reads as follows:

*"83(1). An election petition-*

*(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:*

*[Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof]"*

26. Opposing the same, petitioner submits that Section 86(1) of the RP Act provides that High Court shall dismiss an election petition that does not comply with the provisions of Sections 81, 82 or 117 of the RP Act. It is not provided that violation of Section 83 would also result in outright dismissal of an election petition. Therefore, even presuming that there is partial noncompliance in verification, the same would not be fatal to the election petition and petitioner can be permitted to correct the same. In support of his case, he places reliance upon the judgments of the Supreme Court in the case of ***Uday Shankar Triyar vs. Ram Kalewar Prasad Singh and another (2006) 1 SCC 75; Sheo Sadan Singh vs. Mohan Lal Gautam, 1969(1) SCC 408; Mairembam Prithviraj alias Prithviraj Singh vs. Pukhrem Sharatchandra Singh (2017) 2 SCC 487; Ajay Maken vs. Adesh Kumar Gupta and another (2013) 3 SCC 489; U.S. Sasidharan vs. K. Karunakaran and another (1989) 4 SCC 482; C.P. John vs. Babu M. Palissery and others (2014) 10 SCC 547.***

27. I have considered the submissions of the parties. The Supreme Court has repeatedly considered the law with regard to curable and incurable defects of an election petition. Lastly, in the case of ***Saritha S. Nair vs. Hibi Eden, 2020 SCC Online SC 1006 (SLP (Civil) No.10678 of 2020 dated 9.12.2020),*** a three Judges Bench of the Supreme Court, referring to its earlier pronouncements, again considered the said issue. Relevant paragraphs for our purposes read:

*"21. Chapter-II, Part-VI of the Representation of the People Act, 1951, contains provisions for "Presentation of election petitions to High Court" and Chapter III contains provisions for "Trial of election petitions". Section 86(1), with*

*which Chapter-III begins, obliges the High Court to dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117. The dismissal of an election petition under Section 86(1) is deemed by the Explanation under Section 86(1) to be a decision under Section 98(a). Section 98 speaks about 3 types of orders that could be passed at the conclusion of the trial of an election petition. They are:-*

*(i) The dismissal of the election petition; or*

*(ii) A declaration that the election of the returned candidate is void; or*

*(iii) A declaration not only that the election of the returned candidate is void, but also that the petitioner or any other candidate was duly elected.*

*22. It is important to note that the above 3 different types of decisions under Section 98, can be rendered by the High Court only at the conclusion of the trial. But the dismissal under Section 86(1) is an exception.* ***The reference in the Explanation under Section 86(1) to Section 98(a), makes it clear that the power of the High Court to dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117, is available at the pre-trial stage.***

*28. It is relevant to note that the Act keeps in two separate compartments--*

*(i) the presentation of election petitions; and*

*(ii) the trial of election petitions.*

*The presentation of election petitions is covered by Sections 80 to 84 falling in Chapter-II. The trial of election petitions is covered by Sections 86 to 107 and they are contained in Chapter-III.*

*29. This compartmentalization, may be of significance, as seen from 2 facts namely:--*

*(i) That under Section 80 no election shall be called in question except by* ***an election petition presented*** *in accordance with the provisions of "****this part";*** *and*

*(ii) That a limited reference is made to the provisions of the Code of Civil Procedure, 1908 in Chapter-II, only in places where signature and verification are referred to.*

*35. Section 86(1) empowers the High Court to dismiss an election petition which does not comply with the provisions of Section 81, Section 82 or Section 117 and it does not include Section 83 within its ambit. Therefore, the question whether or not an election petition which does not satisfy the requirements of Section 83, can be dismissed at the pre-trial stage under section 86(1), has come up repeatedly for consideration before this Court. We are concerned in this case particularly with the requirement of Clause (c) of Subsection (1) of Section 83 and the consequence of failure to comply with the same.*

*36. In* ***Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore AIR (1964) SC 1545,*** *a preliminary objection to the maintainability of the election petition was raised on the ground that the verification was defective. The verification stated that the averments made in some paragraphs of the petition were true to the personal knowledge of the petitioner and the averments in some other paragraphs were verified to be true on advice and information received from legal and other sources. There was no statement that the advice and information received by the election petitioner were believed by him to be true. Since this case arose before the amendment of the Act under Act 47 of 1966, the election petition was dealt with by the Tribunal. The Tribunal held the defect in the verification to be a curable*

*defect. The view of the Tribunal was upheld by this Court in* ***Murarka Radhey Shyam Ram Kumar (supra). This Court held that "it is impossible to accept the contention that a defect in verification which is to be made in the manner laid down in the Code of Civil Procedure for the verification of pleadings as required by Clause (c) of Sub-section (1) of Section 83 is fatal to the maintainability of the petition".***

*37. The ratio laid down in* ***Muraraka*** *was reiterated by a three member Bench of this Court in* ***F.A. Sapa v. Singora (1991) 3 SCC 375 holding that "the mere defect in the verification of the election petition is not fatal to the maintainability of the petition and the petition cannot be thrown out solely on that ground". It was also held in F.A. Sapa that "since Section 83 is not one of the three provisions mentioned in Section 86(1), ordinarily it cannot be construed as mandatory unless it is shown to be an integral part of the petition under Section 81"****.*

*38. In* ***F.A. Sapa*** *(supra) this Court framed two questions in paragraph 20 of the Report, as arising for consideration. The first question was as to what is the consequence of a defective or incomplete verification. While answering the said question, this Court formulated the following principles:--*

*(i) A defect in the verification, if any, can be cured*

*(ii) It is not essential that the verification clause at the foot of the petition or the affidavit accompanying the same should disclose the grounds or sources of information in regard to the averments or allegations which are based on information believed to be true*

*(iii) If the respondent desires better particulars in regard to such averments or allegations, he may call for the same, in which case the petitioner may be required to supply the same and*

*(iv) The defect in the affidavit in the prescribed Form 25 can be cured unless the affidavit forms an integral part of the petition, in which case the defect concerning material facts will have to be dealt with, subject to limitation, under section 81(3) as indicated earlier."*

*39. It was also held in* ***F.A. Sapa*** *(supra) that though an allegation involving corrupt practice must be viewed very seriously and the High Court should ensure compliance with the requirements of Section 83 before the parties go to trial,* ***the defective verification of a defective affidavit may not be fatal.*** *This Court held that the High Court should ensure its compliance before the parties go to trial. This decision was followed by another three-member Bench in* ***R.P. Moidutty v. P.T. Kunju Mohammad (2000) 1 SCC 481.***

*40. In* ***Sardar Harcharan Singh Brar v. Sukh Darshan Singh (2004) 11 SCC 196, this Court held that though the proviso to Section 83(1) is couched in a mandatory form, requiring a petition alleging corrupt practice to be accompanied by an affidavit, the failure to comply with the requirement cannot be a ground for dismissal of an election petition in limine under Section 86(1).*** *The Court reiterated that non-compliance with the provisions of Section 83 does not attract the consequences envisaged by Section 86(1) and that* ***the defect in the verification and the affidavit is a curable defect.*** *The following portion of the decision is of significance:*

*"14. xxxx*

*Therefore, an election petition is not liable to be dismissed in limine under Section 86 of the Act, for alleged non-compliance with provisions of Section*

*83(1) or (2) of the Act or of its proviso.* ***The defect in the verification and the affidavit is a curable defect.*** *What other consequences, if any, may follow from an allegedly "defective" affidavit, is required to be judged at the trial of an election petition but Section 86(1) of the Act in terms cannot be attracted to such a case."*

*41. In* ***K.K. Ramachandran Master v. M.V. Sreyamakumar (2010) 7 SCC 428,*** *this Court followed* ***F.A. Sapa*** *(supra) and* ***Sardar Harcharan Singh Brar*** *(supra) to hold that* ***defective verification is curable.*** *The Court again reiterated that the consequences that may flow from a defective affidavit is required to be judged at the trial of an election petition and that such election petition cannot be dismissed under Section 86(1).*

*42. Though all the aforesaid decisions were taken note by a two-member Bench in* ***P.A. Mohammed Riyas v. M.K. Raghavan (2012) 5 SCC 511,*** *the Court held in that case that the absence of proper verification may lead to the conclusion that the provisions of Section 81 had not been fulfilled and that the cause of action for the election petition would remain incomplete. Such a view does not appear to be in conformity with the series of decisions referred to in the previous paragraphs and hence* ***P.A. Mohammed Riyas*** *cannot be taken to lay down the law correctly. It appears from the penultimate paragraph of the decision in* ***P.A. Mohammed Riyas*** *(supra) that the Court was pushed to take such an extreme view in that case on account of the fact that the petitioner therein had an opportunity to cure the defect, but he failed to do so. Therefore,* ***P.A. Mohammed Riyas*** *(supra) appears to have turned on its peculiar facts. In any case* ***P.A. Mohammed Riyas*** *was overruled in* ***G.M. Siddeshwar v. Prasanna Kumar (2013) 4 SCC 776*** *on the question whether it is imperative for an election petitioner to file an affidavit in terms of Order VI Rule 15(4) of the Code of Civil* ***Saritha S. NairSaritha S. NairSaritha S. Nair*** *Procedure, 1908 in support of the averments made in the election petition in addition to an affidavit (in a case where resort to corrupt practices have been alleged against the returned candidate) as required by the proviso to Section 83(1). As a matter of fact, even the filing of a defective affidavit, which is not in Form 25 as prescribed by the Rules, was held in* ***G.M. Siddeshwar*** *to be a curable defect and the petitioner was held entitled to an opportunity to cure the defect.*

*43. The upshot of the above discussion is that a defective verification is a curable defect. An election petition cannot be thrown out in limine, on the ground that the verification is defective."*

28. In the aforesaid judgment, the Supreme Court reiterated the earlier settled law and again held that any defect in verification of pleadings is a curable defect and the same can be cured. Petitioner can be permitted to remove the same through an appropriate application. The election petition cannot be rejected on the said ground at this stage. Therefore, this submission of the respondent is also rejected.

29. So far as ground (iii) of corrupt practice is concerned, it is strongly submitted on behalf of respondent that in Para 6(32) and Ground 7(R) of the election petition allegations of corrupt practice are made, and thus, it was mandatory for the petitioner to also file an affidavit in support of the said allegations, as mandated under Section 83(1) of the RP Act. Para 6 (32) and Ground 7 (R) of the election petition read as follows:

*"6(32). That the petitioner made a serious and detailed complaint through E-mail against the misconduct of R.O. Suresh Kumar, ARO Mahendra Pal Singh and Election Observer Udai Kumar Singh for taking illegal gratification of Rs.3 crore from a Candidate of B.S.P.-S.P. Led. Party for putting only one EVM in place of Two EVM with respect to 20 Candidates which led the R.O. for Improper rejection of Nomination pepers of present petitioner and Eight others to conclude 1 EVM in place of 2, the E-mail was sent to Chief Election Commissioner Election Constitution of India New Delhi on 6th May at 6.36 a.m. and the same was forwarded to the following Authorities.*

*a. Chief Electoral Officer U.P.*

*b. Supreme Court of India*

*c. Sr. Judge Hon'ble Justice Pankaj Kumar Jaiswal Lucknow Bench of Allahabad High Court.*

*A copy of complaint dt. 06.05.2019 is annexed herewith as Annexure No.12 to this Election Petition. (Page Nos.67 to 71)"*

*"Ground-7(R). Because the Returning Officer with the illegal gratification of Rs.3 Cr. From the B.S.P.-SP led candidate, improperly rejected the nomination papers of present petitioner and 7 other candidates so that in that election only One EVM may be utilized in place of 2 EVM and SC/ST voters may not confuse and ultimately, B.S.P.-S.P. led candidate may win the election from 55 Ambedkar Nagar Parlimentary Constituency."*

30. Submission of learned counsel for the respondent is that the above allegations and ground relates to corrupt practice and thus an affidavit must accompany the petition as provided under Rule 94(A) of the Conduct of Election Rules, 1961 (for short "the Rules'). The said Rule provides that affidavit should be sworn before a Magistrate of First Class or a Notary or a Commissioner of Oaths and shall be filed in Form 25. In the present case, no affidavit is filed along with the petition.

31. Opposing the same, the petitioner submits that it is wrong to suggest that the present election petition is filed on grounds of corrupt practice. In Para-3 of the election petition, it is specifically stated that the election petition is filed on the ground of Section 100(1)(C) of R.P. Act and that is only with regard to improper rejection of nomination. He further submits that a reading of the entire election petition shows that the same is filed on sole ground that the Returning Officer has wrongly rejected his nomination paper. He emphasizes upon the relief clause of the election petition to prove his point in which only prayer made is to declare the election of the returned candidate void and there is no other relief sought. Therefore, the petitioner submits that there is no need to file any affidavit in support of the election petition. He further reiterates his earlier submission that since Section 86 of the RP Act does not provide for rejection of an election petition that is not in consonance with Section 83 of the RP Act, thus even if there is any defect, the petitioner should be permitted to correct the same. The petitioner as well as counsel for the respondent has relied upon the case of ***F.A. Sapa and others vs. Singora and others (1991) 3 SCC 375,*** on the issue that in case there are allegations of corrupt practice, the material facts and particulars are required to be given and an affidavit is also required to be filed. In support of his contention, the petitioner has also relied upon the cases of ***Abdulrasakh vs. K.P. Mohammed and others (2018) 5 SCC 59; Anil Vasudev Salgaonkar vs. Naresh***

***Kushali Shigaonkar (2009) 9 SCC 310 and Tej Bahadur vs. Narendra Modi, AIROnline 2019 ALL 2004,*** wherein the Supreme Court has taken similar view as has been taken in **F.A. Sapa** (supra).

32. I have perused the entire election petition with the assistance of both the parties. The allegations in the said paragraph 6(32) are that petitioner made a complaint against the RO, ARO and Election Observer of taking illegal gratification of Rs.3 crore from the SP-BSP led candidate. There are no other or further allegations in the entire petition. Though the said allegation can be said to be an allegation with regard to corrupt practice, however, the petition is not solely filed on the allegation of corrupt practice. Main thrust of the petition is that the nomination paper of the petitioner was illegally rejected. It appears that to emphasize the illegality, the allegations are made in the said paragraph. However, even accepting the submission of the counsel for the respondent, the issue is still covered by the case of ***Saritha S. Nair*** considered at length above. This also is a defect under Section 83 of the RP Act and is thus a curable defect and petitioner can be permitted to file an affidavit now also.

33. The last submission of learned counsel for the respondent is that original election petition is not filed before this Court and, therefore, this election petition should be rejected out-rightly. Attention is drawn by the learned counsel for the respondent to the election petition filed before this Court. It is pointed out that each and every page of the election petition bears a stamp "TRUE COPY ATTESTED" and above the same petitioner has put his signatures. Such a stamp is also put even on the verification page and on each page of the Annexures filed along with the election petition. He further submits that no original document is attached with the election petition and even the certified copy of the judgment of the High Court, upon which reliance is placed, is not an original certified document, but a photocopy. Similarly, other documents, like letters written by him or received by him etc., filed by the petitioner are not filed in original, but photocopies of the same are filed. Since only a true attested copy is filed before this Court along with the Court fee, the same would not become an original election petition. Emphasis is made upon Section 81(3) of the RP Act, which reads as follows:

*"81(3). Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition, and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition."*

34. On the basis of the same, it is submitted that Section 86(1) of the RP Act provides that High Court shall dismiss an election petition that does not comply with the provisions of Section 81, 82 or 117. The present election petition violates Section 81(3) of the RP Act and is liable to be dismissed under Section 86 of the same.

35. Opposing the same, petitioner submits that the petition, upon which he has affixed the Court fee and which is also reported by the Registry, is bound to be treated as the original petition. Therefore, on this ground also, the election petition should not be dismissed.

36. So far as the argument raised by learned counsel for the respondent that the original petition is not filed before the

Court is concerned, the same is a defect which is covered under Section 81(3) of the RP Act which requires that **"every election petition shall be accompanied by as many copies thereof ....."**. Section 81(3) requires that there has to be an election petition and copies thereof are to accompany the same. Therefore, both are entirely distinct and separate things. The petitioner is required to file an election petition and also file its copies for service upon the respondent.

37. Admittedly, the petitioner herein has not filed before this Court the original election petition. The copy filed along with the Court fee is a "true copy attested'. Such a declaration is made on each and every page of the election petition and its annexures. It is not a case where it can be said to be a bonafide mistake, as on one page or some of the pages, such a declaration is made. The entire election petition on each and every page bears a declaration that it is a "true copy attested'. In view of this self declaration made by the petitioner, the same cannot be treated to be an original election petition. To submit that since Court fee is paid on the same and the Registry has also reported the same, therefore, it should be treated to be the original petition is a fallacy as it bears a declaration of the petitioner that it is "true copy attested', same declaration as made on each copy accompanying the same. There is no difference between the two except payment of the Court fee. A copy cannot become an original petition only on the basis of the Court fees and its filing before the Court when it bears a declaration that it is a "true copy attested'.

38. The Supreme Court in the case of ***Uday Shankar Triyar vs. Ram Kalewar Prasad Singh and another (2006) 1 SCC 75,*** has considered the impact of defects in signing of the appeals/petitions and Vakalatnama filed along with the same. After considering the law settled, it concludes in Para-15 which reads:

*"15. It is, thus, now well settled that any defect in signing the memorandum of appeal or any defect in the authority of the person signing the memorandum of appeal, or the omission to file the vakalatnama executed by the appellant, along with the appeal, will not invalidate the memorandum of appeal, if such omission or defect is not deliberate and the signing of the memorandum of appeal or the presentation thereof before the appellate court was with the knowledge and authority of the appellant. Such omission or defect being one relatable to procedure, can subsequently be corrected. It is the duty of the office to verify whether the memorandum of appeal was signed by the appellant or his authorised agent or pleader holding appropriate vakalatnama. If the office does not point out such defect and the appeal is accepted and proceeded with, it cannot be rejected at the hearing of the appeal merely by reason of such defect, without giving an opportunity to the appellant to rectify it. The requirement that the appeal should be signed by the appellant or his pleader (duly authorised by a vakalatnama executed by the appellant) is, no doubt, mandatory. But it does not mean that non-compliance should result in automatic rejection of the appeal without giving an opportunity to the appellant to rectify the defect. If and when the defect is noticed or pointed out, the court should, either on an application by the appellant or suo motu, permit the appellant to rectify the defect by either signing the memorandum of appeal or by furnishing the vakalatnama.*

Thereafter, the Supreme Court prescribes exception to the aforesaid Rule and in Para-17 held as follows:

*"17. Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a handmaiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well-recognised exceptions to this principle are:*

*(i) where the statute prescribing the procedure, also prescribes specifically the consequence of non-compliance;*

*(ii) where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;*

*(iii) where the non-compliance or violation is proved to be deliberate or mischievous;*

*(iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court;*

*(v) in case of memorandum of appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant."*

Therefore, in normal cases, the defects in the pleadings including the defects in signing the same are curable. Had the present case been one of the regular cases or the defects being a minor irregularity, this Court could have permitted the same to be corrected. Present is an election petition and Section 81(3) of the RP Act specifically provides for filing of an election petition along with copies attested by the petitioner. Section 86 of the RP Act provides that failure to comply with the requirement of Section 81 of the RP Act would result in rejection of the election petition at the initial stage only.

In view thereof, condition no.(i) of Para-17 of ***Uday Shankar Triyar*** (supra) is applicable to the present case and thus, the consequences as prescribed under Section 86 of the RP Act are to follow, as is already settled in the case of ***Saritha S. Nair*** (supra).

39. In view of the discussions made hereinabove, C.M. Application No.118019 of 2021 under Order VII Rule 11 of C.P.C. is ***disposed of***, holding that the election petition itself is not maintainable.

40. In view of above, since application for exemption from publication is already ***rejected*** and there is no publication made in the newspaper by the petitioner which is mandatorily required as held above, therefore, the present election petition itself is not maintainable and further, in view of the order passed on C.M. Application No.118019 of 2021 under Order VII Rule 11 of C.P.C. that election petition is not maintainable on the grounds as discussed above, the election petition is also ***dismissed.***

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**(2021)10ILR A671**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 26.10.2021**

**BEFORE**

**THE HON'BLE RAMESH SINHA, J.**
**THE HON'BLE VIVEK VARMA, J.**

Special Appeal No. 417 of 2021

**Shiv Kumar Pandey ...Appellant**
**Versus**
**State of U.P. & Ors. ....Respondents**

**Counsel for the Appellant:**
Shiv Shankar Singh, Reshma Khan

**Counsel for the Respondents:**
C.S.C., Dr. Surendra Singh

**A. Service Law – Regularization – Condonation of delay - If the litigant is not at fault, he should not suffer for such a conduct of his counsel.** In case a litigant is neither negligent nor careless in prosecuting his case but his lawyer pleads no instruction, the Court should issue notice to him to make an alternative arrangement. Such a course is required in the interest of justice and the Court may proceed from the stage the earlier counsel pleaded no instruction. (Para 10, 11, 12)

**Special appeal allowed. Delay condoned. Matter remitted**. (E-4)

**Precedent followed:**

1. Rafiq & anr. Vs Munshilal & anr., AIR 1981 SC 140 (Para 9)

2. Smt. Lachi & ors. Vs Director of Land Records & ors., AIR 1984 SC 41 (Para 9)

3. Goswami Krishna Murarilal Sharma Vs Dhan Prakash & ors., (1981) 4 SCC 474 (Para 10)

4. Tahil Ram Issardas Sadarangani & ors. Vs Ramchandra Issardas Sadarangani & anr., AIR 1993 SC 1182 (Para 11)

5. Malkiat Singh & anr. Vs Joginder Singh & ors., AIR 1998 SC 258 (Para 11)

6. Sushila Narahari & ors. Vs Nand Kumari, (1996) 5 SCC 529 (Para 12)

7. Salil Dutta Vs T.M. & Me (P) Ltd. [1993] 1 SCR 794 (Para 13)

**Present appeal challenges order dated 14.09.2021, passed by learned Single Judge.**

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

(1) This *intra Court* appeal has been filed beyond two days.

(2) Sri Amitabh Kumar Rai, learned Additional Chief Standing Counsel for the State/respondent no. 1 and Dr. Surendra Singh, learned Counsel for the University/respondents no. 2 to 5 have no objection in case delay in filing the appeal is condoned and the matter be heard finally.

(3) On due consideration, since cause shown in the affidavit filed in support of an application for condonation of delay in filing the instant appeal is satisfactory, hence the application for condonation of delay (C.M. Application No. 139821 of 2021) is allowed. Delay in filing the instant appeal is condoned.

(4) The appellant, **Shiv Kumar Pandey**, and five others, namely, Prem Prakash, Diwakar Dube, Dilip Kumar, Harihar Prasad Pandey, Narendra Kumar Dube, have approached this Court by filing Writ Petition No. 6685 (S/S) of 2003 : *Prem Prakash and others Vs. State of U.P. and others,* stating therein that they were working on the post of Class-IV on daily wage basis against the sanctioned and clear vacant posts at Narendra Dev University of Agriculture & Technology, Kumarganj, Faizabad (hereinafter referred to as "**the University**") but their services were not regularized. This writ petition was dismissed as having become infructuous by the learned Single Judge vide order dated 26.03.2014. Thereafter, the appellant/writ petitioner no.4 (Shiv Kumar Pandey) has filed an application for recall of the aforesaid order dated 26.03.2014 (C.M.Application No. 100439 of 2021) along with an application for condonation of delay (C.M. Application No. 100434 of 2021). The learned Single Judge, vide order

dated 14.09.2021, rejected both the aforesaid applications.

(5) Feeling aggrieved by the order dated 14.09.2021, the instant *intra court* appeal has been filed by the appellant/writ petitioner no.4.

(6) Heard Sri Shiv Shankar Singh, learned Counsel for the appellant, Sri Amitabh Kumar Rai, learned Additional Chief Standing Counsel for the State/respondent no.1 and Dr. Surendra Singh, learned Counsel for the University/respondent nos.2 to 5.

(7) Submission of the learned Counsel for the appellant/writ petitioner no.4 is that the appellant/writ petitioner no.4 has no knowledge about the order dated 26.03.2014 passed by the learned Single Judge, dismissing the writ petition as having infructuous. However, when in the year 2021, the process of regularization has again been initiated in the University on 06.08.2021, the appellant contacted his Counsel to know the status of his writ petition but his counsel Sri Vivek Kumar Shukla did not give any satisfactory answer to him. He argued that as soon as the appellant/writ petitioner no. 4 came to know the order dated 26.03.2014, he immediately filed an application for recall of the order dated 26.03.2014 along with an application for condonation of delay. His submission is that the delay in filing the recall application is *bona fide* but the learned Single Judge has rejected both the applications vide order dated 26.03.2014 without looking to the fact that the relief sought by the writ petitioner is still survive for the purpose of regularization of services of the writ petitioner no.4.

(8) On the other hand, learned Counsel for the respondents has opposed the submissions made by the learned Counsel for the appellant and has submitted that the application for recall of the order dated 26.04.2014 has been filed by the writ petitioner no.4 after more than six years, therefore, the learned Single Judge has rightly passed the impugned order dated 14.09.2021, dismissing the recall application as well as application for condonation of delay. There is no illegality or infirmity in the impugned order dated 14.09.2021.

(9) Having heard rival submissions advanced by the learned Counsel for the parties and going through the material brought on record, we deem it appropriate to mention here that in ***Rafiq* and Anr. v. Munshilal and Anr. :** AIR 1981 SC 140 and **Smt. Lachi and Ors. v. Director of Land Records and Ors. : AIR 1984 SC 41** while dealing with a similar issue held that a litigant cannot suffer for the fault of his counsel. The Hon'ble Supreme Court in the former case observed as under :-

"What is the fault of the party who having done everything in his power expected of him, would suffer because of the default of his advocate.... The problem that agitates us is whether it is proper that a party should suffer for the inaction, deliberate omission, or misdemeanour of his agent.... We cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted."

(10) Similar view has been reiterated in **Goswami Krishna Murarilal Sharma v. Dhan Prakash and Ors.** : (1981) 4 SCC 474, where the counsel had withdrawn his Vakalatnama without notice to his client. The Hon'ble Supreme Court following it's earlier judgment in ***Rafiq*** (supra), held that the Court should not have proceeded to

dismiss the appeal straightaway on the ground that the appellant was not present in person when his counsel had withdrawn the Vakalatnama. At least a notice ought to have been given to such a litigant to make an alternative arrangement or appear in person.

(11) Similar view has been reiterated in **Tahil Ram Issardas Sadarangani and Ors. v. Ramchandra Issardas Sadarangani and Anr. :** AIR 1993 SC 1182 and **Malkiat Singh and Anr. v. Joginder Singh and Ors.: AIR 1998 SC 258,** observing that in case a litigant is neither negligent nor careless in prosecuting his case but his lawyer pleads no instruction, the Court should issue notice to him to make an alternative arrangement. Such a course is required in the interest of justice and the Court may proceed from the stage the earlier counsel pleaded no instruction. If the litigant is not at fault, he should not suffer for such a conduct of his counsel.

(12) In **Sushila Narahari and Ors. v. Nand Kumari** : (1996) 5 SCC 529**,** the case was dismissed in default and an application for restoration was dismissed on the ground that there was a delay of 40 days in filing the application for restoration. The Hon'ble Apex Court held that the delay due to advocate's dereliction in duty withdrawing his Vakalatnama without notice to his client warranted condonation.

(13) In **Salil Dutta v. T.M. & Mc (P) Ltd.,** [1993] 1 SCR 794, the Apex Court, after considering its earlier judgment in ***Rafiq*** (supra) observed that the said case was decided on the facts involved therein and, thus, it did not lay down any absolute proposition. The Court observed as under :-

"It is true that in certain situations, the Court may, in the interest of justice, set aside a dismissal order or an ex parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is no such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognised. Such an absolute rule would make the working of the system extremely difficult."

(14) In view of the law settled by the authorities referred to above, in the interest of justice, we deem it appropriate to condone the delay in filing the recall of the order dated 26.03.2021 passed in writ petition No. 6685 of 2003 (S/S) and condone the delay in filing the recall application therein and the matter be remitted to the learned Single Judge for deciding the writ petition No. 6685 of 2003 (S/S), in accordance with law, on merit.

(15) Accordingly, we **allow** the instant appeal. The judgment and order dated 14.09.2021 is hereby set-aside. The delay in filing the application for recall of the order dated 26.03.2014 passed in writ petition No. 6685 of 2003 (S/S) is hereby condoned. The order dated 26.04.2014 passed in writ petition No. 6685 of 2003 (S/S) is recalled. The writ petition No. 6685 (S/S) of 2003 is restored to its original number. The matter is remitted with a request to the learned Single Judge to decide it, in accordance with law, expeditiously, on merit, without influenced by any observation made here-in-above.

(16) It is clarified that we have not touched the merit of the case and the parties shall not seek any unnecessary adjournment before the learned Single Judge.

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**(2021)10ILR A675**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 04.10.2021**

**BEFORE**

**THE HON'BLE RAMESH SINHA, J.**
**THE HON'BLE MRS. SAROJ YADAV, J.**

Special Appeal No. 366 of 2021

**Girja Shankar Tiwari ...Appellant**
**Versus**
**State of U.P. & Ors. ....Respondents**

**Counsel for the Appellant:**
Gaurav Mehrotra, Abhinav Bhattacharya, Akber Ahmad

**Counsel for the Respondents:**
C.S.C.

**A. Service Law – Promotion - U.P. Agriculture (Group-A posts) Service Rules, 1992 - Rule 5 – A promotion takes effect from the date of being granted and not from the date of occurrence of vacancy or creation of the post.** Promotions can be granted only after the Assessment Board has met and made its recommendations for the grant of promotions. (Para 16, 17)

In the present case, the name of the writ petitioner/appellant was considered by the Departmental Promotional Committee (DPC) together with other persons. The DPC met on 31.01.2006, in which the writ petitioner/appellant was found eligible for promotion to the post of Director, Agriculture together with one Girish Kumar but they were not recommended for promotion on the post of the Director, Agriculture for the reasons that they attained the age of superannuation on that date i.e. on 31.01.2006; the vacancy accrued on the next date of attaining the age of superannuation i.e. 01.02.2006; and no junior to the writ petitioner/appellant was granted promotion prior or on the date of his retirement i.e. on 31.01.2006, hence in view of the Office Memorandum dated 23.08.1997 (in which candidature of petitioner had been rejected), the writ petitioner/appellant and one Girish Kumar were not entitled to get notional promotion. Moreover, no entitlement was claimed on the basis of any rule allowing the benefit of notional promotion. (Para 19)

**Special Appeal dismissed**. (E-4)

**Precedent followed:**

1. U.O.I. & ors. Vs K.K. Vadera & ors., 1989 Supp (2) SCC 625 (Para 16)

2. St. of Uttaranchal & anr. Vs Dinesh Kumar Sharma, 2007 (1) SCC 683 (Para 16)

3. K.V. Subba Rao Vs Govt.of A.P., 1988 (2) SCC 201 (Para 16)

4. Sanjay K. Sinha & ors. Vs St. of Bihar & ors., 2004 (10) SCC 734 (Para 16)

**Present appeal assails order of the Single Judge dated 16.08.2021, by which the writ petition filed by the writ petitioner/appellant herein was dismissed.**

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

(1) Supplementary affidavit filed today on behalf of the appellant is taken on record.

(2) Heard Sri Gaurav Mehrotra, learned Counsel assisted by Sri Akber Ahmad, learned Counsel for the appellant and Sri Amitabh Rai, learned Additional Chief Standing Counsel for the State/respondents.

(3) The instant *intra Court* appeal has been filed by the appellant, **Giraja Shankar Tiwari**, challenging the judgment and order of the learned Single Judge dated 16.08.2021 passed in Service Single No. 3659 of 2019 :*Giraja Shankar Tiwari Vs.*

*State of U.P. and others,* by which the writ petition filed by the writ petitioner/appellant herein was dismissed.

(4) According to the appellant, he was appointed as District Agriculture Officer (Section-B) on 02.06.1970. Subsequently, he was promoted to the post of Deputy Director, Agriculture on 03.08.1986 and thereafter, he was promoted to the post of Joint Director, Agriculture on 08.07.2004. His terms and conditions of service were governed by U.P. Agriculture (Group-A posts) Service **Rules, 1992** (hereinafter referred to as 'Rules, 1992') as amended from time to time. Rule 5 of Rules, 1992 provided the channel of promotion from the post of Joint Director to Additional Director, Agriculture and thereafter to the post of Director, Agriculture. The criteria for promotion is merit.

(5) It has been stated by the appellant that he has filed a writ petition, bearing No. 1722 (S/B) of 2005, before this Court, seeking his promotion on the post of Additional Director (Agriculture). A Division Bench of this Court, vide order dated 18.01.2006, disposed of the aforesaid writ petition, which is reproduced as under :-

*"Heard Sri P.N. Mathur, learned Senior Advocate assisted by Sri Manoj Singh for the petitioner and the learned Standing Counsel.*

*During the pendency of the writ petition, the petitioner has been promoted on the post of Additional Director (Agriculture) on 31.12.2005. The State Government has amended the Rules on 24.08.2005. One post of Director Agriculture is lying vacant after the retirement of Mr. Anand Kumar Misra. The petitioner has alleged that he will attain the age of superannuation on 31.01.2006. We, therefore, dispose of the writ petition with a direction to the opposite parties to consider the candidature of the petitioner, along with other eligible persons, for promotion to the post of Director, Agriculture in accordance with Rules, within ten days from the date a certified copy of this order is produced."*

(6) Appellant has stated that though one post of the Director Agriculture (Marketing) was fallen vacant on 31.12.2005 when one Sri Anand Kumar Misra retired but even then his candidature was not considered on the vacancy caused due to retirement of Sri Anand Kumar Misra, hence he had filed contempt petition, bearing No. 1515 of 2006 : *Giraja Shanker Tiwari Vs. Sri Naveen Chand Bajpai and 3 others,* which was disposed of finally vide order dated 19.09.2012 *inter alia* on the ground that the candidature of the appellant was considered by the Departmental Promotion Committee but it was not in his favour, hence liberty was granted to him to ventilate his grievance, if any, before the appropriate forum. Feeling aggrieved by not considering his name for promotion on the post of the Director, Agriculture, the appellant has filed writ petition, bearing No. 1610 (S/B) of 2012, before this Court, which was allowed vide order dated 01.09.2015 with a direction to consider his name for promotion to the post of Director, Agriculture (Marketing) w.e.f. 01.01.2006 along with all consequential benefits and decide the same within two months from the date of production of a certified copy of the order.

(7) In pursuance of the order dated 01.09.2015, the appellant has preferred a representation, which was considered by the respondents and vide Office

Memorandum dated 10.11.2015, denied his promotion on the post of the Director, Agriculture (Marketing) on placing reliance upon the Office Memorandum dated 23.08.1997 issued by the Department of Personnel, Government of U.P. Feeling aggrieved, the appellant had filed writ petition no. 1889 of 2015 (S/B), which was allowed by this Court, while quashing the office memorandum dated 10.11.2015. The operative portion of the order dated 21.04.2017 reads as under :-

*"Under this circumstances, we hereby direct the Principal Secretary, Agriculture to do an inquiry in the matter and also take necessary action against the inquiry officer, who has slapped over the matter deliberately and also to consider the petitioner's promotion on the post of Director Agriculture (Marketing) w.e.f. 01.01.2006, as per earlier order dated 01.09.2015 passed in Writ Petition No. 1610 (S/B) of 2012 may be notionally.*

*With the aforesaid directions, the order impugned dated 10.11.2015 is hereby quashed and writ petition stands* ***allowed.****"*

(8) It has been stated by the appellant that when the aforesaid order dated 21.04.2017 was not complied with, he filed contempt petition, bearing No. 2300 of 2017, before this Court, which was dismissed as infructuous vide order dated 08.01.2019 on the ground that the competent authority has considered the claim of the appellant/writ petitioner vide office memorandum dated 19.12.2018 and rejected the same.

(9) Being dissatisfied with the aforesaid order/office memorandum dated 19.12.2018, the appellant/writ petitioner had filed writ petition No. 3659 (S/S) of 2019, which was dismissed vide order dated 16.08.2021, which is impugned in the instant appeal.

(10) Learned Counsel for the appellant has argued that while passing the impugned order dated 19.12.2018, the learned Single Judge erred in not considering the fact that the vacancy arisen due to superannuation of one Mr. Anand Kumar Misra w.e.f. 01.01.2006 and against which the writ petitioner/appellant ought to has been considered for promotion in the light of the explicit directions of this Court but he was not even taken into account by the Departmental Promotion Committee, which was convened on 31.01.2006, wherein, even though writ petitioner/appellant was found suitable for promotion to the post of Director, Agriculture, however, the writ petitioner/appellant was not recommended for aforesaid promotion only because the vacancy arisen due to superannuation of one Mr. Anand Kumar Misra was not taken into account and the next vacancy would have arise only w.e.f. 01.02.2006 i.e. after the superannuation of the writ petitioner/appellant.

(11) Learned Counsel for the appellant has submitted that the learned Single Judge has also failed to consider the lawful claim of the appellant/writ petitioner for fair consideration for promotion against the aforesaid vacancy which arose w.e.f. 01.01.2006 and the same is a continuing cause of action which accrued to the writ petitioner/appellant when he became eligible for promotion on the post of Director, Agriculture (Marketing), while in service and the same continues to exist till date inasmuch as though the aforesaid claim of the writ petitioner/appellant for promotion stands crystallized by judgments and orders passed by this Court in several

rounds of litigation, the writ petitioner/ appellant has been continuously denied the same on wholly untenable grounds.

(12) *Per contra*, learned Additional Chief Standing Counsel for the State/respondents has argued that in the light of the order passed by this Court on 18.01.2006, the Departmental Promotion Committee has considered the claim of the petitioner in its meeting held on 31.01.2006, wherein the candidature of the writ petitioner/appellant along with the other eligible candidates were considered and after due consideration, the Departmental Promotion Committee, though found the writ petitioner/appellant and one Sri Girish Kumar, eligible to be promoted to the post of Director, Agriculture but on noticing the fact that the retirement of the writ petitioner/appellant is due on 31.01.2006 i.e. the date of meeting of the selection committee itself and the vacancy arose on 01.02.2006, and also noticing the Office Memorandum dated 23.08.1997 issued by the Department of Personnel, Government of U.P., recommended for appointment based on merit in favour of one Jay Prakash Garg. He submits that while the service tenure of the appellant, no junior to him has been promoted to the post of Director, Agriculture. He also argued that as the post of Director, Agriculture arose on 01.02.2006 and the appellant has been retired on 31.01.2006, therefore, the claim of the appellant for promotion to the post of Director, Agriculture does not arise. He also argued that the plea of the writ petitioner/appellant that his candidature has not been considered in a right perspective, is patently not correct from the face of record as the appellant/writ petitioner has admitted the fact that his candidature though has been considered but it has been rejected in pursuance of the Office Memorandum dated 23.08.1997. Thus, the learned Single Judge, after considering the entire material placed on record, has rightly dismissed the writ petition by means of the impugned order.

(13) We have examined the submissions of the learned Counsel for the parties and gone through the record.

(14) The main thrust of argument of the learned Counsel for the appellant that since the writ petitioner/appellant was within the eligibility criterion of promotion to the post of Director, Agriculture and his name was considered and found fit by the Departmental Promotion Committee held on 31.01.2006 i.e. the date on which the writ petitioner/appellant attained the age of superannuation and retired from service, therefore, he was entitled to at least notional promotion on the post of the Director, Agriculture from 01.02.2006.

(15) It transpires from the record that the claim of the writ petitioner/appellant for promotion on the post of Director, Agriculture was rejected by the order dated 19.12.2018, which was impugned in the writ petition, by the Principal Secretary, Department of Agriculture, State of U.P., on placing reliance upon the Office Memorandum dated 23.08.1997 issued by the Department of Personnel, Government of U.P., which states that there is a provision for preparing an eligibility list for each year. Accordingly, the name of an employee would be included in the eligibility list for that year in which the employee had been found entitled, even if in the meantime, the employee had died or attained the age of superannuation. However, Office Memorandum dated 19.12.2018 states that where the question

of notional promotion is concerned, there is no legal compulsion to grant promotion with effect from the date on which the vacancy has arisen. Notional promotion would be granted in the event if a junior being promoted, upon the employee being found fit by the Departmental Promotion Committee.

(16) The law on the subject, is well settled. It has been held in a catena of decisions by the Apex Court that a promotion takes effect from the date of being granted and not from the date of occurrence of vacancy or creation of the post vide **Union of India and others vs. K.K. Vadera and others** : 1989 Supp (2) SCC 625, **State of Uttaranchal and another vs. Dinesh Kumar Sharma :** 2007 (1) SCC 683, **K. V. Subba Rao vs. Government of Andhra Pradesh :** 1988(2) SCC 201, **Sanjay K. Sinha & others vs. State of Bihar and others:** 2004 (10) SCC 734 etc.

(17) In **Union of India and others Vs. K.K. Vadera and others (supra)**, the Apex Court held that after a post falls vacant for any reason whatsoever, a promotion to that post should be from the date the promotion is granted and not from the date such post falls vacant. Similarly, there is no principle of law under which a promotion is to be effective from the date of creation of a promotional post since promotions can be granted only after the Assessment Board has met and made its recommendations for the grant of promotions. On the other hand, if promotions are directed to be effective from the date of creation of the additional posts, then in such eventuality, it would have the effect of giving promotions even before the Assessment Board has met and assessed the suitability of the candidates for promotions.

(18) In the present case, as the facts would indicate, the name of the writ petitioner/appellant was considered by the Departmental Promotional Committee together with other persons. The Departmental Promotion Committee met on 31.01.2006, in which the writ petitioner/appellant was found eligible for promotion to the post of Director, Agriculture togetherwith one Girish Kumar but they were not recommended for promotion on the post of the Director, Agriculture for the reasons that they attained the age of superannuation on the date when the Departmental Promotion Committee met i.e. on 31.01.2006; the vacancy accrue on the next date of attaining the age of superannuation of the writ petitioner/appellant i.e. 01.02.2006; and no junior to the writ petitioner/appellant was granted promotion on the date of his retirement i.e. on 31.01.2006, hence in view of the Office Memorandum dated 23.08.1997, the writ petitioner/appellant and one Girish Kumar was not entitled to get notional promotion.

(19) It transpires that there was no averment to the effect that any junior had been promoted prior to the date on which the writ petitioner/appellant superannuated. Moreover, no entitlement was claimed on the basis of any rule allowing the benefit of notional promotion.

(20) In view of the aforesaid, the learned Single Judge has rightly dismissed the writ petition by means of the impugned order dated 16.08.2021.

(21) Learned Counsel for the appellant/writ petitioner has failed to point out any perversity or illegality in the impugned order dated 16.08.2021 passed by the learned Single Judge.

(22) The special appeal is, accordingly, **dismissed.**

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**(2021)10ILR A680**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 04.10.2021**

**BEFORE**

**THE HON'BLE DINESH KUMAR SINGH, J**

Service Single No. 1301 of 2017

**Rakesh Kumar ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondent**

**Counsel for the Petitioners:**
Yogendra Kumar Mishra, K.B. Pandey

**Counsel for the Respondents:**
C.S.C.

**A. Service Law – Appointment – Essential qualification - U.P. Intermediate Education Act, 1921 - Section 16(2), 16-G - Uttar Pradesh High Schools and Intermediate Colleges (Payment and Selection of Teachers and other Employees) Act, 1971 - Uttar Pradesh Recognized Basic Schools (Junior High Schools) Recruitment and Conditions of Service of Teachers) Rules, 1978 - Rule 4.**

The question, which arises for consideration, is whether the petitioner having qualification of B.A. and B.P.Ed. was eligible to be appointed on the post of Assistant Teacher in the attached primary section of the institution. The qualification of Assistant Teacher in attached primary section of an Intermediate College is graduation plus C.T., B.T.C./H.T.C. or equivalent qualification, but in case of non-availability of person with BTC qualification, person with B.Ed. degree qualification would be appointed. (Para 15)

**Section 16-G of the Act, 1921** - It is evident that in absence of a candidate having essential qualification of graduation plus C.T., B.T.C./H.T.C. or equivalent qualification, the candidate with B.Ed. degree would be eligible for appointment. B.P.Ed. degree is not mentioned as one of the alternate qualifications. **This Court cannot substitute the statutory qualification, which is not otherwise provided under the relevant provisions, which prescribe the essential qualification for appointment to the post of Assistant Teacher in the attached primary school.** (Para 17, 18, 19)

Teacher's Training imparted to teachers for B.Ed. course equips them for teaching higher classes, whereas the Basic Teaching Certificate (BTC) is given to teachers for teaching small children and the two cannot be compared with. The duration of courses of B.T.C. and L.T./B.Ed. are entirely different and have been devised keeping in view the stages through which the students pass. (Para 20)

**Writ petition dismissed**. (E-4)

**Precedent followed:**

1. Ram Surat Yadav & ors. Vs St. of U.P. & ors., 2013 CJ (All) 2205 (Para 19)

**Precedent distinguished:**

1. Amal Kishore Singh Vs State of U.P. & ors., Special Appeal No. 1247 of 2013, decided on 10.10.2018 (Para 12, 21)

**Present petition assails order dated 27.12.2016, passed by District Inspector of Schools, Gonda.**

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

1. The present writ petition under Article 226 of the Constitution of India has been filed for quashing of the order dated 27.12.2016 passed by the District Inspector of Schools, Gonda upholding the order dated 20.10.2014 passed by the committee of management terminating the services of the petitioner on the ground that the

petitioner does not possess the requisite qualification for appointment as Teacher in the attached primary school of the Vivekanand Inter College, Gonda, whereas under sub-section (2) of Section 16 of the Intermediate Education Act, 1921 (for short ?Act, 1921?), the requisite qualification for a Teacher of attached primary school is graduation plus C.T./B.T.C./H.T.C. or equivalent qualification and in the event of non-availability of B.T.C. trained person, person with B.Ed. degree qualification is eligible for appointment.

2. Swami Vivekanand Inter College, Gonda (hereinafter referred to as ?the institution?) is recognised and Government aided institution, which imparts education upto Intermediate classes. It imparts education from Class-I to Class-XII. It is governed under the provisions of the Act, 1921 as well as Uttar Pradesh High Schools and Intermediate Colleges (Payment and Selection of Teachers and other Employees) Act, 1971 (for short ?Act, 1971?).

3. In the primary section, nine posts of Assistant Teachers are sanctioned. In the year 2003, an amendment was brought in by inserting Regulation 7(2)(a) under Regulation 7, Chapter-II of the Regulations framed under the Act, 1921 providing for promotion of Assistant Teachers of the attached primary section to the post of Assistant Teachers in LT Grade and, it was provided that 25% posts of Assistant Teachers of LT Grade would be filled up by promotion of Assistant Teachers of primary schools, who are having five years service to their credit and having requisite qualification for appointment as LT Grade Teacher. Three Teachers of the attached primary school of the institution, namely, Raj Mani Tripathi, Smt. Rama Devi Shukla and Dr. Dinesh Kumar Shukla were promoted to the post of Assistant Teacher in LT Grade under 25% promotional quota.

4. The committee of management of the institution vide its letter dated 1.10.2008 sought sanction from the District Inspector of Schools to fill up three posts of Assistant Teachers in the primary section. The District Inspector of Schools vide letter dated 7.11.2008 informed the institution that the State Government vide order dated 25.9.2008 had imposed ban on the appointments of the Teachers. Subsequently, the said ban was lifted by the State Government. The committee of management, thereafter, advertised three posts and appointed Rakesh Kumar, the present petitioner, Shailendra Kumar Singh and Ms. Poonam Devi and sent the papers to the District Inspector of Schools, Gonda vide letter dated 16.4.2010 for approval. The District Inspector of Schools vide his order dated 5.5.2010 disapproved the selection and appointments made by the committee of management of three aforesaid persons to the post of Assistant Teacher in the primary section of the institution.

5. Against the said order, Writ Petition No.2981 (SS) of 2010, Km. Poonam Devi and others Vs. State of U.P. and others, was filed before this Court. The aforesaid writ petition was disposed of vide order dated 9.8.2010 as under:-

*"Heard Sri H.G.S.Parihar, learned counsel for the petitioner, Sri Rakesh Kumar Chaudhary for the opposite party no.5-Committee of Management and Sri Manjeev Shukla, learned Standing counsel for the State.*

*The petitioner is aggrieved by the order of the District Inspector of Schools*

*(DIOS) dated 5.5.2010. By this order the DIOS has cancelled the appointment made by the committee of management without prior approval of the State Government. The petitioner says that there were vacancies. The committee of management duly informed the DIOS and asked for his permission. The DIOS made some queries which were answered by the committee of management and the committee of management proceeded to make the appointment after making necessary advertisement in the news papers as required by law.*

*Learned Standing counsel says that prior approval is required under the Government Order dated 19th April, 2003 and the committee of management without waiting for the prior approval of the State Government has made the appointment which are against the spirit of the provisions of government order. Hence, the cancellation order passed by the DIOS is valid.*

*Sri H.G.S. Parihar, on the other hand, has stated that under the regulation 7-A, Chapter II, there is no need for the prior approval of the State Government and the Government Order can not override the provisions of the regulations. He has also drawn the attention of this Court towards the judgment of this Court in 2009 (3) ESC 2108 (ALLD) wherein it was decided that since all formalities had already been completed and only prior approval was not given by the State Government it is necessary that such procedure should start once again.*

*In view of rival submissions, the Court comes to the conclusion that prior approval, if not granted, has to be given by the State Government. Accordingly, the DIOS, Gonda is directed to sent the matter along with complete record to the State Government for its approval. The State Government shall be at liberty to examine the matter independently and take a decision either way regarding the requisition of the committee of management. The decision shall be taken within two months from the date a certified copy of this order is placed before him and the decision so taken shall be communicated to the committee of management.*

*With these observations and directions the petition is disposed of finally."*

6. Against the said order dated 9.8.2010, Special Appeal No.607 of 2010, Km. Poonam Devi and others Vs. State of U.P and others, was filed before a Division Bench of this Court. The Division Bench of this Court vide order dated 17.4.2012 disposed of the said special appeal modifying the order dated 9.8.2010 passed by the learned Single Judge to the extent that the primary section concerned should not make appointment beyond the sanctioned strength available and, further that once sanction in respect of appointment has already been granted at any stage in respect of vacancy, against the said vacancy no fresh sanction would be required to fill up the post. In case the appellants have been appointed against sanctioned posts, it would be inappropriate on the part of the authority to insist upon seeking a fresh sanction. With the aforesaid modification, the special appeal stood disposed of.

7. The District Inspector of Schools thereafter, vide order dated 17.7.2012 passed the order for payment of salary to three persons, namely, Rakesh Kumar, the present petitioner, Shailendra Kumar Singh and Km. Poonam Devi with the condition that in case some relevant facts/adverse

material would come to the notice in future in relation to appointment of the said persons, the order for payment of salary would be cancelled and for such action, appointing authority and the concerned Teacher would be responsible. The said three Teachers thereafter, submitted their testimonials for making entries in their service books. The date of birth of Km. Poonam Devi was found to be different than in the mark-sheets. Km. Poonam Devi could not give proper and satisfactory explanation in this regard to the Manager and, therefore, the Manager vide order dated 13.7.2013 stopped the payment of salary of Km. Poonam Devi. Km. Poonam Devi made a representation against the order dated 13.7.2013 passed by the Manager before the District Inspector of Schools and, the District Inspector of Schools vide his order dated 12.9.2013 appointed Principal, F.A.A. Government Inter College, Gonda as enquiry officer for conducting the enquiry in the selection and appointment of the petitioner and two others. The enquiry officer submitted his enquiry report on 12.11.2013, in which it was said that Rakesh Kumar, the present petitioner, Shailendra Kumar Singh and Ms. Poonam Devi were selected only on the basis of the marks secured in the interview instead of the total marks of educational qualifications and interview and despite there having candidates with B.Ed. degree available, two candidates with B.P.Ed. degree were selected and, therefore, the payment of salary to these Teachers would not be proper in the interest of the students or the State.

8. In view of the aforesaid report of the enquiry officer, salary of the aforesaid three Teachers was withheld vide order dated 29.11.2013. Shailendra Kumar Singh again submitted representation for re-consideration of the matter. The then Finance and Accounts Officer (Secondary Education), Gonda vide order dated 28.6.2014 had directed to re-consider the matter, but due to his transfer, the same could not get completed. The committee of management vide order dated 27.6.2014 had decided to terminate the services of three Teachers and forwarded the papers to the office of the District Inspector of Schools for approval. The District Inspector of Schools gave opportunity to these three Teachers for representing their case and fixed 26.9.2014 for hearing. All the three Teachers remained present and made submissions in support of their case. The District Inspector of Schools approved the decision of the committee of management dated 27.6.2014 vide order dated 27.9.2014 and in pursuance thereof, services of the petitioner were terminated by the committee of management vide order dated 20.10.2014.

9. The petitioner challenged the said orders by filing Writ Petition No.6517 (SS) of 2014 before this Court. The aforesaid writ petition was allowed vide judgement and order dated 14.9.2016 on the ground that the order dated 27.9.2014 passed by the District Inspector of Schools did not contain any reason. The matter was remitted back to the District Inspector of Schools to pass a fresh order after giving opportunity of hearing to the petitioner and the committee of management, preferably, within a period of four months from the date of the order. It was further directed that petitioner should continue as Assistant Teacher in the institution and his salary should be paid as and when it would fall due till the fresh decision is taken by the District Inspector of Schools.

10. In compliance of the aforesaid order, the petitioner made representation dated 28.10.2016 annexing the order dated

14.9.2016 passed by this Court. The District Inspector of Schools fixed 18.11.2016, the date for hearing. However, on the said date, Manager of the institution was not present and, therefore, next date was fixed as 25.11.2016, on which date the petitioner as well as the representative of the committee of management, i.e. Principal of the institution, were present. After hearing the petitioner as well as the committee of management, the impugned order dated 27.12.2016 was passed by the District Inspector of Schools.

11. Learned counsel for the petitioner submits that training qualification B.P.Ed. is equivalent qualification to B.Ed., L.T., B.T./C.T. and B.P.Ed. is covered by phrase ?equivalent qualification? as provided under sub-section (2) of Section 16 of the Act, 1921. He, therefore, submits that the ground, on which the petitioner?s services were terminated that he did not possess the requisite qualification for appointment to the post of Assistant Teacher in the attached primary school, is wholly incorrect and is liable to be set aside.

12. Learned counsel for the petitioner in support of his contention has placed reliance upon a Full Bench judgement and order of this Court rendered in ***Special Appeal No.1247 of 2013, Amal Kishore Singh Vs. State of U.P. and others, decided on 10.10.2018.***

13. On the other hand, learned counsel for the opposite parties submit that as per the provisions of sub-section (2) of Section 16 of the Act, 1921, the Assistant Teacher in the primary section, where the Teachers are receiving the salary under the provisions of the Act, 1971 are to be appointed through direct recruitment. The essential qualification for the Assistant Teacher in such primary school is graduation with C.T., B.T.C./H.T.C. or equivalent qualification, but in case of non-availability of person with BTC qualification, person with B.Ed. degree qualification would be appointed. The qualification of B.P.Ed. is not a recognised qualification for appointment to the post of Assistant Teacher in the primary section of Intermediate Colleges. It is further submitted that B.P.Ed. is a training for imparting physical education, which is being imparted at the High School and Intermediate level. However, in the institution in question, no post of Physical Education Teacher is created at primary level.

14. I have considered the submissions advanced on behalf of the learned counsel for the petitioner as well as by the learned counsel for the opposite parties.

15. The question, which arises for consideration, is whether the petitioner having qualification of B.A. and B.P.Ed. was eligible to be appointed on the post of Assistant Teacher in the attached primary section of the institution. The qualification of Assistant Teacher in attached primary section of an Intermediate College is graduation plus C.T., B.T.C./H.T.C. or equivalent qualification, but in case of non-availability of person with BTC qualification, person with B.Ed. degree qualification would be appointed.

16. Section 16-G of the Act, 1921 stipulates that every person employed in a recognized institution shall be governed by such conditions of service as may be prescribed by Regulations. Section 15 of the Act, 1921 empowers the Board to make Regulations for the purpose of carrying into effect the provisions of the Act. In exercise

of the said power, the Board has framed Regulations and under Chapter-II thereof, provisions relating to appointment of heads of institutions and Teachers have been laid down. Regulation-I provides the minimum qualifications for appointment of head of the institution and teachers in a recognized institution. In Appendix-A, the minimum qualifications for appointment of an Assistant Teacher in the attached primary school are provided. It is provided that posts of Assistant Teachers in the attached primary school, who are governed under the provisions of the Act, 1971, shall be filled up by direct recruitment with qualification of graduation plus C.T./B.T.C./H.T.C. or equivalent qualification and in case of non-availability of B.T.C. trained candidate, person with B.Ed. degree can be appointed.

17. From perusal of the aforesaid provision, it is evident that in absence of a candidate having essential qualification of graduation plus C.T., B.T.C./H.T.C. or equivalent qualification, the candidate with B.Ed. degree would be eligible for appointment. B.P.Ed. degree is not mentioned as one of the alternate qualifications. This Court can not substitute the statutory qualification, which is not otherwise provided under the relevant provisions, which prescribe the essential qualification for appointment to the post of Assistant Teacher in the attached primary school.

18. In primary section, the children study in Class-I to Class-V and, therefore, the Teachers require such training to teach students of these classes. The Legislature in its wisdom, has prescribed the qualification for appointment of Assistant Teacher in the attached primary school, which does not include B.P.Ed. degree. It is also prescribed that only in absence of B.T.C. candidates, candidates with B.Ed. degree would be considered for appointment.

19. A Full Bench of this Court in the case of ***Ram Surat Yadav and others Vs. State of U.P and others,*** 2013 CJ (All) 2205, while interpreting Rule 4 of the Uttar Pradesh Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 has rejected the argument that B.Ed. qualification is a higher qualification than TTC and, therefore, the B.Ed. candidates should be held to be eligible to compete for the post of Assistant Teacher. Paragraph 10 of the aforesaid judgement is extracted herein-below:-

*"10. Consequently, the judgment of the Supreme Court holds that (i) the BEd qualification cannot be regarded as a 'higher qualification' than a prescribed certificate of training for primary school children; (ii) whether for a particular post, the source of recruitment should be from candidates with a particular degree is a matter of recruitment policy; and (iii) whether the BEd qualification can also be prescribed for primary school teachers is a question to be considered by the recruiting authority."*

20. It has been further held that Teacher's Training imparted to teachers for B.Ed. course equips them for teaching higher classes, whereas the Basic Teaching Certificate (BTC) is given to teachers for teaching small children and the two cannot be compared with. The duration of courses of B.T.C. and L.T./B.Ed. are entirely different and have been devised keeping in view the stages through which the students pass. In the case of B.T.C., the method of Training Course is devised so as to meet

the requirement of teaching at a formative stage for a student who enters the School. Thus, it has been held that the training qualification for teaching small children is B.T.C. while the training qualification for teaching children in High Schools and Intermediate Colleges is B.Ed. or L.T.

21. The judgement cited by the learned counsel for the petitioner in the case of *Amal Kishore Singh* (supra) was in respect of the Head Master of the institution and not in respect of the Assistant Teacher in the attached primary school. Therefore, the said judgement is not relevant in the facts of the present case. Since, the petitioner lacks essential qualification as prescribed under the statute for appointment as Assistant Teacher in the attached primary school of the institution inasmuch as B.P.Ed. degree is not an alternate qualification prescribed for B.T.C. etc., he can not claim to be qualified and, therefore, I do not find any error in the impugned order dated 27.12.2016 passed by the District Inspector of Schools, Gonda upholding the order dated 20.10.2014 passed by the committee of management terminating the services of the petitioner.

22. In view thereof, the writ petition fails and is hereby ***dismissed.***

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**(2021)10ILR A686**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 06.10.2021**

**BEFORE**

**THE HON'BLE ASHWANI KUMAR MISHRA, J.**

Writ A No. 5636 of 2012

**Umesh Kumar Sinha ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Ajay Bhanot, Sri Kartiyeka Saran, Sri Shashank Shekhar Mishra, Sri Vinayak Ranjan, Sri Shiv Kumar Singh

**Counsel for the Respondents:**
C.S.C., Sri K.S. Kushwaha, Sri Nisheeth Yadav

**A. Service Law – Disciplinary Enquiry - It is the right of the employer to conduct disciplinary action against its employee and the Courts are usually reluctant to interfere with such rights but it must be observed that such right is not absolute**. Where the employer is the State it is expected to act a model employer and due care and caution is expected to be exercised by the relevant authority while dealing with conduct of disciplinary action against its employees. **Merely because the employer is the State it would not mean that the government servant can be placed under suspension for an indefinite period even without initiating disciplinary action, as is the case in hand.** (Para 16)

There is absolutely no reason disclosed in any of the affidavit as to on what basis the charges were levelled against the petitioner when the original records itself were neither traced nor were ever placed before the competent authority who formed the opinion or sanctioned the issuance of charge-sheet to the petitioner. (Para 15)

**B. The initiation of disciplinary action was highly belated and no justification or material was brought on record to explain such inordinate delay.** (Para 18)

Initiation of enquiry after such long lapse of time not only causes extreme prejudice to the employee but otherwise goes contrary to the interest of administration as also larger public interest inasmuch as the Government servant under the threat of such proceedings or their victimization would not be willing to perform even just duties unless such arbitrary action is

met with strong disapproval by the Courts. (Para 19)

**C. Unexplained delay in initiation of disciplinary enquiry as also denial of subsistence allowance for a period of eighteen years has rendered the entire proceeding open to challenge on the ground of apparent arbitrariness.** (Para 21)

In the event non-payment of subsistence allowance has caused prejudice to the employee the action of the employer itself would be open to challenge on such grounds. The petitioner has stated that on account of non payment of subsistence allowance for eighteen years he had to suffer gravely and had to sell his personal belongings to ensure his basis survivals. (Para 21)

Merely by stating that an enquiry committee has been constituted to look into these aspects the State would be not justified in prolonging the suffering of petitioner, any further, by allowing the respondents to proceed with the enquiry. Merely stating that huge financial losses are caused to the State would not suffice unless the charges are even prima facie supported by any credible material placed before the court. (Para 22)

**Writ petition allowed.** (E-4)

**Precedent followed:**

1. P.V. Mahadevan Vs MD, T.N. Housing Board, (2005) 6 SCC 636 (Para 2)

2. Neelu Dwivedi Vs Artificial Limbs Manufacturing Corp. of India & ors., Division Bench judgment, Allahabad High Court, Special Appeal Defective No. 2020 of 2021 (Para 2)

3. U.P. State Textile Corporation Ltd. Vs P.C. Chaturvedi & ors., (2005) 8 SCC 211 (Para 21)

**Precedent distinguished:**

1. U.P. Cooperative Foundation Ltd. & ors. Vs L.P. Rai, (2007) 7 SCC 81 (Para 3)

2. Dinesh Kumar Bhardwaj Vs S.B.I. Through Regional Manager & ors., Writ Petition No. 39036 of 2012, Allahabad High Court (Para 3)

**Present petition assails orders dated 03.12.1997 and 22.01.1998, passed by Joint Director of Education.**

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Petitioner at the relevant point of time was the Senior Clerk in the Office of District Non Formal Education Officer, Varanasi. The Joint Director of Education vide the first impugned order dated 03.12.1997 has held that petitioner is substantively appointed Senior Clerk and was temporarily promoted to the post of Senior Assistant, in a local arrangement, and since disciplinary action is proposed to be initiated against him as such he is being sent back to his substantive post of Senior Clerk. The second order under challenge is an order of suspension passed against the petitioner on 22.01.1998, by the Joint Director of Education, which records that since disciplinary action on serious charges is contemplated, therefore, he is being placed under suspension.

2. It is after a gap of 13 long years that a charge-sheet has been issued to petitioner on 12.10.2011, leveling five charges against the petitioner, which is the third order under challenge. The charge-sheet is assailed on the ground that neither any material in support of the charges exists nor any disciplinary enquiry would be permissible in absence of such material. It is also urged that the delay of thirteen years in initiation of disciplinary action is not explained and in the facts and circumstances is wholly arbitrary. It is also contended that for a period of thirteen years during which petitioner was placed under

suspension even subsistence allowance was not paid to him which renders the entire disciplinary action unsustainable. Sri Kartikeya Saran, learned counsel appearing for the petitioner places reliance upon a judgment of the Supreme Court in P. V. Mahadevan Vs. MD, T. N. Housing Board, (2005) 6 SCC 636, as also a Division Bench Judgment of this Court in Special Appeal Defective No. 202 of 2021 (Neelu Dwivedi Vs. Artificial Limbs Manufacturing Corporation of India and ors.) to submit that unexplained delay in issuance of charge-sheet would vitiate the charge-sheet and it is liable to be quashed.

3. Sri Shailendra Singh, learned Standing Counsel on the other hand contends that charges against the petitioner are extremely serious and for ascertaining the cause of delay in issuance of charge-sheet an enquiry by a three member enquiry committee has been constituted. It is also contended that delay was occasioned in issuing the charge-sheet on account of inter district communication between different officers since the charges related to a period when petitioner was posted at Bahraich whereas he was in fact serving at Varanasi when disciplinary action was initiated. Documents from different offices had to be collected which contributed to the delay. Reliance is placed upon a judgment of the Supreme Court in U.P. Cooperative Federation Ltd. and others Vs. L. P. Rai, (2007) 7 SCC 81, as also the judgment of this Court in Dinesh Kumar Bhardwaj Vs. State Bank of India Thru Regional Manager and others (Writ Petition No.39036 of 2012) to defend the impugned action. A prayer is also made to allow the respondents to proceed with the enquiry in view of the seriousness of charges levelled.

4. In reply Sri Kartikeya Saran, learned counsel for the petitioner states that no material in support of the charges are shown to exists on record and, therefore, the allegation made against the petitioner in the charge-sheet are unsustainable for the mere reason that no material in support of such charges exists on record. It is pointed out that even the subsistence allowance has been paid to petitioner only in the year 2016 after eighteen years at the rate of salary admissible as per Forth Pay Commission report notwithstanding the fact that Fifth Pay Commission report got enforced on 01.01.1996. With reference to the affidavits filed by the Officers before this Court it is urged that respondents admit that original records are not in existence and, therefore, holding of disciplinary enquiry would otherwise be an abuse of the authority vested in the employer. It is contended that petitioner has been sufficiently punished for no fault of his and, therefore, the disciplinary enquiry initiated against him be set aside particularly as he has otherwise attained the age of superannuation and the petitioner be allowed service and retiral benefits as per his entitlement in law.

5. While entertaining the writ petition this Court passed following order on 01.02.2012:-

*"Learned Standing counsel has accepted notice on behalf of respondents nos. 1 to 8. He prays for and is accorded six weeks time to file counter affidavit. Rejoinder affidavit may be filed within next two weeks.*

*List thereafter.*

*It has been contended on behalf of petitioner that in the present case petitioner has been placed under suspension vide order dated 27.01.1998 and for all these years while he has been*

*continuing under suspension subsistence allowance has not been paid to him. Petitioner has contended that he has complied with the term and condition of the suspension order. Petitioner has further contended that respondents have maintained complete silence in respect of holding of disciplinary proceedings and now charge sheet in question has been issued to the petitioner dated 12.10.2011. Petitioner at this juncture has rushed to this Court contending therein that such in ordinate delay in initiating disciplinary proceedings has not been satisfactorily explained as to why charge sheet in question has been belatedly issued and on this score disciplinary proceeding at this juncture are liable to be dropped.*

*Petitioner has placed reliance on the judgment of Apex Court in the case of State of Madhya Pradesh Vs. Bani Singh and other reported in 1990 (Supp.) SCC 738 and submits that it would be unfair to permit the departmental enquiry to proceed at this late stage as charge sheet in question has been issued after 13 years and charges in question are of the year 1996-97 respectively .*

*Primafacie arguments advanced appears to have some substance and requires consideration by this Court.*

*Consequently, till the next date of listing no further action shall be taken pursuant to charge sheet in question and while filing counter affidavit specific details shall be furnished explaining inordinate delay in holding of the enquiry."*

6. Recently, after hearing the learned counsel for the parties the Court proceeded to pass following orders on 02.08.2021:-

*"Petitioner was placed under suspension in the year 1998, whereas chargesheet has been served upon him in the year 2011. Contention is that excessive delay in service of chargesheet is arbitrary in the facts of the present case. It is also contended that petitioner has attained the age of superannuation in the year 2015 and all his retiral benefits are withheld.*

*It would be appropriate to call upon the respondents to produce relevant records, on the next date fixed.*

*List on 18.8.2021."*

7. When the matter was taken up next following orders were passed on 26.08.2021:-

*"Heard learned counsel for the parties.*

*Facts of the writ petition reflects a sorry state of affairs. Petitioner, a clerk, came to be suspended in 1998, a charge-sheet was supplied in 2011.*

*It is urged that in support of the charges no documents/evidence was supplied. Petitioner retired in 2015.*

*This Court had directed the respondents to produce the records, however, the respondents have not responded.*

*In view thereof, the Court is constrained to direct the first respondent-Secretary, Basic Education to file his personal affidavit, as to what, action he proposes against the delinquent employees including the disciplinary authority.*

*On the next date, the sixth respondent shall appear along with the records of the case to show cause.*

*It is clarified that in the event of the affidavit is not being filed by the first respondent, the first respondent shall also appear on the next date fixed.*

*List this case on 17 September 2021."*

8. Again when the matter was taken up following orders were passed on 17.09.2021:-

*"From the contents of the affidavit tendered today as well as the submissions addressed by learned counsels, the following issues emerge.*

*The challenge to the charge-sheet of 12 October 2011 was originally based on the disciplinary proceedings having been initiated with inordinate delay. This since admittedly the petitioner had come to be suspended on 27 January 1998 and the chargesheet came to be issued almost 3 years thereafter. When the writ petition was initially entertained on 01 February 2012, taking notice of the aforesaid contention the Court had provided that no further action would be taken pursuant to the chargesheet in question. That interim restraint continues to operate till date. It is in the aforesaid backdrop that the Court would have to evaluate the contention that the chargesheet is liable to be quashed on account of inordinate delay.*

*Secondly, admittedly the petitioner attained the age of superannuation in 2015 during the pendency of the present writ petition. The issue which consequently arises is whether the proceedings which were initiated in terms of the charge-sheet can possibly be continued. This essentially since it is contended that in the absence of any sanction as envisaged under Regulation 351-A of the Civil Service Regulations having been obtained, proceedings cannot be continued.*

*Lastly the Court notes the contents of paragraph 10 of the personal affidavit of the first respondent who states that for want of original records, the inquiry proceedings could not be completed. It is in the aforesaid backdrop that Sri Kartikeya Saran contends that continuance of proceedings based on the impugned charge-sheet would be an exercise in futility since as per the respondents themselves, no records exist based on which the charges as levelled may be established. Since the principal questions which arise stand duly enumerated, this matter shall stand posted for final disposal on 29 September 2021.*

*As jointly prayed, include in the additional cause list of 29 September 2021. The personal presence of the sixth respondent is dispensed with."*

9. Affidavits have been filed by the respondents in response to the above orders which shall be dealt with later.

10. So far as order dated 03.12.1997 is concerned it records that petitioner substantively holds the post of Senior Clerk and only under internal arrangement he has been allowed to officiate on the post of Senior Assistant purely on temporary basis. This order is challenged on the ground that Joint Director of Education had no jurisdiction to pass it and that the

competent authority in that regard was the Additional Director.

11. The order whereby the petitioner was permitted to officiate temporarily on the promoted post of Senior Assistant although is not filed but from the materials produced on record it is apparent that petitioner was neither promoted to the post of Senior Assistant nor any proceedings as per relevant service rules were undertaken before allowing the petitioner to temporarily hold the promoted post. The findings in the order dated 03.12.1997 that petitioner was only permitted to officiate as an internal arrangement is also not shown to be perverse or arbitrary. Entitlement to continue on the promoted post can arise only if promotion is accorded substantively by following the procedure laid in the rules. Such a right can be claimed only if the competent authority passes an order of promotion after complying with the provisions contained in the recruitment rules itself. There is noting on record to show that petitioner was promoted in any such exercise. Mere officiation on a higher post in such circumstances would not vest any right in petitioner to claim continuance on such post. Order dated 03.12.1997 merely allows the petitioner to continue on his substantive post. Such an order would merit no interference particularly when the basis of right to higher post is not substantiated in connosence with the requirement of law.

12. So far as the order of suspension is concerned it is apparent that neither any charges were specified therein nor the disciplinary enquiry was initiated at that stage. The charge-sheet ultimately has been issued to petitioner after thirteen years on 12.10.2011. The charges against the petitioner are as under:-

(i) that petitioner instead of making purchases as per the recommendation of the State Level Committee has got the purchases made unauthorisedely, with the approval of District Magistrate, Bahraich for his personal vested interest. In support of this charge the respondents proposed to rely upon a letter of the Secretary Basic Shiksha Parishad as also the approval of the District Magistrate dated 02.06.1996 and the letter of Director of Education dated 04.11.1995.

(ii) that petitioner instead of ensuring purchase @ 2725 per Center allowed purchase in excess of the aforesaid amount causing financial loss to the tune of Rs. 40 lakhs. The letter of the Secretary and Director, Basic referred to and relied upon in the first charge has again been relied.

(iii) the third charge is that despite specific directions the petitioner ordered purchase of unwarranted materials like teacher attendance register, T.C. Book, Hindi Alphabet Chart, Hindi Gini Chart, A.B.C.D. Chart, Hindi Table Chart, Sanitation Chart, Carbon Box, Plastic Bucket, Glass, Mug etc. In addition to it the petitioner also caused loss by unauthorisedly placing orders for purchase of football, volleyball, net and other sports goods.

(iv) the petitioner ordered purchase of material over and above rates settled in the contract causing loss to the tune of Rs.11,92,745/-.

(v) the last charge is that petitioner indulged in purchase of materials contrary to the departmental directions and,

thereby, has violated the orders of the senior authorities.

13. The charge-sheet has been issued to the petitioner only in the year 2011 after placing him under suspension in 1998.

14. Pursuant to the orders passed in the writ petition calling upon the respondents to explain this inordinate delay two affidavits have been filed by the respondents, which are worth referring to at this stage. The first affidavit is dated 09.09.2021 and is sworn by the Joint Director of Education, Varanasi, region Varanasi in which correspondence made between different officers for initiating disciplinary action against the petitioner and for providing materials on the basis of which the charge-sheet would be issued is referred to in paragraph nos.6 to 9. Para 10 of the affidavit refers to a communication of the Joint Director of Education, Varanasi to the Joint Director of Education, Faizabad requesting for providing relevant records for the purpose of holding enquiry. Similar communication for securing records appears to to have been made between different officers which are referred to in paragraph nos. 11 to 14. None of the paragraph in this affidavit conveys the reason or justification for the delay occasioned in issuance of charge-sheet to the petitioner. This affidavit also refers to the reply of the petitioner to the charge-sheet dated 22.10.2011, in which the petitioner submitted his interim reply to the charge-sheet and demanded legible and certified copies of the materials which were proposed to be relied upon for the purposes of holding disciplinary enquiry. The list of witnesses to be relied upon were also submitted by the petitioner. The second affidavit is of the Secretary Basic Education. Para 9 to 11 of this affidavit are of relevance and consequently are reproduced hereinafter:-

*"9. That after 6 years from the suspension of the petitioner vide order dated 27.1.1998 passed by the Joint Director of Education, Varanasi Region, Varanasi, the then Joint Director of Education, Varanai Region, Varanasi vide letter dated 8.1.2004 has requested the Joint Director of Education, Faizabad Region, Faizabad to provide the original records with regard to charges levelled against the petitioner.*

*10. That after calling for the report in the event of reinstatement of the petitioner by order dated 13.04.2009 of Directorate, the Joint Director of Education, Varanasi Region, Varanasi vide his letter dated 25.06.2009 has informed the Directorate that for want of original records relating to the charges, the enquiry proceeding could not be completed.*

11. That the Joint Director of Education, Varanasi Region, Varanasi vide letter dated 4.8.2011 annexing the copy of letter of petitioner dated 7.7.2011 has directed the District Basic Education Officer, Varnasi for payment of subsistence allowance to the petitioner. Thereafter, letter dated 9.8.2011 was sent to the District Basic Shiksha Adhikari, Bahraich requesting therein for sending the LPC and service book of the petitioner and in the event of non receiving the same, the District Basic Education Officer, Varanasi vide letter dated 15.10.2011 has informed the Joint Director of Education, Varanasi Region, Varanasi that for want of LPC and Service book, the payment of subsistence allowance to the petitioner is not possible."

15. What exactly was the reason for not taking steps to issue charge-sheet between 1998 to 2004 is left unanswered. Delay of further five years between 2004 to 2009 is also not explained. From the

materials that have been brought on record it is apparent that the original records were either not in possession of the authorities who issued the charge-sheet to the petitioner nor such records have been provided by the office where the acts constituting misconduct are alleged to have been performed by the petitioner. There is absolutely no reason disclosed in any of the affidavit as to on what basis the charges were levelled against the petitioner when the original records itself were neither traced nor were ever placed before the competent authority who formed the opinion or sanctioned the issuance of charge-sheet to the petitioner.

16. Though it is the right of the employer to conduct disciplinary action against its employee and the Courts are usually reluctant to interfere with such rights but it must be observed that such right is not absolute. Where the employer is the State it is expected to act a model employer and due care and caution is expected to be exercised by the relevant authority while dealing with conduct of disciplinary action against its employees. Merely because the employer is the State it would not mean that the government servant can be placed under suspension for an indefinite period even without initiating disciplinary action, as is the case in hand.

17. In P. V. Mahadevan (Supra) the Supreme Court was faced with the case of a similar kind and after it was found that no material was placed to justify the inordinate delay of more than ten years the Supreme Court quashed the charge memo by observing as under in paragraph nos. 8 to 12 of the judgment:-

*"Our attention was also drawn to the counter affidavit filed by the respondent-Board in this appeal. Though some explanation was given, the explanation offered is not at all convincing. It is stated in the counter affidavit for the first time that the irregularity during the year 1990, for which disciplinary action had been initiated against the appellant in the year 2000, came to light in the audit report for the second half of 1994-1995.*

*Section 118 and 119 of the Tamil Nadu State Housing Board Act, 1961 Tamil Nadu Act No. 17 of 1961 read thus :*

*"118. At the end of every year, the Board shall submit to the Government an abstract of the accounts of its receipts and expenditure for such year.*

*119. The accounts of the Board shall be examined and audited once in every year by such auditor as the Government may appoint in this behalf."*

*Section 118 specifically provides for submission of the abstracts of the accounts at the end of every year and Section 119 relates to annual audit of accounts. These two statutory provisions have not been complied with at all. In the instant case the transaction took place in the year 1990. The expenditure ought to have been considered in the accounts of the succeeding year. In the instant case the audit report was ultimately released in the 1994-1995. The explanation offered for the delay in finalising the audit account cannot stand scrutiny in view of the above two provisions of the Tamil Nadu Act 17. It is now stated that the appellant has retired from service. There is also no acceptable explanation on the side of the respondent explaining the inordinate delay in initiating departmental disciplinary proceedings. Mr. R. Venkataramani, learned Senior counsel*

*is appearing for the respondent. His submission that the period from the date of commission of the irregularities by the appellant to the date on which it came to the knowledge of the Housing Board cannot be reckoned for the purpose of ascertaining whether there was any delay on the part of the Board in initiating disciplinary proceedings against the appellant has no merit and force. The stand now taken by the respondent in this Court in the counter affidavit is not convincing and is only an afterthought to give some explanation for the delay.*

*Under the circumstances, we are of the opinion that allowing the respondent to proceed further with the departmental proceedings at this distance of time will be very prejudicial to the appellant. Keeping a higher government official under charges of corruption and disputed integrity would cause unbearable mental agony and distress to the officer concerned. The protracted disciplinary enquiry against a government employee should, therefore, be avoided not only in the interests of the government employee but in public interest and also in the interests of inspiring confidence in the minds of the government employees. At this stage, it is necessary to draw the curtain and to put an end to the enquiry. The appellant had already suffered enough and more on account of the disciplinary proceedings. As a matter of fact, the mental agony and sufferings of the appellant due to the protracted disciplinary proceedings would be much more than the punishment. For the mistakes committed by the department in the procedure for initiating the disciplinary proceedings, the appellant should not be made to suffer.*

*We, therefore, have no hesitation to quash the charge memo issued against the appellant. The appeal is allowed. The appellant will be entitled to all the retiral benefits in accordance with law. The retiral benefit shall be disbursed within three months from this date. No costs."*

18. The Division Bench of this Court in Neelu Dwivedi (Supra) similarly has examined the law on the subject and after elaborately discussing the judgments on the point proceeded to quash the charge-sheet on the ground that the initiation of disciplinary action was highly belated and no justification or material was brought on record to explain such inordinate delay.

19. Initiation of enquiry after such long lapse of time not only causes extreme prejudice to the employee but otherwise goes contrary to the interest of administration as also larger public interest inasmuch as the Government servant under the threat of such proceedings or their victimization would not be willing to perform even just duties unless such arbitrary action is met with strong disapproval by the Courts. So far as the judgment relied upon by learned Standing Counsel in the case of U.P. Cooperative Federation Ltd. and others (Supra) is concerned the Supreme Court observed as under in para 5, which is reproduced hereinafter:-

*"Ms. Rachana Srivastava, learned counsel for the appellant, has submitted that the High Court having come to a finding that no proper enquiry was held as the respondent was not given opportunity to defend himself and the enquiry suffered from procedural irregularities, should have given liberty to the appellant to hold a fresh enquiry against the respondent in accordance with law. However, by the impugned order, the*

*right of the appellant to hold a fresh enquiry has been foreclosed. Learned counsel for the respondent has submitted that L.P. Rai (respondent) has since retired from service and it will not be proper at this stage to hold a fresh enquiry against him. Having considered the submissions made by learned counsel for the parties, we are of the opinion that the charges levelled against the employee are not of a minor or trivial nature and, therefore, it will not be proper to foreclose the right of the employer to hold a fresh enquiry only on the ground that the employee has since retired from service. In this view of the matter, the order passed by the High Court requires to be modified. It is accordingly clarified that it will be open to the appellant-employer to hold a fresh enquiry against L.P. Rai (respondent) in accordance with rules. Having regard to the fact that the respondent has already retired from service, it is directed that if the appellant chooses to hold a fresh enquiry, it must do so expeditiously, preferably within a period of four months from the date on which a certified copy of this judgment is issued by the office. A decision on the question of promotion of the respondent employee shall be taken after the conclusion of the enquiry."*

20. The aforesaid observation of the Court is in the context of the facts of that case and cannot be construed as laying down any principle contrary to what is held in P.V. Mahadevan (Supra) and Neelu Dwivedi (Supra). This is more so as holding of enquiry itself would be difficult in the facts of this case in absence of availability of original records. The other judgment relied upon by learned Standing Counsel in the case of Dinesh Kumar Bhardwaj (Supra) is also distinguishable on facts inasmuch as the delay in departmental enquiry was explained in that case due to pendency of criminal case which is not the case here.

21. It would also be worth noticing the argument of Sri Kartikeya Saran that disciplinary proceedings are also liable to be quashed on account of denial of subsistence allowance for nearly eighteen years. the State in its counter affidavit has clearly admitted that the subsistence allowance was paid to the petitioner for the first time on 24.06.2016, which is after eighteen years of the initiation of disciplinary action. The routine explanation that petitioner had not submitted certificate that he was not employed elsewhere has been strongly objected by the petitioner by repeatedly furnishing materials before the competent authority to show that such materials were placed on record. No material otherwise has been brought on record to show that petitioner was gainfully employed elsewhere. Unexplained delay in initiation of disciplinary enquiry as also denial of subsistence allowance for a period of eighteen years has rendered the entire proceeding open to challenge on the ground of apparent arbitrariness. In U.P. State Textile Corporation Ltd. Vs. P.C. Chaturvedi and others, (2005) 8 SCC 211, the effect of non payment of subsistence allowance came to be examined by the Supreme Court and it has been observed that in the event non-payment of subsistence allowance has caused prejudice to the employee the action of the employer itself would be open to challenge on such grounds. The petitioner has stated that on account of non payment of subsistence allowance for eighteen years he had to suffer gravely and had to sell his personal belongings to ensure his basis survivals. Sri Kartikeya Saran states that this has otherwise compromised the availability of

the petitioner to effectively contest the proceedings and establish petitioner's innocence.

22. As has already been observed above the initiation of the disciplinary enquiry in the present case is after thirteen years and even the materials on the basis of which the charges are proposed to be established are apparently not available. Merely by stating that an enquiry committee has been constituted to look into these aspects the State would be not justified in prolonging the suffering of petitioner, any further, by allowing the respondents to proceed with the enquiry. Even the charges in the charge-sheet are based upon certain letters of the higher authorities without there being any examination of original bills or other materials which alone can constitute the basis for the charge-sheet. Merely stating that huge financial losses are caused to the State would not suffice unless the charges are even prima facie supported by any credible material placed before the court.

23. Having considered the respective submissions and upon examination of materials brought on record this Court finds that absolutely no reasons have been placed on record by the respondents to explain the inordinate delay of thirteen years in initiation of the disciplinary enquiry against the petitioner. The petitioner otherwise has attained the age of superannuation in the year 2015. In the totality of circumstances as also for the reasons recorded above, the writ petition is liable to succeed and is allowed. The charge-sheet issued to petitioner as also the order of suspension and its continuance for a period of thirteen years without any justification are quashed. The petitioner shall be entitled to payment of salary for the period he remained under suspension along with continuity and other service benefits. The retiral benefits which are found due and payable to petitioner in terms of his entitlement as per above shall also be worked out and paid to him within a period of four months, failing which the petitioner would be entitled to interest @ 8% per annum. It shall however be open for the respondents to recover the amount of interest from the salary of the officer found responsible for not ensuring release of the retiral benefits in terms of the aforesaid direction. The writ petition is accordingly allowed.

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**(2021)10ILR A696**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 23.09.2021**

**BEFORE**

**THE HON'BLE NEERAJ TIWARI, J.**

Writ A No. 9026 of 2021

**Rajesh Pratap Singh ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Vijay Kumar Singh

**Counsel for the Respondents:**
C.S.C.

**A. Service Law – Disciplinary enquiry - U.P. Government Servants (Discipline and Appeal) Rules, 1999 - Rule 9(2) –** Disciplinary Authority disagreed with the inquiry report and has passed an order for re-inquiry without assigning any reason. Moreover, nothing has been stated as to why reason has not been recorded. Rule 9(2) of the Rules, 1999 clearly provides that in case of disagreement with inquiry report and passing order for re-inquiry, it is required on the part of Disciplinary Authority to give his own finding i.e. reason has to be recorded, therefore, order is contrary to

the Rule 9(2) of Rules, 1999 and is liable to be set aside. (Para 10)

**Writ petition allowed**. (E-4)

**Precedent followed:**

1. Shiv Shanker Lal Vs St. of U.P. & ors., 2008 1 ADJ 446 (Para 4)

2. St. of U.P. & ors. Vs Neeraj Verma, (2021) ILR 6 All 295 (Para 4)

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard learned counsel for petitioner and learned standing counsel for State-respondents.

2. Present petition has been filed seeking following relief:-

*"i). issue a writ, order or direction in the nature of certiorari to quash the order of re-enquiry dated 03.06.2021 passed by respondent No. 2."*

3. Pursuant to the order of this Court dated 06.08.2021, learned standing counsel has produced instruction dated 13.09.2021 duly signed by Additional Commissioner, Department of Food and Logistics, which is taken on record.

4. Learned counsel for the petitioner submitted that as per Rule 9(2) of U.P. Government Servants (Discipline and Appeal) Rules, 1999 (hereinafter referred to as the 'Rules, 1999'), in case of disagreement with inquiry report, it is required on the part of Disciplinary Authority to record reasons for conducting re-inquiry. In the present case, impugned order of re-inquiry has been passed without recording any reason, therefore, the same is liable to be quashed. In support of his contention he has placed reliance upon the judgments of this Court in the matters of Shiv Shanker Lal vs. State of U.P. and others, reported as 2008 1 ADJ 446 and State of U.P. and others Vs. Neeraj Verma, reported as 2021 0 Supreme (All) 309.

5. Learned Standing Counsel from the instruction could not demonstrate any reason recorded by Disciplinary Authority in the impugned order of re-inquiry while having disagreement with inquiry report. He also could not demonstrate as to why reasons have not been recorded.

6. I have considered rival submissions made by learned counsel for the parties and perused the Rules, 1999 as well as judgments relied upon by learned counsel for the petitioner.

7. Rule 9 of Rules, 1999 clearly provides that Disciplinary Authority shall record reasons for conducting re-inquiry. Rule 9 of Rules, 1999 is quoted below:-

*"9. Action on Inquiry Report.- (1) The disciplinary authority may, for reasons to be recorded in writing, remit the case for re-inquiry to the same or any other Inquiry Officer under intimation to the charged Government servant. The Inquiry Officer shall thereupon proceed to hold the inquiry from such stage as directed by the disciplinary authority, according to the provisions of Rule 7.*

*(2) The disciplinary authority shall, if it disagrees with the findings of the Inquiry Officer on any charge, record its own findings thereon for reasons to be recorded.*

*(3) In case the charges are not proved, the charged Government servant shall be exonerated by the disciplinary*

*authority of the charges and inform him accordingly.*

*(4) If the disciplinary authority having regard to its findings on all or any of charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charged Government servant, he shall give a copy of the inquiry report and his findings recorded under sub-rule (2) to the charged Government servant and require him to submit his representation if he so desires, within a reasonable specified time. The disciplinary authority shall, having regard to all the relevant records relating to the inquiry and representation of the charged Government servant, if any, and subject to the provisions of Rule 16 of these rules, pass a reasoned order imposing one or more penalties mentioned in Rule 3 of these rules and communicate the same to the charged Government servant."*

8. In the case of ***Shiv Shanker Lal (Supra)***, impugned order has been quashed on the ground that reason has not been recorded for conducting re-inquiry. Paragraph Nos. 9 & 13 of the said judgment is quoted below:-

*".....*

*9. A perusal of the aforesaid makes it clear that the same is nothing but reproduction of charge No. 2 levelled against the petitioner vide charge-sheet dated 28.08.2003. The Court is unable to find out any finding or reasons of the disciplinary authority for disagreeing with the findings of the inquiry officer and in our view it is only a conclusion that the aforesaid charge is proved against the petitioner. Para 2 of the notice dated 30.07.2004 cannot be said to contain any finding and reason and on the contrary it is only, at the best, a conclusion drawn by the disciplinary authority without recording its finding and reasons as mandated under Rule 9 (2) of 1999 Rules.*

*.....*

*13. In the result, the writ petition succeeds and is allowed. The impugned order of punishment dated 27.04.2006 (annexure-1) to the writ petition) is hereby quashed. However, the respondents are at liberty to issue a fresh notice to the petitioner conforming with the requirement of Rule 9(2) of 1999 Rules, if is so decides and may pass a fresh order after giving due opportunity to the petitioner. The exercise, as directed above, be completed within four months from the date of production of a certified copy of this order before the competent authority. The petitioner shall be entitled to cost which is quantified to Rs. 2000/."*

9. Again, this Court in the matter of ***State of U.P. and others Vs. Neeraj Verma (Supra)*** has taken the same view. Paragraph No. 14 of the said judgment is quoted below:-

*"(14) In the present case, a perusal of the impugned order transpired that the inquiry officer exonerated the claimant/respondent of all the charges. However, the Disciplinary Authority disagreed with the findings particularly in respect to charges No.6, 7 and 8, and without recording/mentioning any reason with respect to the point on which the Disciplinary Authority has not agreed with the findings of the inquiry officer, straightaway issued a show cause notice to the claimant/ respondent, who, after receipt of the show cause notice, submitted his reply, but without considering the issue*

*raised by the claimant/respondent in its reply to the show cause notice, the Disciplinary Authority has passed the order of punishment, which has been challenged by the claimant/respondent in Claim Petition No. 253 of 2018. The Tribunal has also found that so far as delayed payment of the license fee is concerned, the Excise Commissioner had fixed 15.04.2015 for deposition of the license fee and prior to it, the claimant/respondent has deposited the license fee. The Tribunal has also opined that the punishment order is against the principle of natural justice. In these backgrounds, vide impugned order, the Tribunal allowed the claim petition and quashed the order of punishment with a direction that if any service benefits if withheld on account of the punishment order dated 30.11.2017, the claimant/respondent is entitled to get the same, in accordance with law."*

10. I have perused the impugned order in the present case. After having disagreement with inquiry report, Disciplinary Authority has passed order for re-inquiry, but no reason has been assigned and nothing has been stated as to why reason has not been recorded. Rule 9(2) of the Rules, 1999 clearly provides that in case of disagreement with inquiry report and passing order for re-inquiry, it is required on the part of Disciplinary Authority to give his own finding i.e. reason has to be recorded, therefore, order is contrary to the Rule 9 (2) of Rules, 1999 and is liable to be set aside.

11. Therefore, under such facts and circumstances of the case, Rule 9 (2) of Rules, 1999 as well as pronouncement made by this Court, impugned order dated 03.06.2021 passed by respondent No. 2 is hereby quashed.

12. With the aforesaid observations, writ petition is **allowed.**

13. However, respondents are at liberty to pass fresh order strictly in accordance with Rule 9 (2) of Rules, 1999 after giving opportunity to the petitioner.

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**(2021)10ILR A699**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 23.09.2021**

**BEFORE**

**THE HON'BLE YASHWANT VARMA, J.**

Writ A No. 12665 of 2021

**Seema Devi ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Manoj Kumar Patel

**Counsel for the Respondents:**
C.S.C., Sri Dhamendra Pratap Singh

**A. Service Law – Compassionate appointment - U.P. Recruitment of Dependants of Government Servants (Dying-in-Harness) Rules, 1974 - Rule 2(a) & 2(c) -** The expression "unmarried" in Rule 2(c) has been struck down by this Court as constitutionally invalid, "daughters" per se, irrespective of whether they were married or divorced, would be entitled to be recognised as being entitled to claim the benefit of the 1974 Rules. This, of course, subject to the well accepted caveat that they would, like sons, have to establish a position of financial dependency at the time of the untimely demise of the government servant. (Para 13)

**Matter remitted to consider the claim of the petitioner afresh. Writ petition allowed**. (E-4)

**Precedent cited:**

1. Smt. Vimla Srivastava Vs St. of U.P. & anr., 2016 (1) ADJ 21 (DB) (Para 2)

2. State of U.P. & ors. Vs Noopur Srivastava, 2019 (2) ADJ 585 (Para 2)

**Precedent distinguished:**

1. The Director of Treasuries in Karnataka & anr. Vs V. Somyashree – Civil Appeal No. 5122 of 2021 (Para 3)

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard learned counsel for the petitioner and Sri Chandan Kumar learned Standing Counsel for the State respondents.

2. The present petition challenges an order of 24 May 2021 pursuant to which the respondents have proceeded to reject the application of the petitioner for being accorded appointment on compassionate grounds holding that a divorced daughter would not fall within the ambit of the 1974 Rules. The petitioner questions the correctness of that view taken firstly on the ground that under the 1974 Rules the expression "unmarried" as prefixed to the word "daughter" already stands struck down by the Court in **Smt. Vimla Srivastava v. State of U.P. and Another1**. According to learned counsel, the definition of family as employed in the 1974 Rules is thus liable to be read as encompassing daughters per se of the deceased government servant. Additionally, learned counsel for the petitioner draws the attention of the Court to the decision of the Court in **State of U.P. And Others v. Noopur Srivastava2** wherein it was specifically held that a divorced daughter would fall within the ambit of the 1974 Rules. Dealing with that question the Division Bench in **Noopur Srivastava** held thus:-

"23. Further, under Rule 2 (c) of Rules of 1974 there is no express exclusion that a "divorced daughter" is not entitled to appointment under the Rules nor the expression "Unmarried" daughter has been clarified by putting the words to the effect that it means a "daughter never married" or "daughter not married" and being so the secondary meaning of term "Unmarried" cannot be ignored and is liable to be taken into account in the given circumstances in context of beneficial legislation i.e. Rules of 1974.

24.On the basis of aforesaid discussion in the context of Rules of 1974, we hold that the expression "divorced daughter" is included/implicit in the expression "Unmarried daughter". Accordingly we hold that a "divorced daughter" is entitled to compassionate appointment if she was dependant, on the date of death of her father/mother (the employee) and the marriage was dissolved legally either prior to or after the date of death of bread earner of the family and she remains "not married" at the time of appointment.

25.In addition, the judgment dated 4.7.2011 passed in Writ Petition No. 2707 (SS) of 2004 (Gudiya Awasthy v. State of U.P. was challenged in the Special Appeal No. 19 of 2012 and this Court vide judgment dated 4.9.2018 has set aside the judgement dated 04.07.2011 and being so, no reliance can be placed on the judgment dated 04.07.2011 as the effect of setting aside a judgment in the eye of law is that, the judgment which has been set aside is not in existence and a judgment/order by which the judgment is set aside would be the operative decision in the case. According to doctrine/principle of "merger" original decision merges in appellate decision. The logic underlying the doctrine of merger is that there cannot be more than

one decree or order governing the same subject matter at a given point of time. Thus, judgment dated 04.07.2011 passed in Gudiya Awasthy's case is liable to be ignored and argument based on the same are not sustainable and liable to be rejected."

3. Sri Chandan Kumar learned Standing Counsel, on the other hand, drew the attention of the Court to a recent decision of the Supreme Court in **The Director of Treasuries in Karnataka And Another v. V. Somyashree3** to contend that the aforesaid decision of the Supreme Court is a binding authority in support of the proposition that a divorced daughter cannot claim benefits of compassionate appointment.

4. It is these rival submissions which fall for consideration. Before proceeding to consider the merits of the submission of the State resting on V. Somyashree, it would be appropriate to briefly advert to the legal position as enunciated by this Court dealing with the provisions of the 1974 Rules.

5. It may at the outset be noted that insofar as our 1974 Rules are concerned, the question posited stands answered in unequivocal terms in favour of the petitioner in light of the decision in **Noopur Srivastava.** The Division Bench has taken into consideration the fact that Rule 2(c) does not expressly exclude a divorced daughter. The Court proceeded to hold that a divorced daughter would implicitly fall within the expression "unmarried daughter". It becomes relevant to note that under the 1974 Rules as they stood at the time of introduction of the Eighth Amendment to those Rules [published on 9 February 2007], only unmarried and widowed daughters stood included in the definition of family. Subsequently and in terms of the Ninth Amendment to those Rules [published on 22 December 2011], unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughters-in-law were brought within the sweep of the expression "family". Rule 2 (c ) in its form as noticed above was what fell for consideration in **Vimla Srivastava**. In order to understand the import and essence of that decision, the Court deems it apposite to refer to the following extracts:-

9.....The invidious discrimination that is inherent in Rule 2 (c) lies in the fact that a daughter by reason of her marriage is excluded from the ambit of the expression "family". Her exclusion operates by reason of marriage and, whether or not she was at the time of the death of the deceased Government servant dependent on him. Marriage does not exclude a son from the ambit of the expression "family". But marriage excludes a daughter. This is invidious. A married daughter who has separated after marriage and may have been dependent on the deceased would as a result of this discrimination stand excluded. A divorced daughter would similarly stand excluded. Even if she is dependent on her father, she would not be eligible for compassionate appointment only because of the fact that she is not "unmarried". The only basis of the exclusion is marriage and but for her marriage, a daughter would not be excluded from the definition of the expression "family".

6. The Court then went on to hold:-

The issue before the Court is whether marriage is a social circumstance which is relevant in defining the ambit of the expression "family" and whether the

fact that a daughter is married can constitutionally be a permissible ground to deny her the benefit of compassionate appointment. The matter can be looked at from a variety of perspectives. Implicit in the definition which has been adopted by the state in Rule 2 (c) is an assumption that while a son continues to be a member of the family and that upon marriage, he does not cease to be a part of the family of his father, a daughter upon marriage ceases to be a part of the family of her father. It is discriminatory and constitutionally impermissible for the State to make that assumption and to use marriage as a rationale for practicing an act of hostile discrimination by denying benefits to a daughter when equivalent benefits are granted to a son in terms of compassionate appointment. Marriage does not determine the continuance of the relationship of a child, whether a son or a daughter, with the parents. A son continues to be a son both before and after marriage. A daughter continues to be a daughter. This relationship is not effaced either in fact or in law upon marriage. Marriage does not bring about a severance of the relationship between a father and mother and their son or between parents and their daughter. These relationships are not governed or defined by marital status. The State has based its defence in its reply and the foundation of the exclusion on a paternalistic notion of the role and status of a woman. These patriarchal notions must answer the test of the guarantee of equality under Article 14 and must be held answerable to the recognition of gender identity under Article 15.

7. The fundamental precept which forms the foundation of **Vimla Srivastava** is of the daughter being constitutionally empowered to avail of the same benefits as would extend to a son. The Court, as a corollary to the above, held that a daughter cannot be denied rights and benefits flowing from the 1974 Rules merely based on the circumstance of marriage. More importantly and for the purposes of the present matter, it becomes pertinent to highlight that while expounding upon the various circumstances where the statutory definition would result in invidious discrimination, the Court specifically took note of a situation where a daughter separated after marriage, may have been staying with her parents and was financially dependent upon them.

8. The principles as enunciated in the aforesaid two decisions would clearly establish that a divorced daughter cannot be denied the benefits enshrined in the 1974 Rules. That takes the Court to consider the impact of the decision of the Supreme Court in **V. Somyashree.**

9. It becomes pertinent to note that in the aforesaid decision, the Supreme Court was dealing with the provisions made in Rules 2 and 3 of the **Karnataka Civil Services (Appointment on compassionate Grounds) Rules 19964. Rule 2 of the 1996** Rules defined the word "dependent" in the following terms:-

"2. Definitions:(1) In these rules, unless the context otherwise requires:

(a) "Dependent of a deceased Government servant" means-

(i) in the case of deceased male Government servant, his widow, son, (unmarried daughter and widowed daughter) who were dependent upon him; and were living with him; and

(ii) in the case of a deceased female Government servant, her widower, son, (unmarried daughter and widowed daughter) who were dependent upon her and were living with her;

(iii) 'family' in relation to a deceased Government servant means his or her spouse and their son, (unmarried daughter and widowed daughter) who were living with him.

(2) Words and expressions used but not defined shall have the same meaning assigned to them in the Karnataka Civil Services (General Recruitment) Rules, 1977."

10. The Supreme Court thereafter proceeded to hold as follows:-

"8.1 From the aforesaid rules it can be seen that only 'unmarried daughter' and 'widowed daughter' who were dependent upon the deceased female Government servant at the time of her death and living with her can be said to be 'dependent' of a deceased Government servant and that 'an unmarried daughter' and 'widowed daughter' only can be said to be eligible for appointment on compassionate ground in the case of death of the female Government servant. Rule 2 and Rule 3 reproduced hereinabove do not include 'divorced daughter' as eligible for appointment on compassionate ground and even as 'dependent'. As observed hereinabove and even as held by this Court in the case of N.C. Santhosh (Supra), the norms prevailing on the date of consideration of the application should be the basis of consideration of claim for compassionate appointment. The word 'divorced daughter' has been added subsequently by Amendment, 2021. Therefore, at the relevant time when the deceased employee died and when the original writ petitioner- respondent herein made an application for appointment on compassionate ground the 'divorced daughter' were not eligible for appointment on compassionate ground and the 'divorced daughter' was not within the definition of 'dependent'."

11. In order to ascertain the ratio of **V. Somyashree,** it becomes important to note that the same essentially turned upon the language employed in Rule 2(a) of the Karnataka Rules which only brought an unmarried and widowed daughter within their scope and the ambit of the scheme for compassionate appointment. It was in the aforesaid backdrop and since a divorced daughter had not been specifically added in the definition of "dependent" that the Supreme Court upheld the contention that a divorced daughter could not be extended the benefits of compassionate appointment. The decision is also liable to be viewed in the context of the 2021 amendment which was introduced in the Karnataka Rules in terms of which a divorced daughter was specifically included in the definition of "dependent" subsequently. The Supreme Court thus came to conclude that since a divorced daughter did not stand included in the definition of dependent at the time when the government servant died and the application was made, appointment on compassionate grounds could not be claimed.

12. Regard must also be had to the fact that the 1974 Rules post the decision in **Vimla Srivastava**, are liable to be interpreted with the Court necessarily proceeding on the basis that the word "unmarried" stands deleted and effaced. In

light of the judicial declaration of invalidity, it would be deemed to have never existed on the statute book. Viewed in that light also it is manifest that the decision of the Supreme Court in V. Somyashree is clearly distinguishable since there the Court was called upon to render judgment in light of the Karnataka Rules as they stood and in the absence of any challenge to the constitutional validity of those provisions.

13. The undisputed position which thus emerges from the aforesaid discussion is that consequent to the expression "*unmarried"* as appearing in Rule 2 (c) being struck down by this Court as constitutionally invalid, "daughters" per se, irrespective of whether they were married or divorced, would be entitled to be recognised as being entitled to claim the benefit of the 1974 Rules. This, of course, subject to the well accepted caveat that they would, like sons, have to establish a position of financial dependency at the time of the untimely demise of the government servant. In light of the position in law as found by the Court, learned Standing Counsel submitted that the ends of justice would merit the matter being remitted to the third respondent to consider the claim of the petitioner afresh.

14. Accordingly the writ petition is **allowed.** The impugned order of 24 May 2021 is hereby quashed. The matter shall stand remitted to the third respondent for considering the claim of the petitioner afresh. It is only clarified that this Court has interfered with the impugned order solely on the grounds and for the reasons noted above. All other aspects germane to the consideration of grant of compassionate appointments which would include consideration of factors such as a situation of financial despondency as well as the petitioner being dependent of the deceased government servant are left open to be considered independently by the respondents.

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**(2021)10ILR A704**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 07.10.2021**

**BEFORE**

**THE HON'BLE RAJAN ROY, J.**
**THE HON'BLE SURESH KUMAR GUPTA, J.**

Land Acquisition No. 22953 of 2021

**Radhey Shyam ...Petitioner**
**Versus**
**U.O.I. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Abhay Raj Singh

**Counsel for the Respondents:**
C.S.C., A.S.G., Sarvesh Kumar Dubey

**A. Civil Law – Land acquisition – Payment of compensation - National Highways Act, 1956 - Sections 3G(5) & 3H - Arbitration and Conciliation Act, 1996 - Sections 34 & 36 - National Highways (manner of depositing the amount by the Central Government; making requisite funds available to the competent authority for acquisition of land) Rules, 2019 - Rule 3**.

**Section 3H of the Act, 1956 read with the aforesaid Rules, 2019 themselves contain a mechanism for payment of the amount awarded by the Arbitrator and as such recourse to Section 36 of the Act, 1996 Act may not be necessary.** Remedy u/s 36 of the Act 1996 would not apply at least at this stage of the case. Of course, in the event the award of the Arbitrator is challenged u/s 34 of the Act, 1996, then, the withdrawal and disbursement as envisaged in Rule 3 of Rules, 2019 may not take place. (Para 7, 8)

In the present case, award dated 12.03.2018 in its entirety has been challenged u/s 34 of the Act, 1996. However, it is not confirmed whether the petitioner's land is included in the said award. (Para 9)

Petitioner is allowed to approach the competent authority, under the Act, 1956, who shall verify the fact as to whether there is an award in favour of the petitioner, if it is so, whether it has been challenged by the authority or any other aggrieved person u/s 34 of the Act, 1996 or not. If the award has not been challenged, then, authority shall proceed in accordance with S. 3H of the Act, 1956 read with Rules, 2019. And in case there is a challenge to the award u/s 34 of the Act, then of course, authority cannot proceed any further, but in such eventuality, petitioner shall be informed in writing about the factual position. (Para 10)

**Writ petition disposed of**. (E-4)

(Delivered by Hon'ble Rajan Roy, J.
&
Hon'ble Suresh Kumar Gupta, J.)

1. Petitioner seeks payment of the compensation awarded by the Arbitrator under Section 3G(5) of the National Highways Act, 1956 on 12.03.2018 in Case No. 887 of 2018.

2. The petitioner's counsel categorically states that he is not seeking any enhancement of the amount awarded, by means of this petition.

3. The counsel for the National Highway Authority informs that a similar writ petition bearing No. 533 (LA) of 2021 has been decided on 11.01.2021 by this Court relegating the petitioner to the remedy available under Section 36 of the Arbitration and Conciliation Act, 1996, therefore, in this case also as there is a remedy for enforcement of the award under the said provision and as the Act, 1996 is applicable in the case at hand in view of sub-section (6) of Section 3G of the National Highways Act, 1956 therefore, this petition should also be dismissed in terms of the said judgement. The judgement referred by Shri Sarvesh Kumar Dubey, learned counsel for National Highway Authority reads as under:

*"Heard.*

*Petitioners herein seek enforcement of an arbitral award dated 19.02.2020. The acquisition was made under the National Highways Act, 1956. As per provisions of Section 3G(6) subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred as "Act, 1996" ) shall apply to every arbitration under this Act.*

*Learned counsel for the petitioners admits to the fact that concerned opposite party has challenged the arbitral award dated 19.02.2020 under Section 34 of the Act, 1996.*

*Learned counsel for the concerned opposite party asserts that such arbitral award is executable under Section 36 of the Act, 1996, therefore this writ petition is not maintainable especially as challenge to the said award is still pending. However, he is not in a position to inform the Court as to what is the stage of the proceedings under Section 34 of the Act, 1996 and whether there is any interlocutory order therein.*

*Nevertheless considering the availability of remedy under Section 36 of the Act, 1996 this petition is not maintainable. Accordingly, the petition is dismissed. This order is being passed without prejudice to the rights of the parties.*

*It is further provided that if any proceedings under Section 34 of the Act, 1996 is pending before the concerned*

*Court below, as informed by the learned counsel for the opposite parties, then the Court below shall consider and dispose of the same in accordance with law at the earliest."*

4. The counsel for the petitioner has invited our attention to Sub-section (6) of Section 3H which provides- where the amount determined by the arbitrator is in excess of the amount determined by the competent authority, the excess amount together with interest, if any, awarded under sub-section (5) shall be deposited by the Central Government in such manner as may be laid down by rules made in this behalf by that Government, with the competent authority and the provisions of sub-sections (2) to (4) shall apply to such deposit. As per sub- section (2) of Section 3H, which becomes applicable in the context of sub-section (6) referred herein above, as soon as may be after the amount has been deposited under sub-section (1), the competent authority shall on behalf of the Central Government pay the amount to the person or persons entitled thereto. As per sub-section (3) of Section 3H - where several persons claim to be interested in the amount deposited under sub-section (1), the competent authority shall determine the persons who in its opinion are entitled to receive the amount payable to each of them. As per sub-section (4) of Section 3H- if any dispute arises as to the apportionment of the amount or any part thereof or to any person to whom the same or any part thereof is payable, the competent authority shall refer the dispute to the decision of the principal civil court of original jurisdiction within the limits of whose jurisdiction the land is situated.

5. Thus, subject to the provisions of sub-sections (3) and (4) of Section 3H, in the event of an excess amount having been awarded by the arbitrator under Section 3G(5), the said amount would not only be deposited in terms of sub-section (6) of Section 3H by the Central Government in such manner as may be laid down by rules made in this behalf by that Government, with the competent authority, but the same would also be payable by the competent authority on behalf of the Central Government to the person or persons entitled thereto in view of sub-section (2) of Section 3H. Even in cases where a determination is made under sub-section (3) of Section 3H or the matter is determined after a reference under sub-section (4) of Section 3H, such amount would be deposited accordingly and paid to the person or persons entitled thereto.

6. In the context of sub-section (6) of Section 3H, we may also refer to the Rules known as the National Highways (manner of depositing the amount by the Central Government; making requisite funds available to the competent authority for acquisition of land) Rules, 2019. Rule 3 of the Rules, 2019 provides as under:

*"3. The manner of making requisite funds available to the competent authority shall be as follows: -*

*(i) Subject to provisions of the Act, the executing agency authorised by the Central Government in this behalf, shall open and maintain an account with one or more Scheduled Commercial Banks for remittance of the amount for land acquisition across the country, with arrangements for access to such account by the competent authority for specific jurisdiction as per authorisation of limits by the executing agency. The Executing Agency shall, on the demand raised by the competent authority before announcement*

*of the award, issue requisite authorisation limits in favour of the competent authority for withdrawal of amount from such account as per requirements from time to time for disbursement to the landowners or persons interested therein through an electronic banking mechanism as per extant Reserve Bank of India regulations and the said authorisation limits, revolving in nature, shall entitle the competent authority to withdraw money from such account as per requirements, without any further reference to the land acquiring agency, for disbursement to the landowners or persons interested therein, as follows: -*

*(a) The amount determined under section 3G of the Act within fifteen days of the raising of demand by the competent authority, and*

*(b) Where the amount determined by the Arbitrator under sub-section (7) of Section 3G of the Act is in excess of the amount determined by the competent authority, the excess amount, together with interest, if any, awarded by the Arbitrator, within 30 days of the communication of Arbitrator's award, unless such Award has been further challenged by either of the aggrieved parties.*

*Explanation.- The authorisation limits, revolving in nature, are explained with the help of an illustration as under: -*

*Say, the amount of award is Rs. 200 crore for which the CALA places demand on the acquiring/ executing agency. The executing agency shall issue an authorisation in favour of CALA to draw an amount up to Rs. 200 crore from the Central account, in limits of Rs. 50.00 crore at any point in time. As the CALA keeps disbursing the amount, the limit of Rs. 50.00 crore shall keep getting automatically recouped and so on till the utilisation of total amount of authorisation of Rs. 200 crore.*

*(ii) The executing agency, authorised by the Central Government in this behalf, shall ensure that the requisite account is maintained with a Scheduled Commercial Bank, against which an authorisation limit is issued in favour of the competent authority for disbursement of the compensation amount, duly determined under Section 3G of the Act, to the landowners or persons interested therein. Further, the said authorisation limit shall be utilised by the competent authority for the intended purpose of disbursement and shall be duly reflected in the books of accounts of the executing agency for the purpose of proper monitoring and reconciliation thereof and any interest earned thereon shall be credited into the said account and shall belong to the executing agency.*

*(iii) In cases where the executing agency of a project is any State Government or Union territory, the amount shall preferably be disbursed through the Public Financial Management System of the Ministry of Finance.*

*(iv) The competent authority shall, in turn, disburse the compensation amount to the landowners or the persons interested therein preferably by electronically crediting the said amount into their respective bank accounts."*

7. From the aforesaid provision, it is evident that the competent authority is entitled to withdraw money from the account referred in Rule 3 of the Rules, 2019 as per requirements, without any further reference to the land acquiring agency, for disbursement to the land owners or persons interested therein and in a case where the amount determined by the Arbitrator under sub Section (7) of Section 3G of the Act, 1956 is in excess of the amount determined by the competent

authority, the excess amount, whether with interest, if any, awarded by the arbitrator. The same can be withdrawn within 30 days of the communication of the Arbitrator's award for disbursement to the land owners or persons interested therein, unless such award has been further challenged by either of the aggrieved parties. Thus, Section 3H of the Act, 1956 read with the aforesaid Rules, 2019 themselves contain a mechanism for payment of the amount awarded by the Arbitrator, as such, there is merit in the contention of learned counsel for petitioner that recourse to Section 36 of the Act, 1996 Act may not be necessary. Of course, in the event the award of the Arbitrator is challenged under Section 34 of the Act, 1996, then, the withdrawal and disbursement as envisaged in Rule 3 of Rules, 2019 may not take place. We were not apprised of these rules on the earlier occasion, when we decided Writ Petition No. 533 (LA) of 2021.

8. In view of the opening word of Sub-section (6) of Section 3G - "subject to the provisions of this Act" as there is a mechanism for payment of the amount awarded by the Arbitrator under Section 3H read with Rules, 2019, therefore, the remedy under Section 36 of the Act 1996 would not apply at least at this stage of the case. This aspect of the matter could not be considered earlier.

9. Shri Dubey, learned counsel for the National Highway Authority says that the award dated 12.03.2018 in its entirety has been challenged under Section 34 of the Act, 1996. However, he is not sure as to whether the petitioner's land is included in the said award.

10. We are of the considered opinion that the matter can be resolved by allowing the petitioner to approach the competent authority, under the Act, 1956, who shall verify the fact as to whether there is an award in favour of the petitioner, if it is so, whether it has been challenged by the authority or any other aggrieved person under Section 34 of the Act, 1996 or not. If the award has not been challenged, then, he shall proceed in accordance with Section 3H of the Act, 1956 read with Rules, 2019 as discussed herein above. If he finds that there is a challenge to the award under Section 34 of the Act, then of course, he cannot proceed any further, but in such eventuality, he shall inform the petitioner in writing about the factual position. This exercise shall be completed within one month. Whether the remedy under Section 36 of the Act, 1996 would be available in the event the provisions of Section 3H of the Act, 1956 and Rules, 2019 are not complied, or not, and whether it will be available after disposal of proceedings under Section 34 or for that matter during its pendency, if there is no stay of the award, are questions which are left open for consideration in some other appropriate case.

11. With the aforesaid observations, the writ petition is **disposed of.**

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**(2021)10ILR A708**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 01.10.2021**

**BEFORE**

**THE HON'BLE JASPREET SINGH, J.**

Consolidtation No. 2572 of 1978

**Lalta Prasad & Ors. ...Petitioners**
**Versus**
**Haunsla Prasad & Ors. ...Respondents**

**Counsel for the Petitioners:**
SK Mehrotra, Rakesh Kumar Srivastava

**Counsel for the Respondents:**
C.S.C., R.K. Srivastava

**A. Civil Law – Consolidation – Co-tenancy rights - Uttar Pradesh Consolidation of Holdings Act, 1953 - Sections 9-A(2), 48 & 49; United Provinces Tenancy Act, 1939 - Land Revenue Act: Section 39(2).**

**Oudh Rent Act, 1886 - Section 108 – Challenge to jurisdiction to pass judgment and decree dated 11.03.1930, (which is the basis of three impugned orders), passed in R.S. No. 204 of 1929 - A suit for recovery of possession of lands, held in the right of occupancy tenancy, by a person claiming title on the general law of inheritance against a person, who is not a landlord, is not barred by Clause (10b) of Section 108 of the Oudh Rent Act, 1886.** (Para 46)

Thus, a suit by tenants i.e. from the branch of the petitioner as well as amongst other co-tenants of the other branch i.e. private respondents, was maintainable. The judgment and decree dated 11.03.1930, was passed by the Court of Competent Jurisdiction and could not be treated to be a nullity. (Para 49, 53)

The learned Munsif in its judgment dated 11.03.1930 after referring to the evidence both oral and documentary held that the plaintiff Raghuvir Tiwari (father of petitioner) had failed to prove that the property in suit was a joint family property while the defendants had succeeded in showing that it was their specific and separate property. (Para 52)

The said decree dated 11.03.1930 was never challenged nor ever set aside, moreover, the ground that the aforesaid decree was wholly without jurisdiction was also not raised before the three Consolidation Authorities and it is for the first time that it is being urged before this Court in writ jurisdiction. (Para 23)

The three Courts (Consolidation Authorities) have specifically taken note of the judgment dated 11.03.1930 to hold that once the right of the father of the petitioner was rejected by the Court holding that the property was not joint and the same issue could not be re-agitated, hence, the claim of the petitioner has been rejected. (Para 31)

**B. Code of Civil Procedure, 1908 - Order XXII Rule 9 - Effect of Abatement or dismissal - Effect of the plaint in suit filed by the landlord in the year 1949 seeking eviction and arrears of rent which abated - The effect of abatement is clear from the explanation which is appended to Order 22 Rule 9 and it clarifies that in a later suit a defence which is based on the facts which constituted a cause of action in the suit which abated or is dismissed under the said Rule does not operate as a bar. Thus, the effect of abatement does not create any conclusive bar.** (Para 57)

The petitioner has relied upon the pleading of the suit instituted by the then landlord. The then landlord had initiated proceedings for arrears of rent and ejectment against his tenants which included the petitioners as well as the private respondents which clearly indicates that the petitioner was in possession. Had the property been partitioned between Bhagirathi and Nand Kishore and the petitioner and his predecessors had no right, then obviously the then landlord would not have impleaded the petitioner and his predecessors as a party. (Para 54)

Even if the same is taken at its face value what could not be disputed by the learned counsel for the petitioner is that the aforesaid proceedings abated. There is nothing on record to indicate that in response to the said plaint any of the private respondents or even for that matter the predecessor-in-interest of the petitioner had filed their response. Even if taking the best case scenario, the aforesaid plaint and its averments can only be taken as an admission in so far as the then landlord was concerned, however, the same could not be pressed against either the private respondents or their predecessor-in-interest. Since, there is nothing on record to indicate that any of the private respondents or their predecessors had accepted the aforesaid averments. (Para 56)

**C. It is fairly well settled that in order to entitle a party to claim co-tenancy rights in the holding on the ground of its being ancestral the unbroken identity of the holding has got to be established throughout the period. If the identity has changed of the holding the claim cannot succeed.** (Para 61)

At the very outset, it may be stated that the petitioner had laid his claims before the Consolidation Courts on the ground that the property was joint family property. It was never his case that it was ancestral but nevertheless this Court giving the benefit to the petitioner is assessing the claim of the petitioner on both the counts treating it to be ancestral as well as joint family property. (Para 60)

It is not disputed nor could be shown from the record that the property in question at any point of time was recorded in the name of Debi Charan. It has also not been shown that the partition which had occurred between Nageshwar belonging to the branch of Nand Kishore and Bhagirathi in the year 1901 was ever assailed and since that point of time, the property has been recorded separately. The petitioner also could not explain that it is Nand Kishore and Bhagirathi who had granted 8 bighas of land out of their own holdings in favour of Sri Raghuvir which continues to be held by the petitioner in a separate Khata No. 126. From the said Khata No. 126, the father of the petitioner had leased out certain lands. (Para 66)

**There is a difference between a joint family and a joint family property merely because a joint family exists does not give rise to a presumption that the property also belongs to the joint family.** (Para 62)

There is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available.

So far as the claim of the petitioner treating the property to be joint is concerned, there is neither any pleading nor any material to indicate that the property in question was acquired in a representative capacity. There is nothing on record to indicate that the property was acquired from the joint family nucleus. (Para 63)

Moreover, even though, there is absence of pleadings and proof in this regard another fact which cannot be effaced from the record is that the father of the petitioner had instituted a suit claiming partition on the very same premise that the property was joint which in terms of the judgment dated 11.03.1930 was held to be separate property of Nand Kishore and Bhagirathi. (Para 64)

**Writ petition dismissed.** (E-4)

**Precedent followed:**

1. Mst. Maluka Kunwar Vs Pateshwar Singh & ors., 1926 Rent Cases 301 (Para 27)

2. Karingan Vs Harihar Datt @ Bhola and Rajaram, 1926 Rent Cases 48 (Para 28)

3. Jagdamba Singh & ors. Vs Deputy Director of Consolidation & ors., 1984 (2) LCD 398 (Para 28)

4. Dropadi Devi & ors.Vs Shiv Chandra Dixit, 2020 SCC Online, All 104 (Para 61)

**Precedent distinguished:**

1. Muthavalli of Sha Madhari Diwan Wakf, S.J. Syed Zakrudeen & anr. Vs Syed Zindasha & ors., 2009 (12) SCC 280 (Para 19)

2. Radhavar Vs Devda, 2016 (132) RD 23 (Para 19)

3. Gujarat Urja Vikas Nigam Ltd. Vs S.R. Power Ltd., 2008 (4) SCC 755 (Para 21)

4. V.K. Naswa Vs Home Secretary, U.O.I. & ors., 2012 (30) 375 (SC) (Para 21)

5. Shree Ram & ors. Vs DDC & ors., 2011 (29) LCD 764 (Para 20)

**Present petition assails orders dated 30.04.1970, 07.09.1974 and 15.07.1978, passed by Consolidation Officer, Settlement Officer of Consolidation and Deputy Director of Consolidation repectively.**

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

1. The instant writ petition calls in question the judgment and order passed by the Consolidation Officer in Case No. 165 under Section 9-A(2) of the Uttar Pradesh Consolidation of Holdings Act, 1953 (hereinafter referred to as 'U.P.C.H. Act, 1953') dated 30.04.1970 whereby the claim of the petitioners relating to co-tenancy rights in respect of base year Khata No. 123 and 141 was rejected. The petitioner preferred an appeal before the Settlement Officer of Consolidation which also was rejected by means of judgment and order dated 07.09.1974. The effort of the petitioner to challenge the aforesaid two judgments as mentioned above before the Deputy Director of Consolidation by filing a Revision under Section 48 of the U.P.C.H. Act of 1953 ended in an unsuccessful endevour.

2. Being faced with three such judgments, the petitioner have invoked the jurisdiction of this Court under Article 226 of the Constitution of India wherein by means of order dated 07.11.1978, the petition was admitted and the operation of the impugned orders was stayed.

3. During the pendency of the petition, the original petitioner Lalta Prasad expired so also the private respondent nos. 1, 5, 6, 8, 10, 11 and 12 expired and they were substituted by their legal heirs, however, for the sake of convenience, the Court has referred to the original parties, as they were impleaded at the time of institution of the writ petition.

4. In order to appreciate the controversy involved in the instant petition, an undisputed family tree as set up by the parties is being referred to.

5. Sri Debi Charan is the common ancestor who was survived by his four sons namely (i) Ram Avatar (ii) Nand Kishor (iii) Kali Prasad (iv) Bhagirathi.

6. As far as the petitioner is concerned, he is the son of Raghuvir son of Arjun who in turn is the son of Ram Awatar. While the private respondents no. 1 to 3 are the sons of Sarju Saran while private respondent nos. 4 and 5 are sons of Raj Narayan. They claim through the branch of Bhagirathi whereas the private respondent no. 6 is the son of Chandi Sahai, respondent no. 7 is the son of Suraj Narayan, private respondent nos. 8 and 9 are sons of Uday Narayan, private respondent no. 10 is the son of Lal Bahadur, private respondent no. 11 and 12 are the sons of Indrabali. All the aforesaid respondents nos. 6 to 12 claim their rights through the branch of Sri Nand Kishore.

7. It will also be relevant to notice that it is not disputed that Kali Prasad died issueless. Thus, on one hand the petitioner claiming his 1/3rd right through the branch of Ram Awatar whereas private respondent nos. 1 to 5 are the successors in interest from the branch of Bhagirathi while the respondent nos. 6 to 12 are from the branch of Nand Kishore.

8. The disputes arose upon the commencement of the consolidation operations in Village Sahra Mau, Pargana,

Bidhar, Tehsil, Tanda, District Faizabad (now District Ambedkar Nagar).

9. In the base year, Khata No. 123 was recorded in the names of the respondents nos. 6 to 12 (from the branch of Nand Kishore) while Khata No. 141 was recorded in the names of respondents nos. 1 to 5 (from the branch of Bhagirathi).

10. It was the case of the petitioner that initially the land comprising of Khata No. 123, 141 and 126 was the ancestral/joint family property. Though, the land of Khata No. 126 stands exclusively in the name of the petitioner while the other plots of the Khata in question was joint family property, hence the petitioner have 1/3rd share in each of the three Khatas.

11. The basis of the petitioner's claim was that Sri Nand Kishore was the Karta of the joint family which consisted of his brothers and sons. Since the land was acquired within the family in a representative capacity, hence, the petitioner also had 1/3rd right therein.

12. Upon the commencement of the consolidation operations, the petitioner found that the land comprising of Khata No. 123 was in the name of the respondents nos. 6 to 12 whereas the land of Khata No. 141 was in the name of respondent nos. 1 to 5 and the petitioner claimed 1/3rd share in both the Khatas, thus, he filed his objections under Section 9-A(2) claiming co-tenancy rights to the extent of 1/3rd share. He elaborated in his objections that Debi Charan was the common ancestor who had four sons. One of the sons namely Kali Prasad expired issueless, hence, the property being joint and ancestral devolved amongst the three sons namely Ram Awatar, Nand Kishore and Bhagirathi.

13. He further states that both, his father namely Raghuvir and his grand-father namely Arjun, indulged in intoxication and thus both Arjun as well as Raghuvir were excluded and the property came to be recorded only in the names of Nand Kishore and Bhagirathi while the father and the grand-father of the petitioner also had 1/3rd share in the land in question.

14. The proceedings before the Consolidation Officer came to be contested by both the predecessors-in-interest of the respondents nos. 1 to 5 and 6 to 12 who categorically took the defence that the land in question was never recorded in the name of Debi Charan at any point of time. It was stated that the land was divided between Nand Kishore and Bhagirathi and accordingly the name of their successor continued to be recorded and so reflected in the basic year Khata No. 123 and 141. It was further objected by the private respondents that the father of the petitioner namely Raghuvir in the year 1929 had filed a suit claiming co-tenancy rights in the property in question before the Court of Munsif, Akbarpur, District Faizabad. The said suit was contested and was dismissed wherein it was held that the property in question was not joint, consequently, once the father of the petitioner had lost his right to claim co-tenancy rights, it was not open now for the petitioner to raise the issue once again in the consolidation proceedings.

15. It was also objected that the petitioner was not the legitimate son of Raghuvir and as such he was not entitled to any share. Moreover, both Bhagirathi and Nand Kishore out of their own tenure holding had provided 8 bighas each to Raghuvir and a Khata No. 126 comprising of the aforesaid was recorded in the name

of the petitioner, hence, neither on the basis of the property being joint nor on the basis that the property was ancestral, the petitioner could not get any right.

16. The Consolidation Officer considering the material available on record including the oral as well as the documentary evidence dismissed the objections of the petitioner by means of judgment dated 30.04.1970.

17. The petitioner being aggrieved preferred two appeals bearing No. 798 and 797 before the Settlement Officer of Consolidation and both the appeals were dismissed by means of order dated 07.09.1974. The petitioner preferred two Revisions bearing No. 1 of 1974 and 2 of 1974 which were also dismissed by means of judgment dated 15.07.1978.

18. Being aggrieved, the petitioner preferred the instant writ petition assailing the three orders and Sri I.D. Shukla, learned counsel for the petitioner while assailing the impugned orders has primarily raised the following submissions:-

(i) It has been urged that the three Consolidation Authorities have misdirected itself and have relied simplicitor on the judgment passed in Regular Suit No. 204 of 1929 dated 11.03.1930 to hold that once the right of the petitioner's father namely Raghuvir was negatived by the Court of Munsif in an action claiming co-tenancy rights, hence, the same could not be raised again during the consolidation proceedings.

It is submitted that this approach was erroneous, inasmuch as, the three Authorities, whose decision is under challenge, did not appreciate that in so far as the family tree is concerned, it was not disputed that the father and grand-father of the petitioner was deriving their rights from the branch of Ram Awatar. It is not disputed that Ram Awatar was the real brother of Sri Nand Kishore and Bhagirathi. It is also not disputed that the land comprising of Khata No. 123, 141 and 126 were part of the land which was initially created and acquired within the family, hence, it was ancestral in nature as well as that since the father and grand father of the petitioner had co-tenancy rights, hence, his right claiming 1/3rd share has neither been adjudicated which is an error apparent on the face of record.

It has further been urged that the judgment and decree which is the basis of the three decisions under challenge is the one dated 11.03.1930 passed in R.S. No. 204 of 1929 which is wholly without jurisdiction, inasmuch as, at the relevant time, the Oudh Rent Act, 1886 was in operation and in terms of the aforesaid Act, the tenancy was neither heritable nor transferable, hence by virtue of the Section 108 of the Oudh Rent Act, 1886 no suit of partition or claiming co-tenancy rights could have been preferred before the Civil court, hence, the aforesaid judgment and decree dated 11.03.1930 was wholly without jurisdiction and such a decree could be ignored as it suffered from the vice of coram-non-judice.

(ii) It is also urged that since Oudh Rent Act, 1886 prohibited any transfer or division of the holding amongst the tenants, hence, the decree could not be made binding and in any case, the possession of the petitioner continued throughout which was also evidenced and reflected in a suit filed by the then landlord against the predecessors-in-interest of both the petitioners as well as the private respondents who were jointly impleaded as the defendants and in the said suit it was clearly reflected that the predecessors of

the petitioner was in possession along with the predecessors-in-interest of the private respondents which also indicated the continuity and jointness and this aspect has also been lost sight of by the three Authorities.

(iii) It has further been urged that even though the names of the predecessors-in-interest of the private respondents remained recorded in the basic year Khata and even in the base year Khatauni of 1359 Fasli (year 1952) such entries were only presumptive and it did not prevent the Consolidation Authorities to adjudicate the matter regarding the rights of the petitioner which has not been done and thus the Authorities have committed an error in dismissing and rejecting the claim of the petitioner on technical reasons without entering into the merits of the case which has resulted in sheer miscarriage of justice, consequently, the three decisions deserve to be set aside and the petitioner's right may be recognized granting him 1/3rd share in the aforesaid two Khatas bearing No. 123 and 141 relating to Village Sahra Mau, Pargana Bidhar, Tehsil, Tanda, District Faizabad (now District Ambedkar Nagar).

19. In support of his submissions, Sri I.D. Shukla, learned counsel for the petitioner has relied upon the decision of the Apex Court in ***Muthavalli of Sha Madhari Diwan Wakf, S.J. Syed Zakrudeen and Another Vs. Syed Zindasha and Others*** reported in ***2009 (12) SCC 280*** as well as in ***Radhavar Vs. Devda 2016 (132) RD 23*** for the proposition that no amount of consent can confer jurisdiction on a court which has none. If a Court had no jurisdiction, any order passed by it would be a nullity and a decree suffering from inherent lack of jurisdiction does not attract the procedural provisions of estoppel, waiver or res-judicata.

20. The learned counsel for the petitioner has also relied upon a decision of a larger bench of this Court in the case of ***Shree Ram and Others Vs. DDC and Others*** reported in ***2011 (29) LCD 764*** for the proposition that the doctrine of estoppel and acquiescence does not create an implied bar if a co-tenant has failed to assert his right under the U.P.Z.A. & L.R. Act and such a tenant can raise objections under the U.P.C.H. Act, 1953 which is a special Act and has an overriding effect over the other Acts. The other proposition for which the aforesaid Authority has been pressed into service is that the long standing entries can be questioned by filing objections under the U.P.C.H. Act of 1953 as the said entries only have presumptive value and cannot be taken to be the absolute proof for pressing the principles of estoppel and acquiescence so also Section 49 of the U.P.C.H. Act, 1953 shall not operate as an automatic bar.

21. In order to further buttress his submission, the learned counsel for the petitioner has relied upon a decision of the Apex Court in ***Gujrat Urja Vikas Nigam Ltd. Vs. S.R. Power Ltd.*** reported in ***2008 (4) SCC 755*** and ***V.K. Naswa Vs. Home Secretary, Union of India and Others reported in 2012 (30) 375 (SC)*** to submit that the provisions of a special Act will override the provisions of the general law as well as that the Court by a legal proposition can neither legislate nor issue a direction to legislature to enact in a particular manner. Though, certain other decisions have also been relied upon but since they primarily relate to the aforesaid propositions, hence, this Court does not deem necessary to burden the judgment by multiplying the Authorities where the propositions and decisions on the points have been noticed.

22. Sri Rakesh Srivastava, learned counsel appearing for the private respondents on the other hand has refuted the aforesaid contentions and has submitted that it is not a case where the Court of Munsif, Faizabad in R.S. No. 204 of 1929 while deciding the claim of the father of the petitioner namely Raghuvir was not the Competent Court or that the decree passed by the said Court was a nullity, inasmuch as, there is no bar either in Section 108 of the Oudh Rent Act which prohibited such proceedings while there are authorities to the effect that it was only a bar for the Revenue Court but no such bar was attracted on the Civil Court which was competent to deal with the matter and pass appropriate orders.

23. It is further submitted that the petitioner has not come to the Court with clean hands and has not disclosed the complete facts. It is urged that the father of the petitioner had already instituted a suit claiming co-tenancy rights in respect of the disputed property in question which after due contest was decided in the negative. The said decree dated 11.03.1930 was never challenged nor ever set aside, moreover, the ground that the aforesaid decree was wholly without jurisdiction was also not raised before the three Consolidation Authorities and it is for the first time that it is being urged before this Court in writ jurisdiction apart from the fact that neither there are adequate pleadings nor ground raised in the writ petition to support the aforesaid contention.

24. It is also urged by the learned counsel for the private respondents that the petitioner has also incorrectly stated that the possession of the petitioner and his predecessors was admitted by the landlord who had instituted the suit for eviction and arrears of rent in the year 1949. It is submitted that the alleged suit which is referred to by the petitioner was instituted by the then landlord wherein the primary relief was against the predecessors in interest of the answering private respondents, however, as a matter of abundant caution the then landlord had impleaded the petitioner and his predecessors, however, since the said suit abated and was never taken to its logical conclusion, hence, no benefit can be derived by the petitioner from the said suit.

25. It is further stated that in so far as the three Consolidation Authorities are concerned, each have taken note of the evidence led and have recorded a categorical finding of fact that the property was never ancestral nor it could be shown to be joint property having been acquired in a representative capacity rather the effort of the father of the petitioner to claim co-tenancy rights stood already rejected. The evidence on record rather indicated that both Nand Kishore and Bhagirathi out of their own holdings had given 8 bighas each to Raghuvir the father of petitioner who has a separate khata of his own. At no point of time, the father of the petitioner or his grand father ever claimed or raised any issue after having lost the case in the year 1930, hence, it was not open for the petitioner to re-agitate the same issues which have rightly been held by the three courts to have attained finality.

26. It is also urged that the father of the petitioner had leased out 5 bigahas of land to various tenants whereas he still has 11 bighas of land and only to linger on the disputes, the aforesaid case has been filed which deserves no attention and three decisions being concluded by findings of fact are not liable to be disturbed in

exercise of powers conferred under Article 226 of the Constitution of India.

27. Sri Rakesh Srivastava, learned counsel for the respondents in support of his submissions has relied upon a full bench decision of the Chief Court of Oudh in the case of ***Mst. Maluka Kunwar Vs. Pateshwar Singh and Others*** reported in ***1926*** Rent Cases 301 wherein the issue before the Full Bench was whether a suit for seeking possession of land held in occupancy rights under the Oudh Rent Act, claimed, on the basis of title and law of inheritance against another person not being a landlord is barred by Section 108 (Clause 10 (b) and by a unanimous decision, the Full Bench answered the question in the negative.

28. Sri Srivastava has relied upon a Division Bench Decision of Judicial Commissioners Court in ***Karingan*** Vs. Harihar Datt @ Bhola and Rajaram reported in 1926 Rent Cases 48 for the proposition that a Civil suit for the relief of partition for cultivatory holdings amongst the tenant is maintainable. Lastly, reliance has been placed on a decision of this Court in the case of ***Jagdamba Singh and Others Vs. Deputy Director of Consolidation and Others*** reported in ***1984 (2) LCD 398*** to highlight the difference between an ancestral and joint holding and what ingredients are required to establish a case under the aforesaid two claims. It has been urged that for all the aforesaid reasons, neither the decree passed by the Civil Court in the year 1930 was a nullity, nor the petitioner was able to establish any case either of ancestral property or of joint family property, hence, the findings recorded by the three Consolidation Courts are absolutely just and proper which requires no interference, hence, the writ petition deserves to be dismissed.

29. The Court has heard the learned counsel for the parties at length who have painstakingly taken the Court through the records of the writ petition to support the irrespective contentions.

30. Before adverting to the respective contentions, it will be appropriate to formulate the questions which arise for consideration.

(i) The effect of the judgment and decree dated 11.03.1930 passed in R.S. No. 204 of 1929, whether the said decree was without jurisdiction;

(ii) The effect of the plaint in suit filed by the landlord in the year 1949 seeking eviction and arrears of rent which abated.

(iii) Whether the petitioner has been able to establish its case seeking co-tenancy rights on the basis of the property being ancestral in nature.

31. Referring to the first issue at hand, it would be noticed that the three Courts have specifically taken note of the judgment dated 11.03.1930 passed in R.S. No. 204 of 1929 to hold that once the right of the father of the petitioner was rejected by the Court holding that the property was not joint and the same issue could not be re-agitated, hence, the claim of the petitioner has been rejected.

32. The primary submission of the learned counsel for the petitioner while attacking the three judgments that the judgment and decree dated 11.03.1930 is without jurisdiction on the premise that since at the relevant time the Oudh Rent

Act, 1886 was in operation, hence, the said Act did not permit the tenants to either have the rights of inheritance or division or transfer of the holding, hence, the decree passed by the Civil Court was wholly without jurisdiction and specific attention has been drawn to Section 108 of the Oudh Rent Act, 1886 which relates to the jurisdiction of the Court.

33. On the other hand, the aforesaid contention is repelled on the ground that the bar of the jurisdiction as contained in Section 108 is only in respect of such matters where a tenant institutes a suit against the landlord, however, where there is a claim between two co-tenants, the same was cognizable by the Civil Court and was preserved by Clause 10 (b) of Section 108.

34. Before proceeding further, it will be relevant to notice the tenor and contents of Section 108 which is the pivot upon which the controversy is revolving and it reads as under:-

**" Chapter VIII**

***Jurisdiction of the Court***

***Suits Cognizable***

*108. Suits cognizable under the Act.- Except in the way of appeal as hereinafter provided, Courts other than Courts to Revenue shall not take cognizance of the following descriptions of suits, and those suits shall be heard and determined in Courts of Revenue in the manner provided in this Act, and not otherwise-*

***A-Suits by a Landlord***

*(1) For the delivery by a tenant of the counter-part of a patta;*

*(1-a) for a declaration that a notice of relinquishment is invalid;*

*(2) for arrears of rent, or where rent is payable in kind, for the money equivalent of rent;*

*(3) for the enhancement of the rent of a tenant;*

*(3-a) for the determination of the rent of a tenant;*

*(3-aa) for the determination of the rent of a tenant in respect of a holding part of which has been relinquished under the first proviso to Section 20 (3);*

*(4) for the ejectment of a tenant;*

*(5) against patwaris or agents employed by landlords in the management of land or the collection of revenue or rent, or against the sureties of those patwaris or agents for money received or accounts kept by then patwaris or agents in the course of their employment as aforesaid, or for papers in their possession or for the rendering and settlement of accounts;*

*(5-a) for resumption of, or assessment or enhancement of, rent on land held rent free or at a favourable rate of rent or for declaration of any right as determined under Section 107-G or Section 107-H;*

***B- Suits by a under-proprietor or a tenant***

*(6) for establishing a right of occupancy;*

*(7) for the delivery by a landlord of a patta;*

*(8) for contesting a notice of enhancement or ejectment;*

*(9) for compensation-*

*(a) on account of illegal enhancement of payment of rent, or of any sum in excess of rent due, or*

*(b) on account of the withholding of a receipt for a payment of rent, or*

*(c) on account of illegal ejectment, or*

*(d) on account of loss caused by the making of an improvement under Section 29, sub-Section (3), or*

*(e) on account of the value of standing crops under Section 66;*

*(10) for the recovery of the occupancy of any land which has been treated by a landlord as abandoned or from which an under-proprietor or tenant has been illegally ejected by the landlord or for possession by a person in whose favour an ex-proprietary tenancy arises under Section 7-A:*

*Provided that nothing in this section shall operate to debar any person claiming to be an under-proprietor who has been ejected under the provisions of Section 60 from bringing a suit for possession in a civil court;*

*(10-a) under the third proviso to Section 30-A or for the recovery of the occupancy of a holding or part thereof, and for compensation for dispossession;*

***(10-b) for occupancy of a holding by a person claiming such occupancy as the heir of the deceased tenant of the holding;***

*(11) for contesting the exercise of the power of distraint conferred on landlords and others by this Act, or any act purporting to be done in exercise of that power, or for compensation for illegal distraint or for recovery of the amount realized by proceedings in distraint;*

*(12) for abatement of rent [***];*

*(13) for the recovery of compensation for improvements [***];*

*(13-a) for the recovery of an amount which was recovered from him under Section 12-A in excess of the amount due from him;*

***C-Suit regarding the division or appraisement of produce***

*(14) to set aside an award in respect of a division, estimate, appraisement or proceeding under Section 32;*

***D- Suit by and against lambardars, co-sharers and muafidars***

*(15) by a sharer against a lambardar or Co-sharer for a share of the profits of an estate or any part thereof, or for the rendering and settlement of accounts in respect to those profits;*

*(16) by a lambardar, or by a pattidar who is entitled to collect the rents of the patti, for arrears of revenue or rent payable through him by the Co-sharers whom the represents, or by a lambardar for village expenses and other dues for which the Co-sharers may be responsible to him, or against a joint lambardar for compensation for revenue or rent paid by the lambardar on account of the joint lambardar;*

*(17) by Co-sharers against lambardars, or by proprietors, or lessees against muafidars or assignees of revenue, for compensation on account of exaction in excess of revenue or rent, or on account of the withholding of a receipt for a payment of revenue or rent;*

*(18) by muafidars or assignees of revenue for arrears of revenue. "*

35. Sri Shukla, learned counsel for the petitioner has submitted that Section 108 which is part of the Oudh Rent Act, 1886 is a special Act which contemplated only occupancy rights for the tenants. The Act did not provide for any inheritance or any transfer of the holding by the tenant. It has further been urged that there has been a marked shift, inasmuch as, under the Oudh Rent Act, 1886, the rights conferred on the tenant did not include the right of transfer or inheritance. Later, with the advent of the United Provinces Tenancy Act, 1939 which later was followed by the U.P.Z.A. & L.R. Act 1950 which provided both heritable

and transferrable rights to the tenure holders which has also further found its reflection in the U.P. Revenue Code, 2006, however, the fact remains that under the Oudh Rent Act no such right was granted.

36. Section 108 clearly provided that no courts other than the courts of Revenue shall take cognizance of the suits which have been described in the said Section and it would indicate that there is no category of a suit relating to either division of the holding amongst co-tenants hence the necessary corollary is that since the Act prohibited inheritance and transferability, thus, there was no category of such a nature of a suit followed by the fact that where such specific type of suits were provided to be cognizable by the Revenue Court, the jurisdiction of the Civil Court would stand excluded.

37. It is in the aforesaid context that the learned counsel for the petitioner has relied upon a decision of the Apex Court as well of this Court in ***Mst. Mutwalli (Supra)*** and ***Radhawar (Supra)*** to contend that a decree which was without jurisdiction, no amount of consent can cure the defect nor the principles of resjudicata, acquiescence can be pressed into service and for the said reason, the petitioner could not be have been non-suited only on account of the judgment and decree dated 11.03.1930.

38. It is in the aforesaid context as well that the decision of the Apex Court in the case of ***Gujarat Urza Vikas Nigam Ltd. (Supra)*** and ***V.K. Nasva (supra)*** has been pressed into service to indicate that the provisions of U.P.C.H. Act, 1953 is part of a special Act which has an overriding effect and thus the claim of the petitioner ought to have been adjudicated on its own merits after considering the effect of the judgment and decree and not merely on the ground that there has been a decree of 1930 and the matter was not adjudicated at all.

39. Though, in so far as the decisions referred to by the learned counsel for the petitioner on first principles and proposition is concerned, there can be no two view at all. However, what is to be noticed is that there has been no pleading regarding the fact that the judgment and decree dated 11.03.1930 is a nullity. The writ petition has been pending before this Court since 1978 and though large number of parties have expired and substitutions applications were made so much so that even the counter affidavit was filed sometime in the year 2014 to which the petitioner filed his rejoinder but till then no such plea was raised.

40. Be that as it may, since the issue of jurisdiction has been raised, this Court considers it appropriate that despite that an objection being raised by the learned counsel for the respondents that in absence of pleadings and appropriate foundation for raising the aforesaid plea, the same may not be considered, however, the Court embarks upon the aforesaid submissions strictly in light of the provisions of law and upon the decision cited by the respective parties.

41. The learned counsel for the private respondents has drawn the attention of the Court to the language of Section 108 and the category of suits provided thereunder. It has been submitted that the nature of the suits which have been enumerated in Section 108 have been categorized under broadly four heads. For the purposes of the instant controversy, suits under the head (B) titled suits by a under-proprietor or a tenant is relevant. It has been submitted that Clause 10 (b)

clearly brings the suit which was filed by the father of the petitioner amongst his other brothers, is squarely covered by the aforesaid provisions. It has been submitted that any occupant of a holding claiming such occupancy right as an heir of a deceased tenant of a holding to file a suit in the Civil Court. It is only when such a suit is sought to be brought against the landlord then it would be hit by Section 108 of the Act and such a suit necessarily would be within the jurisdiction of the Revenue Court.

42. It has further been submitted that Full Bench of Chief Court of Oudh in the case of ***Ms. Maluka Kunwar (Supra)*** precisely dealt with the aforesaid question and by a unanimous decision, the three Hon'ble Judges who gave their separate opinion but came to the same conclusion is an elucidating decisions on the point.

43. Upon considering the case of ***Mst. Maluka Kunwar (Supra)***, it would indicate that the matter went up before the Full Bench where a suit in respect of the properties in question consisted of three classes of tenure. The suit of the plaintiff was decreed in respect of under-proprietary land but dismissed as regard, the land held in occupancy right on the ground that the suit in regard to that class of land was not maintainable before the Civil Court and it is in this backdrop that the matter went up in appeal before the Chief Court of Oudh.

44. The question framed before the Full Bench was "Is a suit for recovery for possession of land, held in right of occupancy tenancy, by a person claiming title on general law of inheritance, against a person who is not a landlord, barred by Clause 10 (b) of Section 108 of the Oudh Rent Act, 1886?"

45. After noticing the relevant provisions, Justice Ashworth member of the Full Bench held that a suit against a person who is not the landlord, is not barred from cognizance of a Civil Court, whether the plaintiff claims possession under a title based on general law of inheritance as modified in the case of statutory tenant by the provisions under Section 48 (2) of the Oudh Rent Act.

46. The relevant portion of the opinion of the Justice Ashworth as well as the relevant reasoning given by the other Hon'ble Judges namely Justice Hasan and Chief Justice Mr. Stuart is being reproduced hereinafter for ready reference:

The opinion of Justice Ashworth is as under:-

*"My finding on the reference is, that if, the suit is against a person who is not the landlord, it is not barred from the cognizance of a civil Court, whether the plaintiff claims possession under a title based on the general law of inheritance or under the general law of inheritance as modified in the case of a statutory tenant by the provision in Section 48(2) of the Oudh Rent Act."*

The opinion of Justice Hasan is as under:-

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*"It logically follows, to my mind, that a person is only a tenant in legal relation to the landlord and not otherwise. Outside the scope of such a legal relation that person is not a tenant. In other words, a person had the "status" of a tenant in respect of his rights and duties only in relation to his landlord. Outside that relation he is a person capable of possessing all the rights and subject to all the obligations of an owner, pro-tanto, of his holding. I will make my meaning clear*

*by an illustration. A is the tenant, B is the landlord, and C is the third person. A is a tenant in relation to B and he is an owner, in a restricted sense of the word, in relation to C. When therefore a 'tenant' is given the right to sue, he is given that right in respect of his rights enforceable against his landlord.*

*The word "holding" is used throughout the Act in the Technical sense of land possessed by a tenant as such and the provisions of the Act deal with the land only in so far as its possession gives rise to "rights and obligations" of a tenant and the landlord inter se. Wherever a tenant is given any right in his holding he is given that right against his landlord and wherever an obligation is imposed upon a tenant in respect of the holding such an obligation arises in favour of the landlord only. The land which he holds constitutes his "holding" in relation to his landlord only and his rights in that land are available only against the same person. The right to sue therefore given to a tenant in respect of his holding is a right enforceable against the landlord only.*

*Similarly, suits under class B are suits against the landlord as the nature of the suits described in the several clauses clearly implies.*

*It must therefore be held that having regard to the setting in which clause (10b) is placed that clause also relates to a suit against the landlord. This is particularly so when we bear in mind the nature of the suit contemplated by clause (10a) which was also introduced into the Oudh Rent Act along with clause (10b). In clause (10a) we find the nature of she suit described as "Under the third proviso to S. 30A, for the recovery of the occupancy of a holding or part thereof for compensation for dispossession" When we turn to the third proviso to S. 30A, we find therein the tenant's right of recovery of the occupancy of his holding and compensation as against his landlord provided for. The expression "occupancy of a holding" is used in both clauses (10a) and (10b) and should in my opinion bear the same meaning at both the places, that is, a suit for the recovery of the occupancy of a holding against the landlord."*

The opinion of Hon'ble Chief Justice Sir Louis Stuart is as under:-

*"I have no hesitation in finding, that a suit for recovery of possession of lands, held in the right of occupancy tenancy, by a person claiming title on the general law of inheritance against a person, who is not a landlord, is not barred by Clause (10b) of Section 108 of the Oudh Rent Act, 1886."*

47. It will be noticed that all the three Hon'ble Judges came to a unanimous conclusion that Section 108 Clause 10 (b) did not bar a suit and such a suit was cognizable by the Civil Court.

48. This Court hastens to refer to another judgment of the Division Bench of the Judicial Commissioner's Court in the case of ***Karingan (Supra)*** wherein a similar controversy raised as to whether a cultivatory holding could be partitioned without the consent of the landlord. It will be relevant to notice that the aforesaid decision is also relating to the year 1924 when the Oudh Rent Act of 1886 was in operation. Though, the said decision does not refer to the provisions or the bar of Section 108, however, it takes note of the provisions of Section 39 (2) of the Land Revenue Act. However, what can be inferred is that in so far as the jurisdiction is concerned, the same has already been clarified by the Full Bench judgment in the case of ***Mst. Maluka Kunwar (Supra)***

while whether the suit for partition between two tenants could be maintainable before a Civil Court has been considered and the relevant portion of the report in ***Karingan (Supra)*** is being reproduced hereinafter:-

*" The only point that has been argued before me is a point of law that a cultivatory holding could not be partitioned without the consent of the landlord, which has not been obtained in this case.*

*.....The argument put forward is precisely the same which was put forward before the learned District Judge and I fully agree with the view taken by him. Section 39, clause (2) does not mean that no division of the holding held by two or more tenants should be effected; it only says that if such a partition has been arrived at and the distribution of land has taken place it shall not be recorded in the revenue papers until the consent of the landholder has been obtained. It is clear that this provision of law is intended for the purpose of protecting the rights of the landlord. Any partition of a cultivatory holding should not obviously be binding upon the landlord if effected without his consent. The liability for the payment of rent among the tenants cultivating a particular holding is joint one and they are not entitled to covert their joint liability into a separate liability without the consent of the landlord. This, however, does not mean that the tenants cannot partition their holding among themselves."*

49. Thus, it would be seen that both the aforesaid decisions are specific on the point of jurisdiction and maintainability of the suit and this Court is in agreement thereof. Thus, from the aforesaid, it would be clear that a suit by a tenants i.e. from the branch of the petitioner as well as amongst other co-tenants of the other branch i.e. private respondents, was maintainable.

50. The pleadings and the decision of the R.S. No. 204 of 1929 have been brought on record along with the counter affidavit. A translated copy of the pleadings and the typed copy of the judgment dated 11.03.1930 has been brought on record and from the perusal thereof the pedigree which has been mentioned in the instant proceedings are one in the same. The Court while deciding the issue had framed certain issues. The issue no. (i) related whether the property in suit was joint property of the parties as alleged by the plaintiff. It will be relevant to notice that Raghuvir Tiwari, the father of the petitioner was the plaintiff while Chandi Sahai and others which included the predecessors in interest of the present respondents were the defendants.

51. At this stage, it will also be relevant to notice that in paragraph 3 of the written statement filed by the predecessors in interest of the present private respondents, it was urged that a partition had already been effected between Nageshwar Tiwari and Bhagirathi some time in the year 1901 where the grand father of the petitioner namely Arjun had not raised any objections and whether in light of law of limitation such a claim could be considered.

52. The learned Munsif in its judgment dated 11.03.1930 after referring to the evidence both oral and documentary held that the plaintiff Raghuvir Tiwari had failed to prove that the property in suit was a joint family property while the defendants had succeeded in showing that it was their specific and separate property.

53. In light of the aforesaid decision where as a fact the property in question was held to be not joint and the fact now being raised that the said decree was nullity

which in light of what has been stated above is found to be not tenable, hence, this Court comes to the conclusion that in so far as the judgment and decree dated 11.03.1930 is concerned, the same was passed by the Court of Competent Jurisdiction and could not be treated to be a nullity as suggested by the learned counsel for the petitioner. For the aforesaid reasons, the decision relied upon by the learned counsel for the petitioner do not come to his rescue.

54. The next issue which has been canvassed before the Court is that as per the petitioner, the then landlord had initiated proceedings for arrears of rent and ejectment against his tenants which included the petitioners as well as the private respondents which clearly indicates that the petitioner was in possession. Had the property being partitioned between Bhagirathi and Nand Kishore and the petitioner and his predecessors have no right then obviously the then landlord would not have impleaded the petitioner and his predecessors as a party. This in itself was indicative of the fact that the property was ancestral and the petitioner and his predecessor continued to remain in possession. Since there is no material to indicate as to how the petitioners were evicted, thus, it would be presumed that the petitioner continues to remain in possession as their names was also recorded in the revenue records of rights, thus, this aspect has also not been considered.

55. The Court has given its thoughtful consideration to the aforesaid aspect, however, the aforesaid submissions may at the first blush seem attractive but is fallacious.

56. In order to establish the aforesaid contentions, the petitioner has relied upon the pleading of the suit instituted by the then landlord. Even if the same is taken at its face value what could not be disputed by the learned counsel for the petitioner is that the aforesaid proceedings abated. There is nothing on record to indicate that in response to the said plaint any of the private respondents or even for that matter the predecessor-in-interest of the petitioner had filed their response. Even if taking the best case scenario, the aforesaid plaint and its averments can only be taken as an admission in so far as the then landlord was concerned, however, the same could not be pressed against either the private respondents or their predecessor-in-interest. Since there is nothing on record to indicate that any of the private respondents or their predecessors had accepted the aforesaid averments. Even otherwise the effect of abatement of a proceedings has been noticed under Order 22 Rule 9 C.P.C. The effect of an abatement has been mentioned in the aforesaid provision and is reproduced hereinafter:-

***"Rule 9 Order XXII of Code of Civil Procedure 1908 "Effect of abatement or dismissal"***

*(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.*

*(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.*

*(3) The provisions of section 5 of the Indian Limitation Act, 1877 (15 of*

*1877) shall apply to applications under sub-rule (2).*

***[Explanation.-****Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this Order."*

57. The effect of abatement is clear from the explanation which is appended to Order 22 Rule 9 and it clarifies that in a later suit a defence which is based on the facts which constituted a cause of action in the suit which abated or is dismissed under the said Rule does not operate as a bar. Thus, the effect of abatement does not create any conclusive bar.

58. This being the situation merely by referring to the plaint avements of a suit instituted in the year 1945 by the then landlord and that too a suit which abated in absence of any other material or evidence, it cannot be stated that mere averment in the said plaint instituted by a third party can be made binding or be treated as a admission of possession by the private respondents or their predecessor-in-interest. Thus, for the aforesaid reason, this Court finds that the aforesaid contention raised by the learned counsel for the petitioner does not hold water. Moreover, this aspect of the matter has also been considered by the Consolidation Courts and a finding to the contrary has been recorded by them which does not suffer from any error to persuade this Court to upset the same.

59. Coming to the next question as to whether the petitioner has been able to establish its claim on the basis that the property was ancestral.

60. At the very outset, it may be stated that the petitioner had laid his claims before the Consolidation Courts on the ground that the property was joint family property. It was never his case that it was ancestral but nevertheless this Court giving the benefit to the petitioner is assessing the claim of the petitioner on both the counts treating it to be ancestral as well as joint family property.

61. At this stage, it will be relevant to note the decision of this Court in the case of ***Jagdamba Singh & Ors. vs. Dy. Director of Consolidation & Ors.,*** reported in ***1984 (2) LCD Page 398 [LB]*** wherein the ingredients for a claim of co-tenancy and ancestral has been considered very lucidly and the relevant Paragraphs 14, 15, 22 and 23 will be apposite to resolve this controversy.

*"....14. It is fairly well settled that in order to entitle a party to claim co-tenancy rights in the holding on the ground of its being ancestral the unbroken identity of the holding has got to be established throughout the period. If the identity has changed of the holding the claim cannot succeed. This view has been expressed in several decisions of Board of Revenue and also of this Court in the cases noted below:--*

*(1) 1943 RD 567 (BR)Jodhia v. Bhikwa.*

*(2) 1942 RD 379 (BR)Hamid Ali v. Benares Bank.*

*(3) 1942 RD 401 (BR)Mohd. Yasin v. Mohd. Shafi.*

*(4) 1945 RD 122 (BR)Rajaram v. Narain Singh.*

*(5) 1969 RD 175 (BR)Abhai Narain v. Ram Manorath.*

*(6) 1973 RD 242 (BR)Aminuddin v. Kamuruddin.*

*(7) 1975 RD 195 (BR)Ram Narain v. Buddhu.*

*(8) 1963 RD 37 (BR)Mahadeo Singh v. Sunder Kewat.*

*(9) 1979 RD 125 (BR) Balwanti v. Bhaiya Ram.*

*(10) 1983 (1) Lucknow Civil Decision, 40 (HC) Jhagroo v. The Deputy Director of Consolidation.*

*15. In all the aforesaid decisions it has been consistently held that in order to uphold the claim of co-tenancy rights on the ground of land being ancestral it is essential that the entire land of the holding of the common ancestor must have come down in the identical form an it must have remained unchanged and intact. It would, however, be correct to say that where as a result of survey made during settlements, the area of some plots might have decreased or increased or that some plot or plots are eliminated for some explained reason from the holding in question viz. having fallen in the bed of river due to the alluvial and deluvial action of the river or by the construction of the canal etc., then in such event it cannot be said that there is break in the identity of the holding in dispute. The slight change like elimination of certain plot or the increase or decrease in the area of certain plots for the aforesaid reasons shown would not operate to destroy the identity of the holding coming down in identical form in the family from the time of common ancestor. But in order to uphold the claim of co-tenancy rights on the ground of land being ancestral it must be established by the claimant that the holding has come down intact and in identical form that it has not been sub-divided or resettled with one or some of the heirs or with the strangers. Thus, where the disputed holding has not come intact in the identical form and only some of the plots of the holding belonging to common ancestor are found included as in the present disputed holding it would not make it ancestral holding so as to give a share in it to the claimants on that ground nor it would be permissible to pick up those plots from the holding and declare them to be ancestral property and give a share in those plots to the claimant.*

* * * * * * * * * * *

*22. Learned counsel for the opposite parties Sri Hargun Charan, however, urged that even if the claim of the opposite parties 5 to 8 cannot be sustained on the ground that the disputed holding is ancestral, yet their claim is sustainable on the ground that the entire land of the disputed Khata No. 36 is joint family property and the name of Mata Dihal Singh was recorded in the representative capacity as he was head and Karta of the joint family. His further contention was that even if it be held that the holding in dispute consisting of 84 plots with an area of 44 bighas, 9 biswas, 14 biswansis was settled afresh by the landlord with Mata Dihal Singh, the same would be deemed to be joint family property as at the time of acquisition he was head and Karta of the family being elder brother. Learned counsel pointed out that the opposite parties 1 to 3 have recorded a finding to the effect that at the time of second settlement in the year 1301 F., both these brothers Mata Dihal Singh and Ram Baran Singh formed joint family and on the basis of this finding learned counsel urged that even if land of the disputed holding was acquired by Mata Dihal Singh, but the same would be treated to be joint family property and the opposite parties 5 to 8 would get half share in all the plots of the disputed holding-Khata No. 36.1 am unable to agree with this contention as well.*

*23. It is well settled that the creation of tenancy in respect of*

*agricultural land is a matter of contract between the landlord and the tenant. Even in the joint Hindu family a member of the joint family could acquire land for himself and unless it is proved that the land was acquired by him in the representative capacity and for the benefit of the family, it cannot be held to be joint family land merely because it was acquired by him when he formed joint family with other members. Even a Karta of joint Hindu family can acquire land in his name for his own benefit and it cannot be treated to be joint family property merely because he happens to be Karta of the family at the time of the alleged acquisition of the property. It has to be positively proved that when the land was acquired by the Karta of the joint family he had acquired it in the representative capacity for the entire body of coparceners and it is treated as such by the members of the family."*

61. This Court had the occasion to consider the issue of joint family and joint family property in the case of ***Dropadi Devi & others Vs. Shiv Chandra Dixit, 2020 SCC Online, All 104.*** The relevant paragraphs 54 and 55 of the said report is being reproduced as under:-

*"54. There is a difference between a joint family and a joint family property merely because a joint family exists does not give rise to a presumption that the property also belongs to the joint family. In this regard, this Court draws strength from the decision of the Apex Court in the case of D.S. Lakshmaiah and Another Vs. L. Balasubramanyam reported in 2003 (10) SCC 310, the relevant portion reads as under:-*

*18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available.*

*55. Similarly, the Coordinate Bench of this Court in the case of Kunj Bihari Vs. Ganga Sahai Pande reported in 2013 SCC Online Alld. 13489: 2013 (99) ALR 826 wherein tracing the history and considering the earlier decision on the point of Joint Hindu Family and property, the burden of proof etc. This Court has held as under:-*

*24. The "patriarchal family" may be defined as a group of natural or adoptive descendants, held together by subjection to the eldest living ascendant, father, grand-father, great-grandfather. Whatever be a formal prescription of law, the head of such a group is always in practice, despotic; and he is the object of respect, if not always of affection, which is probably seated deeper than any positive institution. Manu says, "three persons, a wife, a son and a slave, are declared by law to have in general no wealth exclusively their own; the wealth which they may earn is regularly acquired for the man to whom they belong." Narada says, "he is of age and independent, in case his parents be dead; during their lifetime he is dependent, even though he be grown old."*

*25. The "joint family" is normally a transition form from "patriarchal family". At the death of common ancestors or head of house, if the family chooses to continue united, the eldest son would be the natural*

*head. The former one was head of family by natural authority, the later other can only be so by a delegated authority. He is primus but inter pares. An undivided Hindu family thus is ordinarily joint, not only in estate but in food and worship. The presumption, therefore, is that members of a Hindu family are living in a state of union unless contrary is established. This presumption however varies inasmuch as it is stronger in case of real brother than in case of cousin and farther one go, from the founder of family, the presumption becomes weaker and weaker. However, there is no presumption that a family, because it is joint, possesses joint property. Under Mitakshara Law, possession of property is not necessary requisite for constitution of a joint family, though where persons live together, joint in food and worship, it is difficult to conceive of their possessing no property whatever, such as, at least, ordinary household articles which they would enjoy in common.*

*32. The joint undivided family is the normal condition of Hindu society as observed in Raghunadha Vs. Brozo Kishroe (1876) 3 IA 154 and Neelkisto Deb Vs. Beerchunder (1989) 12 MIA 523. An HUF is ordinarily joint not only in estate but in food and worship. Unless contrary is established, the presumption is that the members of a Hindu family are living in a state of union (see: Govind Dass Vs. Kuldip Singh AIR 1971 Delhi 151 and Bhagwan Dayal Vs. Mst. Reoti Devi AIR 1962 SC 287). If, however, one of the coparceners is admittedly living separately from other members of the family, neither it can be said that other members do not constitute a Hindu joint family nor the member living separately, who has stripped his relation with the joint family, can be said to be still a coparcener or member of joint family. Simultaneously, merely if some members are working and living at different places, though own a joint family in common, it cannot be said that they do not form a joint Hindu family. Since it is only a presumption, the strength thereof necessarily varies in every case. The presumption of union is stronger in the case of brothers than in the case of cousins and farther one goes from the founder of the family, the presumption becomes weaker and weaker.*

*33. Brothers may be presumed to be joint but conclusion of jointness with collaterals must be affirmatively proved. The presumption lies strongly in favour of father and son that they are living jointly unless proved otherwise.*

*34. This presumption, however, does not apply in respect of property. There is no presumption that a family, because it is joint, possess joint property. As per Mitakshara law, the possession of property is not a necessary requisite for the constitution of a joint family, though where persons live together, joint in food and worship, it is difficult to conceive that they are possessing no property whatever, such as ordinary household articles which they would enjoy in common.*

*35. In Sher Singh Vs. Gamdoor Singh 1997 (2) HLR 81 (SC), the Court said that once existence of a joint family is not in dispute, necessarily the property held by family assumed the character of a coparcenary property and every member of family would be entitled, by birth, to a share in coparcenary property, unless any one of the coparcener pleads, by separate pleadings and proves, that some of the properties or all the properties are his self-acquired properties and cannot be blended in coparcenary property. Merely because the family is joint, there is no presumption of joint property. A Hindu, even if he be joint may possess separate property. Such*

*property belongs exclusively to him. Neither member of the coparcenary, nor his male issue, acquires any interest in it by birth. On his death (intestate), it passes by succession to his heirs and not by survivorship to the surviving coparcener. The existence of joint family does not raise presumption that it owns properties jointly. But once joint family nucleus is either proved or admitted so as to draw inference that such property could have been acquired out of joint family funds, the burden shifts to the party alleging self acquisition, to establish affirmatively, that such property was acquired without aid of joint family. Initial burden always lies upon the party asserting that any item of property is joint family property.*

*38. In Appalaswami Vs. Suryanarayanamurti and Ors., AIR 1947 PC 189, it was held that Hindu law is very clear. Proof of existence of a joint family does not lead to the presumption that property held by any member of family is joint. The burden rests upon one who asserts that an item of property is joint, to establish that fact. But where it is established that the family possessed some joint property which, from its nature and relative value, may have formed the nucleus, from which property in question may have been acquired, the burden shifts to the party alleging self-acquisition, to establish affirmatively that the property was acquired without the aid of joint family property/fund.*

*39. Again in Srinivas Krishnarao Kango Vs. Narayan Devji Kango AIR 1954 SC 379, it was held that proof of existence of a joint family does not lead to the presumption that property held by any member of family is joint. The burden rests upon anyone asserting that any item of property is joint to establish the fact. But where it is established that the family possessed some joint property which form its nature and relative value, may have formed the nucleus, from which property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of joint family property.*

*40. The legal proposition which emerges therefrom is that initial burden is on the person who claims that it is joint family property but after initial burden is discharged, the burden shifts to the party claiming that the property was self acquired and without the aid of joint family property/fund.*

*41. In Rukhmabai Vs. Lala Laxminarayan AIR 1960 SC 335, the Court said:*

*"There is a presumption in Hindu Law that a family is joint. There can be a division in status among the members of a joint Hindu family by refinement of shares which is technically called "division in status", or an actual division among them by allotment of specific property to each one of them which is described as "division by metes and bounds". A member need. not receive any share in the joint estate but may renounce his interest therein, his renunciation merely extinguishes his interest in the estate but does not affect the status of the remaining members vis- a-vis the family property, A division in status can be effected by an unambiguous declaration to become divided from the others and that intention can be expressed by any process. Though prima facie a document clearly expressing the intention to divide brings about a division in status, it is open to a party to prove that the said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. But there is no presumption that any property, whether*

*movable or immovable, held by a member of, a joint Hindu family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property. to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property..."*

*(emphasis added)"*

62. Now applying the principles as have been noticed above, it will be seen that in so far as the claim of the petitioner treating the property to be joint is concerned, there is neither any pleadings nor any material to indicate that the property in question was acquired in a representative capacity. There is nothing on record to indicate that the property was acquired from the joint family nucleus.

62. Moreover, even though, there is absence of pleadings and proof in this regard another fact which cannot be effaced from the record is that the father of the petitioner had instituted a suit claiming partition on the same very premise that the property was joint which in terms of the judgment dated 11.03.1930 was held to be separate property of Nand Kishore and Bhagirathi.

63. Thus, for the aforesaid reasons, the aforesaid contentions of the petitioner cannot be countenanced.

64. Now in case if the property is considered to be ancestral then as per principles as noticed in the case of ***Jagdamba Singh (Supra)***, it ought to have been shown by the petitioner that the property was recorded at any point of time in the name of the common ancestor Debi Charan. It is not disputed nor could be shown from the record that the property in question at any point of time was recorded in the name of Debi Charan. It has also not been shown that the partition which had occurred between Nageshwar belonging to the branch of Nand Kishore and Bhagirathi in the year 1901 was ever assailed and since that point of time, the property has been recorded separately. The petitioner also could not explain that it is Nand Kishore and Bhagirathi who had granted 8 bighas of land out of their own holdings in favour of Sri Raghuvir which continues to be held by the petitioner in a separate Khata No. 126. From the said Khata No. 126, the father of the petitioner had leased out certain lands.

65. Thus, all the aforesaid facts and circumstances cumulatively indicate that all the three namely Nand Kishore, his successors, Bhagirathi, his successors and Arjun and his successors continued to occupy their separate land. Nothing from record could indicate that the property was ancestral and even the fact that the entries were recorded separately in the names of Bhagirathi and his successors, Nand Kishore and his successors in respect of separate areas and separate Khata No. 123 and 141 indicates the severability, the exclusive ownership and possession, thus, for all the reasons, the said property cannot be treated to be ancestral. The three Consolidation Courts have also taken note of it and have found that the property was enjoyed by the parties separately.

66. Even noticing the submission of learned counsel for the petitioner who by relying upon a larger Bench decision of this Court in the case of ***Sri Ram (Supra)***, it would indicate that the same also does not

come to the help of the petitioner for the reasons that even if the long standing entries of the revenue records may be treated as presumptive but nevertheless the fact remains that it is for the petitioner to have displaced the said presumption by leading cogent and substantial evidence to rebut the said presumption.

67. Needless to say that the same has not been done and despite both oral and documentary evidence having been led before the three Consolidation Authorities which have concurrently recorded that the petitioner is not entitled to claim of 1/3rd share on the basis of co-tenancy in Khata No. 123 and 141 is based on proper appreciation and material available on record and is concluded by the concurrent findings which for the reasons as recorded herein above do not suffer from any error which may persuade this Court to interfere in exercise of powers conferred on this Court under Article 226 of the Constitution of India.

68. This Court does not find that there is any merit in the petition, accordingly, the same is liable to be dismissed. Accordingly, the writ petition is dismissed. The order passed by the Consolidation Authorities are affirmed. In the facts and circumstances, there shall be no order as to costs.

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**(2021)10ILR A730**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 01.10.2021**

**BEFORE**

**THE HON'BLE RAVI NATH TILHARI, J.**

Consolidation No. 22410 of 2021

**Ram Lal ...Petitioner**
**Versus**
**D.D.C., Sultanpur & Anr. ...Respondents**

**Counsel for the Petitioners:**
Prabhat Kumar, Vinod Kumar

**Counsel for the Respondents:**
C.S.C., Ajay Pratap Singh 'Vatsa'

**A. Civil Law – Consolidation – Condonation of delay - U.P. Consolidation of Holdings Act, 1954 - Section 48 - Rule 109-A - Limitation Act,1963 - Section 5 - It is a well settled proposition of law that existence of sufficient cause is sine quo non, for condonation of delay. In absence of being any finding that the cause shown is sufficient the delay cannot be condoned.** It is true that length of delay does not matter, but what matters is, the existence of sufficient cause and for condoning the delay a specific finding must be recorded that the cause shown is sufficient, which lacks in the order of the Settlement Officer of Consolidation. The Settlement Officer of Consolidation has specifically written on the point of delay that the cause shown was casual one and even the date of knowledge of the order dated 04.05.1983 (implementation of which, deleted petitioner's name from revenue records) was not disclosed by the petitioner. Even then the Settlement Officer of Consolidation has condoned the delay of 38 years in filing the appeal from the date of the order and 27 years from 1994 (since petitioner's name was mutated in place of his grandfather). (Para 11)

**B. Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds.** The court cannot enquire into belated and state claims on the ground of equity. Delay defeats equity. The court helps those who are vigilant and "do not slumber over their rights." (Para 12, 13)

It is settled in law that even though a liberal and justice oriented approach is required to be adopted in exercise of powers u/s 5 of the

Limitation Act, the Courts cannot be oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment passed quite long ago against which no remedy was availed within the period of limitation, or even thereafter, within the reasonable period. Although the length of delay by itself cannot be a ground to reject the application for condonation of delay there must be sufficient cause for condonation of delay, and particularly where such application is filed after more than 38 years from the date of the order. (Para 15)

**C. In the exercise of revisional jurisdiction the discretion by the court below in condoning the delay cannot be lightly interfered but where the court while condoning the delay or not condoning the delay, acted with material irregularity or contrary to law or on no evidence to support the cause for condonation of delay such order can be interfered with.** (Para 17)

**Writ petition dismissed.** (E-4)

**Precedent followed:**

1. Shanti Prasad Gupta Vs Deputy Director of Consolidation, Camp at Meerut, 1984 RD page 382 (SC) (Para 4)

2. State of Jharkhand & ors. Vs Ashok Kumar Chokhani & ors., (2009) 2 SCC 667 (Par 5)

3. P.K. Ramachandran Vs St. of Kerala, AIR 1998 SC 2276 (Para 12)

4. Pundlik Jalam Patil (dead) by LRS. Vs Executive Engineer, Jalgaon Medium Project anr., (2008) 17 SCC 448 (Para 13)

5. Maniben Devraj Shah Vs Municipal Corporation of Brihan Mumbai, 2012 (5) SCC 157 (Para 14)

**Precedent distinguished:**

1. Paras Nath Vs Deputy Director of Consolidation, Basti, 2002 (93) R.D. 764 (Para 5)

**Present petition challenges order dated 04.08.2021, passed by Deputy Director of Consolidation, Sultanpur.**

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

1. Heard Sri Prabhat Kumar, learned counsel for the petitioner and Sri Ajay Pratap Singh "Vatsa', learned counsel for the opposite party No.2 and Dr. Krishna Singh, learned Standing Counsel for the State.

2. This petition has been filed challenging the order dated 04.08.2021 passed by the Deputy Director of Consolidation, Sultanpur in Revision No. 1171, Ram Keval Vs. Ram Lal, Annexure No. 1 to the petition.

3. In the consolidation proceedings, the Consolidation Officer passed an order dated 04.05.1983 on the basis of some compromise said to be between the parties or their predecessor. Ram Sumer, grand father of the petitioner never challenged the order dated 04.05.1983, during his life time. On his death, the petitioner was mutated on 2.1.1994, in place of Ram Sumer as the name of Ram Sumer had continued in the revenue records. The petitioner's father had predecreed Ram Sumer. Later on, in the proceedings under Rule 109-A of the U.P. Consolidation of Holdings Act, 1954 the order dated 04.05.1983 was implemented, and the name of the petitioner was deleted. The petitioner filed appeal before 25.03.2021, after about 38 years of the order dated 04.05.1983 with the prayer for condonation of delay inter alia on the grounds that the order dated 04.05.1983 was not in his knowledge and his name had been mutated on the death of his grand father on 2.1.1994.

4. The Settlement Officer of Consolidation, by order dated 25.03.2021 condoned the delay and directed the matter to be listed for hearing on merits. The opposite party No.2 filed revision, which has been allowed by the Deputy Director of Consolidation by order dated 04.08.2021 against which, the present petition has been filed.

5. Sri Prabhat Kumar submits that the Settlement Officer of Consolidation having condoned the delay in the exercise of its discretion, the Deputy Director of Consolidation is legally not justified in interfering with such direction, which was to advance substantial justice, in the exercise of revisional jurisdiction under Section 48 of the Act. He has placed reliance on the judgment of Hon'ble the Supreme Court in the case of **Shanti Prasad Gupta Vs. Deputy Director of Consolidation, Camp at Meerut reported in 1984 RD page 382 (SC)**. He further placed reliance on judgment of this Court in the case of **Paras Nath Vs. Deputy Director of Consolidation, Basti reported in 2002 (93) R.D. 764** in support of his contention that the order condoning the delay is an interlocutory order and the revision was not maintainable. He has further placed reliance in the case of **State of Jharkhand and others Vs. Ashok Kumar Chokhani and others (2009) 2 SCC667** in support of his contention that while deciding an application for condonation of delay in filing the appeal, the merits of the case could not be gone into.

6. Sri Ajay Pratap Singh "Vatsa', submits that the delay was inordinate, of 38 years, in filing the appeal. The petitioner's grand father Ram Sumer did not challenge the order dated 4.5.1983 during his life time. The order dated 4.5.1983 was recorded in revenue records in the year 1994 but inspite thereof, the petitioner did not challenge the same for 27 years. There was no sufficient cause to condone the delay, but the Settlement Officer of Consolidation not only allowed the application without recording any finding in favour of the petitioner on the point of sufficient cause, but also made vital observations on the merits of the case and as such the order has been rightly set aside by the Deputy Director of Consolidation.

7. I have considered the submissions advanced by learned counsels for the parties and perused the material on record.

8. The Deputy Director of Consolidation has set aside the order of the Settlement Officer of Consolidation on the ground that Ram Sumer during his life time did not challenge the order dated 04.05.1983. It has also recorded that for the cause of delay as mentioned therein, that the petitioner was minor in the year 1983, no evidence of minority was adduced.

9. Learned counsel for the petitioner could not answer the query of the Court about the age of the petitioner in 1983. However, perusal of the affidavit dated 13.09.2021 in support of the writ petition mentions the age of the petitioner as 79 years.

10. I have considered the order passed by the Settlement Officer of Consolidation and a perusal thereof shows that the Settlement Officer of Consolidation was even not satisfied with the cause shown, as would appear from the following, part of the order dated 25.03.2021: which reads as under:

*"fमयाद के सम्बन्ध में उभयपक्षों के कथन से स्पष्ट है कि अपीलकर्ता द्वारा विलम्ब के बिन्दु पर सरसरी तौर से कारण प्रस्तुत किया गया, प्रतिवादी का कथन सही है कि विलम्ब की जानकारी का दिनांक अपील में अंकित नहीं किया गया है।"*

11. It is a well settled proposition of law that existence of sufficient cause is sine quo non, for condonation of delay. In absence of being any finding that the cause shown is sufficient the delay cannot be condoned. It is true that length of delay does not matter, but what matters is, the existence of sufficient cause and for condoning the delay a specific finding must be recorded that the cause shown is sufficient. It, lacks in the order of the Settlement Officer of Consolidation. The Settlement Officer of Consolidation has specifically written on the point of delay that the cause shown was casual one and even the date of knowledge of the order dated 04.05.1983 was not disclosed by the petitioner. Even then the Settlement Officer of Consolidation has condoned the delay of 38 years in filing the appeal from the date of the order and 27 years from 1994.

12. In ***P. K. Ramachandran Vs. State of Kerala, AIR 1998 SC 2276*** the Hon'ble Supreme Court has held that, "Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds."

13. In ***Pundlik Jalam Patil (dead) by LRS. Vs. Executive Engineer, Jalgaon Medium Project and Anr. (2008) 17 SCC 448,*** in para 17 of the judgment, the Hon'ble Supreme Court held that, "*...The evidence on record suggests neglect of its own right for long time in preferring appeals. The court cannot enquire into belated and state claims on the ground of equity. Delay defeats equity. The court helps those who are vigilant and "do not slumber over their rights."*

14. In ***Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai, 2012 (5) SCC 157,*** in para 18 of the judgment, the Supreme Court held as under:

*"What needs to be emphasised is that even though a liberal and justice oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost. What colour the expression 'sufficient cause' would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. In cases involving the State and its agencies/ instrumentalities, the Court can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and / or its agencies /instrumentalities and the applications filed by them for condonation of delay cannot be*

*allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest."*

15. In view of the aforesaid judgments, it is settled in law that even though a liberal and justice oriented approach is required to be adopted in exercise of powers under Section 5 of the Limitation Act, the Courts can not be oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment passed quite long ago against which no remedy was availed within the period of limitation, or even thereafter, within the reasonable period. Although the length of delay by itself cannot be a ground to reject the application for condonation of delay there must be sufficient cause for condonation of delay, and particularly where such application is filed after more than 38 years from the date of the order.

16. In ***Shanti Prasad Gupta (supra)***, the Hon'ble Supreme Court held that whether or not there is sufficient cause for condonation of delay, is a question of fact dependent upon the facts and circumstances of a particular case, and the proposition is well settled that when order has been made under Section 5, Limitation Act by the lower court in the exercise of its discretion allowing or refusing an application to extend time, it cannot be interfered with in revision, unless the lower court has acted with material irregularity or contrary to law or has come to that conclusion on no evidence. It has been held that in exercise of revisional jurisdiction under Section 48 of Consolidation of Holdings Act, the Deputy Director of Consolidation cannot lightly interfere with the discretion in the exercise of Consolidation Officer in favour of condonation of delay.

17. In view of the order of Settlement Officer of Consolidation condoning the delay, in the absence of any finding that the cause shown is sufficient and also that the cause shown was casual one, as also in view of the judgment in the case of ***Shanti Prasad Gupta (supra)***, finding that the Settlement Officer of Consolidation acted with material irregularity or contrary to law and condoned the delay on no evidence, the submission of the petitioner's counsel that in exercise of revisional jurisdiction the Deputy Director of Consolidation, could not interfere with the discretion exercised by the Settlement Officer of Consolidation cannot be accepted. The proposition of law in ***Shanti Prasad (supra)*** is that in the exercise of revisional jurisdiction the discretion by the court below in condoning the delay cannot be lightly interfered but where the court while condoning the delay or not condoing the delay, acted with material irregularity or contrary to law or on no evidence to support the cause for condonation of delay such order can be interfered with.

18. In the case of ***Ashok Kumar (supra)***, it has been observed that it is well settled that while deciding an application of condonation of delay in filing the appeal, the merits of the case could not be gone into. This proposition of law applies with respect to the order passed by the Settlement Officer of Consolidation as well, as a perusal thereof, shows that while condoning the delay the Settlement Office of Condonation entered into the merits of the case, as according to it, there being four brothers and the property being ancestral it should have been divided equally amongst them.

19. I n the case of ***Paras Nath (supra)***, it has been held by this Court that against an interlocutory order no revision is maintainable. Interlocutory order is an order, which does not touch the merit of the case and which does not prejudice any party, while arguing the case on merits. It was found, therein, that by condonation of delay the merits of the case had not been touched by the Settlement Officer Consolidation. From reading of ***Paras Nath (supra***) it is evident that the interlocutory order is such order by which the delay is condoned but without touching the merits of the case. In the present case, as mentioned above, the Settlement Officer of Consolidation while condoning the delay has touched the merits of the case, and, therefore, the order passed by the Settlement Officer of Consolidation is not be an interlocutory order.

20. For the aforesaid reasons, I do not find any illegality in the order of the Deputy Director of Consolidation. The order passed by the Settlement Officer of Consolidation was not sustainable and therefore this Court is not inclined to interfere in the matter. However, the Court finds that the courts below ought not to have made any observation on the merit of the case. Therefore, it is observed that any observation made by the Deputy Director of Consolidation or the Settlement Officer of Consolidation in their respective orders on the merits of the claim of the parties shall not be taken into consideration by any authority.

21. The writ petition is **dismissed** with the aforesaid observation.

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**(2021)10ILR A735**

**ORIGINAL JURISDICTION**

**CIVIL SIDE**

**DATED: ALLAHABAD 07.09.2021**

**BEFORE**

**THE HON'BLE NAHEED ARA MOONIS, J.**
**THE HON'BLE SAUMITRA DAYAL SINGH, J.**

Writ Tax No. 110 of 2021

**M/s Magma Industries Ltd., Muzaffarnagar ...Petitioner**

**Versus**

**Designated Committee, Office of Commissioner C.G.S.T., Commissionerate, Meerut & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Suyash Agarwal

**Counsel for the Respondents:**
A.S.G.I., Sri Ramesh Chandra Shukla

**A. Tax Law - Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 - Sections 125, 125(1)(e), 123(c), 124(1)(d), 121(r), 121(m) & 133 - Central Excise Act, 1944 - Income Tax Act, 1961 - Section 119(1) - A person against whom an enquiry, investigation or audit may be pending and whose 'tax dues' may not have been 'quantified', would remain ineligible to make a declaration on form SVLDRS-1**. (Para 10)

There is no doubt that the 'Panchnama' document dated 10.02.2016 prepared by the Central Excise authorities, in writing, clearly mentioned the amount Rs. 2,18,516/- as the amount of duty short paid by the petitioner. Again, there can be no doubt that a director of the petitioner-company Dinesh Garg, in his statement recorded, in writing, on 13.05.2016 further admitted duty avoidance by the petitioner, to the tune of Rs. 45,38,231/-. The total of these two admissions is Rs. 47,56,751/-. **Section 121(r) does not, in any manner suggest or seek to limit the meaning of the phrase 'written communication' to be one written and issued by any Central Excise authority. Plainly, it refers to an amount of duty under any indirect tax**

**enactment, reduced to writing.** Once the amount of Rs. 45,38,231/- was thus reduced to writing before the Central Excise authority in an "enquiry or investigation" as defined under Section 121(m) of the Scheme and the petitioner did not dispute the same, the requirement of Section 121(r) read with Section 125(1)(e) read with 123(c) stood fulfilled. (Para 11)

**The CBIC has only clarified the meaning to be given to the word 'quantified' used under the Scheme - to include thereunder any duty liability admitted (in writing) by a person (during an enquiry or investigation) - as a 'written communication' spoken of u/s 121(r) of the Scheme.** Also, Rs. 45,38,231/- is the exact amount 'quantified' while issuing the subsequent show-cause-notice dated 06.09.2019. While that notice may never be read as evidence of the 'quantification' made earlier since that show-cause-notice was issued after the cut-off date 30.06.2019, at the same time, the said document does indicate - other than the aforesaid 'Panchnama' and admission made by the petitioner there was no other material with the revenue authorities to create any other or further demand. (Para 20)

**B. Circular No. 1071/4/2019-CX.8, dated 27.08.2019, issued by CBIC - The Circular would bind the revenue authorities ranked lower to the CBIC, in so far as it is beneficial to the petitioner. Those revenue authorities, subordinate to the CBIC, cannot resist or protest or deviate from the interpretation of the Scheme made by the CBIC. To allow them to do so would be to render the mandate of Section 133 of the Scheme, redundant.** (Para 16)

Once the CBIC clarified and thus enlarged the meaning of the word 'quantified' to give effect to the purpose of Section 123(c) read with Section 125(1)(e) and Section 121(1)(r) of the Scheme - clearly to extend the benefit of the Scheme to more persons, there is neither any wisdom nor legal basis to curtail the same, contrary to the express intent of the CBIC. (Para 17)

Therefore, (i) the 'tax dues' of the petitioner stood 'quantified' for the purpose of Section 121(r), 123(c), 124(1)(d) and 125(1)(d) before the cut-off date 30.06.2019 at Rs. 45,38,231 and (ii) even if it may have been otherwise permissible to interpret those provisions in a manner that in the case of a pending enquiry, investigation or audit, no declaration may be filed unless the revenue authority had first communicated in writing the 'quantified' amount of 'tax dues'/duty demand proposed under the Act, yet, that interpretation would stand blocked, at the instance of the revenue authorities, by virtue of the binding interpretation of the law offered by the CBIC, u/s 133 of the Scheme. (Para 21)

**The Scheme is a piece of reform legislation. It commends a purposive construction.** The object of the Scheme is only to resolve all legacy disputes and focus all energies of the revenue authorities as also of the assessees at the (then) imminent enforcement of the new G.S.T regime. (Para 22)

**Writ petition allowed**. (E-4)

**Precedent followed:**

1. CCE, Vadodara Vs Dhiren Chemical Industries, (2002) 2 SCC 127 (Para 14)

2. Commissioner of Customs, Calcutta & ors. Vs Indian Oil Corporation Ltd. & anr., (2004) 3 SCC 488 (Para 15)

3. UCO Bank, Calcutta Vs Commissioner of Income Tax, W.B., (1999) 4 SCC 599 (Para 18)

4. M/s Fashion Dezire and another Vs U.O.I. Through Principal Secretary, Ministry of Finance, Department of Revenue & 3 ors., 2021 (8) ADJ 133; (2021) ILR 9 All 1359 (Para 22)

**Present petition challenges order dated 05.05.2020, passed by Designated Committee, Office of Commissioner Central Goods and Service Tax, Commissionerate, Meerut.**

(Delivered by Hon'ble Naheed Ara Moonis, J.
&
Hon'ble Saumitra Dayal Singh, J.)

1. Heard Sri Suyash Agarwal, learned counsel for the petitioner and Sri R.C. Shukla, learned counsel for the revenue.

2. Present writ petition raises challenge to the order dated 05.05.2020 passed by respondent no.1-Designated Committee rejecting the declaration filed by the petitioner on SVLDRS-1, seeking settlement of its dispute, under the provisions of the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 (in short the 'Scheme').

3. Undisputed facts of the case are, a search was conducted in the case of the petitioner under the provisions of the Central Excise Act, 1944, (hereinafter referred to as the Act) on 10.02.2016 at the business and other premises of the petitioner and its directors etc. In the *"Panchnama'* drawn on 10.02.2016 itself, an allegation of short payment of Central Excise duty (against shortage of stock) Rs. 2,18,516/- was made. A copy of the same is annexed as Annexure No. 1 to the writ petition. Pursuant to the search, an investigation (under the Act), became pending against the petitioner and its directors. During that investigation, on 13.05.2016, the statement of Dinesh Garg, a director of the petitioner-company came to be recorded. As per Annexure-A to that statement duty payment Rs. 45,38,231/- was avoided upon clandestine removal of excisable goods. Its copy is annexed as Annexure No. 3 to the writ petition. Relevant to our discussion, the contents of question nos. 3 and 7 together with the answers furnished by the said Dinesh Garg, in that statement, read as under:

*"Q-3. On the basis of print outs of sales register taken from the laptop and sales register submitted by your accountant Shri Gaurav Tyagi on 10.02.2016 in reply of Question No.4 of his statement, a detail have been prepared containing date wise entries of sales made to different buyers during the period 01.04.2015 to 09.02.2016 in Annexure-A. Please see the said Annexure-A and explain about the entries?*

*Ans: I have seen the Annexure-A and put my dated signatures on it. I have also perused the sales detail given in our sales register provided by Shri Gaurav Tyagi on 10.02.2016. The said Annexure-A contains the sales details made to different parties by our manufacturing unit M/s Magma Industries Ltd., during the period 01.04.2015 to 09.02.2016. In some case where Bill issued has been shown, we have issued proper bills and account for the said sale in our ledgers. Against sales in few cases bills for lesser amount have been issued due to adjustment of commission to commission agent and rate differences. Against rest entries we have neither issued any Sale Bill nor account for the said sales in our ledgers for payment of central excise duty. I also want to state that the name of G.S. Pharma has wrongly mentioned by our Accountant in the said sales register and party ledger, whereas the actual sale was made to M/s Trends Remedies Pvt. Ltd., Roorkee on the sale bills. These facts may also be checked.*

*Q-7. What do you want to state about the central excise duty liability on the sales done by your company without issuing bills and without payment of duty?*

*Ans: I admit that sales of finished goods shown against other entries except the sales made to M/s S.S. Enterprises, Gulzar (Kabadi) have been done by our unit to different parties without payment of Central Excise duty and without entry in the statutory records. We have sold empty old and used drums, in which we purchased raw material to M/s S.S. Enterprises,*

*Gulzar (Kabadi) and Israr (Kabadi) and we have neither issued any bill nor paid any central excise duty since these are not our manufactured goods. I admit the duty liability in respect of other clearances shown in the said Annexure-A, Which have been done without issuing sales bills and without payment duty."*

4. The amount of excise duty as per Annexure-A to that statement is Rs. 45,38,231/-. Yet, that investigation remained pending. Before a show-cause-notice could be issued, the Scheme was introduced by Finance Act No. 2 of 2019. Much later, after the Scheme came into force a show-cause-notice was issued to the petitioner, on 06.09.2019.

5. In the aforesaid fact background, the petitioner filed its declaration on SVLDRS-1, under the Scheme on 13.01.2020. It disclosed the amount of disputed duty payable under the Act at Rs. 47,56,751/- and the Estimate Amount Payable (EAP in short) Rs. 14,27,025.30/-. The disputed duty payable/'tax dues' disclosed was the sum of the alleged short-paid duty - as per the *''Panchnama'* document dated 10.02.2016 and, the evaded duty - as per the statement of Dinesh Garg dated 13.05.2016. The Designated Committee did not dispute the computation of disputed duty payable and EAP disclosed by the petitioner yet, on 31.01.2020, instead of issuing a demand on SVLDRS-3 it issued a demand on SVLDRS-2, to the petitioner. It also computed the EAP at Rs. 14,27,025.30. It included the amount of Rs. 2,18,516/- already paid by the petitioner, during the investigation.

6. Thereafter, though no hearing took place, the Designated Committee rejected the petitioner's declaration by the impugned order dated 05.05.2020. While rejecting the petitioner's declaration, it has been observed as under:

*"I find that in the instant case, the officers of Anti-evasion, Central Excise Commissionerate, Meerut has initiated an enquiry against the party, wherein a search was conducted on 10.02.2016. During the visit a shortage in stock of finished goods valued at Rs. 17,48,129/- involving Central Excise duty of Rs. 2,18,516/- was found, which was debited by the party through CENVAT on the same day. Further, during statement dated 13.05.2016 tendered before the Superintendent (Anti-evasion), Central Excise, Meerut, Shri Dinesh Garg, Director admitted/accepted the liability of Central Excise duty of Rs. 45,38,231/- involved on the sales done without issuing bills and without payment of duty. This acceptance of taxability remains tentative as further investigation was still going on. It is only after conclusion of investigation, final Tax liability was to be computed and communication to the party. We find that no such communication of final Tax liability was made by the department in the instant case on or before 30.06.2019. From the records, it is evident that they have not got anything in writing from the department about final tax liability so far. In this case, Tax liability was finally quantified in Show Cause Notice dated 06.09.2019 issued vide C.No.IV-CE(9)CP/M/08/2016/1289-1305 dated 06.09.2019 for demand of Central Excise duty amounting to Rs. 47,56,751/- (including Rs. 2,18,516/- + Rs. 45,38,235/-) and to appropriate an amount of Rs. 2,18,516/- already deposited by the party"*

7. Having heard learned counsel for the parties, we find, under Section 125 of

the Scheme all persons, except those specified under sub-clause 1(a) to (h) of that Section were eligible to make a declaration. Under Section 125(1)(e) of the Scheme in the case of a person who may have been subjected to an enquiry or investigation, if the amount of duty involved in that investigation had not been 'quantified' on or before 30.06.2019, would be ineligible to make a declaration. If that amount stood 'quantified', such person would be eligible and the liability of that declarant, would be 30% to 50% of the 'tax dues', thus 'quantified'. That is the effect of Section 123(c) read with Section 124(1)(d) of the Scheme.

8. Under Section 124(1)(d) of the Scheme in cases where enquiry, investigation or audit may have been pending on 30.06.2019 the "tax dues' may be calculated as a percentage of amount "quantified'. The word 'quantified' has been defined under Section 121(r) of the Scheme as below:

*"121(r). "quantified", with its cognate expression, means a written communication of the amount of duty payable under the indirect tax enactment;"*

9. Also, the phrase "enquiry or investigation" has been defined under Section 121(m) of the Scheme. It reads:

*"121(m). "enquiry or investigation", under any of the indirect tax enactment, shall include the following actions, namely:-*

*(i) search of premises;*
*(ii) issuance of summons;*
*(iv) recording of statements;"*

10. Clearly, a person against whom an enquiry, investigation or audit may be pending and whose "tax dues' may not have been 'quantified', would remain ineligible to make a declaration on form SVLDRS-1. According to the revenue, for the purposes of Clause 123(c) of the Scheme, on 30.06.2019, the "tax dues' against the petitioner were not "quantified'. Admittedly, prior to that date no communication whatsoever was issued by any Central Excise authority to the petitioner to communicate the 'quantified' amount of 'tax dues'/duty amount payable.

11. However, there is no doubt that the *"Panchnama'* document dated 10.02.2016 prepared by the Central Excise authorities, in writing, clearly mentioned the amount Rs. 2,18,516/- as the amount of duty short paid by the petitioner. Again, there can be no doubt that a director of the petitioner-company Dinesh Garg, in his statement recorded, in writing, on 13.05.2016 further admitted duty avoidance by the petitioner, to the tune of Rs. 45,38,231/-. The total of these two admissions is Rs. 47,56,751/-. Section 121(r) does not, in any manner suggest and it therefore does not seek to limit the meaning of the phrase 'written communication' to be one written and issued by any Central Excise authority. Plainly, it refers to an amount of duty under any indirect tax enactment, reduced to writing. Once the amount of Rs. 45,38,231/- was thus reduced to writing before the Central Excise authority in an "enquiry or investigation" as defined under Section 121(m) of the Scheme and the petitioner did not dispute the same, the requirement of Section 121(r) read with Section 125(1)(e) read with 123(c) stood fulfilled.

12. While that is the interpretation that commends to us, the discussion cannot

rest here. Section 133 of the Scheme, reads as below:

*"133(1) The Central Board of Indirect Taxes and Customs may, from time to time, issue such orders, instructions and directions to the authorities, as it may deem fit, for the proper administration of this Scheme, and such authorities, and all other persons employed in the execution of this Scheme shall observe and follow such orders, instructions and directions:*

*Provided that no such orders, instructions or directions shall be issued so as to require any designated authority to dispose of a particular case in a particular manner.*

*(2) Without prejudice to the generality of the foregoing power, the Central Board of Indirect Taxes and Customs may, if it considers necessary or expedient so to do, for the purpose of proper and efficient administration of the Scheme and collection of revenue, issue, from time to time, general or special orders in respect of any class of cases, setting forth directions or instructions as to the guidelines, principles or procedures to be followed by the authorities in the work relating to administration of the Scheme and collection of revenue and any such order may, if the said Board is of opinion that it is necessary in the public interest so to do, be published in the prescribed manner."*

13. The Central Board of Indirect Taxes and Customs (hereinafter referred to as the CBIC), is the highest administrative authority under the Act. It was also given the power to issue binding orders and instructions and directions to other authorities under the Scheme, for its proper administration. In exercise of that power, the CBIC issued the Circular No. 1071/4/2019-CX.8, dated 27.8.2019 (hereinafter referred to as the 'Circular'). Relevant to our discussion, the opening Clauses and Clause 10(g) of that Circular read as under:

*" I am directed to state that the Government has announced the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 as a part of the recent Union Budget. Further, in accordance with the Finance (No.2) Act, 2019, the Central Government has notified the Sabka Vishwas (Legacy Dispute Resolution) Scheme Rules, 2019 as well as issued Notification No. 04/2019 Central Excise-NT dated 21.08.2019 to operationalize this Scheme from 01.09.2019 to 31.12.2019.*

*2. As may be appreciated, this Scheme is a bold endeavor to unload the baggage relating to the legacy taxes viz. Central Excise and Service Tax that have been subsumed under GST and allow business to make a new beginning and focus on GST. Therefore, it is incumbent upon all officers and stall of CBIC to partner with the trade and industry to make this Scheme a grand success.*

*3. Dispute resolution and amnesty are the two components of this Scheme. The dispute resolution component is aimed at liquidating the legacy cases locked up in litigation at various forums whereas the amnesty component gives an opportunity to those who have failed to correctly discharge their tax liability to pay the tax dues. As may be seen, this Scheme offers substantial relief to the taxpayers and others who may potentially avail it. Moreover, the Scheme also focuses on the small taxpayers as would be evident from the fact that the extent of relief provided is higher in respect of cases involving lesser duty (smaller taxpayers can generally be expected to face disputes involving relatively lower duty amounts).*

*4. .....*

*5. .....*

*6. .....*

*7. .....*

*8. .....*

*9. .....*

*10. Further, the following issues are clarified in the context of the various provisions of*

*the Finance (No.2) Act, 2019 and Rules made thereunder:*

*a. .....*

*b. .....*

*c. .....*

*d. .....*

*e. .....*

*f. .....*

*g. Cases under an enquiry, investigation or audit where the duty demand has been quantified on or before the 30th day of June, 2019 are eligible under the Scheme. Section 2(r) defines "quantified" as a written communication of the amount of duty payable under the indirect tax enactment. It is clarified that such written communication will include a letter intimating duty demand; or duty liability admitted by the person during enquiry, investigation or audit; or audit report etc."*

14. In **CCE, Vadodara Vs. Dhiren Chemical Industries, (2002) 2 SCC 127**, a five-Judge Constitution Bench of the Supreme Court had the occasion to interpret the phrase *"on which the appropriate amount of duty of excise has already been paid"* appearing in an exemption notification issued under the Act. Giving a wider meaning to that phrase, in view of the purpose of the exemption notification, as to the Circular issued by the CBEC, the Constitution Bench of the Supreme Court held as below:

*"11. We need to make it clear that, regardless of the interpretation that we have placed on the said phrase, if there are circulars which have been issued by the Central Board of Excise and Customs which place a different interpretation upon the said phrase, that interpretation will be binding upon the Revenue."*

That principle has been consistently applied by the Supreme Court. Also, our Court has consistently followed the same.

15. In **Commissioner of Customs, Calcutta & Ors. Vs. Indian Oil Corporation Ltd. & Anr., (2004) 3 SCC 488,** the above principle was reiterated and reaffirmed. After discussing the entire gamut of law on the subject, the Supreme Court held as below:

*"12. The principles laid down by all these decisions are :*

*(1) Although a circular is not binding on a Court or an assessee, It is not open to the Revenue to raise the contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the statute.*

*(2) Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.*

*(3) A show cause notice and demand contrary to existing circulars of the Board are ab initio bad.*

*(4) It is not open to the Revenue to advance an argument or file an appeal contrary to the circulars."*

16. Thus, the Circular would bind the revenue authorities ranked lower to the CBIC, in so far as it is beneficial to the

petitioner. Those revenue authorities, subordinate to the CBIC, cannot resist or protest or deviate from the interpretation of the Scheme made by the CBIC. To allow them to do so would be to render the mandate of Section 133 of the Scheme, redundant.

17. Once the CBIC clarified and thus enlarged the meaning of the word "quantified' to give effect to the purpose of Section 123(c) read with Section 125(1)(e) and Section 121(1)(r) of the Scheme - clearly to extend the benefit of the Scheme to more persons, there is neither any wisdom nor legal basis to curtail the same, contrary to the express intent of the CBIC. We have reached this conclusion applying the first principle crystalised/summarised by the Supreme Court in paragraph 12(1) in **Commissioner of Customs, Calcutta Vs. IOCL (supra).**

18. We are also unable to accept the submission advanced by learned counsel for the revenue, that the Circular is contrary to the Scheme and therefore unenforceable. A similar submission had been advanced by the revenue in **UCO Bank, Calcutta Vs. Commissioner of Income Tax, W.B., (1999) 4 SCC 599.** In that case, it had been contended by the revenue, that a circular issued by the CBDT under Section 119 of the Income Tax Act, 1961 stood in conflict with the method of computation of income chargeable to tax (existing under the Income Tax Act, 1961). Dealing with such submission, it was held as below:

*"Thus, the authority which wields the power for its own advantage under the Act is given the right to forego the advantage when required to wield it in a manner it considers just by relaxing the rigour of the law or in other permissible manners as laid down in Section 119. The power is given for the purpose of just, proper and efficient management of the work of assessment and in public interest. It is a beneficial power given to the Board for proper administration of fiscal law so that undue hardship may not be caused to the assessee and the fiscal laws may be correctly applied. Hard cases which can be properly categorised as belonging to a class, can thus be given the benefit of relaxation of law by issuing circulars binding on the taxing authorities."*

19. In the present case, Section 133 of the Scheme is pari materia (in material parts) to Section 119(1) of the Income Tax Act, 1961. Under clause 10(g) of Circular issued by the CBIC under Section 133 of the Scheme, the CBIC had forsaken the power it wielded, to its own advantage, under the Scheme. Thus, it waived that advantage and relaxed the rigor of law - to make the Scheme more purposeful and successful by maximizing amicable/consented resolution of legacy disputes, under all indirect taxation enactments, in the context of the imminent enforcement of the G.S.T. Regime, at the relevant time. That being the emphasis laid by the CBIC, it clearly sought to maximize the number and quantum of settlements under the Scheme. That intent is self-apparent from a plain reading of paragraphs 2 and 3 of the Circular. It needs no elaboration.

20. Thus, the CBIC has only clarified the meaning to be given to the word 'quantified' used under the Scheme - to include thereunder any duty liability admitted (in writing) by a person (during an enquiry or investigation) - as a 'written communication' spoken of under Section 121(r) of the Scheme. Also, Rs. 45,38,231/-

is the exact amount "quantified' while issuing the subsequent show-cause-notice dated 06.09.2019. While that notice may never be read as evidence of the 'quantification' made earlier since that show-cause-notice was issued after the cut-off date 30.06.2019, at the same time, the said document does indicate - other than the aforesaid *"Panchnama'* and admission made by the petitioner there was no other material with the revenue authorities to create any other or further demand.

21. Therefore, we unhesitatingly reach the conclusions - (i) the 'tax dues' of the petitioner stood 'quantified' for the purpose of Section 121(r), 123(c), 124(1)(d) and 125(1)(d) before the cut-off date 30.06.2019 at Rs. 45,38,231 and (ii) even if it may have been otherwise permissible to interpret those provisions in a manner that in the case of a pending enquiry, investigation or audit, no declaration may be filed unless the revenue authority had first communicated in writing the "quantified' amount of "tax dues'/duty demand proposed under the Act, yet, that interpretation would stand blocked, at the instance of the revenue authorities, by virtue of the binding interpretation of the law offered by the CBIC, under section 133 of the Scheme.

22. We also note, the Scheme is a piece of reform legislation. It commends a purposive construction. That view we have expressed in Writ Tax No. 220 of 2020 (M/s Fashion Dezire And Another Vs. Union of India Through Principal Secretary, Ministry of Finance, Department of Revenue & 3 Ors.). We see no good ground to form any different opinion in this regard as the object of the Scheme is only to resolve all legacy disputes and focus all energies of the revenue authorities as also the assessees at the (then) imminent enforcement of the new G.S.T regime.

23. Thus, the reasoning given by the Designated Committee in the impugned order runs contrary to law. The Designated Committee was obligated to deal with the declaration filed by the petitioner, on merits. No discretion was vested in the Designated Committee to take a different view. Even though the Circular has not been referred to or dealt by the Designated Committee, by virtue of the clear language of Section 133 of the Scheme, it was further obligated to necessarily act in accordance with that law.

24. Consequently, the impugned order dated 05.05.2020 is set aside. In absence of any other dispute or objection, the matter is remitted to the Designated Committee to issue the necessary SVLDRS-3 in line with the observations made above, within a period of thirty days from today. Petitioner shall have thirty days therefrom to deposit that amount and obtain a Discharge Certificate, in accordance with law.

25. Accordingly, the present petition is **allowed**. No orders as to costs.

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**(2021)10ILR A743**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 28.09.2021**

**BEFORE**

**THE HON'BLE NAHEED ARA MOONIS, J.**
**THE HON'BLE SAUMITRA DAYAL SINGH, J.**

Writ Tax No. 378 of 2021
with other cases

**M/s Jain Distillery Pvt. Ltd., Bijnor**
**...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Nishant Mishra, Sri Tanmay Sadh, Sri Navin Sinha

**Counsel for the Respondents:**
C.S.C., A.S.G.I., Sri Dhananjay Awasthi, Sri Satendra Kumar Upadhyay

**A. Tax Law – Uttar Pradesh Value Added Tax Act, 2008 - Sections 28, 4(4), 74 & 4(1)(c) read with Schedule IV, 7(c) - UPVAT Act and Central Sales Tax Act,1956 - Section 29 - Central Sales Tax Act, 1956 - Section 2 (d) & 9(2) - United Provinces Sales of Motor Spirit - Diesel Oil and Alcohol Taxation Act, 1939.**

**ENA continues to fall outside the phrase "alcoholic liquor for human consumption", as it appears under Entry 54 of List II of the Seventh Schedule, to the Constitution of India.** (Para 55)

**Industrial alcohol is broadly categorised into three categories.** Having categorized the three types of industrial alcohols, the Supreme Court has observed that the first two categories i.e., Isopropyl and Methyl Alcohol are poisonous, toxic, and fatal for human consumption. Therefore, they are capable of industrial use only. Further, owing to their inherent chemical properties, those two categories of alcohol cannot be purified or used to produce any "intoxicating liquor" or ''potable liquor", for human consumption. Only the third category of industrial alcohol namely, Ethyl Alcohol or Ethanol is capable of use to manufacture "intoxicating liquor" or potable liquor. Ethanol or Rectified Spirit upon redistillation, fractional distillation etc., whereby impurities are removed, is rendered purer in content. It then comes to be described as ENA (Extra Neutral Alcohol). (Para 49, 50, 51)

**IMFL (Indian Made Foreign Liquor) or country liquor or any other liquor that may qualify as "alcoholic liquor for human consumption", uses ENA as a raw material.** (Para 52)

**In any case, for a commodity to be described as an "alcoholic liquor for human consumption", it must be capable or ready to be consumed, in that state itself-as a beverage.** An alcoholic liquor having 90%-95% content of Ethanol is certainly not that commodity. Such alcohol is not, and it cannot be marketed for human consumption. If consumed, it would be unbearably toxic and, therefore, never fit for human consumption. (Para 53)

**B. Indisputably, tax on all goods and services, except supply of "alcoholic liquor for human consumption" would fall under the GST regime.** It is that change to the Constitutional scheme that has been given effect - by substituting the pre-existing Entry 54 of List II of the Seventh Schedule, to the Constitution of India. (Para 57)

Under that pre-existing entry, the State legislatures were competent to enact laws to tax sale and purchase of all goods, other than the newspapers (subject to Entry 92A of List I). Upon enactment of the 101st Constitution Amendment, that power is heavily curtailed (under the substituted Entry 54 of List II of the Seventh Schedule, to the Constitution of India), to certain items specified therein namely, petroleum crude, high speed diesel, motor-spirit/petrol, natural gas, aviation turbine fuel and "alcoholic liquor for human consumption". A corresponding change was made by the Parliament to the definition of the term 'goods', under Section 2(d) of the Central Sales Tax Act, 1956. It was also substituted, to limit the same to the exact six items, finding mention in the substituted Entry 54 of List II of the Seventh Schedule, to the Constitution of India. (Para 57)

**Both the Parliament and the State legislatures, sacrificed their pre-existing, respective legislative competence to - enact laws to impose duties of excise and to tax sales of 'alcoholic liquors not-for human consumption', at the high altar of the 101st Constitution Amendment, enacted to consecrate the GST laws.** The express intent of that Constitutional change appears to be one - to tax all alcohols except "alcoholic liquor for human consumption", under the GST regime, only. Thus, alcoholic liquor not for human consumption or industrial alcohol or

non-potable alcohol, is subject to GST laws, only. (Para 60)

That Constitutional intent was unequivocally recognized by the State legislature. It resonates in perfect harmony, through the instrument of incorporation of Section 174(1)(i) to the UPGST Act 2017. (Para 60)

**C. 1) Impugned Notification seeks to overreach the Constitutional scheme, as amended by the 101st Constitution Amendment.** By that Constitution Amendment, the only surviving legislative field to impose taxes (saved exclusively with the State legislatures), finds mention in Entry 54 (as substituted). **It is only with respect to "alcoholic liquor for human consumption". Since ENA is not that, the State legislature cannot circumvent the Constitutional scheme by introducing a tax on its sale, by describing it as 'non-GST alcohol'.** (Para 62)

**Describing ENA as 'non-GST alcohol' is impermissible.** By virtue of Article 366(12-A) of the Constitution of India, 'non-GST alcohol' may only be "alcohol for human consumption". By virtue of the clear dictum of the Supreme Court, ENA is not fit for human consumption. Hence, for reasons noted above, it would remain a 'GST-alcohol', if such a thing exists. (Para 63)

**2) For a tax to be levied on sale of a commodity, its identity *in presenti* alone is relevant.** The intended use to which a commodity may be put, and the character or identity of the commodity manufactured therefrom, would never be relevant to impose a differential rate of tax on sale of that commodity, depending upon different uses, it may be put to. (Para 63)

**Alcoholic or "intoxicant liquor" must be understood as these are, i.e., in the presenti, and not what these may become or be capable of or able to become upon application of certain processes etc**. Applying that law, even today, as a commodity, ENA remains an alcohol or alcoholic liquor not for human consumption, under Entry 54 of List II of the Seventh Schedule, to the Constitution of India. (Para 54)

As a fact, there exists only one type of ENA. It may be put to different uses i.e., to manufacture either potable alcohol or chemicals or other commodities or all or any of them. By looking at any quantity of ENA, its use may never be predicted or pre-determined. To subject it to differential rates of tax under the UPVAT Act, depending solely on the intent of the purchaser (to use it a specified way), may never qualify as a tax on the sale of the goods. It may transform into another kind of tax. (Para 63)

**3) In any case, the use to which ENA may be put may be relevant to the legislature to determine the measure or the rate of tax to be suffered by it, but not to the identity of the taxable commodity.** That may be established based on its form, shape, and commercial identity, by the people who deal in it. Since ENA is not a 'non-GST' alcohol, the question of measure or rate of tax thereon (based on its use), is extraneous to the issue at hand. (Para 63)

**D. Issue for consideration is whether the State may ever be able to defend a taxation law or whether the State may ever be able to enact a taxation law, referable to Entry 8 of List II of the Seventh Schedule, to the Constitution of India, to impose tax on sale.** (Para 64)

The UPVAT Act, 2017 was not a law enacted with reference to Entry 8 of List II of the Seventh Schedule,-to the Constitution of India rather, it was a law referable only to Entry 54 of List II of the Seventh Schedule, to the Constitution of India, as it then existed. (Para 64)

**That Entry only creates a field of legislation by State legislature to enact any law on intoxicating liquors**. The words 'that is to say', restrict and confine the scope and ambit of those laws – w.r.t. production, manufacture, possession, transport, purchase, and sale and matters incidental or ancillary thereto. **It does not grant any legislative competence to the State legislature to impose a tax on intoxicating liquors.** (Para 68)

**E. Words and Phrases – "*that is to say*" - The phrase "that is to say" appearing in**

**Entry 8 of List II of the Seventh Schedule, to the Constitution of India may never be read to bestow legislative competence on the State legislatures to enact a law to tax "intoxicating liquors".** That competence must remain confined to the matters specified after that phrase, appearing under that Entry or matters ancillary or incidental thereto, such as regulatory measures. (Para 68)

**It is declared, the State lost its legislative competence to enact laws, to impose tax on sales of ENA, upon the enactment of the 101st Constitution Amendment.** Consequently, and upon considering Section 174(1)(i) of UPGST Act, 2017, the impugned Notification dated 17.12.2019, insofar as it seeks to impose UPVAT on ENA, Rectified Spirit and SDS, is ultra vires, both on account of lack of (i) legislative competence and (ii) valid delegation. (Para 70, 73)

**Writ petitions allowed.** (E-4)

**Precedent followed:**

1. Synthetics and Chemicals Ltd. & ors. Vs St. of U.P. & ors., (1990) 1 SCC 109 (Para 23)

2. St. of U.P. & ors. Vs Modi Distillery & ors., (1995) 5 SCC 753 (Para 24)

3. Bihar Distillery & anr. Vs U.O.I. & ors. (1997) 2 SCC 727 (Para 25)

4. Deccan Sugar & Abkari Co. Ltd. Vs Commissioner of Excise, A.P., (1998) 3 SCC 272 (Para 26)

5. Deccan Sugar & Abkari Co. Ltd. Vs Commissioner of Excise, A.P. & concerned matters, (2004) 1 SCC 243 (Para 26)

6. St. of U.P. & ors. Vs VAM Organics Chemicals Ltd. & ors. (2004) 1 SCC 225 (Para 27)

7. St. of Jharkhand & ors. Vs Ajanta Bottlers and Blenders Pvt. Ltd., (2019) 7 SCC 545 (Para 29)

8. M.P.V. Sundararamier & Co. Vs State of A.P. & ors., AIR 1958 SC 468 (Para 30)

9. State of Mysore & ors. Vs D. Cawasji and Company & ors., (1970) 3 SCC 710 (Para 30)

10. Hoechst Pharmaceuticals Ltd. & ors. Vs St. of Bihar & ors., (1983) 4 SCC 45 (Para 40)

11. Southern Pharmaceuticals and Chemicals, Trichur & ors., Vs St. of Kerala & ors., (1981) 4 SCC 391 (Para 40)

12. St. of Bihar & ors. Vs Shree Baidyanath Ayurved Bhawan (P) Ltd. & ors., (2005) 2 SCC 762 (Para 42)

13. VAM Organics Chemicals Ltd. & anr. Vs State of U.P. & ors. (1997) 2 SCC 715 (Para 45)

14. Navnit Lal C Javeri Vs K.K. Sen, Appellate Assistant Commissioner of Income Tax, Bombay, AIR 1965 SC 1375 (Para 47)

15. Delhi Cloth and General Mills Co. Ltd. Vs Excise Commissioner, U.P., Allahabad, 1973 All LJ 629 (Para 67)

16. State of T.N. Vs Pyare Lal Malhotra, (1976) 1 SCC 834 (Para 68)

(Delivered by Hon'ble Naheed Ara Moonis, J.
&
Hon'ble Saumitra Dayal Singh, J.)

1. Heard Shri Navin Sinha, learned Senior Advocate, assisted by Shri Nishant Mishra, learned counsel for the petitioner in Writ Tax Nos. 378 of 2021 and 383 of 2021; Shri Nishant Mishra in Writ Tax Nos. 369 of 2021, 370 of 2021, 371 of 2021 and 385 of 2021; Shri Rahul Agarwal, learned counsel for the petitioner in Writ Tax No. 355 of 2020; Shri Pawan Shri Agarwal, learned counsel for the petitioner in Writ Tax Nos. 364 of 2021 and 451 of 2021; Shri Manish Goel, learned Additional Advocate General assisted by Shri Apurva Hajela and Shri A.C. Tripathi, learned Standing Counsel, for the State.

2. In Writ Tax No. 378 of 2021, the petitioner has sought relief in the nature of a declaration that the State legislature (of Uttar Pradesh) lost its legislative competence to impose or levy tax on sale of Extra Neutral **Alcohol** (in short, 'ENA'), after enactment of the 101st Constitution Amendment, with effect from 01.07.2017 - as a direct consequence of the enactment of Article 246A read with Article 366 (12-A) of the Constitution of India, read with the substituted Entry 54 of List II of the Seventh Schedule, to the Constitution of India. Further relief has been sought, to seek quashing of the Notification No. KA.NI-2-1793 dated 17 December 2019, issued under Section 74 read with Section 4(4) of the Uttar Pradesh Value Added Tax Act, 2008 (in short, UPVAT Act), whereby Schedule entry 1-A was added to the pre-existing Schedule IV (below entry 1), of the UPVAT Act, to impose tax on sale of ENA, at the rate 5 percent, at the point of Manufacturer or Importer, w.e.f. 09.12.2019. Challenge has also been raised to the Circular/letters dated 10.06.2021 and 11.06.2021 issued by the Additional Commissioner Grade-I, Commercial Tax, directing the subordinate authority to charge and collect UPVAT on ENA used in the manufacture of "alcoholic liquor for human consumption". Next, purely alternatively, adjustment of the GST levied and paid on ENA and Special Denatured Spirit (in short, 'SDS'), has been sought, against the UPVAT liability imposed by the State, on the above described commodities. By way of an amendment (allowed), challenge has also been raised to the assessment order dated 30.06.2021, for the A.Y. 2017-18 (U.P. & Central) (01.07.2017 to 31.03.2018), whereby UPVAT & Central Sales Tax has been assessed on ENA, treating that commodity to be covered under entry 1 of Schedule IV of the UPVAT Act.

3. In Writ Tax No. 369 of 2021, besides the challenge raised to the legislative competence and the Notification dated 17.12.2019 (as above), challenge has also been raised to the assessment notice dated 08.06.2021, issued against that petitioner, for A.Y. 2019-20, as also Circular/letters dated 10.06.2021 and 11.06.2021 (as above).

4. Similarly, in Writ Tax No 370 of 2021, besides the challenge raised to the legislative competence (as above), challenge has been raised to the assessment notice dated 15.06.2021 issued to that petitioner, for A.Y. 2017-18 (01.07.2017 to 31.03.2018); the assessment order dated 30.06.2021 passed under Section 29 of the UPVAT Act, for A.Y. 2017-18 (01.07.2017 to 31.03.2018) and; the Circular/letters dated 10.06.2021 and 11.06.2021 (as above).

5. In Writ Tax No. 383 of 2021, besides the challenge raised to the legislative competence (as above) and the Notification dated 17.12.2019, challenge has also been raised to the assessment notice dated 21.06.2021 issued under Section 28 of UPVAT Act, for A.Y. 2018-19 (U.P.) and, the Circular/letters dated 10.06.2021 and 11.06.2021 (as above).

6. In Writ Tax No. 371 of 2021, besides the challenge raised to the legislative competence and Notification dated 17.12.2019 (as above), challenge has also been raised to the assessment notice dated 08.06.2021 issued under Section 28 of the UPVAT Act, for A.Y. 2019-20 and the Circular/letters dated 10.06.2021 and 11.06.2021 (as above).

7. In Writ Tax No. 364 of 2021, besides the challenge to the legislative

competence (as above), challenge has also been raised to two assessment notices, both dated 11.06.2021, issued under Section 29 of the UPVAT Act and the Central Sales Tax Act, seeking to impose tax under the UPVAT Act as also the Central Sales Tax Act, for A.Y. 2017-18 (01.07.2017 to 31.03.2018) (UP & Central).

8. In Writ Tax No. 451 of 2021, besides the challenge to the legislative competence and the Notification dated 17.12.2019 (as above), challenge has also been raised to two assessment notices, both dated 07.07.2021, one issued under Section 28 of the UPVAT Act and the other under Section 9 (2) Central Sales Tax Act, for A.Y. 2019-2020.

9. Writ Tax No. 355 of 2020 has been filed by the U.P. Sugar Mills Association seeking to challenge the legislative competence of the State to levy UPVAT on sales of ENA and Rectified Spirit, used to manufacture "alcoholic liquor for human consumption". A further challenge has been raised to the Notification dated 17.12.2019 (as above).

10. In Writ Tax No. 385 of 2021, besides the challenge raised to the legislative competence and Notification dated 17.12.2019 (as above), challenge has also been raised to the assessment notice dated 21.06.2021 issued under Section 28 of the UPVAT Act, for A.Y. 2018-19 as also Circular/letters dated 10.06.2021 and 11.06.2021 (as above).

11. Since identical facts are involved in all the above writ petitions and challenge raised is also identical, we have heard these petitions together. Basic/essential facts, common to all the writ petitions, are extracted below.

12. According to the petitioners ENA, both denatured and un-denatured as also SDS fall under the heading 2207 of the First Schedule to the Customs Tariff Act, 1975. ENA, is concentrated Ethyl Alcohol (Ethanol) having alcohol content about 95 percent. Similarly, SDS is spirit or neutral alcohol used for industrial purposes only. According to the petitioners, they manufacture and sell ENA, both to distilleries that manufacture "alcoholic liquor for human consumption" and to chemical and other industries. Owing to high alcohol content (above 95 percent), both ENA and SDS are unfit for human consumption. Prior to the 101st Constitution amendment and, in light of Article 246 of the Constitution read with Entry 54 of List II (as those provisions then existed), the State legislature had the legislative competence to enact laws to impose tax on sale or purchase of any goods other than newspapers, subject however, to the provisions of Entry 92A of List I. Also, in view of Article 246 of the Constitution read with Entry 51 of List II of the Seventh Schedule, the State Government had the legislative competence to enact laws to impose duties of excise on goods manufactured or produced in the State, being (i) alcoholic liquors for human consumption and (ii) opium, Indian hemp etc.

13. On the other hand, in view of Article 246 read with Entry 92, the Parliament had the legislative competence to enact laws, to impose tax on sale or purchase of newspapers and on advertisements published therein. Similarly, by virtue of Article 246 read with Entry 84 of List I of the Seventh Schedule, the Parliament had the legislative competence to enact laws to impose duties of excise on tobacco and other goods

manufactured or produced in India, except (i) alcoholic liquors for human consumption and (ii) opium, Indian hemp etc.

14. It is an admitted case between the parties, prior to the introduction of 101st Constitution Amendment, various State legislatures had made laws to impose tax on sale and to levy duties of excise on "alcoholic liquors for human consumption". Insofar as the Parliament is concerned, prior to the aforesaid amendment, it had enacted laws imposing duties of excise on manufacture of alcohol - not for human consumption, including ENA and SDS.

15. In the State of Uttar Pradesh, there pre-existed, the United Provinces Sales of Motor Spirit, Diesel Oil and Alcohol Taxation Act, 1939 (hereinafter referred to as the 'United Provinces Act'). Under Section 2 (aaaa) of that Act, the term 'alcohol' was defined as Ethyl Alcohol not being "alcoholic liquor for human consumption". It included, Rectified Spirit, Denatured Spirit and Absolute Alcohol. Under Section 3(c) of the said Act, there existed a provision to levy tax, at the point of first purchase of 'alcohol', at the prescribed rate.

16. With time, under Section 4(1)(c) read with Schedule IV to the UPVAT Act, tax became payable on the sale of goods specified in the said Schedule, (including 'alcohol' as defined under the United Provinces Act), at the rate 32.5 percent. For ready reference, Entry No.1 of Schedule IV to the UPVAT Act, is quoted below:

| *Sl No* | *Name and description of goods* | *Point of Tax* | *Rate of Tax %* |
|---|---|---|---|
| *1.* | *Spirits and Spirituous Liquors of all kinds including Alcohol, as defined under the United Provinces Sales of Motor Spirit, Diesel Oil and Alcohol Taxation Act, 1939, but excluding country liquors* | *M or I* | *32.5%* |

Also, under Section 7(c) of the UPVAT Act, the State Government was delegated a power, to not levy UPVAT on such sale or purchase or, sale or purchase of such goods by such class of dealers, as may be specified in the Notification issued by it, in that regard. In exercise of that power, the State Government issued Notification No. KA.NI-2-14/XI dated 10.01.2008. It reads:

*"WHEREAS the State Government is satisfied that it is expedient so to do in public interest.*

*Now, Therefore, in exercise of the powers under clause (c) of Section 7 read with Section 74 of the Uttar Pradesh Value Added Tax Ordinance, 2007 [U.P. Ordinance no. 37 of 2007], the Governor is pleased to direct, that no tax shall be payable under the said Ordinance with effect from January 01, 2008, on the sale or purchase of country liquor and spirit and spirituous liquors of all kinds including methyl alcohol in Uttar Pradesh by manufacturer or importer dealer subject to the condition that a certificate prescribed by the Commissioner of Commercial Taxes, Uttar Pradesh is submitted by the concerned dealer with the return of the tax period before the assessing authority to the effect that consideration fee or excise duty payable under the United Provinces Excise Act, 1910 or the United Provinces Sales of Motor Spirit, Diesel Oil and Alcohol Taxation Act, 1939, as the case may be, has been paid."*

17. Thus, UPVAT did not apply to the goods specified in Entry No.1 to Schedule IV of the UPVAT Act, if the Manufacturer or the Importer dealer had paid excise duty under the United Provinces Act and, he had been issued the prescribed certificate, by the Commissioner of Commercial Tax, Uttar Pradesh, in that regard. That Notification was later amended by Notification No. KA.NI-2-879/XI dated 26.03.2008. Thereby, the words 'including methyl alcohol' were substituted with the words 'excluding methyl Alcohol'. Also, the words 'manufacture or importer dealer' were substituted with the word 'dealer'. The words 'consideration fee or excise duty' were replaced by- 'consideration fee, excise duty, fees or purchase tax'.

18. It would be fruitful for our discussion to extract the unamended and amended taxation Entries of List I and List II (as amended by the 101st Constitution Amendment), as have also been extensively referred to by the learned counsel for the parties. A comparative chart showing relevant Entries before and after that amendment read as under:

List II, Seventh Schedule, Constitution of India

| *Unamended Entries of List II (State List)* | *Entries as Amended* |
|---|---|
| *8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.* | *Same as before* |
| *51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India;-*<br>*(a) alcoholic liquors for human consumption;*<br>*(b) opium, Indian hemp and other narcotic drugs and narcotics,*<br>*but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.* | *Same as before* |
| *54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.* | *54. Taxes on the sale of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for huma consumption, but not including sale in the course of inter-State trade or commerce or sale in the course of international trade or commerce of such goods.* |

List I, Seventh Schedule, Constitution of India

| *Unamended Entries of List I (Union List)* | *Entries as Amended/Inserted* |
|---|---|
| *84. Duties of excise on tobacco and other goods manufactured or produced in India except -*<br>*(a) alcoholic liquors for human consumption;*<br>*(b) opium, Indian hemp and other narcotic drugs and narcotics,*<br>*but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.* | *84. Duties of excise on the following goods manufactured or produced in India, namely: -*<br>*(a) petroleum crude;*<br>*(b) high speed diesel;*<br>*(c) motor spirit (commonly known as petrol);*<br>*(d) natural gas;*<br>*(e) aviation turbine fuel; and*<br>*(f) tobacco and tobacco products.* |
| *92. Taxes on the sale or purchase of newspapers and on advertisements published therein.* | *Omitted* |
| *92A. Did not exist* | *92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State* |

| | |
|---|---|
| | *trade or commerce. (Inserted )* |

19. Also, by the 101st Constitution amendment, Article 246A was first enacted, as below:

***"246A.Special provision with respect to goods and services tax.- (1)*** *Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause(2), the Legislature every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.*

*(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.*

*Explanation.- The provisions of this article, shall, in respect of goods and services tax refer to in clause(5) of Article 279-A, take effect from the date recommended by the Goods and Services Tax Council. "*

20. Further, Article 366 (12A) introduced simultaneously, reads thus:

***"366. Definitions -*** *In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say-*

***(12A).*** *"goods and services tax" means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption."*

21. Consequently, the Parliament also enacted the Central GST Act, 2017. The State legislature, on its part, enacted the UPGST Act, 2017. Also, by Act No.18 of 2017, the Parliament substituted Section 2(d) of the Central Sales Tax Act, 1956. The original and the substituted texts of Section 2(d) of that Act, read as below:

| *Unamended Section 2(d)* | *Section 2(d) as substituted* |
|---|---|
| *Section 2(d) as substituted* | *(d) "goods" means -*<br>*(i) petroleum crude;*<br>*(ii) high speed diesel;*<br>*(iii) motor spirit (commonly known as petrol);*<br>*(iv) natural gas;*<br>*(v) aviation turbine fuel; and*<br>*(vi) alcoholic liquor for human consumption* |

22. Last, the impugned Notification No. KA.NI-2-1793 dated 17.12.2019, reads as below:

***Uttar Pradesh Shasan Sansthagat Vitta, Kar Evam Nibandhan Anubhag-2***

*In pursuance of the provisions of clause (3) of Article 348 of the Constitution, the Governor is pleased to order the publication of the following English Translation of Government Notificaton no. KA.NI-2-1793/XI-29(134)/17-U.P. Act-5-2008-Order-(80)-2019, dated 17 December, 2019;*

***NOTIFICATION***

***No.-KA.NI-2-1793/XI-29(134)/17-U.P.Act-5-2008-Order-(80)-2019***

***Lucknow : Dated : 17 December, 2019***

***WHEREAS*** *the State Government is satisfied that it is expedient so to do in public interest;*

*NOW, THEREFORE, In exercise of the powers under sub-section (4) of section 4 read with section 74 of the Uttar Pradesh Value Added Tax Act, 2008 (U.P. Act no.5 of 2008), the Governor is pleased to make with effect from 09. December,*

*2019, the following amendment in Schedule-IV to the said Act:-*

***Amendment***

*In the aforesaid Schedule, after serial no.1 the following serial and entries relating there to shall column-wise be inserted, namely:-*

| *S. No.* | *Name and Description of goods* | *Point of Tax* | *Rate of Tax %* |
|---|---|---|---|
| 1 | 2 | 3 | 4 |
| *1-A* | *Any non GST alcohol, when sold for use in the process of manufacture of alcoholic liquor for human consumption against a certificate issued by the Commissioner of State Excise, Uttar Pradesh or by the officer authorised by him in this regard.* | *M or I* | *5%* |

23. It has been vehemently urged by Sri Sinha, before the introduction of the 101st Constitution Amendment, the competence of the State legislatures to impose duties of excise on industrial alcohol (i.e. non-potable alcohol), came up for consideration before a seven-Judge Constitution Bench of the Supreme Court, in **Synthetics and Chemicals Ltd. & Ors. Vs. State of U.P. & Ors., (1990) 1 SCC 109**. Relying, both on the majority opinion, as also the concurring opinion, it has been urged, the legislative competence of the States (to levy duties of excise) was confined to "alcoholic liquors for human consumption" - as an existing commodity, on the date of that levy being imposed. The argument-denatured spirit can also be transformed to "alcoholic liquors for human consumption", and therefore be amenable to duties of excise, by the State legislatures, was specifically rejected. Ethyl Alcohol (95%) (also known as Rectified Spirit) i.e. industrial alcohol, was opined to be not-fit for human consumption. The range of alcohol in potable alcohol i.e. "alcoholic liquors for human consumption" was also opined to be 19% - 43%. The conclusions reached in that decision as recorded in paras 54, 86 and 88 (majority view) and para 101 (concurring view) of the report, read as below:

*"54. We have no doubt that the framers of the Constitution when they used the expression ''alcoholic liquor for human consumption' they meant at that time and still the expression means that liquor which as it is is consumable in the sense capable of being taken by human beings as such as beverage of drinks. Hence, the expression under Entry 84, List I must be understood in that light. We were taken through various dictionary and other meanings and also invited to the process of manufacture of alcohol in order to induce us to accept the position that denatured spirit can also be by appropriate cultivation or application or admixture with water or with others, be transformed into "alcoholic liquor for human consumption' and as such transformation would not entail any process of manufacture as such. There will not be any organic or fundamental change in this transformation, we were told. We are, however, unable to enter into this examination. Constitutional provisions specially dealing with the delimitation of powers in a federal polity must be understood in a broad commonsense point of view as understood by common people for whom the Constitution is made. In terminology, as understood by the framers of the Constitution, and also as viewed at the relevant time of its interpretation, it is not possible to proceed otherwise; alcoholic or intoxicating liquors must be understood as these are, not what these are*

*capable of or able to become. It is also not possible to accept the submission that vend fee in U.P. is a pre-Constitution imposition and would not be subject to Article 245 of the Constitution. The present extent of imposition of vend fee is not a pre-Constitution imposition, as we noticed from the change of rate from time to time."*

*86. The position with regard to the control of alcohol industry has undergone material and significant change after the amendment of 1956 to the IDR Act. After the amendment, the State is left with only the following powers to legislate in respect of alcohol:*

*(a) It may pass any legislation in the nature of prohibition of potable liquor referable to Entry 6 of List II and regulating powers.*

*(b) It may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol.*

*(c) The State may charge excise duty on potable alcohol and sales tax under Entry 52 of List II. However, sales tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Orders, sales tax cannot be charged by the State on industrial alcohol.*

*(d) However, in case State is rendering any service, as distinct from its claim of so-called grant of privilege, it may charge fees based on quid pro quo. See in this connection, the observations of Indian Mica case [(1971) 2 SCC 236 : 1971 Supp SCR 319 : AIR 1971 SC 1182] .*

*88. On an analysis of the aforesaid decisions and practice, we are clearly of the opinion that in respect of industrial alcohol the States are not authorised to impose the impost they have purported to do. In that view of the matter, the contentions of the petitioners must succeed and such impositions and imposts must go as being invalid in law so far as industrial alcohol is concerned. We make it clear that this will not affect any impost so far as potable alcohol as commonly understood is concerned. It will also not affect any imposition of levy on industrial alcohol fee where there are circumstances to establish that there was quid pro quo for the fee sought to be imposed. This will not affect any regulating measure as such.*

*101. Under these circumstances therefore it is clear that the State legislature had no authority to levy duty or tax on alcohol which is not for human consumption as that could only be levied by the Centre."*

24. Then, in **State of U.P. & Ors. Vs. Modi Distillery & Ors., (1995) 5 SCC 753,** an issue had arisen as to competence of the State legislature to impose duties of excise on (i) wastage of IMFL, exported outside the State, (ii) wastage of high strength spirit, during transportation from the distillery to warehouse and (iii) obscuration. Upon consideration of the State's submission in that regard, it was held as below:

*"10. What the State seeks to levy excise duty upon in the Group "B' cases is the wastage of liquor after distillation, but before dilution; and, in the Group "D' cases, the pipeline loss of liquor during the process of manufacture, before dilution. It is clear, therefore, that what the State seeks to levy excise duty upon is not alcoholic liquor for human consumption but the raw material or input still in process of being rendered fit for consumption by human beings. The State is not empowered to levy excise duty on the raw material or input that is in the process of being made into alcoholic liquor for human consumption."*

25. Yet, a contrary view was taken by a two-Judge bench decision of the Supreme Court in **Bihar Distillery & Anr. Vs. Union of India & Ors., (1997) 2 SCC 727,** upon a different reading of the aforesaid Constitution bench decision of the Supreme Court in **Synthetics and Chemicals Ltd. & Ors. Vs. State of U.P. & Ors.** (supra). It was observed as below:

*"10. A reading of the above entries would immediately disclose that Entry 51 in List II and Entry 84 in List I compliment each other. Both provide for duties of excise but while the States are empowered to levy duties of excise on (a)alcoholic liquors for human consumption and (b) opium, Indian hemp and narcotics manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India [but excluding medicinal and toilet preparation containing alcohol or any substance included in sub-para (b) of this Entry], the Union is empowered to levy duties of excise on tobacco and other goods manufactured or produced in India except (a) alcoholic liquors for human consumption and (b) opium, Indian hemp and other narcotic including drugs and narcotics. Medicinal and toilet preparations containing alcohol or any substance included in sub-para (b) which are excluded from Entry 51 in List II are expressly included in this entry. For our purposes, the relevant expression is "alcoholic liquors for human consumption" which is included in Entry 51 in List II and excluded from Entry 84 in List I. The words employed denote that there may be alcoholic liquors meant for human consumption as well as for other purposes. Now coming to Entry 8 in List II, it does not use the expression "alcoholic liquors for human consumption". It employs the expression "intoxicating liquors" which expression is, of course, not qualified by words "for human consumption". This is for the obvious reason that the very word "intoxicating" signifies "for human consumption". Entry 8, it is necessary to emphasize, places all aspects of intoxicating liquors within the State's sphere; production, manufacture, possession, transport, purchase and sale of intoxicating liquors is placed within the exclusive domain of the States. Entry 6, which inter alia speaks of "public health" is relevant only for the reason that it furnishes a ground for prohibiting consumption of intoxicating liquors. Coming to Entry 33 in List III, the language of clause (a) thereof is significant. Even though control of certain industries may have been taken over by the Union by virtue of a declaration made by Parliament in terms of Entry 52 in List I, yet the "trade, commerce in, and the production, supply and distribution of the products" of such industry is placed in the concurrent field, which in the present context means that though the control of alcohol industry is taken over by the Union, trade, commerce in and the production, supply and distribution of the products of alcohol industry can be regulated both by the Union and the States subject, of course, to Article 254. It also means, as will be explained later, that insofar as the field is not occupied by the laws made by the Union, the States are free to legislate.*

*11. In the matter of industries mentioned in List II, Entry 24 in List II is in the nature of general entry. It speaks of industries but is made expressly subject to Entries 7 and 52 of List I. By making a declaration in terms of Entry 52 in List I in Section 2 of the IDR Act, Parliament has taken control of the several industries*

*mentioned in the Schedule to the Act. The States have been denuded of their power to legislate with respect to those industries on that account. It has, however, been held by a three-Judge Bench of this Court in State of A.P. v.McDowell & Co. [(1996) 3 SCC 709] that Entry 52 overrides only Entry 24 in List II and no other Entry in List II. It has been held that Entry 8 is not overridden or overborne in any manner by Entry 52 -- which means that so far as intoxicating liquors are concerned, they are within the exclusive sphere of the States. We may pause at this stage and append a clarification which has become necessary in the light of certain words occurring in para 85 of the judgment of Sabyasachi Mukharji, J. in Synthetics [ Whenever we refer to "Synthetics" hereafter, it would mean the judgment of the seven-Judge Constitution Bench reported in (1990) 1 SCC 109.] . At the inception of para 85 of the said judgment, the following statement occurs: (SCC p. 157)*

*"After the 1956 amendment to the IDR Act bringing alcohol industries (under fermentation industries) as Item 26 of the First Schedule to IDR Act the control of this industry has vested exclusively in the Union. Thereafter, licences to manufacture both potable and non-potable alcohol is vested in the Central Government. Distilleries are manufacturing alcohol under the Central licences under the IDR Act. No privilege for manufacture even if one existed, has been transferred to the distilleries by the State."*

*12. It is obvious that the words "both potable and" occur here as a result of some accidental or typographical error. The entire preceding discussion in the judgment repeatedly affirms that so far as potable alcohols are concerned, they are governed by Entry 8 and are within the exclusive domain of the States. The aforesaid words cannot fit in with the said repeatedly affirmed reasoning. We are, therefore, of the opinion that the said passage cannot be understood as holding that even in respect of the industries engaged in the manufacture or production of potable liquors, the control is vested in the Union by virtue of Item 26 of the First Schedule to the IDR Act. In view of the express language of Entry 8 -- as has been clearly explained in McDowell [(1996) 3 SCC 709] -- so far as potable liquors are concerned, their manufacture, production, possession, transport, purchase and sale is within the exclusive domain of the States and the Union of India has no say in the matter. For a similar clarification with respect to the power of the State to levy sales tax on industrial alcohol, reference may be had to State of U.P. v. Synthetics and Chemicals Ltd. [(1991) 4 SCC 139]."*

26. That decision sought to recognize the competence of the State legislatures, to levy duties of excise on Rectified Spirit, if used to manufacture potable alcohol. Later, the correctness of that view was doubted by another two-Judge bench of the Supreme Court in **Deccan Sugar & Abkari Co. Ltd. Vs. Commissioner of Excise, A.P., (1998) 3 SCC 272.** Upon that reference made, a three-Judge bench of the Supreme Court, in **Deccan Sugar & Abkari Co. Ltd. Vs. Commissioner of Excise, A.P., and connected matters, (2004) 1 SCC 243** again reiterated the earlier ratio of the Constitution bench decision of the Supreme Court, in **Synthetic and Chemicals Limited** (supra), as followed by a three-Judge bench decision in **State of U.P. Vs. Modi Distillery, (1995) 5 SCC 753.** Thus, it was held :

*"2. It is settled by the decision of this Court in Synthetics and Chemicals Ltd.*

*v. State of U.P., (1990) 1 SCC 109 that the State Legislature has no jurisdiction to levy any excise duty on rectified spirit. The State can levy excise duty only on potable liquor fit for human consumption and as rectified spirit does not fall under that category the State Legislature cannot impose any excise duty. The decision in Synthetics and Chemicals Ltd. v. State of U.P. has been followed in State of U.P. v. Modi Distillery, (1995) 5 SCC 753 where certain wastage of ethyl alcohol was sought to be taxed. This Court following the decision in Synthetics and Chemicals Ltd. came to the conclusion that this cannot be done."*

27. That confirmed position in law, was reiterated by a two- Judge bench decision of the Supreme Court in **State of U.P. & Ors. Vs. VAM Organic Chemicals Ltd. & Ors., (2004) 1 SCC 225.** Therein, it was opined as below:

*"22. Article 246 gives to Parliament exclusive power to make laws with respect to the matters enumerated in List I of the Seventh Schedule. Entry 84 of List I and Entry 51 of List II were construed by this Court in Synthetics case[(1990) 1 SCC 109 : 1989 Supp (1) SCR 623] to hold that Parliament alone has the exclusive power to legislate and levy excise tax in respect of industrial alcohol. It is unnecessary to refer to the law with regard to the comparative competence of the Union and the States with regard to levy of excise, regulation and control of industrial alcohol prior to the decision of the Constitution Bench in Synthetics[(1990) 1 SCC 109 : 1989 Supp (1) SCR 623] . Whatever the law was earlier, the decision in Synthetics [(1990) 1 SCC 109 : 1989 Supp (1) SCR 623] now holds the field. In that decision the State's power to levy excise duty was held to be limited by Entry 51 to tax on alcoholic liquors for human consumption. It was also held that Section 2 of the Industries (Development and Regulation) Act, 1951 as well as Serial No. 26 of the First Schedule to that Act covered the whole field on industrial alcohol and its products. Therefore, since the coming into force of the IDR Act on 8-5-1952 the State Legislatures are constitutionally incompetent to levy any tax on industrial alcohol.*

*23. The principle was succinctly reiterated in State of U.P. v. Modi Distillery[(1995) 5 SCC 753] where it was said that the State's power to levy excise duty was limited to alcoholic liquor for human consumption and that the framers of the Constitution, when they used the expression "alcohol liquors for human consumption", meant, and the expression still means, that liquor which, as it is, is consumable in the sense that it is capable of being taken by human beings as such as a beverage or drink. ... Dictionaries and technical books showed that rectified spirit (95 per cent) was an industrial alcohol and not potable as such. ... Therefore even if ethyl alcohol (95 per cent) could be used as a raw material or input, after processing and substantial dilution, in the production of whisky, gin, country liquor etc. nevertheless, it was not "intoxicating liquor" which expression meant only that liquor which was consumable by human beings as it was.*

*(emphasis supplied)*

*Thus the State cannot legislate on industrial alcohol despite the fact that such industrial alcohol has the potential to be used to manufacture alcoholic liquor."*

28. Thus, though denuded of any power to enact a law to levy a duty of excise on alcohol-not for human

consumption, the State legislatures were conceded the legislative competence to enact regulatory laws, to prevent diversion of industrial alcohol, to manufacture alcohol for human consumption.

29. Reliance has also been placed on another decision of the Supreme Court in **State of Jharkhand & Ors. Vs. Ajanta Bottlers and Blenders Private Ltd., (2019) 7 SCC 545** to emphasize - the levy or impost of duties of excise may fructify only upon completion of the distillation process and not earlier. Hence ENA, prior to its transformation into "alcoholic liquor for human consumption", could not be subjected to a duty of excise by the State legislature. Once transformed, there exists no ENA. Relevant to our discussion, the contents of para 11 of that report read as below: -

*"11. We have adverted to the abovementioned process, noted in the written submissions filed by the appellant, so as to give proper interpretation to the impugned notification and the subject rules, in particular Rule 106(Tha). English version of the said rule noted in the notification (as translated by the official translator of this Court reproduced in para 2 above), in our opinion, makes it amply clear that the levy or impost fructifies only upon completion of distillation process (in two stages -- first from rectified spirit to ENA and then from ENA to IMFL) and in particular converting into a final product "IMFL". The collection of impost is, however, deferred until the bottling of that product. In other words, the levy is not at the stage of import of rectified spirit within the State; nor at the stage of initial distillation thereof to Extra Neutral Alcohol (ENA) and not until the product IMFL is ready for bottling as such. Thus, the levy under the impugned rule ripens or fructifies only after the original raw material (imported rectified spirit) has undergone distillation process at two different stages and transmute and mutate into an intoxicant or potable alcohol palatable to human consumption, but its (impost) collection is effected just before bottling it in that form (potable liquor). Indeed, the levy predicated in this rule is on the total quantity of imported rectified spirit utilised for mutating it in the form of IMFL, a new produce. The last part of the rule stipulates the quantum of charges to be levied on such utilised imported rectified spirit for production of the foreign liquor. For that limited purpose, the quantity of imported rectified spirit utilised in the production of potable liquor, is reckoned."*

30. Then, relying on the decision of the Supreme Court in **Synthetics and Chemicals Limited** (supra) and another Constitution bench decision of the Supreme Court in **M.P.V. Sundararamier & Co. Vs. State of A.P. & Ors., AIR 1958 SC 468** as also the decision of the Supreme Court in **State of Mysore & Ors. Vs. D. Cawasji & Company & Ors., (1970) 3 SCC 710,** it has been submitted, the legislative competence to enact a law imposing tax, cannot be derived from a general entry, falling under either of the three Lists of the Seventh Schedule, to the Constitution of India. Such competence must be derived under a specific taxing entry alone. Therefore, according to learned senior counsel for the petitioner, there is no applicability of Entry 8 of List II of the Seventh Schedule, to the Constitution and that general Entry cannot be referred to or relied upon to enact a law to impose tax on the sale or purchase of ENA.

31. As a fact, in the background law above noted, relying on the pleadings made

in the writ petition and the reply furnished in the counter affidavit, it has been submitted, undoubtedly, ENA is not an "alcoholic liquor for human consumption". Second, there is no denial that GST was paid on ENA, with effect from 01.07.2017. Read in conjunction to the first submission advanced by learned Senior Counsel for the petitioners (as to lack of legislative competence of the State legislature to impose UPVAT on ENA), its delegate, the State Government could not have issued the impugned Notification dated 17.12.2019 and thus colourably or artificially created a commodity by describing it "non-GST alcohol". Merely because ENA may be used to manufacture another commodity namely, "alcoholic liquor for human consumption", no new commodity can come into existence, either on a notional or deemed basis nor, it (ENA) can ever be described as a non-GST alcohol, only to impose tax thereon.

32. In any case, GST being levied under authority of law, and therefore paid on ENA, the levy of UPVAT on ENA, created by the impugned Notification is invalid and wholly unenforceable. Sale of ENA may not be made taxable under the UPVAT Act - on the basis of an artificial distinction drawn relying on the words - "for use in the process of manufacture of..." That line of reasoning was specifically disapproved by the Supreme Court in **State of U.P. & Ors. Vs. VAM Organic Chemicals Ltd. & Ors., (2004) 1 SCC 225** and in **State of Jharkhand & Ors. Vs. Ajanta Bottlers and Blenders Private Ltd**. (supra), applying the ratio of the seven-Judge Constitution bench decision of the Supreme Court in **Synthetics and Chemicals Limited** (supra).

33. Insofar as GST has been levied and paid on ENA and it has not undergone any change, either physical or chemical or as to its commercial identity, *(in presenti)*, there arises no legislative competence with the State legislature to impose tax on that commodity because it may eventually be used to manufacture a commodity that may be "alcoholic liquor for human consumption", that would be taxable under Entry 54 of List II of the Seventh Schedule, to the Constitution of India. The commodity (ENA) would remain outside the purview of that taxing entry, as substituted by the 101st Constitution Amendment.

34. Relying on Article 246A read with Article 366 (12A) of the Constitution of India, it has been further submitted, insofar as taxes on supply of goods/commodities are concerned, upon the 101st Constitution amendment, besides "alcoholic liquor for human consumption", all other goods or commodities may remain under the GST regime. Therefore, in any case, UPVAT may never be imposed on ENA as it is alcohol not-for human consumption, and therefore necessarily included under the GST regime. That intent of the Constitution of India was acknowledged and statutorily incorporated, by virtue of Section 174(1)(i) of the UPGST Act. It repealed UPVAT Act, 2008 except with respect to laws-to tax goods included under Entry 54 of List II of the Seventh Schedule, to the Constitution of India i.e., with respect to the six commodities (including alcoholic liquor for human consumption), specified under that legislative entry.

35. Thus, of all alcohols, only "alcoholic liquor for human consumption" may be subjected to UPVAT. Correspondingly, the Parliament has substituted Section 2(d) of the Central

Sales Tax Act, 1956 to include "alcoholic liquor for human consumption", in the definition of 'goods' but it has purposely left out ENA and other alcoholic liquors, not for human consumption, from the ambit of taxation of 'goods' under that Act. For the self-same reason, the Parliament has substituted Entry 84 of List I of the Seventh Schedule, to the Constitution of India, to save to itself, the legislative competence to levy duties of excise only on the same commodities finding mention in Entry 54 of List II of the Seventh Schedule, to the Constitution of India, besides tobacco & tobacco products but except, "alcoholic liquor for human consumption". Therefore, the impugned Notification dated 17.12.2019 is beyond the legislative competence of the State Legislature, besides being otherwise invalid, as noted above.

36. Last, it has been submitted, once the State had levied, charged and collected GST on ENA, at the rate of 9 percent, it cannot subject the same sale transaction (of that commodity), to further tax, on the basis of the aforesaid artificial distinction attempted to be made. In fact, if the contention of the State were to be accepted, it would make the State liable to refund the GST on ENA being excess tax suffered by that commodity, under the GST regime.

37. Shri Rahul Agarwal learned counsel for the petitioner in Writ Tax No. 355 of 2020 has adopted the submissions advanced by Shri Sinha. He vehemently urged, besides the admission made by the State in the counter affidavit filed in Writ Tax No. 364 of 2021, it is beyond the pale of doubt, whether ENA is not "alcoholic liquor for human consumption". It is industrial alcohol. To that end, he has extensively referred to and relied upon another decision of the Supreme Court in **State of Jharkhand & Ors. Vs. Ajanta Bottlers and Blenders Private Ltd.** (supra). In that case, the dispute was to the legislative competence of the State of Jharkhand to levy tax/fee on the import of Rectified Spirit. That challenge had been raised on the premise; Rectified Spirit was not potable liquor, i.e., it was not an alcohol fit for human consumption. While dealing with that issue, the Supreme Court considered the exact nature of industrial alcohol. Paragraphs 9 and 10 of that report, read as under:

*"9. The seminal issue to be answered in this appeal is about the purport of the Notification dated 6-11-2010 as published on 10-11-2012 and whether it is in the nature of legislation by the State on the subject of industrial alcohol. Alcohol can generally be classified into the following categories:*

*"I. Isopropyl alcohol (or IPA or isopropanol) is a compound with the chemical formula CH3CHOHCH3. It is a colourless, flammable chemical compound with a strong odour. As an isopropyl group linked to a hydroxyl group, it is the simplest example of a secondary alcohol, where the alcohol carbon atom is attached to two other carbon atoms. If consumed, isopropanol is converted into acetone in the liver, which makes it extremely toxic. Often used for disinfecting skin an antiseptic.*

*II. Methyl Alcohol (or Methanol): Chemical formula -- CH3OH: Not for human consumption. If consumed, can cause blindness and death. Methanol acquired the name wood alcohol because it was once produced chiefly by the destructive distillation of wood. Today, methanol is mainly produced industrially by hydrogenation of carbon monoxide.*

*III. Ethyl alcohol, (also known as Ethanol and abbreviated as EtOH), is a colourless, volatile, and flammable liquid that is soluble in water. Its chemical formula is C2H6O, or can be written as C2H5OH or CH3CH2OH. It has one methyl (-CH3) group, one methylene (-CH2-) group, and one hydroxyl (-OH-) group."*

*The first two categories are poisonous, toxic and fatal for human consumption, rendering its use only for industrial purposes. It is stated that isopropanol and methanol, because of their inherent chemical properties, cannot be purified and used for the production of "intoxicating liquor" or "potable liquor" by adopting "physical means" like decantation, filtration, redistillation, fractional distillation, etc. The third category, namely, Ethyl Alcohol or Ethanol (in India is usually produced from molasses derived from sugarcane) in its concentrated form and it is also known as "rectified spirit" and its strength measured in LPL signifies the strength of alcohol by volume, 13 parts of which weigh exactly equal to 12 parts of water at 51 degrees Fahrenheit.*

*10. Be that as it may, rectified spirit after it undergoes certain "physical changes" by adopting "physical means" like re-distillation, rectification (repeated or fractional distillation) to remove impurities, it becomes purer and is known as extra neutral alcohol (ENA). Thereafter, by addition and mixing of colouring and flavouring agents (compounding), as well as after dilution with water, ENA is left for maturation, to be bottled and used as "intoxicating liquor" or "potable liquor" known as Indian Made Foreign Liquor (IMFL). Whereas the country liquor, also known as "desi sharab" is prepared from rectified spirit or low grade ENA having alcohol content below 40% (as decided by different State Governments) which may be coloured (by caramel) and may be spiced too. Notably, the chemical composition of ethyl alcohol or ethanol (C2H6O or C2H5OH or CH3CH2OH) remains the same in the entire process, though addition of colouring and flavouring agents makes it a mild concoction/mixture/solution (in chemical parlance a solution of alcohol is known as "tincture") which renders it more palatable to human consumption."*

38. Shri Agarwal would therefore submit, in law it cannot be disputed, Extra Neutral Alcohol (ENA) is nothing but Rectified Spirit that has undergone certain physical changes, by adopting physical means like re-distillation and rectification to remove impurities. Through that process, it becomes purer and is therefore known as ENA. If at all, it is rendered more unfit for human consumption on account of the purity of its alcohol content being enhanced. To manufacture alcohol for human consumption, further processes including addition and mixing of colouring and flavouring agents (compounding), as well as dilution with water must be applied. The concoction is then left for maturation, to be bottled and used as an "intoxicating liquor' or "potable liquor' known as Indian Made Foreign Liquor (IMFL) etc. All throughout, such processes, the chemical composition of Ethyl alcohol or Ethanol remains the same, yet ENA as such can never be called or classified as "alcoholic liquor for human consumption".

39. Shri Pawan Shree Agarwal learned counsel for some of the other petitioners has adopted the submissions advanced by Shri Sinha and Shri Rahul Agarwal. He further emphasized, by virtue of Section 174 (1)(i) of the UPGST Act, 2017, the UPVAT Act, 2008 was repealed

in toto, except with respect to the goods specified under Entry 54 of List II of the Seventh Schedule, to the Constitution of India. That legislative field, became limited (for our discussion) to the commodity "alcoholic liquor for human consumption" upon enactment of the 101st Constitution amendment. Therefore, besides the general legislative incompetence arising upon the amendments made to the Constitution of India, there is a total absence of any parent legislation, as may allow any delegated legislation to arise or exist, to tax sale of any other goods.

40. Then, he has further emphasized, the Constitution recognizes a clear distinction between the taxing entries and the general entries, each of which creates a field of legislation on which the respective legislative body may enact laws. A general legislative Entry such as Entry 8 of List II of the Seventh Schedule, to the Constitution of India may never come in aid of the State legislature, to enact a law imposing a tax. Reliance has been placed on a 3-Judge bench decision of the Supreme Court in **Hoechst Pharmaceuticals Ltd. & Ors. Vs. State of Bihar & Ors., (1983) 4 SCC 45.** To the same effect, reliance has been placed on another decision of the Supreme Court in **Southern Pharmaceuticals and Chemicals, Trichur & Ors. Vs. State of Kerala & Ors., (1981) 4 SCC 391.**

41. Raising challenge to the Notification dated 17.12.2019, it has been further submitted, the Schedule entry 1-A, thus introduced to Schedule IV of the UPVAT Act is with respect to "non-GST alcohol" only. That phrase or commodity has not been defined either under the UPVAT Act or under the Rules framed or, the Notification issued thereunder. Plainly, in the context of the language of Article 366 (12A) of the Constitution, "non-GST alcohol" refers to "alcoholic liquor for human consumption". That ENA is not. Reference has also been made to paragraph 35 of the counter affidavit filed in Writ Tax No. 364 of 2021. It has been submitted, there is no quarrel raised by the State that the commodity ENA is not covered under any of the six items enumerated under amended Entry 54 of List II of the Seventh Schedule, to the Constitution of India. In conjunction to the above, reference has been made to the contents of paragraph 17 of that counter affidavit to submit, undisputedly, ENA is only a raw material used to manufacture alcoholic beverage. It contains over 95 percent alcohol by volume. Adopting the submission advanced by Shri Sinha, it has further been submitted, considering unequivocal pronouncements made by the Supreme Court-in **Synthetics and Chemicals Ltd.** (supra), the said commodity ENA is not an alcoholic liquor for human consumption and, that it can never be.

42. Shri Manish Goel, learned Additional Advocate General has stoutly defended the levy of UPVAT on ENA, under the UPVAT Act. He would submit, prior to issuance of the impugned Notification dated 17.12.2019, the commodity ENA suffered UPVAT at the rate of 32.5 percent. However, by virtue of the impugned Notification and introduction of the new entry 1-A, to Schedule IV to the UPVAT Act, the said commodity became taxable at a lower rate of tax, being 5 percent, with effect from 09.12.2019. Thus, the State Government has reduced the rate of tax on ENA. Hence, there can be no quarrel to the same. As to the identity of ENA, the learned AAG has also referred in extenso, to the discussion made by the

Supreme Court in **State of Jharkhand & Ors. Vs. Ajanta Bottlers and Blenders Private Ltd**. (supra). He would, however, contend, it does not lead to the conclusion - ENA falls outside the competence of the State legislature to impose tax on its sale. Here, he would rely on another three-Judge bench decision of the Supreme Court in **State of Bihar & Ors. Vs. Shree Baidyanath Ayurved Bhawan (P) Ltd. & Ors., (2005) 2 SCC 762.** In that case, a question had arisen, to the legislative competence of the State legislature to redefine the word 'intoxicant' appearing in Section 2(12-a) of the Bihar and Orissa Excise Act, 1915, to include therein - medicinal and toilet preparations containing alcohol, as defined under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955. Referring its earlier decision in the case of **Bihar Distillery & Anr. Vs. Union of India & Ors.** (supra), it had been reasoned, Rectified Spirit is produced in a distillery licenced by the State Government. The cancellation of registration/licence had been resisted by that distillery. That dispute travelled to the High Court and then to the Supreme Court. While dealing with that issue, the Supreme Court observed as under:

*"22. In the case of Bihar Distillery v. Union of India [(1997) 2 SCC 727] a distillery was established. It sold rectified spirit produced by it. The distillery got its licence from the State Government up to the year 1991-92 under the Bihar Act. In 1992 the department proposed to cancel the licence. The distillery objected on the ground that it was manufacturing rectified spirit which came within the exclusive province of the Central Government. With this contention the distillery approached this Court. After noticing the relevant entries in the Seventh Schedule to the Constitution this Court took the view that Entry 84 in List I and Entry 51 in List II complemented each other. Both provide for duties of excise. But while the States are empowered to levy duties of excise on alcoholic liquor for human consumption and on opium and narcotic products in the State but excluding medicinal and toilet preparations containing alcohol, the Union is empowered to levy excise duty on tobacco and other goods, except alcoholic liquor for human consumption. This Court further held that Entry 8 of List II covers all aspects of intoxicating liquors within the State; it covers production, manufacture, possession, transport, purchase and sale. Entry 6 speaks of public health. It furnishes a ground of prohibiting consumption of intoxicating liquor. On reading Entries 6, 8 and 51 in List II, this Court held that so far as potable alcohols are concerned, they are squarely covered by Entry 8. They are within the exclusive domain of the State. It was further held that rectified spirit was an industrial alcohol. The State has no power whatsoever to legislate in relation to industrial alcohol. However, the Court observed that in many cases the rectified spirit was an ingredient for intoxicating liquor or alcoholic liquor for human consumption. Hence, so long as alcoholic preparation can be diverted to human consumption, the States shall have the power to legislate as also to impose taxes on such diversion. This is also the ratio of the judgment of this Court in the case of Vam Organic Chemicals Ltd. v. State of U.P. [(1997) 2 SCC 715]."*

43. Placing heavy reliance on the aforesaid law laid down by the Supreme Court, it has been submitted, Entry 8 of List II of the Seventh Schedule, to the Constitution of India is wide enough to take within its amplitude and cover, any law to

impose tax on sale of ENA if that intoxicating liquor may be diverted to human consumption.

44. To clarify his submission further, the learned AAG would insist, ENA is not Rectified Spirit but only an 'intoxicating liquor'. Intoxicating liquor includes both "alcoholic liquor for human consumption" and alcoholic liquor not for human consumption. Therefore, the State legislature has the legislative competence to enact laws under Entry 8 of List II of the Seventh Schedule, to the Constitution of India with respect to 'intoxicating liquor'. There is no warrant to limit or restrict that legislative field to "alcoholic liquor for human consumption" alone. To do that, would be to read into the legislative field a restriction that plainly does not exist. In that regard, reliance has been placed on the decision of the Supreme Court in **Bihar Distillery & Anr. Vs. Union of India & Ors.** (supra), wherein the law laid down by the Constitution Bench of the Supreme Court, in the case of **Synthetics and Chemicals Ltd. & Ors.** (supra) was considered and, in the submission of the learned AAG, an exception thereto had been carved out. Relevant to our discussions, paragraphs 10, 11 and 12 of the aforesaid report have been noted above.

45. Reliance has also been placed on another decision of the Supreme Court in **VAM Organic Chemicals Ltd. & Anr. Vs. State of U.P. & Ors., (1997) 2 SCC 715,** wherein the Supreme Court again had the occasion to consider the law laid down by its earlier seven-Judge Constitution Bench, in **Synthetics and Chemicals Ltd. & Ors. Vs. State of U.P. & Ors.** (supra). According to the learned AAG, the legislative competence of the State legislature to enact laws on 'intoxicating liquors' included laws on "alcoholic liquor for human consumption" was clearly recognised with reference to Entry 8 of List II of the Seventh Schedule, to the Constitution of India. It was observed thus:

*"13. ...The following part of the judgment can be read with profit: (SCR pp. 681-82: SCC p. 158, para 86)*

*"The position with regard to the control of alcohol industry has undergone material and significant change after the amendment of 1956 to the IDR Act. After the amendment, the State is left with only the following powers to legislate in respect of alcohol:*

*(a) It may pass any legislation in the nature of prohibition of potable liquor referable to Entry 6 of List II and regulating powers.*

*(b) It may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol.*

*(c) The State may charge excise duty on potable alcohol and sales tax under Entry 52 of List II. However, sales tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Orders, sales tax cannot be charged by the State on industrial alcohol.*

*(d) However, in case State is rendering any service, as distinct from its claim of so-called grant of privilege, it may charge fees based on quid pro quo. See in this connection, the observations of Indian Mica case [Indian Mica Micanite Industries v. State of Bihar, (1971) 2 SCC 236] ."*

*Denaturation of spirit meant for industrial use is meant to prevent misuse of non-potable alcohol for human consumption and as such specifically*

*mentioned by the Court to be within the legislative competence of the State."*

46. Reference has also been made to paragraphs 14 and 17 of the said report, which read as under:

*"14. It is to be noticed that the States under Entries 8 and 51 of List II read with Entry 84 of List I have exclusive privilege to legislate on intoxicating liquor or alcoholic liquor for human consumption. Hence, so long as any alcoholic preparation can be diverted to human consumption, the States shall have the power to legislate as also to impose taxes etc. In this view, denaturation of spirit is not only an obligation on the States but also within the competence of the States to enforce.*

*17. M/s McDowell & Co., manufacturers of intoxicating liquors challenged the constitutional validity of the Act by which the Prohibition Act was amended to include Section 7-A. One of the grounds of challenge was lack of legislative competence in view of Entry 26 in the First Schedule of the IDR Act which according to the writ petitioners, vested the control of alcohol industries exclusively in the Union and denuded the State Legislature of its power to licence or regulate the manufacture of liquor. This submission was based on the fact that fermentation industries were included in the Schedule of the IDR Act and hence the State was denuded of its power to licence and regulate manufacture of liquor. Entry 26 reads "Fermentation Industries; (1) Alcohol, (2) other products of fermentation industries". It was argued that after the amendment the control and regulation of such industries and their product fell within the exclusive province of the Union and hence the State lost its competence to grant, refuse or renew the licences. After an analysis of all the relevant provisions of the law the Court concluded as under:*

*"(W)e must first carve out the respective fields of Entry 24 and Entry 8 in List II. Entry 24 is a general entry relating to industries whereas Entry 8 is a specific and special entry relating inter alia to industries engaged in production and manufacture of intoxicating liquors. Applying the well-known rule of interpretation applicable to such a situation (special excludes the general), we must hold that the industries engaged in production and manufacture of intoxicating liquors do not fall within Entry 24 but do fall within Entry 8. This was the position at the commencement of the Constitution and this is the position today as well. Once this is so, the making of a declaration by Parliament as contemplated by Entry 52 of List I does not have the effect of transferring or transplanting, as it may be called, the industries engaged in production and manufacture of intoxicating liquors from the State List to Union List. As a matter of fact, Parliament cannot take over the control of industries engaged in the production and manufacture of intoxicating liquors by making a declaration under Entry 52 of List I, since the said entry governs only Entry 24 in List II but not Entry 8 in List II."*

*It was reiterated in the later part of the judgment as under:*

*"It follows from the above discussion that the power to make a law with respect to manufacture and production and its prohibition (among other matters mentioned in Entry 8 in List II) belongs exclusively to the State Legislatures. Item 26 in the First Schedule to the IDR Act must be read subject to Entry 8 -- and for that matter, Entry 6 -- in List II. So read, the said item does not and cannot deal with*

*manufacture, production of intoxicating liquors. All the petitioners before us are engaged in the manufacture of intoxicating liquors. The State Legislature is, therefore, perfectly competent to make a law prohibiting their manufacture and production -- in addition to their sale, consumption, possession and transport -- with reference to Entries 8 and 6 in List II of the Seventh Schedule to the Constitution read with Article 47 thereof."*

47. Last, reference has been made to a Constitution Bench decision of the Supreme Court in **Navnit Lal C Javeri Vs. K.K. Sen, Appellate Assistant Commissioner of Income Tax, Bombay, AIR 1965 SC 1375.** In that case, it had been submitted before a five-Judge Constitution Bench of the Supreme Court, Entry 82 of List I of the Seventh Schedule, to the Constitution of India, deals with taxes on income other than agricultural income. In that context, it was observed as under:

*"8. In dealing with this point, it is necessary to consider what exactly is the denotation of the word "income" used in the relevant Entry. It is hardly necessary to emphasise that the entries in the Lists cannot be read in a narrow or restricted sense, and as observed by Gwyer, C.J. in United Provinces v. Atica Begum [(1940) FCR 110] "each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it". What the entries in the List purport to do is to confer legislative powers on the respective Legislatures in respect of areas or fields covered by the said entries; and it is an elementary rule of construction that the widest possible construction must be put upon their words. This doctrine does not, however, mean that Parliament can choose to tax as income an item which in no rational sense can be regarded as a citizen's income. The item taxed should rationally be capable of being considered as the income of a citizen. But in considering the question as to whether a particular item in the hands of a citizen can be regarded as his income or not, it would be inappropriate to apply the tests traditionally prescribed by the Income Tax Act as such."*

48. Thus, it has been submitted, the words used in List II of the Seventh Schedule, to the Constitution of India, should be read widely, to include all ancillary or subsidiary matters that can fairly and reasonably be included therein. Applying that principle, undoubtedly, the State legislature can enact a law with respect to any "intoxicating liquors" with reference to Entry 8 of List II of the Seventh Schedule, to the Constitution of India, including a law to impose tax on such "intoxicating liquors".

49. Having heard learned counsel for the parties and having perused the record, insofar as the identity of the commodity is concerned, there is no dispute between the parties. It is Extra Neutral Alcohol (ENA). While the petitioners contend; the same is alcohol of high purity, above 90%, by volume, the State does not dispute the same. In its counter affidavit, the State also makes pleadings to the same effect. Besides the admission made by the State, it is too late in the day to dispute or deliberate as to the true character or identity or contents of ENA. Thus, the Supreme Court in the case of **State of Jharkhand & Others Vs. Ajanta Bottlers and Blenders Private Ltd.** (supra) had clearly opined - industrial alcohol is broadly categorised into three

categories. The first being Isopropyl alcohol (or IPA or Isopropanol). It is a compound with chemical formula CH3CHOHCH3, linked to a hydroxyl group. It is the simplest example of a secondary alcohol where alcohol carbon is attached to two other carbon atoms. If consumed, Isopropanol is converted into acetone in the liver, making it extremely toxic. The second category of industrial alcohol is Methyl Alcohol or Methanol with chemical formula CH3OH. Its consumption leads to blindness and death. The third category of industrial alcohol is Ethyl Alcohol also known as Ethanol having chemical formula C2H6O which may also be written as C2H5OH or CH3CH2OH.

50. Having thus categorized the three types of industrial alcohols, the Supreme Court further observed, the first two categories i.e., Isopropyl and Methyl Alcohol are poisonous, toxic, and fatal for human consumption. Therefore, they are capable of industrial use only. Further, owing to their inherent chemical properties, those two categories of alcohol cannot be purified or used to produce any "intoxicating liquor" or "potable liquor", for human consumption. Only the third category of industrial alcohol namely, Ethyl Alcohol or Ethanol is capable of use to manufacture "intoxicating liquor" or potable liquor.

51. Also, as accepted in that decision, in its concentrated form, Ethanol is also known as Rectified Spirit. Such Rectified Spirit upon redistillation, fractional distillation etc., whereby impurities are removed, is rendered purer in content. It then, comes to be described as ENA. Insofar as "intoxicating liquor" is concerned, the Supreme Court clearly observed, it is only by addition and mixing of colouring and flavouring agents (compounding) as well as after dilution with water, ENA is left to mature and is bottled. Thereafter, the "intoxicating liquor" comes into existence whether known as Indian Made Foreign Liquor (IMFL) or country liquor, by whatever name called.

52. What emerges from the above is, whether IMFL or country liquor or any other liquor that may qualify as "alcoholic liquor for human consumption", it uses ENA as a raw material. ENA, in turn, is derived from Rectified Spirit. At the same time, "alcoholic liquor for human consumption" would not arise either if ENA is left to mature for some time or in certain conditions. Neither its alcoholic content would reduce from the range 90% - 95 % to 19% - 43% nor it would otherwise render itself fit for human consumption. In fact, the counter affidavit of the State itself indicates in no uncertain terms - ENA is not for human consumption. It cannot be described as "intoxicating liquor", for that reason, either.

53. In any case, for a commodity to be described as an "alcoholic liquor for human consumption", it must be capable or ready to be consumed, in that state itself-as a beverage, as held by the seven-Judge Constitution bench of the Supreme Court in **Synthetics and Chemicals Ltd. & Ors. Vs. State of U.P. & Ors.** (supra) and as followed by a three-Judge bench of the Supreme Court in **State of U.P. Vs. Modi Distillery** (supra). An alcoholic liquor having 90%-95% content of Ethanol is certainly not that commodity. Such alcohol is not, and it cannot be marketed for human consumption. If consumed, it would be unbearably toxic and, therefore, never fit

for human consumption. Thus, it was held by the Constitution bench of the Supreme Court in **Synthetics and Chemicals Ltd. & Ors. Vs. State of U.P. & Ors.** (supra) - "alcoholic liquor for human consumption" is:

*"...that liquor which as it is is consumable in the sense capable of being taken by human beings as such as beverage of drinks. ..."*

54. Though that law emerged in the context of Entry 84 of List I of the Seventh Schedule, to the Constitution of India (with reference to imposition of duties of excise) yet, it clearly interprets the term "alcoholic liquor for human consumption", as it now appears under Entry 54 of List II of the Seventh Schedule, to the Constitution of India. The earlier use of the plural of the word liquor is not material. Applying that law, the Constitution bench of the Supreme Court could not be persuaded to accept, that denatured spirit, by appropriate cultivation or application or admixture with water or with other things, be transformed into an "alcoholic liquor for human consumption". It concluded, alcoholic or "intoxicant liquor" must be understood as these are, i.e., in the presenti, and not what these may become or be capable of or able to become upon application of certain processes etc. Applying that law, even today, as a commodity, ENA remains an alcohol or alcoholic liquor not for human consumption, under Entry 54 of List II of the Seventh Schedule, to the Constitution of India. There is absolutely no room or licence to give a different meaning to that phrase, as claimed by the learned AAG.

55. Rectified Spirit, Ethanol or Extra Neutral Alcohol (ENA) having been opined by the Constitution bench of the Supreme Court (followed, explained and applied in its later pronouncements), to be not alcoholic liquor for human consumption and, since there is no material whatsoever to take a contrary view on facts, it must be emphatically concluded, ENA continues to fall outside the phrase "alcoholic liquor for human consumption", as it appears under Entry 54 of List II of the Seventh Schedule, to the Constitution of India.

56. We may also recognize, at present the dispute has arisen, not in the context of pre-existing laws but in the context of change of laws arising from the 101st Constitution Amendment. In the first place, by virtue of Article 246A (1) introduced to the Constitution of India, the Parliament and then, subject to Clause (2), the State legislatures have the competence to make laws with respect to goods and service tax. By virtue of Article 366 (12A), the phrase 'goods and service tax' would always mean, tax on supply of goods, or services or both, except tax on the supply of the "alcoholic liquor for human consumption".

57. Thus, indisputably, tax on all goods and services, except supply of "alcoholic liquor for human consumption" would fall under the GST regime. It is that change to the Constitutional scheme that has been given effect - by substituting the pre-existing Entry 54 of List II of the Seventh Schedule, to the Constitution of India. Under that pre-existing entry, the State legislatures were competent to enact laws to tax sale and purchase of all goods, other than the newspapers (subject to Entry 92A of List I). Upon enactment of the 101st Constitution Amendment, that power is heavily curtailed (under the substituted Entry 54 of List II of the Seventh Schedule, to the Constitution of India), to certain items specified therein namely, petroleum

crude, high speed diesel, motor-spirit/petrol, natural gas, aviation turbine fuel and "alcoholic liquor for human consumption". A corresponding change was made by the Parliament to the definition of the term 'goods', under Section 2(d) of the Central Sales Tax Act, 1956. It was also substituted, to limit the same to the exact six items, finding mention in the substituted Entry 54 of List II of the Seventh Schedule, to the Constitution of India.

58. Whether by virtue of Article 366 (12-A) read with Article 246-A of the Constitution of India or the substituted Entry No. 54 of List II of the Seventh Schedule, to the Constitution of India, the nuanced distinction, between those two Constitutional provisions would have no bearing on the controversy at hand. The State legislature remains denuded of its pre-existing competence to enact a law to tax sale of alcoholic liquor not for human consumption, in both contingencies.

59. To take note of all the changes thus made, correspondingly, the Parliament also amended Entry 84 of List I of the Seventh Schedule, to the Constitution of India, to limit its power to enact laws, to now impose duties of excise on only six items, in place of the pre-existing entry that included all manufactured goods, except "alcoholic liquor for human consumption" and opium, Indian hemp etc.

60. Thus, both the Parliament and the State legislatures, sacrificed their pre-existing, respective legislative competence to - enact laws to impose duties of excise and to tax sales of alcoholic liquors not-for human consumption, at the high altar of the 101st Constitution Amendment, enacted to consecrate the GST laws. The express intent of that Constitutional change appears to be one - to tax all alcohols except "alcoholic liquor for human consumption", under the GST regime, only. Thus, alcoholic liquor not for human consumption or industrial alcohol or non-potable alcohol, is subject to GST laws, only. That Constitutional intent was unequivocally recognized by the State legislature. It resonates in perfect harmony, through the instrument of incorporation of Section 174(1)(i) to the UPGST Act 2017. For ready reference, that provision of law reads as below:

*"(1) Save as otherwise provided in this Act, on and from the date of Commencement of this Act.*

*(i) The Uttar Pradesh Value Added Tax Act- 2008, except in respect of goods included in the Entry 54 of the State List of the Seventh Schedule to the Constitution."*

61. Since the State legislature did not attempt to save the UPVAT Act - to tax alcoholic liquor not for human consumption, two direct consequences arise. First, a consequence arises of recognition of the change in the Constitutional scheme, noted above. Second, yet more directly, the State legislature did not save UPVAT Act to impose tax on any commodity except "alcoholic liquor for human consumption". Hence, in any case, after the enactment of the UPGST Act, 2017 and in absence of any amendment to Section 174 (1) (i) of that Act, there neither survives nor exists any delegated power with the State Government, to issue the impugned Notification, to impose UPVAT on ENA.

62. We cannot help over emphasise the fact that the impugned Notification

seeks to overreach the Constitutional scheme, as amended by the 101st Constitution Amendment. By that Constitution Amendment, the only surviving legislative field to impose taxes (saved exclusively with the State legislatures), finds mention in Entry 54 (as substituted). Relevant to our discussion, it is only with respect to "alcoholic liquor for human consumption". Since ENA is not that, the State legislature cannot circumvent the Constitutional scheme by introducing a tax on its sale, by describing it as 'non-GST alcohol'.

63. That phraseology, used to describe ENA is, in any case, a misnomer. It is impermissible. By virtue of Article 366(12-A) of the Constitution of India, 'non-GST alcohol' may only be "alcohol for human consumption". By virtue of the clear dictum of the Supreme Court in **Synthetic and Chemicals Limited** (supra), **Modi Distillery** (supra), **VAM Organic Chemicals Ltd**. (supra) and **Ajanta Bottlers and Blenders Private Ltd.** (supra), ENA is not fit for human consumption. Hence, for reasons noted above, it would remain a "GST-alcohol', if such a thing exists. Second, the intended use to which a commodity may be put, and the character or identity of the commodity manufactured therefrom, would never be relevant to impose a differential rate of tax on sale of that commodity, depending upon different uses, it may be put to. For a tax to be levied on sale of a commodity, its identity in presenti alone is relevant. As a fact, there exists only one type of ENA. It may be put to different uses i.e., to manufacture either potable alcohol or chemicals or other commodities or all or any of them. By looking at any quantity of ENA, its use may never be predicted or pre-determined. To subject it to differential rates of tax under the UPVAT Act, depending solely on the intent of the purchaser (to use it a specified way), may never qualify as a tax on the sale of the goods. It may transform into another kind of tax. Third, in any case, the use to which ENA may be put may be relevant to the legislature to determine the measure or the rate of tax to be suffered by it, but not to the identity of the taxable commodity. That may be established based on its form, shape, and commercial identity, by the people who deal in it. Since ENA is not a 'non-GST' alcohol, the question of measure or rate of tax thereon (based on its use), is extraneous to the issue at hand.

64. What then survives for our consideration is, whether the State may ever be able to defend a taxation law or whether the State may ever be able to enact a taxation law, referable to Entry 8 of List II of the Seventh Schedule, to the Constitution of India, to impose tax on sale. The UPVAT Act, 2017 was not a law enacted with reference to Entry 8 of List II of the Seventh Schedule, to the Constitution of India rather, it was a law referable only to Entry 54 of List II of the Seventh Schedule, to the Constitution of India, as it then existed.

65. Even if, in the context of the challenge raised, the answer to the question - if the State legislature had the competence to enact the UPVAT Act with reference to the said Entry 8 of List II of the Seventh Schedule, to the Constitution, must remain - emphatically in the negative. The law with respect to the scope of legislative entries has been consistently laid down to mean - taxing power is a special/specific legislative power. It may be exercised with reference to a specific taxing entry. If legislative entries under the Seventh

Schedule to the Constitution of India are treated to be mother entries, with reference to the laws that may be enacted, a taxation legislation must be born to a taxing legislative entry alone. It can have no surrogate mother i.e., a general entry, as has been attempted to be established by the learned AAG.

66. In **M.P.V. Sundararamier & Co. Vs. State of A.P., AIR 1958 SC 468,** the Constitution Bench of the Supreme Court held as below:

*"(i) ...*

*(ii) Under the constitutional scheme of division of powers under legislative lists, there are separate entries pertaining to taxation and other laws. A tax cannot be levied under a general entry.*

*(iii) A Constitution is an organic document and has to be so treated and construed."*

67. Similar principle was laid down by the Supreme Court in **State of Mysore & Ors. Vs. D. Cawasji & Company & Ors.** (supra). It was reiterated in **Delhi Cloth and General Mills Co. Ltd. Vs. Excise Commissioner, U.P., Allahabad, 1973 All LJ 629.** The principle thus laid down by the Supreme Court has been consistently applied without exception. Plainly, Entry 8 of List II of the Seventh Schedule, to the Constitution reads thus:

*"8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors."*

68. That Entry only creates a field of legislation by State legislature to enact any law on intoxicating liquors. The words 'that is to say', restrict and confine the scope and ambit of those laws - with respect to production, manufacture, possession, transport, purchase, and sale and matters incidental or ancillary thereto. It does not grant any legislative competence to the State legislature to impose a tax on intoxicating liquors. In the oft cited decision of the four-Judge bench of the Supreme Court in **State of T.N. Vs. Pyare Lal Malhotra, (1976) 1 SCC 834,** the meaning of the phrase "that is to say" suffixed to the words "iron and steel" in the then existing Clause (iv) of Section 14 of the Central Sales Tax Act, 1956, was interpreted as below:

*"7. What we have inferred above also appears to us to be the significance and effect of the use of words "that is to say" in accordance with their normal connotation and effect. Thus, in Stroud's Judicial Dictionary, 4th Edn. Vol. 5, at p. 2753, we find:*

*"That is to say.--(1) "That is to say' is the commencement of an ancillary clause which explains the meaning of the principal clause. It has the following properties: (1) it must not be contrary to the principal clause; (2) it must neither increase nor diminish it; (3) but where the principal clause is general in terms it may restrict it; see this explained with many examples, Stukeley v. Butler Hob, 1971."*

*The quotation, given above, from Stroud's Judicial Dictionary shows that, ordinarily, the expression "that is to say" is employed to make clear and fix the meaning of what is to be explained or defined. Such words are not used, as a rule, to amplify a meaning while removing a possible doubt for which purpose the word "includes" is generally employed. In unusual cases, depending upon the context of the words "that is to say", this expression may be followed by illustrative instances.*

*In Megh Raj v. Allah Rakhia [AIR 1947 PC 72 : 74 IA 12] the words-- "that is to say", with reference to a general category "land" were held to introduce "the most general concept" when followed, inter alia, by the words "right in or over land". We think that the precise meaning of the word "that is to say" must vary with the context. Where, as in Megh Raj case, the amplitude of legislative power to enact provisions with regard to "land" and rights over it was meant to be indicated, the expression was given a wide scope because it came after the word "land" and then followed "rights over land" as an explanation of "land". Both were wide classes. The object of using them for subject-matter of legislation, was obviously, to lay down a wide power to legislate. But, in the context of single point sales tax, subject to special conditions when imposed on separate categories of specified goods, the expression was apparently meant to exhaustively enumerate the kinds of goods in a given list. The purpose of an enumeration in a statute dealing with sales tax at a single point in a series of sales would, very naturally, be to indicate the types of goods each of which would constitute a separate class for a series of sales. Otherwise, the listing itself loses all meaning and would be without any purpose behind it".*

Similarly, the phrase "that is to say" appearing in Entry 8 of List II of the Seventh Schedule, to the Constitution of India may never be read to bestow legislative competence on the State legislatures to enact a law to tax "intoxicating liqours". That competence must remain confined to the matters specified after that phrase, appearing under that Entry or matters ancillary or incidental thereto, such as regulatory measures.

69. The ratio in the case of **Shree Baidyanath Ayurved Bhawan (P) Ltd. & Ors.** (supra), **Bihar Distilleries** (supra) an**d VAM Organic** (supra), if read as suggested by the learned AAG, it would lead to a conflict between the seven-Judge Constitution bench decision of the Supreme Court in **Synthetics and Chemicals Ltd. & Ors. Vs. State of U.P. & Ors.** (supra), as explained and followed by three-Judge bench decisions of the Supreme Court in **State of U.P. Vs. Modi Distillery** (supra) and **Deccan Sugar & Abkari Co. Ltd.** (supra) and the other decisions of that Court. Therefore, the other decisions may be read, only in the context of the specific disputes involved therein. In **Shree Baidyanath Ayurved Bhawan (P) Ltd. & Ors.** (supra), the dispute was with respect to licence, regulation, use and possession of alcoholic preparation. In **Bihar Distilleries**, the dispute was with respect to cancellation of licence. In **VAM Organic** (supra), what was saved was the power to enact regulatory laws.

70. Even otherwise, once the law stood clarified by the larger/3-judge Bench decision of the Supreme Court in **State of U.P. Vs. Modi Distillery** (supra), there survived no legislative competence to the State legislature to enact a law, referable to Entry 8 of List II of the Seventh Schedule, to the Constitution of India, to impose tax on any intoxicating liquors, with reference to Entry 8 of that List. Therefore, the submission advanced by the learned AAG to the contrary, cannot be accepted. That expansive reasoning is impermissible under the existing Constitutional scheme.

71. The Constitution bench decision of the Supreme Court in **Navnit Lal C Javeri** (supra) is of no help to the State. In that case, the issue was not if the Parliament could enact a law to tax a loan advanced to a shareholder, by taking

recourse to a general entry rather, the issue involved in that case was - if, while enacting a law to tax income (referable to Entry 82, List I), the Parliament could enact a law to tax that transaction by treating it as an income. Here, the issue to be examined is - if in the absence of a taxing entry, a taxation law may be enacted. Plainly, that ratio is inapplicable to the facts of this case.

72. Before parting, the State has already charged 9 percent GST on the sale of ENA with effect from 01.07.2017. Thus, if it were to enforce the impugned Notification dated 17.12.2019, with effect from 09.12.2019, it necessarily would lead to an admission of collection (without authority of law) - of GST on ENA, by 4 to 13 percent. We do not see, what useful purpose the impugned Notification would serve if the argument of the learned AAG were to be accepted.

73. Consequently, all the writ petitions deserve to be allowed. It is declared, the State lost its legislative competence to enact laws, to impose tax on sales of ENA, upon the enactment of the 101st Constitution Amendment. Consequently, and upon considering Section 174(1)(i) of UPGST Act, 2017, the impugned Notification dated 17.12.2019, insofar as it seeks to impose UPVAT on ENA, Rectified Spirit and SDS, is *ultra vires,* both on account of lack of (i) legislative competence and (ii) valid delegation. It is therefore quashed. Consequentially, all assessment Orders/Notices dated 30.06.2021, 21.06.2021, 08.06.2021, 15.06.2021, 11.06.2021, 07.07.2021, the (administrative) Circulars/letters dated 10.06.2021 and 11.06.2021, impugned in these writ petitions, holding otherwise are also quashed.

74. It is further directed, subject to applicability of the rule against unjust enrichment, any amount that may have been deposited by the petitioners (except petitioners claiming under this order, in Writ Tax 355 of 2020), by way of UPVAT on ENA on or after 01.07.2017, may be refunded to them, within a period of one month from today.

75. All writ petitions are **allowed,** as above. No order as to costs.

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**(2021)10ILR A772**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 22.09.2021**

**BEFORE**

**THE HON'BLE NAHEED ARA MOONIS, J.**
**THE HON'BLE SAUMITRA DAYAL SINGH, J.**

Writ Tax No. 443 of 2020

**M/s Unitech Machines Limited & Anr. ...Petitioners**
**Versus**
**Union of India & Ors. ...Respondents**

**Counsel for the Petitioners:**
Sri Tanmay Sadh, Sri Nishant Mishra, Sri Dharnendra Kumar Rana, Sri Ayush Agarwal

**Counsel for the Respondents:**
A.S.G.I., Sri Ashok Singh, Sri Devendra Gupta

**A. Tax Law - Central Excise Rules, 2002 - Rule 8(3A), 8(4) - Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 - Sections 121(c), 123(e), 124(1)(c), 124(2), 128 & 133 - Sabka Vishwas (Legacy Dispute Resolution) Scheme Rules, 2019: Rule 3, 6(6); Central Excise Act, 1944 - Section 11 - Customs Act, 1962 -Section 142(1)(d).**

**Once a valid settlement is reached, then, by way of a consequence provided, u/s 129(1)(a) of the Scheme no interest or penalty liability may exist. If no amount of the Central Excise duty or Service Tax was due on the date of filing the declaration on SVLDRS-1, the fact that interest or penalty alone may have been claimed on that date, may not give rise to an eligibility under the Scheme.** Here, admittedly, the entire Central Excise duty demand stood satisfied on 11.9.2018 and the entire Service Tax demand stood satisfied on 13.6.2019. (Para 21)

No show-cause notice came to be issued to petitioners before the cut-off date 30.06.2019 to confirm, either any amount of interest or penalty. Those amounts were otherwise never quantified in writing either by any statutory authority or the petitioners. (Para 22)

Therefore, neither declaration filed by petitioner No. 1, on Form SVLDRS-1 was maintainable as those were filed only w.r.t. unknown and indeterminate interest and penalty liabilities. That **hypothetical liability could not be described either as "tax dues" or "amount of duty" or "amount in arrears", under the Scheme.** (Para 23)

**B. The Circulars are not pieces of legislation but only binding directions issued to executive authorities, by virtue of Section 133 of the Scheme. Their applicability would stay confined within the legislative limits set by the Scheme and, their own language.** Thus, *de hors* the above referred Circulars, if a declarant had no "tax dues" outstanding and there was no amount of interest or penalty demanded from him, on the date of filing the declaration, on Form SVLDRS-1, neither it could be effectively processed nor any relief granted thereon, by virtue of the language of the provisions. (Para 27)

**Administrative Circulars cannot overreach or circumvent the statute or defeat the plain letter of law.** In the present case, the Circulars clearly do not convey such intent of the CBIC. The Circular dated 25.9.2019 would remain confined (in applicability) only to cases where an adjudication order may have been passed, and to no other case. (Para 28)

In the present case, though the petitioner No. 1 had deposited the entire duty demand, however, on its own showing, there did not exist any adjudication order with respect to the same, let alone any demand of interest and/or penalty. (Para 29)

**The procedure i.e. manner of filling up the statutory Form SVLDRS-1 or the explanations furnished cannot create any right to the relief claimed that otherwise does not exist under the Scheme.** This is also not a case u/s 123(c) of the Scheme, inasmuch as, the petitioner No. 1 does not contend that the amount of penalty and interest had ever been quantified in writing, by any means. (Para 30)

**C. Central Excise Rules, 2002 - Rule 8(4)** - Before any recovery of interest or penalty may be enforced against the petitioners it would have to be first adjudicated. Consequently, the communications dated 17.3.2020 and 7.4.2020 issued by respondent No. 6 are found to be wanting in jurisdiction and wholly pre-mature. (Para 32)

**D. Notification No. 68/63-CE dated 04.05.1963 - Clause 1 -** The provision of Section 142(1)(d) of the Customs Act, 1962 had not been borrowed either by reference or by incorporation or otherwise made applicable to the provisions of Central Excise Act, 1944. Thus, the garnishee proceeding instituted against the petitioners w.r.t. duty liability under the Central Excise Act is wholly without jurisdiction. For the above reasons, the communications dated 17.3.2020 and 7.4.2020 issued by respondent No. 6 are set aside. (Para 34)

**E. No provision of the Scheme indicates that an amount of duty would include interest or penalty in the definition of the words "amount in arrears".** (Para 20)

**Words and Phrases – "*amount in arrears*" -** For the computation of relief u/s 124(c) of the Scheme, the phrase "amount in arrears" means the amount of Central Excise or Service Tax or Cess dues recoverable as arrears of duty under

any indirect tax enactment (specified u/s 122 of the Scheme) that may be admittedly payable but may not have been paid upto that date. (Para 18)

***"Amount of duty" -*** The phrase "amount of duty" conveys a singular meaning under the Scheme. It is the amount of Central Excise duty or an amount of Service Tax or a Cess payable under any of the specified indirect tax enactments. No other amount whether by way of interest or penalty can ever be categorized as an amount of duty, especially as the entire scheme conveys that singular meaning. (Para 19)

**Writ petition partly allowed**. (E-4)

**Present petition challenges the computation/made on Form SVLDRS-3 dated 06.12.2019, issued for the periods Sept. 2016 to Feb. 2017 and, April 2017 to June 2017, by the Designated Committee under SVLDRS 2019 and rejection of SVLDRS-1 dated 27.12.2019 both, for the periods Sept. 2016 to Feb. 2017 and, April 2017 to June 2017. Also, challenge has been raised to the communications dated 17.3.2020 and 7.4.2020 issued by the Assistant Commissioner, Central GST Division.**

(Delivered by Hon'ble Naheed Ara Moonis, J.
&
Hon'ble Saumitra Dayal Singh, J.)

1. Heard Sri Dharmendra Kumar Rana alongwith Sri Tanmay Sadh, learned counsel for the petitioners; Sri Ashok Singh and B.K.S. Raghuvanshi, learned counsel for the revenue.

2. Present writ petition has been filed to challenge the computation/made on Form SVLDRS-3 dated 06.12.2019, issued for the periods September 2016 to February 2017 and, April 2017 to June 2017, by the Designated Committee under the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 (hereinafter referred to as the 'Scheme') and rejection of SVLDRS-1 dated 27.12.2019 both, for the periods September 2016 to February 2017 and, April 2017 to June 2017. Also, challenge has been raised to the communications dated 17.03.2020 and 07.04.2020 issued by the Assistant Commissioner, Central GST Division/respondent no.6, seeking recovery of interest and penalty Rs. 74,36,934/-.

3. Further, mandamus has been sought to re-compute the amount payable under the Scheme as also for refund claimed. Insofar as challenge to the validity of Rule 8(3A) of the Central Excise Rules, 2002 is concerned, the same has not been pressed.

4. Present writ petition has been filed by M/s Unitech Machines Ltd.-petitioner no.1 and M/s UM Autocomp Pvt. Ltd.-petitioner no.2. It has been submitted, earlier, M/s United Machines Ltd. had two manufacturing divisions, namely an auto division and an engineering division. It had incurred liabilities both under the Central Excise Act, 1944 and also towards Service Tax, under the Finance Act, 1994.

5. According to the petitioners, petitioner no.1 filed its return under the Central Excise Act on Form ER-1 on time, for the period September 2016 to February 2017 and also for the period April 2017 to June 2017. Thus, total excise duty liability was admitted at Rs. 26,62,16,761/-. Of that, it discharged Central Excise duty liability to the extent of Rs. 16,68,84,918/-, by the due date. The balance Central Excise duty was discharged belatedly, during the period 23.11.2016 to 11.09.2018.

6. Similarly, petitioner no.1 filed its return under the Finance Act, 1994 with

respect to its Service Tax liability, for the period April 2016 to June 2017, on or before the due date. It admitted Service Tax liability, Rs. 1,98,34,281/-. That petitioner did not discharge any part of that liability within the due date and it discharged that liability after the due date, between the period 21.09.2018 to 13.06.2019.

7. The reason for the delayed payment is stated to be financial distress suffered by petitioner no.1. It is also on record that the auto division of petitioner no.1 came to be transferred by way of slump sale, in favour of the petitioner no.2, under the Business Transfer Agreement dated 14.03.2017. Thus, all assets and liability of the auto division are stated to have been transferred by petitioner no.1, to petitioner no.2.

8. It is a fact that no interest or penalty came to be adjudicated before introduction of the Scheme. Infact, no adjudication notice was issued in that regard. Upon issuance of the disputed SVLDRS-3 on 06.12.2019 and on rejection of the (second) SVLDRS-1 dated 27.12.2019, the present (two) petitions have been filed. Insofar as the Writ Petition No. 443 of 2020 is concerned, the same arises from Central Excise duty for the periods September 2016 to February 2017 and, April 2017 to June 2017, both for auto division and engineering divisions of petitioner no.1. Similarly, Writ Petition No. 444 of 2020 pertains to Service Tax liability for the tax period April 2016 to June 2017.

9. First, learned counsel for the petitioners submits, the Designated Committee has completely erred in making the computation on Form SVLDRS-3, by its order dated 06.12.2019. Here, reliance has been placed on the provisions of Section 121(c), 123(e), 124(1)(c) read with Section 124(2), Section 128 and Section 133 of the Scheme. Reliance has also been placed on the Explanation (b) appended to Rule 3 read with Rule 6(6) of the Sabka Vishwas (Legacy Dispute Resolution) Scheme Rules, 2019 (hereinafter referred to as the 'Rules'). Reliance has also been placed on Column 9.2 of the Form SVLDRS-1 (Part B) as also Columns 10, 11 and 12 thereof. Again, reference has been made on Column G of the Form SVLDRS-2 and the Columns 1, 2 and 3 of the Form SVLDRS-2A read with Column G of the Form SVLDRS-3. Heavy reliance has been placed on Circular No. 1073/06/2019.CX dated 29.10.2019 issued by the CBIC Clause 2(iii) read with Circular No. 1072/05/2019.CX dated 25.09.2019 Clause 2(iv)(b). Thus, it has been submitted, though the petitioner no.1 had paid the amount of Central Excise duty and Service Tax yet, owing to delayed payments of that duty and tax, the petitioner no.1 was eligible to make an application on Form SVLDRS-1 as it is not a person ineligible for making such application under any of the Clauses (a to h) of Section 125(1) of the Scheme. The Estimated Amount Payable should have been computed as 'zero'. In any case, the second declaration filed on Form SVLDRS-1, should have been entertained.

10. Second, it has been submitted, no demand of interest or penalty could be pressed against the petitioners without being preceeded by any order of adjudication passed under Section 11 of the Central Excise Act, 1944. By means of paragraph no.54 of the writ petition, it has been specifically stated that no such adjudication had taken place. That averment has not been denied by means of

paragraph no.32 of the counter affidavit filed by the respondent.

11. Third, it has been submitted, in any case, the provisions of Section 142(1)(d) of the Customs Act, 1962 are not applicable with respect to any demand under the Central Excise Act, 1944.

12. Last, it has been submitted, in any case, in view of the Business Transfer Agreement dated 14.03.2017 entered into between the parties, interest or penalty liabilities, if any, would have to be split up between two petitioners with respect to the auto division and the engineering division. That exercise could only be done by carrying out proper adjudication. Insofar as that adjudication has not been done till date, the recovery of interest and penalty is wholly without jurisdiction or authority of law.

13. Responding to the above, learned counsel for the revenue has placed heavy reliance on the provisions of Section 121(c) read with Section 121(d) read with Section 123(e) read with Section 124(1)(c) and Section 125(1)(f) of the Scheme to submit - according to the own showing of the petitioners, no amount of Central Excise duty or Service Tax was due from petitioner no.1, on the date of filing of either of the two declarations on Form SVLDRS-1. Therefore, the petitioners were neither eligible to make an application seeking settlement nor that application was otherwise maintainable for the purposes of computation of Estimated Amount Payable (EAP).

14. As to the other submissions advanced by learned counsel for the petitioners, learned counsel for the revenue has placed reliance on Rule 8(3A) of the Central Excise Rules, 2002 and Notification No. 68/63-CE dated 04.05.1963 to submit, no adjudication was required to be made as the default is admitted to the petitioners and the provisions of Section 142(1)(d) of the Customs Act, 1962, apply to the provisions of Central Excise Act. As to the Business Transfer Agreement, it has been submitted, the same may give rise to inter se dispute between the two petitioners with which the respondent authorities have no lis as the duty liability and, therefore, the interest and penalty liabilities arose only against petitioner no.1, from whom recoveries are being sought.

15. Having heard learned counsel for the parties and having perused the record, Section 124 of the Scheme reads as under:

***"124. (1) Subject to the conditions specified in sub-section (2), the relief available to a declarant under this Scheme shall be calculated as follows:--***

(a) where the tax dues are relatable to a show cause notice or one or more appeals arising out of such notice which is pending as on the 30th day of June, 2019, and if the amount of duty is,--

(i) rupees fifty lakhs or less, then, seventy per cent, of the tax dues;

(ii) more than rupees fifty lakhs, then, fifty per cent, of the tax dues;

(b) where the tax dues are relatable to a show cause notice for late fee or penalty only, and the amount of duty in the said notice has been paid or is nil, then, the entire amount of late fee or penalty;

***(c) where the tax dues are relatable to an amount in arrears and,--***

***(i) the amount of duty is, rupees fifty lakhs or less, then, sixty per cent, of the tax dues;***

***(ii) the amount of duty is more than rupees fifty lakhs, then, forty per cent of the tax dues;***

***(iii) in a return under the indirect tax enactment, wherein the declarant has indicated an amount of duty as payable but not paid it and the duty amount indicated is,--***

***(A) rupees fifty lakhs or less, then, sixty per cent, of the tax dues;***

***(B) amount indicated is more than rupees fifty lakhs, then, forty per cent, of the tax dues;***

(d) where the tax dues are linked to an enquiry, investigation or audit against the declarant and the amount quantified on or before the 30th day of June, 2019 is--

(i) rupees fifty lakhs or less, then, seventy per cent, of the tax dues;

(ii) more than rupees fifty lakhs, then, fifty per cent, of the tax dues;

(e) where the tax dues are payable on account of a voluntary disclosure by the declarant, then, no relief shall be available with respect to tax dues.

(2) The relief calculated under sub-section (1) shall be subject to the condition that any amount paid as predeposit at any stage of appellate proceedings under the indirect tax enactment or as deposit during enquiry, investigation or audit, shall be deducted when issuing the statement indicating the amount payable by the declarant:

Provided that if the amount of predeposit or deposit already paid by the declarant exceeds the amount payable by the declarant, as indicated in the statement issued by the Designated Committee, the declarant shall not be entitled to any refund."

Relief may be available, under Section 124(1)(c), to a declarant with reference to and against whom "tax dues" are relatable to an "amount in arrears", at prescribed rates.

16. Then Section 123(e) of the Scheme reads:

*"123. For the purposes of the Scheme, "tax dues" means -*

*(a) .....*

*(b) .....*

*(c) .....*

*(d) .....*

*(e) Where an amount in arrears rela*ting to the declarant is due, the amount in arrears."

Thus, the words "tax dues" mean "amount in arrears" that may be due.

17. The legislative intent becomes further clear from Sections 121(c) and 121(d) of the Scheme. They read as under:

*"121. In this Scheme, unless the context otherwise requires, -*

*(a) .....*

*(b) .....*

*(c) "amount in arrears" means the amount of 'duty' which is recoverable as arrears of duty under the indirect tax enactment, on account of -*

*(i) no appeal having been filed by the declarant against an order or an order in appeal before expiry of the period of time for filing appeal; or*

*(ii) an order in appeal relating to the declarant attaining finality; or*

*(iii) the declarant having filed a return under the indirect tax enactment on or before the 30th day of June, 2019, wherein he has admitted tax liability but not paid it;*

*(d) "amount of duty" means the amount of central excise duty, the service tax and the cess payable under the indirect tax enactment;"*

18. Thus, for the computation of relief under Section 124(c) of the Scheme, the phrase "amount in arrears" means the amount of Central Excise or Service Tax or Cess dues recoverable as arrears of duty under any indirect tax enactment (specified under Section 122 of the Scheme) that may be admittedly payable but may not have been paid upto that date.

19. The phrase "amount of duty" conveys a singular meaning under the Scheme. It is the amount of Central Excise duty or an amount of Service Tax or a Cess payable under any of the specified indirect tax enactments. No other amount whether by way of interest or penalty can ever be categorized as an amount of duty, especially as the entire scheme conveys that singular meaning.

20. No provision of the Scheme indicates - an amount of duty would include interest or penalty in the definition of the words "amount in arrears".

21. Once a valid settlement is reached, then, by way of a consequence provided under Section 129(1)(a) of the Scheme no interest or penalty liability may exist. Consequently, for the purposes of Sections 121(1)(c), 123(e), 124(1)(c) and 125(1)(f) also, the "amount in arrears" would be referable only to duty liability outstanding and not to interest or penalty liability, where only that liability may exist. If no amount of the Central Excise duty or Service Tax was due on the date of filing the declaration on SVLDRS-1, the fact that interest or penalty alone may have been claimed on that date, may not give rise to an eligibility under the Scheme. Here, admittedly, the entire Central Excise duty demand stood satisfied on 11.09.2018 and the entire Service Tax demand stood satisfied on 13.06.2019.

22. Even if there were any doubt in that regard, undisputedly according to the petitioners themselves, no show cause notice came to be issued to them before the cut off date 30 June 2019 to confirm, either any amount of interest or penalty. Those amounts were otherwise never quantified in writing either by any statutory authority or the petitioners.

23. In view of the above, neither declaration filed by petitioner no.1, on Form SVLDRS-1 was maintainable as those were filed only with respect to unknown and indeterminate interest and penalty liabilities. That hypothetical liability could not be described either as "tax dues" or "amount of duty" or "amount in arrears", under the Scheme.

24. Though the petitioners admit that the entire duty demand of Central Excise duty and Service Tax liability stood discharged before filing of the declaration of SVLDRS-1 and before the Scheme being enforced, yet, the petitioner no. 1 was not ineligible to make an application under Section 125(1)(f)(ii) of the Scheme. Still, no relief may be granted thereon as there were no "tax dues" relatable to an "amount of arrears" due against petitioner no.1 on the date of filing the declaration. The definition of the phrase "amount of duty" under Section 121(d) clearly prohibits any other construction to be made in favour of the petitioners.

25. In face of such statutory intent, the Circulars referred to by learned counsel for the petitioners are also of no avail,

inasmuch as paragraph no. 2(iii) of the Circular dated 29 October, 2019 reads as below:-

*"2(iii) A doubt has also been expressed whether a party who has filed an ST-3 return and has also paid the dues in FULL before filing the application but still wants to avail the benefits of the scheme for interest on the late paid dues is eligible. In this regard, attention is invited to illustrations (a) and (b) under Para 2(iv) of Circular No. 1072/05/2019-CX dated 25.09.2019, given in the context of arrears of confirmed demand. It is clarified that these also cover the cases of arrears of tax liability admitted under returns filed on or before 30.06.2019."*

26. Further paragraph no. 2(iv) of the Circular dated 25.09.2019 reads as below:-

*"2(iv) Section 121(c) defines an amount in arrears as the amount of duty which is recoverable as arrears of duty. Further, Section 123 defines 'tax dues' in respect of arrears as the amount which is due in arrears. In other words, tax dues is the amount of duty which is outstanding against the declarant. This is the net amount after deducting the dues that he has already paid. Such payment may be in the form of pre-deposits appropriated or paid subsequently by the tax payer voluntarily against the outstanding amount. It is clarified that the relief available under Section 124(1)(c) will be applied to the net outstanding amount so arrived at. It may be noted that in respect of all other categories, any money paid before its appropriation is in the nature of a deposit only. Hence, in respect of declarations made under these other categories, the relief will be applied to the outstanding amount and, only thereafter the pre-deposits/deposits [Section 124(2)] shall be adjusted. The same is illustrated as follows:*

*(a) Tax paper has outstanding arrears of confirmed duty demand of Rs.1 crore and he has already paid Rs.60 lakhs. So, the amount of tax dues is Rs. 40 lakhs. After applying applicable relief @ 60%, the amount payable under the Scheme is Rs 16 lakhs.*

*(b) Taxpayer has outstanding arrears of confirmed duty demand of Rs.1 crore apart from Rs 20 lakh penalty and interest as applicable. He has already paid Rs 1 cr towards duty. So, the amount of tax dues is zero, and the amount payable under the Scheme is zero."*

27. The Circulars are not pieces of legislation but only binding directions issued to executive authorities, by virtue of Section 133 of the Scheme. Their applicability would stay confined within the legislative limits set by the Scheme and, their own language. Thus, de hors the above referred Circulars, if a declarant had no "tax dues" outstanding and there was no amount of interest or penalty demanded from him, on the date of filing the declaration, on Form SVLDRS-1, neither it could be effectively processed nor any relief granted thereon, by virtue of the language of the provisions noted above.

28. Administrative Circulars cannot overreach or circumvent the statute or defeat the plain letter of law. In the present case, the Circulars clearly do not convey such intent of the CBIC. "Tax dues" relatable to "amount in arrears" may arise under Section 124(1)(c) both, in view of an adjudication or other order passed that may not have been satisfied on the date of filing of the declaration and also, by way of admitted liability under a return filed or other admission made by a declarant.

Clause 2(iv)(b) of the Circular dated 25 September, 2019 alludes to the first type of case noted above only i.e. where there may be outstanding arrears of 'confirmed duty' demand as also 'penalty and interest demands' on the date of the declaration being filed. Therefore, the Circular dated 25.09.2019 would remain confined (in applicability) only to cases where an adjudication order may have been passed, and to no other case.

29. In the present case, though the petitioner no.1 had deposited the entire duty demand, however, on its own showing, there did not exist any adjudication order with respect to the same, let alone any demand of interest and/or penalty.

30. This is also not a case under Section 123(c) of the Scheme, inasmuch as, the petitioner no.1 does not contend that the amount of penalty and interest had ever been quantified in writing, by any means. The procedure i.e. manner of filling up the statutory Form SVLDRS-1 or the explanations furnished cannot create any right to the relief claimed that otherwise does not exist under the Scheme.

31. In view of the above reasons, the first submission advanced by learned counsel for the petitioners cannot be accepted. For the same reasons, no recoveries are possible to be made pursuant to any determination made under the Scheme.

32. Insofar as the other contention has been raised, the same appears to be wholly well founded, inasmuch as Rule 8(4) of the Central Excise Rules, 2002 reads as under:-

*"8(4). The provisions of section 11 of the Act shall be applicable for recovery of the duty as assessed under rule 6 and the penalty under sub-rule 3(A) in the same manner as they are applicable for recovery of any duty or other sums payable to the Central Government."*

Therefore, before any recovery of interest or penalty may be enforced against the petitioners it would have to be first adjudicated. Consequently, the communications dated 17.03.2020 and 07.04.2020 issued by respondent no.6 are found to be wanting in jurisdiction and wholly pre-mature.

33. Also, Clause 1 of the Notification No. 68/63-CE dated 04.05.1963, reads as under:-

*"(1) In supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) Central Excise No. 69/59 (G.S.R. No. 822 of 1959), dated the 18th July, 1959, the Central Government hereby declares that the provisions of sub-section (1) of Section 105, Section 110, Section 115 [excluding clauses (a) and (e) of sub-section (1)] clause (a) of Section 118, Sections 119, 120, 121 and 124, clause (b) and sub-clause (ii) of clause (c) of sub-section (1) of Section 142 and 150 of the Customs Act, 1962, (52 of 1962), relating to matters specified therein, shall be applicable in regard to like matters in respect of the duties imposed by Section 3 of the first mentioned Act, subject to the following modifications and alterations which the Central Government considers necessary and desirable to adapt those provisions to the circumstances, namely:-"*

34. Thus, the provision of Section 142(1)(d) of the Customs Act, 1962 had not been borrowed either by reference or by incorporation or otherwise made applicable to the provisions of Central Excise Act,

1944. Thus, the garnishee proceeding instituted against the petitioners with respect to duty liability under the Central Excise Act is wholly without jurisdiction. For the above reasons, the communications dated 17.03.2020 and 07.04.2020 issued by respondent no.6 are set aside. Any amount that may have been recovered pursuant to those communications may be refunded within a period of one month from today.

35. As to the submission of learned counsel for the petitioners based on the Business Transfer Agreement dated 14.03.2017, we do not record any conclusion in that regard and that issue may remain to be examined in appropriate proceedings, at the appropriate stage. We further leave it open to the revenue authorities to initiate a valid adjudication proceeding with respect to penalty and interest, if the limitation to institute such proceeding otherwise survives today. We make clear, we have not granted any extension of limitation that may have otherwise expired.

36. Thus, the writ petition stands **partly allowed.** No order as to costs.

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**(2021)10ILR A781**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 15.09.2021**

**BEFORE**

**THE HON'BLE NAHEED ARA MOONIS, J.**
**THE HON'BLE SAUMITRA DAYAL SINGH, J.**

Writ Tax No. 477 of 2021
and
Writ Tax No. 225 of 2021
and
Writ Tax No. 872 of 2018

**M/s Ratek Pheon Friction Technologies Pvt. Ltd., Noida, Gautam Budh Nagar ...Petitioner**

**Versus**

**Principal Commissioner, Central G.S.T. Noida & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Shubham Agarwal, Sri Suyansh Agarwal

**Counsel for the Respondents:**
C.S.C., Sri Krishna Agarawal, Sri Sudarshan Singh, Sri R.C. Shukla, Sri Gaurav Mahajan, Sri Anant Kumar Tiwari

**A. Tax Law - CGST Act,2017 & U.P. GST Act,2017 - Sections 140 & 174(2)(c) - Central Goods and Services Tax Act, 2017 - Sections 168 & 168A - Uttar Pradesh Goods and Services Tax Act, 2017 - Central Excise Act, 1944 - The Uttar Pradesh Value Added Tax Act, 2008 - U.P. Goods and Services Tax Rules, 2017 - Rule 117 & 117 (1)(a) - Indian Income Tax Act, 1922 & Section 24(1) & CGST Rules and UPGST Rules: Rule 121 -**

**The first issue for consideration is whether the ITC is a vested right under the GST regime.** This issue arises in the context of transition provisions enacted under the CGST Act read with the CGST Rules. (Para 22)

The legislature did not intend to nullify those credits earned under the pre-existing laws, rather, it intended to transition those credits to the GST regime. That appears to be the plain object and intent, of section 140 of the CGST & UPGST Acts. It has also allowed ITC to unregistered dealers under the preexisting laws, on tax paid inputs, stocks etc., on the strength of Tax Invoices. (Para 23, 48)

Thus, u/s 140(1) of the Act, a "registered person", other than one opting to pay tax by way of composition levy (u/s 10 of the CGST Act) has been made entitled to take benefit of any CENVAT credit of eligible duties that may have been carried forward on 30 June 2017. However, by virtue of the plain language of Section 140 of the Act, that right is subject (mainly) to fulfilment of two conditions, namely,

the return for such CENVAT credit of eligible duty and/or VAT ITC should have been furnished by a "registered person" under the pre-existing law/s. In case such person was not registered under the pre-existing laws, he may avail ITC on tax paid inputs, stocks etc., against Tax Invoices. Second, compliance of time and manner prescribed, is required to be fulfilled. Importantly, the words "within such time and" have been inserted by Finance Act, 2020, with full retrospective effect from 01.07.2013. (Para 25)

As to the prescribed manner, there is no quarrel between the parties. The petitioners do not contend, that the details required to be filled up in the Form were impossible or difficult to be filled up. The only challenge they raise is based on their inability to submit electronically that data on the GST Portal, within time granted. (Para 48)

Clearly, while enacting the GST law, the Parliament and the State Legislature were conscious of the duties and obligations created under the new law. It is those obligations for which timeline and manner has been prescribed. Therefore, the condition within such time and within such manner, must be read only in conjunction with the right to avail entitlement to take into the Electronic Credit Ledger, the amount of CENVAT credit or ITC. (Para 30)

Thus, **the right to avail ITC did not get vested on the petitioners upon their filing returns under the pre-existing laws. The petitioners were obligated to perform further act under the new laws i.e., CGST Act and the UPGST Act - to submit electronically, Form GST TRAN-1 and/or TRAN-2, before they could carry that credit to their Electronic Credit Ledger.** (Para 32)

**It may not be empirically correct to contend that CENVAT or ITC is a pure concession as concessions do not necessarily spring from a conceptual base to tax value addition.** However, that principle may be relevant only to determine the ITC arising against transactions performed after enforcement of the GST regime i.e., post 01.07.2017. It may not be true of past/earlier transactions arising under the pre-existing/repealed laws, in the context of pure transition provision. (Para 35)

**B. Failure or inability to provide that reliable online platform would render the strict time prescription (made u/s 140 of the CGST Act read with Rule 117 of the CGST Rules), arbitrary and therefore violative of Article 14 of the Constitution of India.** Though the consequence of non-submission of those Forms are also clearly visible, yet no procedural law may be valid or held mandatory, if there exists physical impossibility or unreasonable difficulty/obstruction, to comply with the same. Once the CGST Act prescribed the manner and time to submit/revise only electronically through Form GST TRAN-1/ TRAN-2, the State was obligated to provide a robust and wholly reliable GST Portal to comply with that law. (Para 50)

Petitioners were required to submit/revise electronically, Form GST TRAN-1/TRAN-2 electronically. They were obstructed, and remained disabled (generally) owing, not to any conduct attributable to them but owing solely to factors beyond their control and for reasons attributable to the respondents. The difficulties claimed were generic as had been recognized by the CBIC itself vide his circular dated 03.04.2018 as also by various decisions of the other High Courts. (Para 60, 61)

**The time limit u/s 140(1) of the CGST Act read with Rule 117 of the CGST Rules 2017 and parallel provisions under the State law (to submit Form TRAN-1/TRAN-2 electronically, within 90 days from the appointed date), was the time limit specified in or prescribed by those enactments.** Therefore, even if reference to Section 140 has not been specifically made in any of the orders and notifications issued u/Rule 117(1), Rule 117(1)A or Section 140A or Section 168A still, undeniably, the time limit to submit electronically Form GST TRAN-1/TRAN-2 stood extended in accordance with law, up to 31.08.2020. No contrary provision of law, either statutory or delegated, has been shown to exist as may warrant a different construction to be made to the exercise of powers made by the Commissioner CGST or of the CBIC or the

Central Government, acting either on their own or on the recommendation of the CBIC or the GST Council. (Para 43)

**C. Rule of law and good administration go hand in hand. It is true, no ITC may arise under the GST regime unless a "registered person" fulfils the conditions therefore, so also, the administration of tax law that is in the hands of the GST Council, GST Commissioner (Central), GST Commissioner (UP), GST Network and all other State or statutory authorities, must allow all "registered persons"/taxpayers, reasonable opportunity to exercise their rights and make their claims, in the manner contemplated by law.** (Para 62)

Though unintentional on part of the State authorities, it cannot be lost sight that the obstruction thus caused was attributable only to the conduct of the State authorities since, the GST Portal is a creation of the State authorities and the responsibility to run the same seamlessly, rests exclusively on them. **The "registered persons"/taxpayers, whose rights were adversely impacted by the lack of smooth operation of the GST Portal, could not be saddled with any civil consequences arising from the non-functioning or improper or irregular functioning of the GST Portal.** (Para 63)

Once the CBIC clearly recognised the existence of such technical glitches on the GST Portal, there is no reasonable basis on which the CBIC and the revenue authorities insisted for specific evidence and verification as a condition to grant relaxation of timeline - to submit/revise/re-revise Form GST TRAN-1/TRAN-2. (Para 64)

**D. In absence of any enabling law, that burden cast on the "registered persons"/tax payers - to lead evidence of difficulty faced, is wholly arbitrary and unreasonable and therefore unenforceable.** The injury caused being attributable to the State authorities, even if unintentional, the "registered persons"/taxpayers cannot be burdened today, to bring home evidence to establish the extent of the injury caused that too w.r.t. transition provision newly introduced, especially when the injury sprung from a generic event/cause. (Para 65)

At the relevant time, there was no requirement in law and even today, there is no requirement either under the Act or the Rules, to obtain evidence of every attempt made to submit Form GST TRAN-1 or TRAN-2. It is only by way of the Circular instruction dated 3.4.2018 that such a requirement was introduced by the revenue authorities. It is arbitrary and therefore unenforceable. (Para 67, 68)

**E. Any law that may differentiate between two similarly situated persons based on a chance occurrence/s and allow the valuable civil rights of a citizen to be prejudiced, based solely on that, would remain exposed to the vice of arbitrariness and therefore be invalid.** If allowed to work, it (submission of evidence of attempts) would create hostile discrimination between two similarly situated persons based solely on the chance occurrence of one having in his possession proof of attempt/s made to submit/revise/re-revise Form TRAN-1/TRAN-2, electronically, though he was not required (by law), to obtain or maintain such evidence. (Para 69)

**Writ petitions allowed.** (E-4)

**Precedent followed:**

1. R.R. Distributors Pvt. Ltd. Vs Commissioner of Central Tax, GST Delhi North & anr., WP (C) No. 4143/2020, decided on 27.05.2021 (Para 12)

2. Blue Bird Pure Pvt. Ltd. Vs U.O.I. & ors., 2019 SCC OnLine Del 9250 (Para 12)

3. M/s Carlstahl Craftsman Enterprises Pvt. Ltd.Vs U.O.I. & 3 others, W.P. No. 11119/2020 dated 23.04.2020 (Para 12)

4. M/s Bharat Electronics Limited Vs Commissioner of GST & Central Excise & 3 ors., W.P. No. 2937 of 2019 dated 21.06.2021 (Para 12)

5. Jakap Metind Pvt. Ltd. Vs U.O.I., 2019 (31) GSTL 422 (Guj.) (Para 12)

6. Adfert Technologies Pvt. Ltd. Vs U.O.I.& ors., W.P. No. 30949 of 2018, dated 04.11.2019 (Para 12)

7. Commissioner of Income Tax, Delhi Vs Mahalaxmi Sugar Mills Co. Ltd., (1986) 3 SCC 544 (Para 13)

8. SKH Sheet Metal Components Vs U.O.I. & ors., (2020) 38 GSTL 592 (Del) (Para 14)

9. Dhampur Sugar Mills Ltd. Vs Commissioner of Income Tax Delhi Central, (1973) 90 ITR 236 (Para 14)

10. State of Mysore & ors. Vs Mallick Hashim & Co., (1974) 3 SCC 251 (Para 18)

11. Brintell Vs Secretary of State Security, (1991) 2 All ER 726 (Para 20)

12. K.S. Paripoornan Vs St. of Kerala & ors., (1994) 5 SCC 593 (Para 20)

13. M/s P.R. Mani Electronics Vs U.O.I. & anr., (2020) 7 MLJ 605 (Para 21)

14. Bhargava Motors Vs U.O.I., WP (C) No. 1280/2018, dated 13 May, 2019 (Para 52)

15. M/s Ingersoll-Rand Technologies & Services Pvt. Ltd. Vs U.O.I. & 3 ors., Writ Tax No. 1120 of 2019 (Para 57)

16. St.of Andhra Pradesh & anr. Vs Nalla Raja Reddy & ors., AIR 1967 SC 1458 (Para 69)

17. S.G. Jaisinghani VsUOI & ors., AIR 1967 SC 1427 (Para 70)

**Precedent distinguished:**

1. Jayam & Company Vs Assistant Commissioner (CT) & another, (2016) 15 SCC 125 (Para 20)

2. ALD Automotive Pvt. Ltd. Vs Commercial Tax Officer & ors., 2018 (364) ELT 3 (SC) (Para 20)

3. Siddharth Enterprises Vs Nodal Officer, 2019 (29) GSTL 664 (Guj.) (Para 12)

**Present petitions seek relief in the nature of mandamus commanding the respondent authorities to allow the petitioners to submit/revise/re-revise electronically, their respective declarations on Form GST TRAN-1 and GST TRAN-2, under the provisions of the CGST Act, 2017 and, the UPGST Act, 2017, to carry forward the CENVAT and VAT Input Tax Credit, under the CGST Act, 2017 and the U.P. GST Act, 2017.**

(Delivered by Hon'ble Naheed Ara Moonis, J.
&
Hon'ble Saumitra Dayal Singh, J.)

1. Heard Mr Shubham Agarwal, Mr Nishant Mishra, Mr Praveen Kumar, Mr Suyash Agarwal, Mr Rahul Agarwal, Mr Rishi Raj Kapoor, Mr Ayush Khanna, Mr Harsh Vardhan Gupta, Mr Vishwjit, Mr Krishnaji Khare, Mr Vinayak Mithal, Mr Pranjal Shukla, Ms Sanyukta Singh and Ms Pooja Talwar for the petitioners; Mr Manish Goyal, learned Additional Advocate General, assisted by Mr Apurva Hajela, Mr A.C. Tripathi, Mr B.P. Singh Kachhawah and Mr Manoj Kumar Kushwaha for the State; Mr Shashi Prakash Singh, learned Additional Solicitor General of India, assisted by Mr Sudarshan Singh, Mr Krishna Ji Shukla, Mr Anant Kumar Tiwari, Mr Rajesh Tripathi, Mr Ishan Shishu and Mr Manoj Kumar Singh for the Union of India and; Mr Ramesh Chandra Shukla, Mr Ashok Singh, Mr Parv Agarwal, Mr Dhananjai Awasthi, Mr Krishna Agarwal, Mr Gaurav Mahajan, Mr Amit Mahajan, Mr Ankur Agarwal and Mr B.K. Singh Raghuvanshi, for the CGST authorities.

2. This batch of writ petitions has been filed seeking relief in the nature of mandamus commanding the respondent authorities to allow the petitioners to submit/revise/re-revise electronically, their

respective declarations on Form GST TRAN-1 and GST TRAN-2, under the provisions of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the "CGST Act') and, the Uttar Pradesh Goods and Services Tax Act, 2017 (hereinafter referred to as the "UPGST Act'), to carry forward the CENVAT and VAT Input Tax Credit, under the CGST Act , 2017 and the U.P. GST Act, 2017. No other relief has been pressed at the hearing.

3. On facts, broadly there are three types of cases. First, some of the petitioners claim, they had submitted electronically, the Form GST TRAN-1 and/or TRAN-2 (on the GST Portal), within time, but errors had crept in that Form so submitted. They attempted to correct/revise that Form GST TRAN-1 and/or TRAN-2 on the GST Portal within time granted for the same but could not succeed due to technical glitches on the GST Portal. They have evidence of such attempt/s made. In the second type of cases, the petitioners claim, they could not submit electronically, the Form GST TRAN-1 and/or TRAN-2 within time granted (despite efforts made by them), due to technical glitches on the GST Portal. They have evidence of such attempt/s made. The third type of cases, involve a variety of the first two types described above. Therein, petitioners claim, though they tried to submit or revise electronically, the Form GST TRAN-1 and/or TRAN-2 on the GST Portal, they could not succeed in the same. They do not have any evidence of such attempt made to submit or revise electronically, the Form GST TRAN-1 and/or TRAN-2. Thus, the petitioners claim denial of full benefit of transition credit arising from transactions performed under the repealed indirect tax enactments.

4. For the purposes of convenience, we have heard this batch of writ petitions on the facts disclosed in **Writ Tax No. 477 of 2021** (M/s Ratek Pheon Friction Technologies Private Limited Vs. Principal Commissioner, Central Goods and Services Tax & Ors.); **Writ Tax No. 225 of 2021** (M/s Modern Plywood Center Vs. Union of India & Ors.) and; **Writ Tax No. 872 of 2018** (Allied Agencies Vs. Union of India & 4 Ors.). The facts of these three cases would be sufficient to cover the discussion necessary for the purposes of our decision. At the same time, we deem appropriate to take note of the basic facts involved in all cases in this batch of petitions. Those are as below.

| SN | WP (Writ Tax) | CENVAT Available as on 30th June 2017 [in Rs.] | ITC Available as on 30th June 2017 [in Rs.] | Credit on Stocks as on 30th June 2017 | Return filed under the erstwhile regime along with date | Date of making first attempt to upload TRAN-1/2 | Date of uploading TRAN-1/2 | Date of making attempt to revise TRAN-1/2 |
|---|---|---|---|---|---|---|---|---|
| 1 | 422 /2018 | - | 31,34,052 | 48,92,772 | To be verified | 9.12.2017 | 9.12.2017 | 19.12.2017 |
| 2 | 546 /2018 | - | - | 3,22,760 | To be verified | 27.12.2017 | - | - |
| 3 | 567 /2018 | - | - | 6,44,875.55 | To be verified | 27.12.2017 | - | - |
| 4 | 630 /2018 | - | 3,69,552 | - | To be verified | 27.12.2017 | - | - |
| 5 | 694 /2018 | 1,49,922 | - | 1,46,415 | 6.7.2017 | 27.12.2017 | - | - |
| 6 | 702 /2018 | 27,76,000 | - | - | To be verified | 27.12.2017 | - | - |
| 7 | 720 /2018 | - | - | 4,43,479 | 28.9.2017 | 27.12.2017 | - | - |
| 8 | 721 /2018 | - | - | 4,18,067 | 28.9.2017 | 27.12.2017 | - | - |
| 9 | 727 /2018 | 1,68,41,568 | - | - | To be verified | - | 27.12.2017 | 28.12.2017 |
| 10 | 736 /2018 | 75,18,296 | - | - | To be verified | December 2017 | - | - |
| 11 | 774 /2018 | 23,75,831.65 | - | 2,35,81,098 | To be verified | 26.10.2017 | 26.10.2017 | 27.12.2017 |
| 12 | 792 /2018 | 11,44,322 | Claiming only CENVAT | 11,44,322 | Claiming only CENVAT | 26.12.2017 | 27.12.2017 | - |
| 13 | 800 /2018 | 1,49,922 | - | 1,46,415 | 6.7.2017 | 27.12.2017 | - | - |
| 14 | 802 /2018 | - | - | 4,81,445 | To be verified | 27.12.2017 | - | - |
| 15 | 807 /2018 | 22,06,927 | - | - | To be verified | 27.12.2017 | - | - |
| 16 | 823 /2018 | - | - | 20,15,902 | To be verified | 27.12.2017 | - | - |
| 17 | 829 /2018 | - | - | 30,40,657 | To be | 27.12.2017 | Screenshot of | - |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | | | | verified | | attempt to upload TRAN 1 available and invoices have been processed | |
| 18 | 838 /2018 | - | 27,06,843.03 | - | To be verified | 27.12.2017 | 27.12.2017 | - |
| 19 | 847 /2018 | - | 55,60,967 | - | To be verified | 27.12.2017 | 27.12.2017 | 27.12.2017 |
| 20 | 856 /2018 | - | - | 8,51,817 | To be verified | 27.12.2017 | - | - |
| 21 | 859 /2018 | 6,16,026.66 | - | - | To be verified | 27.12.2017 | - | - |
| 22 | 872 /2018 | - | - | 16,00,639.74 | To be verified | 25 to 27.12.2017 | - | - |
| 23 | 883 /2018 | - | 1,86,621 | 3,13,608 | 16.7.2017 | 17.9.2017 | - | January 2018 |
| 24 | 891 /2018 | 7,38,997 | - | Nil | Excise Return filed on 07.07.2017 & VAT Return filed on 21.07.2017 | 13.12.2017 | 13.12.2017 | - |
| 25 | 896 /2018 | 1,56,26,966 | - | - | To be verified | 27.12.2017 | - | - |
| 26 | 936 /2018 | 25,01,309 | - | - | 31.5.18 | 24.11.17 | - | - |
| 27 | 944 /2018 | 9,57,180 | 9,57,180 | - | To be verified | 27.12.2017 | - | - |
| 28 | 965/2018 | - | - | 8,23,297 | To be verified | 27.12.2017 | - | - |
| 29 | 984 /2018 | - | 5,72,466 | - | July 2017 | 27.12.2017 | - | - |
| 30 | 1022/2018 | 1,26,13,183 | | | To be verified | After 27.12.2017 | - | - |
| 31 | 1029 /2018 | - | - | 15,71,653 | To be verified | 27.12.17 | - | - |
| 32 | 1030 /2018 | - | 10,13,840 | 10,95,261 | To be verified | 27.12.17 | 27.12.17 | 27.12.17 |
| 33 | 1031 /2018 | - | - | 53,12,047 | To be verified | 27.12.17 | - | - |
| 34 | 1032 /2018 | - | - | 2,98,611 | To be verified | 27.12.17 | - | - |
| 35 | 1037 /2018 | - | - | 28,02,554 | To be verified | 27.12.17 | - | - |
| 36 | 1097/2018 | 15,45,821/- | - | - | VAT 20-07-2017 ER-1 14-07-2017 | 25.12.2017 | - | - |
| 37 | 1111/ 2018 | 19,69,845 | 23,74,294 | - | 20.7.2017 | 27.12.2017 | - | - |
| 38 | 1115/2018 | - | - | 70,09,486 | 20.7.2017 | 27.12.2017 | 27.12.2017 | 11.1.2018 |
| 39 | 1143/2018 | 1,81,075 | - | - | To be verified | 27.12.2017 | - | - |
| 40 | 1174/18 | - | - | 21,20,290 | To be verified | 27.12.17 | - | - |
| 41 | 1218/18 | - | - | 29,86,189 | To be verified | 27.12.17 | - | - |
| 42 | 1251/2018 | - | 3,08,653 | - | VAT 19-07-2017 | 27.12.2017 | - | - |
| 43 | 1370/2018 | - | 2,62,877 | - | VAT 20.7.2017 | 27.12.2017 | - | - |
| 44 | 2/2019 | 6,93,914 | - | - | To be verified | 27.12.20147 | 27.12.2017 | - |
| 45 | 119/2019 | - | 1075302 | - | To be verified | 27.12.2017 | 27.12.2017 | - |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 46 | 361/2019 | 1,81,000 | - | - | 08.07.2017 | Before and After 27.12.2017 | - | - |
| 47 | 363/2019 | | 3,50,000 | - | To be verified | - | 25.12.2017 | After 27.12.2017 |
| 48 | 394/2019 | - | - | 54,675 | 17.7.2017 | 27.12.2017 | - | - |
| 49 | 401/2019 | 10,00,223 | - | - | To be verified | 9.7.17 7.12.17 | - | - |
| 50 | 405/2019 | - | 48,45,262 | - | To be verified | 15.8.17 | - | - |
| 51 | 406/2019 | 28,99,287 | - | - | 15.8.17 | 27.12.17 | - | - |
| 52 | 407/2019 | - | - | 2,04,806 | To be verified | 27.12.17 | - | - |
| 53 | 408/2019 | - | - | 2,65,120 | To be verified | 27.12.17 | - | - |
| 54 | 409/2019 | - | - | 11,35,153 | To be verified | 31.8.2017 | December 2017 | - |
| 55 | 411/2019 | 8,25,373/- | - | 2,66,224 | VAT 21-7-2017 ER-1 10-7-2017 | 27-12-2017 | 9-1-2020 | - |
| 56 | 541/2019 | 5,10,153 | 4,33,761 | - | VAT 16-7-2017 ER-1 19-7-2017 | 27.12.2017 | - | - |
| 57 | 550/2019 | - | 22,40,891 | - | To be verified | 27.12.2017 | - | - |
| 58 | 887/2019 | - | - | 10,73,350 | To be verified | 27.12.2017 | - | - |
| 59 | 903/2019 | - | - | 11,25,192 | To be verified | 27.12.2017 | - | - |
| 60 | 977/2019 | 12,65,078 | - | 65,33,573 | August 2017 | 25.12.2017 | 25.12.2017 | - |
| 61 | 1000/2019 | 89,18,31,760 | 15,44,848 | - | 10.7.17 31.7.17 | August 2017 | August 2017 | 27.12.2017 |
| 62 | 1136/2019 | 3,43,19,951 | 40,52,969 | - | To be verified | - | 26.12.2017 | - |
| 63 | 1147/2019 | - | - | 67,98,005 | To be verified | 9.1.2018 | 18.1.2018/23.1.2018 | - |
| 64 | 1178/2019 | - | - | 12,54,328 | 20-7-2017 | 27-12-2017 | - | - |
| 65 | 1244/2019 | 17,32,879 | - | - | ST-3 25.09.2017 | - | 21-12-2017 | 27.12.2017 |
| 66 | 1245/2019 | 4,43,131 | - | - | ER-1 19.07.2017 | 27.12.2017 | - | - |
| 67 | 1246/2019 | 16,06,984 | - | - | 23.09.2017 | - | 21-12-2017 | 27.12.2017 |
| 68 | 1247/2019 | 16,47,968 | - | - | 23.09.2017 | - | 21-12-2017 | 27.12.2017 |
| 69 | 1255/2019 | - | - | 14,28,504 | August 17 | 13.11.17 | Screenshot of attempt to upload TRAN 1 available and invoices have been processed | - |
| 70 | 362/2020 | - | - | 24,66,545 | To be verified | Manually filed | - | - |
| 71 | 369/2020 | 16,06,981 | - | 7,87,000 | 10.7.17 | 27.12.17 | - | - |
| 72 | 370/2020 | - | - | 24,58,190 | To be verified | 27.12.17 | - | - |
| 73 | 377/2020 | 45,18,280- | - | - | To be verified | - | 27.12.2017 | 27.12.2017 |
| 74 | 456/2020 | 19,80,750 | - | 10,90,630 | To be verified | 14.12.2017 | 14.12.2017 | 23.5.2020 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 75 | 225/2021 | - | 2,82,035 | 8,52,511 | VAT 18.7.2017 | - | 23.12.2017 | December 2019 |
| 76 | 458/2021 | 51,19,305 | - | - | 3.7.2017 | - | - | 27.12.2017 and thereafter. |
| 77 | 671/2021 | 9,53,880 | 9,53,880.07 | 45,40,588.17 | 26.12.2017 | 26.12.2017 | - | - |
| 78 | 698/2021 | 62,10,062.75 | 62,10,062.75 | - | To be verified | 26.9.2017 | 26.9.2017 | - |
| 79 | 722/2020 | - | 17,03,981 | - | To be verified | 27.12.2017 | - | - |
| 80 | 477/2021 | 52,54,954 | - | - | 13.7.2017 | 26.12.2017 | 26.12.2017 | 26.5.2020 |

5. In Writ Tax No. 477 of 2021, the petitioner contends, it filed its return under the Central Excise Act, 1944 on Form ER-1, on 13.07.2017 for the period ending 30.06.2017, disclosing total CENVAT credit available Rs. 52,54,954/-. Also, it submitted electronically its Form GST TRAN-1, for the period ending 30.06.2017, within time granted. Inadvertently, it submitted the figure Rs. 50,702/- as admissible CENVAT in place of the actual entitlement figure Rs. 52,54,954/-. The Form GST TRAN-1 containing the aforesaid error was submitted electronically on 13.07.2017 on the GST portal. Despite best efforts, the petitioner could not submit electronically the revised Form GST TRAN-1 before the cut-off date 27.12.2017 as that function on the GST portal had not been activated or not made fully functional. Besides making unsuccessful attempts to revise the Form GST TRAN-1, manually, the petitioner further claims to have written to the Principal Commissioner CGST on 10.9.2020 and 12.2.2021 to verify the correct amount of ITC available to it and to resolve the issue in favour of the petitioner. Vide communication dated 15.3.2021, the Principal Commissioner CGST refused that resolution since the petitioner's request was received on 26.05.2020, after expiry of the last date for that purpose, 31.03.2020.

6. In Writ Tax No. 225 of 2021, the petitioner contends, it filed its return under the Central Excise Act, 1944 on Form ER-1 for the period ending 30.06.2017 disclosing ITC available, Rs. 2,82,035/-. The petitioner submitted electronically its Form GST TRAN-1 on 23.12.2017 disclosing Rs. 2,82,035/- ITC availed [in Table no.5(c) of Form TRAN-1]. The balance ITC of eligible duties on inputs held on stocks as on 30.06.2017 was Rs. 8,52,511/-. It was inadvertently filled up in Table no. 7(d) in place of Table no. 7(a) of the Form GST TRAN-1. The petitioner tried to revise the Form GST TRAN-1 but could not succeed due to technical glitches on the GST Portal. Petitioner also claims to have lodged a complaint with the GST Helpdesk on 30.12.2019 as also a grievance on the common portal, on 11.02.2020. On 04.03.2020, the petitioner further claims to have informed the Nodal Officer and the Assistant Commissioner about the inadvertence and requested permission to correct the same. Evidence in support of such claim is on record. However, no relief came to be granted to the petitioner.

7. In Writ Tax No. 872 of 2018, the petitioner claims, it held tax paid stocks for the period ending 30.06.2017 disclosing ITC available, Rs. 16,00,639.74/-. It tried, but could not submit electronically, the Form GST TRAN-1 due to technical glitches on the GST Portal. It admits, there is no evidence available with it, to establish

the number of attempts made by it or the date or time when such attempts may have been made - to submit electronically, the Form GST TRAN-1.

8. Largely, all learned counsel for the petitioners have relied on the provisions of Section 140 of the CGST Act and the UPGST Act to contend - upon filing their return under The Central Excise Act, 1944 and/or The Finance Act, 1994 and/or The Uttar Pradesh Value Added Tax Act, 2008, for the period 30.06.2017, a right accrued or vested in their favour, to claim transition ITC under the GST regime. The transition provisions and the Rules framed under the CGST Act and the UPGST Act are only enabling provisions. They govern the procedure to avail such ITC under the CGST Act and/or the UPGST Act. Reference has also been made to Section 174(2)(c) of the CGST Act and the UPGST Act to submit - the right accrued to the petitioners under the repealed law i.e. The Central Excise Act, 1944; The Finance Act, 1994 and; The Uttar Pradesh VAT Act, 2008, stood saved under the CGST Act and the UPGST Act. That substantive right could not be defeated by the procedural law framed and enforced by the delegate of the legislature i.e. the Central Government and the State Government.

9. Alternatively, reliance has been placed on Rule 117 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the "CGST Rules') read with Rule 117 of the Uttar Pradesh Goods and Services Tax Rules, 2017 (hereinafter referred to as the "UPGST Rules') read with Sections 168 and 168A of the CGST Act, to submit - in any case, the time to submit electronically, Form GST TRAN-1 existed up to 31.08.2020 in view of Order no.1 of 2020 issued by the Principal Commissioner GST under Rule 117(1)(a) of the CGST Rules read with notification no. 35 of 2020 read with notification no. 55 of 2020 dated 26.06.2020, both issued under Section 168A of the CGST Act by the CBIC dated 03.04.2020. These orders and notifications have been referred to in conjunction with the statutory provisions whereunder they were issued - to establish the procedural requirement to submit or revise electronically, the Form GST TRAN-1 and/or TRAN-2 (as existed up to 27.12.2017), stood revised and extended up to 31.08.2020. Denial of a real opportunity to submit or revise electronically, the Form GST TRAN-1 and/or TRAN-2, prior to that date, was contrary to law. It is strenuously urged that the extension of time, thus granted, had been obstructed by the executive authorities. They chose to selectively and therefore arbitrarily allow some "registered persons" to submit/revise electronically, the Form GST TRAN-1 and/or TRAN-2, who fulfilled the arbitrary conditions imposed by such authorities.

10. Second, as to the evidence of technical difficulties experienced by the petitioners and the glitches suffered on the GST Portal, it has been submitted, that fact is wholly admitted and documented. First, reference has been made to repeated extensions of time granted by all the statutory authorities and the legislative action taken to extend the timeline to submit Form GST TRAN-1, for that reason. Then reference has been made to Circular no. 39/13/2018-GST dated 03.04.2018 issued by CBIC recognising the existence of such difficulties and efforts made to remedy the wrong. In face of that admission, no further proof or evidence is required, to establish difficulties faced in individual cases. That test, if applied, would lead to arbitrary results and promote

hostile discrimination. Last, reference has been made to various decisions of different High Courts, chiefly, the Delhi High Court, Madras High Court, Gujarat High Court, Calcutta High Court, Bombay High Court and Punjab & Haryana High Court, to submit - technical glitches and difficulties faced by different "registered persons"/taxpayers, in submitting/revising/re-revising, electronically, their Form GST TRAN-1 and/or TRAN-2 on the GST portal was not a local phenomenon or a rare event but a common and generic difficulty faced by all "registered persons"/tax payers across the country, while working on the newly designed GST Portal.

11. In the first place, that difficulty arose on account of the switch over required to be made from the plural indirect tax regime (including Central Excise, Service Tax and VAT laws) to the singular GST regime. Second, difficulty arose on account of only one method provided to migrate and merge from the old/plural indirect tax regimes to the new/singular GST regime. While doing so, the executive authorities acted in a manner that was unmindful of the inherent difficulties and challenges faced by the vital stake holders i.e., the "registered persons"/taxpayers and tax professionals and tax authorities. Third all such "registered persons"/taxpayers and tax professionals had not migrated to online or digitized platform, before 30.06.2017. Fourth, the newly devised GST Portal was hurriedly activated, leading to multiple teething as also genuine technical and other difficulties faced by all including the CGST & UPGST authorities. Since the existence of such technical and other difficulties and glitches is admitted or indisputably established, no further burden exists on the individual "registered person"/taxpayer/petitioner to establish the extent of difficulty faced by each such person or to establish strict proof that the Form GST TRAN-1 and/or TRAN-2 could not be submitted or revised or re-revised electronically, for reason of that difficulty.

12. Shri Shubham Agarwal **(in Writ Tax No. 477 of 2021)** has placed reliance on the decisions of the Delhi High Court in **R.R. Distributors Pvt. Ltd. Vs. Commissioner of Central Tax, GST, Delhi North & Anr.**, WP (C) No. 4143/2020, decided on 27.05.2021 wherein, following its earlier decision in **Blue Bird Pure Pvt. Ltd. Vs. Union of India & Ors., 2019 SCC OnLine Del 9250,** the Delhi High Court held - inadvertent and genuine mistakes in filling up of credit in Form GST TRAN-1 should not preclude tax payers from having their claims examined in accordance with law. That Court further opined, non-filling of Part VII-B of Table no. 7(a) and 7(d) of Form GST TRAN-1 could not impair the rights of the assessee to claim transition ITC. It further recognized - at the relevant time, the GSTN system was in a trial-and-error phase and that from the beginning, the GST Network threw up difficulties in filling up returns etc., on the GST Portal. He has also relied on a decision made on similar lines, pronounced by the Madras High Court in **M/s Carlstahl Craftsman Enterprises Private Limited Vs. Union of India & 3 Ors.,** W.P. No. 11119/2020 dated 23.4.2020, and another decision of that High Court in **M/s Bharat Electronics Limited Vs. Commissioner of GST & Central Excise and 3 Ors.,** W.P. No. 2937 of 2019 dated 21.6.2021, wherein the multiple difficulties faced by the taxpayers in filling up and submitting electronically Form GST TRAN-1 were recognized. He also relied upon the decision of the Gujarat

High Court in **Jakap Metind Pvt. Ltd. Vs. Union of India, 2019 (31) GSTL 422 (Guj.)** and **Siddharth Enterprises Vs. Nodal Officer, 2019 (29) GSTL 664 (Guj.)** to submit that in similar circumstances, the Gujarat High Court has also taken the same view as taken by the Delhi High Court while allowing the Form GSTN TRAN-1 to be revised. Last, reliance has also been placed on the decision of the Punjab & Haryana High Court in **Adfert Technologies Pvt. Ltd. Vs. Union of India & Ors.,** CWP No. 30949 of 2018, dated 04.11.2019.

13. Shri Nishant Mishra **(in Writ Tax No. 225 of 2021)**, has, besides adopting the submissions of Shri Shubham Agarwal, further submitted - under Rule 121 of the CGST Rules and the UPGST Rules, the assessing authority is obligated to verify the correct amount of ITC available. Thus, it is his submission, even if some inadequacies or errors or deficiencies may be attributed to the conduct of the "registered persons"/taxpayers/petitioners, yet, ITC being a vested statutory right, the statutory authorities would remain obligated to make due verification of the actual amount of carry forward ITC available to such persons, by looking at their returns filed under the Central Excise Act and/or the Service Tax law and/or the UP VAT Act, 2007, for the period ended 30.06.2017. So long as that/those return/s may be found to have been filed within time and so long as there is nothing to doubt the correctness of the CENVAT or ITC disclosed in that/those return/s, the authority would have to allow such "registered person" the benefit of the ITC under the CGST Act and the UPGST Act, accordingly. In that regard, he has relied upon a decision of the Supreme Court in **Commissioner of Income Tax, Delhi Vs. Mahalaxmi Sugar Mills Co. Ltd., (1986) 3 SCC 544.**

14. He would further submit, there is a difference between the act of revision and correction in a return. By revision, a "registered person" may change the nature and character of the disclosures made in the original return. However, by a simple correction in its return, the "registered person" only corrects the disclosure made in Table no.7(a) and 7(d) of the Form GST TRAN-1. It would relate back to the original form submitted by the petitioner. He has relied upon the decision of the Delhi High Court in **SKH Sheet Metal Components Vs. Union of India & Ors., (2020) 38 GSTL 592 (Del).** He has also relied on a decision of this Court in **Dhampur Sugar Mills Ltd. Vs Commissioner of Income-Tax, Delhi Central, (1973) 90 ITR 236** to submit that an error in Form GST TRAN-1 should be allowed to be corrected, at any time.

15. As to the submission advanced by Sri Nishant Mishra, relying on the decision in **Commissioner of Income Tax Vs. Mahalaxmi Sugar Mills Co. Ltd. (supra),** the precise issue was whether the business loss incurred in India could be set off against dividend income accrued in Pakistan, in the context of Section 24(1) of the Indian Income Tax Act, 1922. The issue was decided on the strength of the language of that statutory provision under that Act.

16. In the present case, the duty on the statutory authorities to examine the correctness of the claim of ITC would arise only upon submission of declaration on Form GST TRAN-1. We find no statutory basis to obligate the statutory authorities to grant benefit of ITC in absence of such declaration. For that reason, we find the

ratio in the aforesaid decision to be inapplicable to the facts and law in the present case.

17. As to the other submission advanced by Sri Mishra, relying on **Dhampur Sugar Mills Ltd. (supra),** there could be no dispute that a correction made in the return or declaration filed by a "registered person"/taxpayer would relate back to the date of filing of the original return/declaration. However, the issue here is whether the petitioners continues to be entitled to submit and/or correct their return/declaration on Form GST TRAN-1 and/or TRAN-2. Plainly, the ratio of the decision in the case of **Dhampur Sugar Mills Ltd. (supra)** is not relevant at the present stage.

18. Shri Praveen Kumar **(in Writ Tax No. 872 of 2018)** has also adopted the submissions advanced by Shri Agarwal and Shri Mishra. He has further emphasised that the right to claim ITC is a vested right. Relying upon the decision of the Gujarat High Court in **Siddharth Enterprises Vs. Nodal Officer, 2019 (29) GSTL 664 (Guj.),** he would submit, that right could not be defeated by a defective procedure devised and enforced by the rule making body. Also, he has relied on the decision of Supreme Court in **State of Mysore & Ors. Vs. Mallick Hashim & Co., (1974) 3 SCC 251**, to submit, time prescription could not have been made by the rule making body while making rule prescribing the Form GST TRAN-1.

19. Shri Manish Goyal, learned Additional Advocate General has relied on the language of Section 140 of the CGST Act to submit, no vested right ever accrued to the petitioners to avail ITC under the CGST or UPGST Act. The transition ITC was only a concession granted. It could be availed only in the event of Form GST TRAN-1 being submitted electronically within time and in the manner prescribed by the Rules framed under the CGST Act. Since some of the petitioners did not submit their original or revised Form GST TRAN-1, electronically, within the time and in manner prescribed, no right to carry forward ITC, as on 30.06.2017 ever accrued to them. Such of the petitioners who could file their Form GST TRAN-1 but did not revise or re-revise it within time granted, cannot complain as they would be allowed ITC up to the limit of the disclosure made by them in their original Form GST TRAN-1. To bolster that submission, learned Additional Advocate General has referred to the provisions of Section 140 of the CGST Act together with all its sub-sections, to highlight the different contingencies contemplated under each of the sub-section.

20. He has further submitted - transition provision such as Section 140 of the CGST Act & the UPGST Act is a special provision. It has a temporary enforcement. It exhausts upon the special circumstance (for which it was incorporated), coming to an end. He relies on **Britnell Vs. Secretary of State for Social Security, (1991) 2 All ER 726.** Also, relying on the majority opinion in the Constitution Bench decision of the Supreme Court in **K.S. Paripoornan Vs. State of Kerala & Ors., (1994) 5 SCC 593,** he would submit, such a transition provision must be read keeping in mind the mischief sought to be addressed by the legislature while enforcing the substantive law, during the period of transition. He has also relied on the decision of the Supreme Court in **Jayam & Company Vs. Assistant Commissioner (CT) & Anr.**

**(2016) 15 SCC 125 and ALD Automotive Pvt. Ltd. Vs. Commercial Tax Officer & Ors., 2018 (364) ELT 3 (SC)** to submit, CENVAT and/or ITC carry forward as on 30.06.2017 was not a vested right but, only a concession granted in law.

21. The submissions advanced by the learned Additional Advocate General have been adopted by the learned Additional Solicitor General of India and other counsel of the CGST authorities. Shri Krishna Ji Shukla, learned counsel for the Union of India also placed reliance on the decision of the Madras High Court in **M/s P.R. Mani Electronics Vs. Union of India & Anr., (2020) 7 MLJ 605.**

22. Having heard learned counsel for the parties and having given our anxious consideration to the issues raised, we find, principally, three submissions are required to be dealt with. The first issue for consideration is whether the ITC is a vested right under the GST regime. This issue arises in the context of transition provisions enacted under the CGST Act read with the CGST Rules. Section 140 of that Act, reads as under:

*"**140. transition Arrangements for Input Tax Credit. (1)** A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit of eligible duties carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law within such time and in such manner as may be prescribed:*

*Provided that the registered person shall not be allowed to take credit in the following circumstances, namely:-*

*(i) where the said amount of credit is not admissible as input tax credit under this Act; or*

*(ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or*

*(iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government.*

*(2) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, credit of the unavailed CENVAT credit in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day within such time and in such manner as may be prescribed:*

*Provided that the registered person shall not be allowed to take credit unless the said credit was admissible as CENVAT credit under the existing law and is also admissible as input tax credit under this Act.*

*Explanation: For the purposes of this sub-section, the expression "unavailed CENVAT credit" means the amount that remains after subtracting the amount of CENVAT credit already availed in respect of capital goods by the taxable person under the existing law from the aggregate amount of CENVAT credit to which the said person was entitled in respect of the said capital goods under the existing law.*

*(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No.*

*26/2012-Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to goods held in stock on the appointed day, within such time and in such manner as may be prescribed, subject to the following conditions, namely:-*

*(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;*

*(ii) the said registered person is eligible for input tax credit on such inputs under this Act;*

*(iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs;*

*(iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and*

*(v) the supplier of services is not eligible for any abatement under this Act:*

*Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed.*

*(4) A registered person, who was engaged in the manufacture of taxable as well as exempted goods under the Central Excise Act, 1944 or provision of taxable as well as exempted services under Chapter V of the Finance Act, 1994, but which are liable to tax under this Act, shall be entitled to take, in his electronic credit ledger,--*

*(a) the amount of CENVAT credit carried forward in a return furnished under the existing law by him in accordance with the provisions of sub-section (1); and*

*(b) the amount of CENVAT credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, relating to such exempted goods or services, in accordance with the provisions of sub-section (3).*

*(5) A registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law existing law, within such time and in such manner as may be prescribed subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day:*

*Provided that the period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding thirty days:*

*Provided further that said registered person shall furnish a statement, in such manner as may be prescribed, in respect of credit that has been taken under this sub-section.*

*(6) A registered person, who was either paying tax at a fixed rate or paying a fixed amount in lieu of the tax payable under the existing law shall be entitled to take, in his electronic credit ledger, credit*

*of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to goods held in stock on the appointed day, within such time and in such manner as may be prescribed, subject to the following conditions, namely:-*

*(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;*

*(ii) the said registered person is not paying tax under section 10;*

*(iii) the said registered person is eligible for input tax credit on such inputs under this Act;*

*(iv) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of inputs; and*

*(v) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day.*

*(7) Notwithstanding anything to the contrary contained in this Act, the input tax credit on account of any services received prior to the appointed day by an Input Service Distributor shall be eligible for distribution as credit under this Act even if credit under this Act, within such time and in such manner as may be prescribed, even if the invoices relating to such services are received on or after the appointed day.*

*(8) Where a registered person having centralised registration under the existing law has obtained a registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of CENVAT credit carried forward in a return, furnished under the existing law by him, in respect of the period ending with the day immediately preceding the appointed day in such manner within such time and in such manner as may be prescribed:*

*Provided that if the registered person furnishes his return for the period ending with the day immediately preceding the appointed day within three months of the appointed day, such credit shall be allowed subject to the condition that the said return is either an original return or a revised return where the credit has been reduced from that claimed earlier:*

*Provided further that the registered person shall not be allowed to take credit unless the said amount is admissible as input tax credit under this Act:*

*Provided also that such credit may be transferred to any of the registered persons having the same Permanent Account Number for which the centralised registration was obtained under the existing law.*

*(9) Where any CENVAT credit availed for the input services provided under the existing law has been reversed due to non-payment of the consideration within a period of three months, such credit can be reclaimed subject to credit can be reclaimed within such time and in such manner as may be prescribed, subject to the condition that the registered person has made the payment of the consideration for that supply of services within a period of three months from the appointed day.*

*(10) The amount of credit under sub-sections (1), (3), (4) and (6) shall be calculated in such manner as may be prescribed.*

*Explanation 1: For the purposes of sub-sections (3), (4) and (6), the expression "eligible duties" means-*

*(i) the additional duty of excise leviable under section 3 of the Additional*

*Duties of Excise (Goods of Special Importance) Act, 1957;*

*(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975;*

*(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975;*

*(iv) omitted*

*(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985;*

*(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985; and*

*(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001, in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day.*

*Explanation 2: For the purposes of Sub-sections (1) and (5), the expression "eligible duties and taxes" means-*

*(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957;*

*(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975;*

*(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975;*

*(iv) omitted*

*(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985;*

*(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985;*

*(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001; and*

*(viii) the service tax leviable under section 66B of the Finance Act, 1994, in respect of inputs and input services received on or after the appointed day.*

*Explanation 3: For removal of doubts, it is hereby clarified that the expression "eligible duties and taxes" excludes any cess which has not been specified in Explanation 1 or Explanation 2 and any cess which is collected as additional duty of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975."*

23. In the first place, as rightly claimed by the Additional Advocate General, Section 140 of the CGST Act & UPGST Act is a transition provision. It was incorporated to cater to the special circumstances arising upon replacement of the pre-existing plural indirect tax regime, by a singular indirect tax regime. Transactions had been performed under the pre-existing laws and tax paid thereon. Such transactions gave rise to CENVAT and ITC under the pre-existing laws. The legislature did not intend to nullify those credits earned under the pre-existing laws, rather, it intended to transition those credits to the GST regime. That appears to be the plain object and intent, of section 140 of the CGST & UPGST Acts. It has also allowed ITC to unregistered dealers under the pre-existing laws, on tax paid inputs, stocks etc., on the strength of Tax Invoices.

24. Plainly, after the repeal of the pre-existing laws, such an exercise could only be a one-time affair. Once completed, no circumstance would exist or arise as may require or permit a repeat action of that kind. Therefore, the provision is purely temporary, to allow migration from the pre-existing plural tax regime to the singular

GST regime. It mitigates the hardship and financial loss that would otherwise visit the 'registered persons' if the CENVAT and/or ITC earned under the pre-existing indirect tax laws were annulled or lost upon enforcement of the GST law.

25. Thus, under sub-section (1) of Section 140 of the Act, a "registered person", other than one opting to pay tax by way of composition levy (under Section 10 of the CGST Act) has been made entitled to take benefit of any CENVAT credit of eligible duties that may have been carried forward on 30 June 2017. However, by virtue of the plain language of Section 140 of the Act, that right is subject (mainly) to fulfilment of two conditions, namely, the return for such CENVAT credit of eligible duty and/or VAT ITC should have been furnished by a "registered person" under the pre-existing law/s. In case such person was not registered under the pre-existing laws, he may avail ITC on tax paid inputs, stocks etc., against Tax Invoices. Second, compliance of time and manner prescribed, is required to be fulfilled. Importantly, the words "within such time and" have been inserted by Finance Act, 2020, with full retrospective effect from 01.07.2013.

26. Insofar as the first condition is concerned, there is little difficulty in the present batch of cases since all petitioners claim to have filed their return of CENVAT credit, to carry forward CENVAT and/or VAT ITC for the period ending 30 June 2017 or they claim ITC on tax paid inputs, stocks etc., against Tax Invoices held by them. Many petitioners have disclosed the date of filing of the return, in their writ petition. The same has not been disputed by the revenue authorities. In other cases, though such returns are claimed to have been filed, that date of filing has not been disclosed. Yet, it is not the submission of the revenue authorities (in any case) that any petitioner had not filed its return either for the CENVAT or the ITC credit brought forward, for the period ending 30 June 2017. In any case, that eligibility condition may remain to be verified on facts, by the statutory authorities. A similar position exists with respect to the ITC arising under the U.P.V.A.T. Act, 2017, carried forward, for the period ending 30 June 2017.

27. As to the second eligibility condition, the parties are at variance - whether the stipulation of timeline and manner prescribed, appearing at the end of sub-section (1) of Section 140 relates to the return to be filed under the pre-existing/repealed law/s or it pertains to the transition required to be made upon enforcement of the CGST and UPGST enactments - to avail the CENVAT and ITC brought forward, for the period ending 30 June 2017.

28. The CGST Act and the UPGST Act, pertain to and lay down the law under the GST regime. By virtue of Section 174 of the CGST Act, the provisions of the Central Excise Act, 1944 and/or other Acts pertaining to imposition of like duties, have been specifically repealed. Similarly, by virtue of Section 174 of the UPGST Act, the provisions of the U.P.V.A.T. Act, 2008 have been specifically repealed. The new Act and the Rules framed thereunder only provide for the mode and rules of procedure to file returns, documents etc. Looked at in this light, the words "within such time and in such manner as may be prescribed' must be read in the context of things required to be done under the CGST/UPGST law, only.

29. To read those words in conjunction with the stipulations made under the pre-existing/repealed laws would

be to attribute superfluity and redundancy to the words used by the Parliament and the State Legislature, while enacting the GST laws. That may never be done. Then, under the old law, the time limits, procedure and method were already prescribed - to furnish any information, declaration or return. No fresh prescription was required or has been made under the GST regime, with respect to those laws. The pre-existing laws having been repealed. Hence, there is no warrant to accept the contention advanced by Shri Praveen Kumar, learned counsel for the petitioner, that Section 140 of the CGST Act and the UPGST Act, prescribed that manner, procedure, and timeline, to be adhered to under the pre-existing/repealed laws.

30. Clearly, while enacting the GST law, the Parliament and the State Legislature were conscious of the duties and obligations created under the new law. It is those obligations for which timeline and manner has been prescribed. Therefore, the condition within such time and within such manner, must be read only in conjunction with the right to avail entitlement to take into the Electronic Credit Ledger, the amount of CENVAT credit or ITC.

31. The submission of the learned Additional Advocate General that the CENVAT or ITC either under the pre-existing/repealed law or under the new law is only in the nature of a concession made, even if correct, may not be decisive of the dispute before us. We observe, the carry forward CENVAT and ITC under the pre-existing laws would remain a statutory entitlement. It may be taken credit in the Electronic Credit Ledger, under the new GST regime. However, it would remain subject to the fulfilment of the twin conditions noted above and the further conditions arising under the proviso to section 140(1) of the CGST Act.

32. Thus, the right to avail ITC did not get vested on the petitioners upon their filing returns under the pre-existing laws. The petitioners were obligated to perform further act under the new laws i.e., CGST Act and the UPGST Act - to submit electronically, Form GST TRAN-1 and/or TRAN-2, before they could carry that credit to their Electronic Credit Ledger.

33. To complete our discussion, it may further be noted - the exact nature of the CENVAT/ITC, would always depend upon the language of the provisions and scheme of the enactment whereunder that question may arise. Therefore, though the decisions relied upon by learned Additional Advocate General do appear to lay down, by way of a principle, that ITC is not a vested right but merely a concession, at the same time, we cannot overlook the fact that those decisions arose under different laws.

34. To clarify, we observe - a pure concession such as a set-off may be granted under a law, as a discretion or benefit or relaxation, in certain circumstances, for the benefit of some, on an objective classification, by the legislature. However, under the CGST Act and the UPGST Act, ITC is the legislative doctrine arising or springing from a fiscal policy or a modern taxation concept applied by the legislature, whereunder any tax paid at each link of the chain (in a chain of transactions) must not add to the chain, by way of tax burden, more than the tax that would arise on the value addition caused at that link of the

chain. The principle involves both, an affirmation of charge of tax at every value addition and negation of double taxation on one value addition.

35. Therefore, it may not be empirically correct to contend that CENVAT or ITC is a pure concession as concessions do not necessarily spring from a conceptual base to tax value addition. However, that principle may be relevant only to determine the ITC arising against transactions performed after enforcement of the GST regime i.e., post 01.07.2017. It may not be true of past/earlier transactions arising under the pre-existing/repealed laws, in the context of pure transition provision. To that extent and for that reason, we respectfully disagree with the contrary view taken by Gujarat High Court in **Siddharth Enterprises (supra)**, to the extent it has been held therein that the ITC became a vested right upon that return being filed under the erstwhile law i.e., the Central Excise Act and the State Sales Tax/VAT Act.

36. That being our opinion, we do not consider it necessary to express any definite opinion as to applicability of the ratio laid down by the Supreme Court in the decisions in **Jayam & Company Vs Assistant Commissioner (CT)** and **Another (supra) and ALD Automotive Pvt. Ltd. Vs Commercial Tax Officer & Ors. (supra).** The issue before us may be dealt with, as below.

37. Coming back to the Scheme of the Act, we find, Section 164 of the CGST Act and the UPGST Act empowers the Union and the State Governments to make Rules on matters required to be or that may be prescribed or in respect of which provisions are to be or may be made. Therefore, Rule 117 of the CGST Rules clearly appears to be a rule made to give effect to the transition provisions of the Act. It provides for filing/revision electronically, of Form GST TRAN-1 and/or TRAN-2, to obtain credit of ITC. In this regard, the provisions of Rule 117 read as under:

***"117. Tax or duty credit carried forward under any existing law or on goods held in stock on the appointed day.-(1)*** *Every registered person entitled to take credit of input tax under Section 140 shall, within ninety days of the appointed day, submit a declaration electronically in FORM G.S.T. T.R.A.N.-1, duly signed, on the Common Portal specifying therein, separately, the amount of input tax credit [x x x] to which he is entitled under the provisions of the said section:*

*Provided that the Commissioner may, on the recommendations of the Council, extend the period of ninety days by a further period not exceeding ninety days:*

*Provided that in the case of a claim under sub-section (1) of Section 140, the application shall specify separately-*

*(i) the value of claims under Section 3, sub-section (3) of Section 5, Sections 6 and 6A and sub-section (8) of Section 8 of the Central Sales Tax Act, 1956 made by the applicant; and*

*(ii) the serial number and value of declarations in Forms C or F and certificates in Forms E or H or Form I specified in Rule 12 of the Central Sales Tax (Registration and Turnover) Rules, 1957 submitted by the applicant in support of the claims referred to in sub-clause (I);*

*[(1A) Notwithstanding anything contained in sub-rule (1), the Commissioner may, on the recommendations of the Council, extend the date for submitting the declaration*

*electronically in FORM GST TRAN-1 by a further period not beyond 31st March, 2019, in respect of registered persons who could not submit the said declaration by the due date on account of technical difficulties on the common portal and in respect of whom the Council has made a recommendation for such extension.]*

*(2) Every declaration under sub-rule (1) shall,-*

*(a) in the case of a claim under sub-section (2) of Section 140, specify separately the following particulars in respect of every item of capital goods as on the appointed day-*

*(i) the amount of tax or duty availed or utilised by way of input tax credit under each of the existing laws till the appointed day; and*

*(ii) the amount of tax or duty yet to be availed or utilised by way of input tax credit under each of the existing laws till the appointed day;*

*(b) in the case of a claim under sub-section (3) or Clause (b) of sub-section (4) or sub-section (6) or sub-section (8) of Section 140, specify separately the details of stock held on the appointed day;*

*(c) in the case of a claim under sub-section (5) of Section 140, furnish the following details, namely:*

*(i) the name of the supplier, serial number and date of issue of the invoice by the supplier or any document on the basis of which credit of input tax was admissible under the existing law;*

*(ii) the description and value of the goods or services;*

*(iii) the quantity in case of goods and the unit or unit quantity code thereof;*

*(iv) the amount of eligible taxes and duties or, as the case may be, the value added tax [or entry tax] charged by the supplier in respect of the goods or services; and*

*(v) the date on which the receipt of goods or services is entered in the books of account of the recipient.*

*(3) The amount of credit specified in the application in FORM G.S.T. T.R.A.N.-1 shall be credited to the electronic credit ledger of the applicant maintained in FORM G.S.T. P.M.T.-2 on the Common Portal.*

*(4) (a)(i) A registered person, holding stock of goods which have suffered tax at the first point of their sale in the State and the subsequent sales of which are not subject to tax in the State availing credit in accordance with the proviso to sub-section (3) of Section 140 shall be allowed to avail input tax credit on goods held in stock on the appointed day in respect of which he is not in possession of any document evidencing payment of value added tax.*

*(ii) The credit referred to in sub-clause (i) shall be allowed at the rate of sixty per cent. on such goods which attract State tax at the rate of nine per cent, or more and forty per cent, for other goods of the State tax applicable on supply of such goods after the appointed date and shall be credited after the State tax payable on such supply has been paid:*

*Provided that where integrated tax is paid on such goods, the amount of credit shall be allowed at the rate of thirty per cent and twenty per cent, respectively of the said tax;*

*(iii) The scheme shall be available for six tax periods from the appointed date.*

*(b) The credit of State tax shall be availed subject to satisfying the following conditions, namely:*

*(i) such goods were not wholly exempt from tax under the (Name of the State) Value Added Tax Act; ....*

*(ii) the document for procurement of such goods is available with the registered person;*

*[(iii) the registered person availing of this scheme and having furnished the details of stock held by him in accordance with the provisions of clause (b) of sub-rule (2), submits a statement in FORM G.S.T. T.R.A.N.-2 by 31st March, 2018, or within such period as extended by the Commissioner, on the recommendations of the Council, for each of the six tax periods during which the scheme is in operation indicating therein, the details of supplies of such goods effected during the tax period:]*

*[Provided that the registered persons filing the declaration in FORM GST TRAN-1 in accordance with sub-rule (1A), may submit the statement in FORM GST TRAN-2 by 30th April, 2019.]*

*(iv) the amount of credit allowed shall be credited to the electronic credit ledger of the applicant maintained in FORM G.S.T. P.M.T.-2 on the Common Portal; and*

*(v) the stock of goods on which the credit is availed is so stored that it can be easily identified by the registered person."*

38. Thus, a detailed procedure has been prescribed to submit/revise/re-revise electronically, Form GST TRAN-1/TRAN-2 with respect to CENVAT/ITC carried forward for the period ending 30.06.2017. It is only upon such Form being submitted electronically, in the manner prescribed that the right to carry forward such credit to the Electronic Credit Ledger would arise. Unless this vital procedural step is taken, the petitioner can never claim a accrual of a vested right to transition ITC.

39. Coming to the alternative submission advanced by learned counsel for the petitioners, it is seen, Rule 117(1) of the CGST Rules lays down a period of 90 days from the appointed date (01.07.2017), to submit electronically, the declaration on Form GST TRAN-1. That period could be extended by a further period of 90 days, by the Commissioner on the recommendation of the GST Council. As a fact, extension was granted up to 27.12.2017. Thereafter, by virtue of the CGST (Amendment) Rules 2020 and introduction of sub-Rule 1A of Rule 117 to the CGST Rules, 2017, the Commissioner was further empowered to act on the recommendation of the GST Council and extend the time limit - to submit the Form GST TRAN-1, electronically, up to 31.03.2020. Again, as a fact, that extension was granted vide Order no.01/2020/GST dated 07.02.2020. It reads as below:

*F. No. CBEC-20/06/17/2018-GST (Pt. I)*
*Government of India*
*Ministry of Finance*
*(Department of Revenue)*
*[Central Board of Indirect Taxes and Customs]*

***

*New Delhi, the 7th February, 2020*
*Order No. 01/2020-GST*

***Subject: Extension of time limit for submitting the declaration in FORM GST TRAN-1 under rule 117(1A) of the Central Goods and Service Tax Rules, 2017 in certain cases***

*In exercise of the powers conferred by sub-rule (lA) of rule 117 of the Central Goods and Services Tax Rules, 2017 read with section 168 of the Central Goods and Services Tax Act, 2017, on the recommendations of the Council, and in supersession of Order No. 01/2019-GST dated 31.01.2019, except as respects things done or omitted to be done before such supersession, the Commissioner hereby extends the period for submitting the*

*declaration in FORM GSTTRAN-1 till 31st March, 2020, for the class of registered persons who could not submit the said declaration by the due date on account of technical difficulties on the common portal and whose cases have been recommended by the Council.*

*Sd/-*
*07.02.2020*
*(Yogen a Garg)*
*Principal Commissioner (GST)*

40. The matter does not end here. Later, the Parliament introduced Section 168A to the CGST Act. It reads as below:

***"168A - Power of Government to extend time limit in special circumstances.***

*(1) Notwithstanding anything contained in this Act, the Government may, on the recommendations of the Council, by notification, extend the time limit specified in, or prescribed or notified under, this Act in respect of actions which cannot be completed or complied with due to force majeure.*

*(2) The power to issue notification under sub-section (1) shall include the power to give retrospective effect to such notification from the date not earlier than the date of commencement of this Act.*

*Explanation.-- For the purposes of this section, the expression "force majeure" means a case of war, epidemic, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature or otherwise, affecting the implementation of any of the provisions of this Act."*

41. In exercise of the above power, thus vested, the Central Government, by its notification no.35 of 2020 dated 03.04.2020, granted extension upto 30.06.2021 to file forms, declarations and returns etc. specified or prescribed in or notified under the CGST Act during the period 20.3.2020 to 29.06.2020. The said notification reads as below:

*"Government of India*
*Ministry of Finance*
*(Department of Revenue)*
*Central Board of Indirect Taxes and Customs*
*Notification No. 35/2020 - Central Tax*
*New Delhi, the 3rd April, 2020*

*G.S.R.....(E).- In exercise of the powers conferred by section 168A of the Central Goods and Services Tax Act, 2017 (12 of 2017) (hereafter in this notification referred to as the said Act), read with section 20 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), and section 21 of Union Territory Goods and Services Tax Act, 2017 (14 of 2017), in view of the spread of pandemic COVID-19 across many countries of the world including India, the Government, on the recommendations of the Council, hereby notifies, as under,-*

*(i) where, any time limit for completion or compliance of any action, by any authority or by any person, has been specified in, or prescribed or notified under the said Act, which falls during the period from the 20th day of March, 2020 to the 29th day of June, 2020, and where completion or compliance of such action has not been made within such time, then, the time limit for completion or compliance of such action, shall be extended upto the 30th day of June, 2020, including for the purposes of--*

*(a) completion of any proceeding or passing of any order or issuance of any notice, intimation, notification, sanction or approval or such other action, by whatever name called, by any authority, commission*

*or tribunal, by whatever name called, under the provisions of the Acts stated above; or*

*(b) filing of any appeal, reply or application or furnishing of any report, document, return, statement or such other record, by whatever name called, under the provisions of the Acts stated above; but, such extension of time shall not be applicable for the compliances of the provisions of the said Act, as mentioned below -*

*(a) Chapter IV;*

*(b) sub-section (3) of section 10, sections 25, 27, 31, 37, 47, 50, 69, 90, 122, 129;*

*(c) section 39, except sub-section (3), (4) and (5);(d) section 68, in so far as e-way bill is concerned; and (e) rules made under the provisions specified at clause (a) to (d) above;*

*(ii) where an e-way bill has been generated under rule 138 of the Central Goods and Services Tax Rules, 2017 and its period of validity expires during the period 20th day of March, 2020 to 15 th day of April, 2020, the validity period of such e-way bill shall be deemed to have been extended till the 30th day of April, 2020.*

*2. This notification shall come into force with effect from the 20th day of March, 2020.*

*[F. No. CBEC-20/06/04/2020-GST]*

*(Pramod Kumar)*

*Director, Government of India"*

42. Again, on 27.06.2020, the Central Government issued notification no.55 of 2020 under Section 168A of the CGST Act to further extend the time extended (earlier) under its notification no. 35 of 2020 dated 3.4.2020, up to 31.8.2020 - with respect to any acts specified in or prescribed or notified under in respect of the CGST Act, up to 31.08.2020.

43. Thus, the time limit under Section 140(1) of the CGST Act read with Rule 117 of the CGST Rules 2017 and parallel provisions under the State law (to submit Form TRAN-1/TRAN-2 electronically, within 90 days from the appointed date), was the time limit specified in or prescribed by those enactments. Therefore, even if reference to Section 140 has not been specifically made in any of the orders and notifications issued under Rule 117(1), Rule 117(1)A or Section 140A or Section 168A still, undeniably, the time limit to submit electronically Form GST TRAN-1/TRAN-2 stood extended in accordance with law, up to 31.08.2020. No contrary provision of law, either statutory or delegated, has been shown to exist as may warrant a different construction to be made to the exercise of powers made by the Commissioner CGST or of the CBIC or the Central Government, acting either on their own or on the recommendation of the CBIC or the GST Council.

44. Having reached that conclusion, it survives for consideration whether the petitioners had made out a case to submit/revise/re-revise, electronically, the Form GST TRAN-1/TRAN-2, within time as stood extended upto 31.8.2020. Here, we find, the matter has matured for our consideration after a long lapse of time. Thus, we have the benefit of not only the decisions of other High Courts wherein similar submissions had been considered but also the opportunity to observe the conduct of the statutory authorities themselves, to test how they had looked at and reacted to the situation as had developed on or after 01.07.2017, with

respect to the transition to be made from the erstwhile plural indirect tax regime to the singular GST regime.

45. While the petitioners had been clamouring as to the technical difficulties and glitches or obstructions faced by them in submitting/revising the Form GST TRAN-1/TRAN-2 electronically, we may not be required to rule on those pleadings with suspicion, in view of the stand that has been taken by the CBIC itself, as reflected in its Circular letter dated 3 April 2018. We are aware, the said Circular does not directly concern itself with the extension of time and the latitude to be granted to the "registered person", to submit/revise electronically, the Form GST TRAN-1/TRAN-2. However, that Circular was issued on 3 April 2018, i.e., beyond nine months after the introduction of the GST regime. The recital of the background facts and the modalities offered, are clearly noteworthy. We, therefore, extract the entire circular as below:

***"Circular No. 39/13/2018-GST***

*F. No. 267/7/2018-CX.8*

*Government of India*
*Ministry of Finance*
*Department of Revenue*
*Central Board of Indirect Taxes and Customs*

***New Delhi, dated the 3 rd April, 2018***

*To*

*The Principal Chief Commissioners/ Chief Commissioners/ Principal Commissioners/ Commissioner of Central Tax (All),*

*The Principal Director Generals/ Director Generals (All).*

***Sub: Setting up of an IT Grievance Redressal Mechanism to address the grievances of taxpayers due to technical glitches on GST Portal-reg.***

*Madam/Sir,*

*It has been decided to put in place an IT-Grievance Redressal Mechanism to address the difficulties faced by a section of taxpayers owing to technical glitches on the GST Portal and the relief that needs to be given to them. The relief could be in the nature of allowing filing of any Form or Return prescribed in law or amending any Form or Return already filed. The details of the said grievance redressal mechanism are provided below:*

***2. Introduction***

*Where an IT related glitch has been identified as the reason for failure of a class of taxpayer in filing of a return or a form within the time limit prescribed in the law and there are collateral evidences available to establish that the taxpayer has made bonafide attempt to comply with the process of filing of form or return, GST Council has delegated powers to the IT Grievance Redressal Committee to approve and recommend to the GSTN the steps to be*

*taken to redress the grievance and the procedure to be followed for implementation of the decision.*

***3. Scope***

*Problems which are proposed to be addressed through this mechanism would essentially be those which relate to Common Portal (GST Portal) and affect a large section of taxpayers.*

*Where the problem relates to individual taxpayers, due to localised issue such as non-availability of internet connectivity or failure of power supply, this mechanism shall not be available.*

***4. IT-Grievance Redressal Committee***

*Any issue which needs to be addressed through this mechanism shall be identified by GSTN and the method of resolution approved by the GST Implementation Committee (GIC) which shall act as the IT Grievance Redressal Committee. In GIC meetings convened to address IT issues or IT glitches, the CEO, GSTN and the DG (Systems), CBEC shall participate in these meetings as special invitees.*

***5. Nodal officers and identification of issues***

*5.1 GSTN, Central and State government would appoint nodal officers in requisite number to address the problem a taxpayer faces due to glitches, if any, in the Common Portal. This would be publicized adequately.*

*5.2 Taxpayers shall make an application to the field officers or the nodal officers where there was a demonstrable glitch on the Common Portal in relation to an identified issue, due to which the due process as envisaged in law could not be completed on the Common Portal.*

*5.3 Such an application shall enclose evidences as may be needed for an identified issue to establish bonafide attempt on the part of the taxpayer to comply with the due process of law.*

*5.4 These applications shall be collated by the nodal officer and forwarded to GSTN who would on receipt of application examine the same. GSTN shall after verifying its electronic records and the applications received, identify the issue involved where a large section of tax-payers are affected. GSTN shall forward the same to the IT Grievance Redressal Committee with suggested solutions for resolution of the problem.*

***6. Suggested solutions***

*6.1 GST Council Secretariat shall obtain inputs of the Law Committee, where necessary, on the proposal of the GSTN and call meeting of GIC to examine the proposal and take decision thereon.*

*6.2 The committee shall examine and approve the suggested solution with such modifications as may be necessary.*

*6.3 IT-Grievance Redressal Committee may give directions as necessary to GSTN and field formations of the tax administrations for implementation of the decision.*

***7. Legal issues***

*7.1 Where an IT related glitch has been identified as the reason for failure of a taxpayer in filing of a return or form prescribed in the law, the consequential fine and penalty would also be required to be waived. GST Council has delegated the power to the IT Grievance Redressal Committee to recommend waiver of fine or penalty, in case of an emergency, to the Government in terms of section 128 of the CGST Act, 2017 under such mitigating circumstances as are identified by the committee. All such notifications waiving fine or penalty shall be placed before GST Council.*

*7.2 Where adequate time is available, the issue of waiver of fee and penalty shall be placed before the GST Council with recommendation of the IT-Grievance Redressal Committee.*

***. Resolution of stuck TRAN-1s and filing of GSTR-3B***

*8.1 A large number of taxpayers could not complete the process of TRAN-1 filing either at the stage of original or revised filing as they could not digitally authenticate the TRAN-1s due to IT related glitches. As a result, a large number of such TRAN-1s are stuck in the system. GSTN shall identify such taxpayers who could not file TRAN-1 on the basis of*

*electronic audit trail. It has been decided that all such taxpayers, who tried but were not able to complete TRAN-1 procedure (original or revised) of filing them on or before 27.12.2017 due to IT-glitch, shall be provided the facility to complete TRAN-1 filing. It is clarified that the last date for filing of TRAN 1 is not being extended in general and only these identified*

*taxpayers shall be allowed to complete the process of filing TRAN-1.*

*8.2 The taxpayer shall not be allowed to amend the amount of credit in TRAN-1 during this process vis-à-vis the amount of credit which was recorded by the taxpayer in the TRAN-1, which could not be filed. If needed, GSTN may request field formations of Centre and State to collect additional document/ data etc. or verify the same to identify taxpayers who should be allowed this procedure.*

*8.3 GSTN shall communicate directly with the taxpayers in this regard and submit a final report to GIC about the number of TRAN-1s filed and submitted through this process.*

*8.4 The taxpayers shall complete the process of filing of TRAN 1 stuck due to IT glitches, as discussed above, by 30th April 2018 and the process of completing filing of GSTR 3B which could not be filed for such TRAN 1 shall be completed by 31st May 2018.*

*9. The decisions of the Hon'ble High Courts of Allahabad, Bombay etc., where no case specific decision has been taken, may be implemented in-line with the procedure prescribed above, subject to fulfillment of the conditions prescribed therein. Where these conditions are not satisfied, Hon'ble Courts may be suitably informed and if needed review or appeal may be filed.10. Trade may be suitably informed and difficulty if any in implementation of the circular may be brought to the notice of the Board.*

*(ROHAN)*
*(Deputy Commissioner)"*

46. At the very beginning of the said Circular, it has been recognized by the highest administrative authority under the CGST Act (the CBIC) - the need to address the difficulties faced by the taxpayers owing to technical glitches. It needs no further emphasis, under the changed indirect tax regime, introduced by the CGST Act and the UPGST enactments, the "registered persons" were left with no choice but to submit/revise the Form GST TRAN-1/TRAN-2 electronically, over the GST Portal. In its wisdom, the Parliament, and its delegate the Central Government and State Government did not offer by way of an alternative method, permission to transition the CENVAT/VAT ITC arising under the pre-existing/repealed laws, by physical filing of Form GST TRAN-1/TRAN-2. The legislature and its delegate chose to insist that the transition provision be given effect to only through submission/revision of the form GST TRAN-1/TRAN-2 electronically. That insistence was a policy decision, perhaps, to put the entire indirect tax regime of the country on one, inter-operable platform, in a single step.

47. Though, no debate may be entertained by this Court as to the wisdom of the Parliament and its delegate and the merits of that method prescribed under the new indirect tax regime and though time allowance may be claimed by the respondents, to sort out the initial difficulties and issues and no challenge may arise to the new regime on that count, at the same time, the Courts cannot remain oblivious or indifferent, either to the plight of the "registered persons"/taxpayers who provide the fuel to run that gigantic

machinery of the State or to the purpose and object of the whole exercise.

48. As we have examined above, it was never the object of the Parliament to defeat the CENVAT or ITC arising under the pre-existing/repealed indirect tax laws. In fact, the CGST Act and the UPGST Act sought to protect and make available to the "registered persons", the benefit of CENVAT and ITC earned under the pre-existing laws. Mainly, the Parliament enacted two pre-conditions to avail that CENVAT and ITC by insisting, only such CENVAT and ITC be allowed to be recorded in the Electronic Credit Ledger of the "registered persons", with respect to which a return may have been filed by that person under the pre-existing laws, for period ending 30.06.2017 or by production of Tax Invoice of input or stocks etc. The second stipulation is, such figures must be translated and submitted electronically on the GST Portal through the Form GST TRAN-1/TRAN-2, within the prescribed time. As to the prescribed manner, there is no quarrel between the parties. The petitioners do not contend, that the details required to be filled up in the Form were impossible or difficult to be filled up. The only challenge they raise is based on their inability to submit electronically that data on the GST Portal, within time granted.

49. Undisputedly, the GST Portal was set up and was run and managed by Government corporation known as the GST Network. There was no alternative method available to submit electronically the Form GST TRAN-1/TRAN-2. Therefore, unless the said GST Portal was up and running without any errors, the time limit that had been set by the Act and the Rules and the orders and notifications issued thereunder, would remain directory or elastic, within reasonable limits. That time limit was set at the date 31.08.2020.

50. Though the consequence of non-submission of those Forms are also clearly visible, yet no procedural law may be valid or held mandatory, if there exists physical impossibility or unreasonable difficulty/obstruction, to comply with the same. Once the CGST Act prescribed the manner and time to submit/revise only electronically through Form GST TRAN-1/ TRAN-2, the State was obligated to provide a robust and wholly reliable GST Portal to comply with that law. Failure or inability to provide that reliable online platform would render the strict time prescription (made under Section 140 of the CGST Act read with Rule 117 of the CGST Rules), arbitrary and therefore violative of Article 14 of the Constitution of India.

51. Coming back to the Circular dated 3 April 2018, the CBIC further recognized, there were IT related glitches on the GST Portal resulting in compliances remaining from being made by a vast section of "registered persons". Once that difficulty was recognized to have existed on a pan-India basis, over a long duration of time, the CBIC, in its own wisdom, created a mechanism to resolve the same. Chiefly, it provided for creation of Nodal agencies to examine all such grievances of IT related glitches and to allow for extension of time (to submit GST Form TRAN-1/TRAN-2, electronically), only in those cases where a complaint had been received by the Nodal authority and where electronic trail etc. of such failed attempt was available.

52. Thus, the CBIC itself recognized the existence of technical difficulties in working the GST Portal over a long period

of time, that too, immediately upon introduction of the GST regime. A long and burdensome transition was attempted all over the country, by all indirect taxpayers. It compounded that difficulty further. The Court cannot remain unmindful of the fact that numerous writ petitions came to be filed all over the country, before different High Courts wherein some Courts granted interim relief while in other cases, final orders came to be passed allowing the complaining "registered persons"/taxpayers, time to submit/revise the Form GST TRAN-1/TRAN-2, electronically. Thus, the Delhi High Court in the case of **Blue Bird Pure Pvt. Ltd. (supra)** relied on its earlier decision **Bhargava Motors Vs Union of India, dated 13 May, 2019 in WP (C) No. 1280/2018** and observed as under:

*"10. Having carefully examined those decisions, the Court is unable to find any distinguishing feature that should deny the Petitioner a relief similar to the one granted in those cases. In those cases also, there was some error committed by the Petitioners which they were unable to rectify in the TRAN-1 Form and as a result of which, they could not file the returns in TRAN-2 Form and avail of the credit which they were entitled to. In both the said decisions, the Court noticed that GST system is still in the ''trial and error phase' insofar as its implementation is concerned. It was observed in Bhargava Motors (supra) as under:*

*"10. The GST System is still in a ''trial and error phase' as far as its implementation is concerned. Ever since the date the GSTN became operational, this Court has been approached by dealers facing genuine difficulties in filing returns, claiming input tax credit through the GST Portal. The Court's attention has been drawn to a decision of the Madurai Bench of the Madras High Court dated 10th September, 2018 in W.P. (MD) No. 18532/2018 (Tara Exports v. Union of India) where after acknowledging the procedural difficulties in claiming input tax credit in the TRAN-1 form that Court directed the respondents "either to open the portal, so as to enable the petitioner to file the TRAN1 electronically for claiming the transition credit or accept the manually filed TRAN1" and to allow the input credit claimed "after processing the same, if it is otherwise eligible in law".*

*11. In the present case also the Court is satisfied that the Petitioner's difficulty in filling up a correct credit amount in the TRAN-1 form is a genuine one which should not preclude him from having its claim examined by the authorities in accordance with law. A direction is accordingly issued to the Respondents to either open the portal so as to enable the Petitioner to again file TRAN-1 electronically or to accept a manually filed TRAN-1 on or before 31st May, 2019. The Petitioner's claims will thereafter be processed in accordance with law.*

*12. With a view to ensure that in future such glitches can be overcome, the Court directs the Respondents to consider providing in the software itself a facility of the trader/dealer being able to save onto his/her system the filled up form and also a facility for reviewing the form that has been filled up before its submission. It should also permit the dealer to print out the filled up form which will contain the date/time of its submission online. The Respondents will also consider whether there can be a message that pops up by way of an acknowledgement that the Form with the credit claimed has been correctly uploaded."*

53. That view was followed by the Delhi High Court in **R.R. Distributors Pvt. Ltd. (supra),** wherein it was held as below:

*"10. As can be seen from the aforesaid decisions, this Court has held that inadvertent and genuine mistakes in filling up the correct details of credit in TRAN-1 Form should not preclude taxpayers from having claims examined by the authorities in accordance with law. This Court has consistently been issuing directions to the Respondents and granting relief to such taxpayers. When the Petitioner attempted to upload TRAN-2 Form, it was prevented to do so because of the error committed by him while making the declaration in the TRAN-1 Form, however, the system did not enable the Petitioner to revise TRAN-1 Form on the system. In Blue Bird Pure (supra), this Court, had, in fact, observed that the Respondents ought to have provided a facility in the system itself for rectification of errors which are clearly bona fide. Further, the Court had also noticed that although the system provided for revision of a return, the deadline for making the revision coincided with the last date for filing the return i.e., 27th December, 2017, rendering such facility to be impractical and meaningless.*

*11. Further, this Court, in the case of Aadinath Industries & Ors. v. Union of India and Ors.5, Lease Plan India Private Limited v. Government of National Capital Territory of Delhi and Ors.6, Godrej & Boyce Mfg. Co. Ltd. v. Union of India and Ors.7, Arora & Co v. Union of India & Ors., 8 and M/s Blue Bird (supra), has taken a similar view. In our view, the non- filing of part 7B of table 7(a) and table 7(d) of TRAN-1 Form cannot impair the rights of the petitioner to claim transition ITC, if he is otherwise eligible. This Court has observed in numerous decisions that the GST system was in a trial-and-error phase as far as its implementation was concerned and ever since GSTN network became operational, taxpayers genuinely faced difficulties in filing the returns and input tax credit in the GST Portal. Acknowledging the procedure and difficulties in claiming input tax credit, this Court and several other High Courts have granted relief to such taxpayers. Failure on the part of the Petitioner to give relevant details in TRAN-1 Form can only be taken as a procedural lapse which should not cause any impediment to its right to claim transition ITC."*

54. In **Carlsthal Craftsman Enterprises (supra),** the Madras High Court was persuaded to follow the above view of the Delhi High Court. It allowed the "registered persons"/taxpayers to transition the ITC. It was held:

*"4. In the present case, the error is seen to be inadvertent, constituting a human error. The Revenue does not dispute this either. Moreover, the era of GST is nascent and I am of the view that a rigid view should not be taken in procedural matters such as the present one.*

*5. The petitioner is thus be permitted to transition the credit. After all, the consequence of such transition is only the availment of the credit and not the utilization itself, which is a matter of assessment and which can be looked into by the Assessing Officer at the appropriate stage."*

55. In **Jakap Metind (supra),** the Gujarat High Court allowed revision of Form GST TRAN-1 electronically, outside the strict time limit prescribed under the

Act and the Rules read with the orders and notifications operating at the relevant time. It was held as below:

*"18. In the case of Bhargava Motors v. Union of India rendered on 13th May, 2019 in WP(C) 1280/2018, the Delhi High Court held as under:*

*10. The GST System is still in a 'trial and error phase' as far as its implementation is concerned. Ever since the date the GSTN became operational, this Court has been approached by dealers facing genuine difficulties in filing returns, claiming input tax credit through the GST portal. The Court's attention has been drawn to a decision of the Madurai Bench of the Madras High Court dated 10th September, 2018 in W.P. (MD) No. 18532/2018 (Tara Exports vs. Union of India) where after acknowledging the procedural difficulties in claiming input tax credit in the TRAN-1 form that Court directed the respondents "either to open the portal, so as to enable the petitioner to file the TRAN1 electronically for claiming the transition credit or accept the manually filed TRAN1" and to allow the input credit claimed "after processing the same, if it is otherwise eligible in law.*

*11. In the present case also the Court is satisfied that the Petitioner's difficulty in filling up a correct credit amount in the TRAN-1 form is a genuine one which should not preclude him from having its claim examined by the authorities in accordance with law. A direction is accordingly issued to the Respondents to either open the portal so as to enable the Petitioner to again file TRAN-1 electronically or to accept a manually filed TRAN-1 on or before 31st May, 2019. The Petitioner's claims will thereafter be processed in accordance with law.*

*12. With a view to ensure that in future such glitches can be overcome, the Court directs the Respondents to consider providing in the software itself a facility of the trader/dealer being able to save onto his/her system the filled up form and also a facility for reviewing the form that has been filled up before its submission. It should also permit the dealer to print out the filled up form which will contain the date/time of its submission online. The Respondents will also consider whether there can be a message that pops up by way of an acknowledgement that the Form with the credit claimed has been correctly uploaded.*

*23. In this case, it is not as if the petitioner has not filed FORM GST TRAN-1 within the time provided by the respondents under the rules. The petitioner had filed the form, but on account of not properly understanding the nature of the columns provided in the form, due to inadvertent error, did not mention the details of Rs.83,99,136/- in column 6 of Table 5a and instead uploaded the details in column 5 of Table 5a in FORM GST TRAN-1. Now the substantive right of the petitioner to claim transition credit of such amount is sought to be denied on the ground that the time limit for filing revised FORM GST TRAN-1 has elapsed.*

*24. In the opinion of this court, as held by the Delhi High Court in M/s Blue Bird Pure Pvt. Ltd. vs. Union of India (supra), the respondents ought to have provided in the system itself a facility for rectification of such errors which are clearly bona fide. Besides, although the system provided for revision of a return, the deadline for making the revision coincided with the last date for filing the return, that is, 27th December, 2017. Thus, such facility was rendered impractical and meaningless.*

*25. This court is further of the view that retention of the amount of Rs.83,99,136/- by the respondents which the petitioner is otherwise entitled to get by way of transition credit would be directly hit by article 265 of the Constitution of India which provides that no tax shall be levied or collected except by authority of law. The respondents have no legal authority to retain the amount of credit to which the petitioner is duly entitled and retention of the same is violative of article 265 of the Constitution of India. Therefore, when the petitioner is entitled to credit of Rs.83,99,136/-, non grant of the same is bad in law."*

56. In **Adfert Technologies Private Ltd. Vs Union of India (supra)** the Punjab & Haryana High Court also took a similar view. It was held as below:

*"Having scrutinized record of the case(s) and heard arguments of both sides, we find that on the introduction of GST regime, Government granted opportunity to registered persons to carry forward unutilized credit of duties/taxes paid under different erstwhile taxing statues. GST is an electronic based tax regime and most of people of India are not well conversant with electronic mechanism. Most of us are not able to load simple forms electronically whereas there were a number of steps and columns in TRAN-1 forms thus possibility of mistake cannot be ruled out. Various reasons assigned by Petitioners seem to be plausible and we find ourselves in consonance with the argument of Petitioners that unutilized credit arising on account of duty/tax paid under erstwhile Acts is vested right which cannot be taken away on procedural or technical grounds. The Petitioners who were registered under Central Excise Act or VAT Act must be filing their returns and it is one of the requirements of Section 140 of CGST Act, 2017 to carry forward unutilized credit. The Respondent authorities were having complete record of already registered persons and at present they are free to verify fact and figures of any Petitioner thus inspite of being aware of complete facts and figures, the Respondent cannot deprive Petitioners from their valuable right of credit."*

57. Earlier, a coordinate Bench of this Court in **Writ Tax No. 1120 of 2019 (M/S Ingersoll-Rand Technologies & Services Pvt. Ltd. Vs. Union of India & 3 Ors.)** also had the occasion to consider this issue whereupon it required the GST Council to take a decision in the matter. The matter was required to be examined by the GST Council. However, no contrary view (of this Court), has been shown to us.

58. Undisputedly, existence of various opinions of different High Courts referred above are also clear evidence of the difficulty faced by the "registered persons"/taxpayers, pan-India. Also, those decisions are evidence of that difficulty faced over a long duration of time, stretching into the period when the pandemic COVID-19 spread all over the country, beginning from 2019 **(Blue Bird Pure Pvt. Ltd.** case) to 2021 **(R R Distributor case).**

59. Looking at the institution date of the present batch of writ petitions, we find, these have been instituted from the year 2018 to 2021. It corresponds to the period when similar petitions were filed and were decided in favour of other "registered

persons"/taxpayers, by other High Courts, allowing them margin of time to submit/revise electronically, Form GST TRAN-1 and/or TRAN-2.

60. Therefore, without referring to the individual difficulties cited by the petitioners in the present batch of petitions, we are of the opinion, the difficulties claimed were generic as had been recognized by the CBIC itself vide his circular dated 03.04.2018 as also by various decisions of the other High Courts. Those difficulties and obstacles were suffered over a very long duration. It therefore necessarily emerges that the petitioners/"registered persons" were unreasonably obstructed on account of technical glitches and errors on the GST Portal during the limited time they were required to submit/revise electronically, Form GST TRAN-1/TRAN-2 electronically.

61. They were obstructed, and remained disabled (generally) owing, not to any conduct attributable to them but owing solely to factors beyond their control and for reasons attributable to the respondents. Consequently, it would be arbitrary, to enforce strict timeline prescribed under the Act and the Rules framed thereunder, against them.

62. Rule of law and good administration go hand in hand. It is true, no ITC may arise under the GST regime unless a "registered person" fulfils the conditions therefor, so also, the administration of tax law that is in the hands of the GST Council, GST Commissioner (Central), GST Commissioner (UP), GST Network and all other State or statutory authorities, must allow all "registered persons"/taxpayers, reasonable opportunity to exercise their rights and make their claims, in the manner contemplated by law.

63. Though unintentional on part of the State authorities, it cannot be lost sight that the obstruction thus caused was attributable only to the conduct of the State authorities since, the GST Portal is a creation of the State authorities and the responsibility to run the same seamlessly, rests exclusively on them. The "registered persons"/taxpayers, whose rights were adversely impacted by the lack of smooth operation of the GST Portal, could not be saddled with any civil consequences arising from the non-functioning or improper or irregular functioning of the GST Portal.

64. Once the CBIC clearly recognised the existence of such technical glitches on the GST Portal, we fail to understand why and on what reasonable basis the CBIC and the revenue authorities insisted for specific evidence and verification as a condition to grant relaxation of timeline - to submit/revise/re-revise Form GST TRAN-1/TRAN-2. The "registered persons"/taxpayers have been saddled with the burden to produce evidence of individual difficulty faced. In absence of existence of any statutory requirement (at the relevant time), that burden would now involve recalling from memory, the number of attempts made and the time and date when such attempt was made - to retrieve electronic trail of that event.

65. In absence of any enabling law, that burden cast on the "registered persons"/tax payers - to lead evidence of difficulty faced, is wholly arbitrary and unreasonable and therefore unenforceable. The injury caused being attributable to the State authorities, even if unintentional, the

"registered persons"/taxpayers cannot be burdened today, to bring home evidence to establish the extent of the injury caused that too with respect to transition provision newly introduced, especially when the injury sprung from a generic event/cause.

66. It is also a common fact, not all "registered persons"/taxpayers would submit electronically, Form GST TRAN-1/TRAN-2, themselves. Often, professionals are hired to make such compliances. A single tax practitioner or Chartered Accountant may be engaged by numerous "registered persons"/taxpayers to submit electronically, their respective Form GST TRAN-1/TRAN-2. Once such professional would try to submit such Form electronically, on behalf of one taxpayer and fail, as part of the prudent behaviour, he may be expected to make no further attempts on behalf of each of the other "registered person"/taxpayer, at the same time, though he may have been similarly engaged by others as well.

67. At the relevant time, there was no requirement in law and even today, there is no requirement either under the Act or the Rules, to obtain evidence of every attempt made to submit Form GST TRAN-1 or TRAN-2. It is only by way of the Circular instruction dated 3.4.2018 that such a requirement was introduced by the revenue authorities. It is arbitrary and therefore unenforceable.

68. Commonly, the CBIC Circulars are issued to give effect to law and make it functional and practical. Insofar as the procedures are concerned, often CBIC Circulars introduce measures to reduce the rigour of law. In the present facts, we find, the CBIC has travelled half the distance required and left the taxpayers in the lurch for the other half. Having recognised the continued generic errors on the GST Portal, it would have been wholly reasonable and within the powers exercised by the CBIC, to remove all legal impediments. Perhaps, it has escaped the attention of the CBIC that it was never the requirement of law that such evidence of failed attempts to submit Form GST TRAN-1/TRAN-2 be maintained, in any form. To enforce that condition is plainly not protected by any Statute or Rule.

69. If allowed to work, it would create hostile discrimination between two similarly situated persons based solely on the chance occurrence of one having in his possession proof of attempt/s made to submit/revise/re-revise Form TRAN-1/TRAN-2, electronically, though he was not required (by law), to obtain or maintain such evidence. Any law that may differentiate between two similarly situated persons based on a chance occurrence/s and allow the valuable civil rights of a citizen to be prejudiced, based solely on that, would remain exposed to the vice of arbitrariness and therefore be invalid. In **State of Andhra Pradesh & Anr. Vs. Nalla Raja Reddy & ors., AIR 1967 SC 1458,** a Constitution Bench of the Supreme Court observed as under:-

*"Official arbitrariness is more subversive of doctrine of equality than the statutory discrimination. In spite of statutory discrimination, one knows where he stands but the wand of official arbitrariness can be waved in all directions indiscriminately."*

70. Similarly, in **S.G. Jaisinghani Vs. Union of India & ors., AIR 1967 SC 1427,** a Constitution Bench of the Supreme Court observed as under:-

*"In the context it is important to emphasize that absence of arbitrary power is the first essence of the rule of law, upon which our whole Constitutional System is based. In a system governed by rule of law, discretion, when conferred upon Executive Authorities, must be confined within the clearly defined limits. Rule of law, from this point of view, means that the decision should be made by the application of known principle and rules and in general such decision should be predictable and the citizen should know where he is, if a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law."*

71. Looked from another perspective, the clear intent of the legislature is to grant benefit of CENVAT and ITC under the pre-existing laws, as may have been carried forward on the appointed date 01.07.2017. In such circumstances, if the GST Portal had worked seamlessly, all petitioners would have submitted/revised/re-revised electronically, their Forms GST TRAN-1 and/or TRAN-2 within the time granted. In that situation, all petitioners would clearly be entitled to avail ITC under the CGST Act and the UPGST Act, without any objection by the State/revenue authorities. Taxing statute and equity considerations are not natural allies. At the same time, in the context of a purely procedural requirement and transition provision, we cannot act unmindful of that consequence - if the respondents had offered a functional system, the State could not have deprived the petitioners of transition credit of CENVAT and ITC (under the repealed laws).

72. Thus, we have no hesitation in observing that a reasonable opportunity ought to have been granted to all "registered persons"/taxpayers to submit/revise/re-revise electronically their Form GST TRAN-1/TRAN-2.

73. For the reasons given above, we allow all the writ petitions with the following directions:

(i) All petitioners before this Court may first file physical Form GST TRAN-1/TRAN-2 before their respective jurisdictional authority, within a period of four weeks from today.

(ii) That jurisdictional authority shall then make a report in writing on the same, as to compliances contemplated under Section 140 of the CGST Act and Rule 117 of the CGST Rules.

(iii) In case, no objection be taken, a report to submit/revise/re-revise the Form GST TRAN-1/TRAN-2 electronically, would be made by the concerned jurisdictional authority, within a period of two weeks.

(iv) In the event of any objection arising, one limited opportunity may be given to that petitioner to correct or revise or re-revise the physical Form GST TRAN-1/TRAN-2. That exercise may be completed within a period of three weeks and the report be submitted accordingly.

(v) Upon completion of that exercise, the jurisdictional authority shall forward his report along with said physical GST TRAN-1/TRAN-2 to the GST Network, within a further period of one week, with a copy of that communication to the petitioner concerned, through Email or other approved mode. No form submitted in compliance of this order would be rejected/declined as filed outside time.

(vi) The GST Network shall thereupon either itself upload the GST

TRAN-1/TRAN-2, within two weeks of receipt of such communication or allow that petitioner opportunity to upload those details, within a reasonable time.

74. We make it clear, the above exercise would be a one-time affair and any details thus submitted would not remain open to any further or other revision by the petitioners/"registered persons".

75. Since, we have noted the general difficulty obtaining with all the "registered persons"/taxpayers and have considered the same to be generic in nature, we also make this order applicable to all other "registered persons"/taxpayers within the State of U.P. (who are not before this Court), subject to the modification that such non-petitioners/"registered persons" may approach their jurisdictional authority, as above, within a period of eight weeks from today. The further timelines provided by this Court shall stand modified accordingly.

76. We also provide, subject to right of appeal that otherwise exists with the respondents (against this order), they shall host the operative portion of this order on their website and the GST portal to ensure that the one-time/final resolution is made of all disputes of this nature, in the State of U.P. It will also avoid repeated and continued litigation for years after the GST regime has come into existence.

77. All writ petitions are thus **allowed.** No order as to costs.

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**(2021)10ILR A816**

**ORIGINAL JURISDICTION**

**CIVIL SIDE**

**DATED: ALLAHABAD 30.09.2021 and 08.10.2021**

**BEFORE**

**THE HON'BLE NAHEED ARA MOONIS, J.**
**THE HON'BLE SAUMITRA DAYAL SINGH, J.**

Writ Tax No. 524 of 2021

**Ashok Kumar Agarwal ...Petitioner**
**Versus**
**Union of India & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Suyash Agarwal, Sri Rakesh Ranjan Agarwal (Senior Adv.)

**Counsel for the Respondents:**
Sri Gaurav Mahajan, Sri Ashish Agrawal, Sri Gopal Verma, Sri Shashi Prakash Singh (ASGI)

**A. Tax Law - Enabling Act,1933 - Sections 3(1), 153 & 153B - Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 - Finance Act, 2021: Section 2 to 88.**

**Absence of saving clause in case of substitution of a legislative provision - There can be no exception to the principle: an Act of legislative Substitution is a composite act. Thereby, the legislature chooses to put in place another or, replace an existing provision of law. It involves simultaneous omission and re-enactment.** By its very nature, once a new provision has been put in place of a pre-existing provision, the earlier provision cannot survive, except for things done or already undertaken to be done or things expressly saved to be done. **In absence of any express saving clause and, since no reassessment proceeding had been initiated prior to the Act of legislative Substitution, the second aspect of the matter does not require any further examination.** (Para 64)

Therefore, on 01.04.2021, by virtue of plain/unexcepted effect of Section 1(2)(a) of the Finance Act, 2021, the provisions of Sections 147, 148, 149, 151 (as those provisions existed upto 31.3.2021), stood substituted, alongwith a new provision enacted by way of Section 148A of that Act. In absence of any saving clause, to

save the pre-existing (and now substituted) provisions, the revenue authorities could only initiate reassessment proceeding on or after 1.4.2021, in accordance with the substituted law and not the pre-existing laws. (Para 65)

It is equally true that the Enabling Act that was pre-existing, had been enforced prior to enforcement of the Finance Act, 2021. **In the Enabling Act and the Finance Act, 2021, there is absence, both of any express provision in itself or to delegate the function - to save applicability of the provisions of Sections 147, 148, 149 or 151 of the Act, as they existed up to 31.3.2021. Plainly, the Enabling Act is an enactment to extend timelines only.** Consequently, it flows from the above - 1.4.2021 onwards, all references to issuance of notice contained in the Enabling Act must be read as reference to the substituted provisions only. Equally there is no difficulty in applying the pre-existing provisions to pending proceedings. Looked in that manner, **the laws are harmonized.** (Para 66)

**B. Jurisdiction - A reassessment proceeding is not just another proceeding emanating from a simple show-cause notice. Both, under the pre-existing law as also under the law enforced from 1.4.2021, that proceeding must arise only upon jurisdiction being validly assumed by the assessing authority.** Till such time jurisdiction is validly assumed by assessing authority - evidenced by issuance of the jurisdictional notice u/s 148, no re-assessment proceeding may ever be said to be pending before the assessing authority. All re-assessment notices involved in this batch of writ petitions had been issued after the enforcement date 1.4.2021. As a fact, no jurisdiction had been assumed by the assessing authority against any of the petitioners, under the unamended law. Hence, no time extension could ever be made u/s 3(1) of the Enabling Act, read with the Notifications issued thereunder. (Para 67)

**C. Enabling Act: Section 3(1) - Section 3(1) of the Enabling Act does not speak of saving any provision of law.** It only speaks of saving or protecting certain proceedings from being hit by the rule of limitation. That provision also does not speak of saving any proceeding from any law that may be enacted by the Parliament, in future. (Para 68)

**Section 3(1) of the Enabling Act does not itself speak of reassessment proceeding or of Section 147 or Section 148 of the Act as it existed prior to 1.4.2021. It only provides a general relaxation of limitation granted on account of general hardship existing upon the spread of pandemic COVID-19.** After enforcement of the Finance Act, 2021, it applies to the substituted provisions and not the pre-existing provisions. (Para 71)

**Words and phrases – '*notwithstanding*' -** Even otherwise the word 'notwithstanding' creating the non obstante clause, does not govern the entire scope of Section 3(1) of the Enabling Act. It is confined to and may be employed only with reference to the second part of Section 3(1) of the Enabling Act i.e. to protect proceedings already under way. There is nothing in the language of that provision to admit a wider or sweeping application to be given to that clause - to serve a purpose not contemplated under that provision and the enactment, wherein it appears. (Para 69)

**D. Colourable exercise of power** - The Enabling Act only protected certain proceedings that may have become time barred on 20.3.2021, upto the date 30.6.2021. Correspondingly, by delegated legislation incorporated by the Central Government, it may extend that time limit. That time limit alone stood extended upto 30 June, 2021. Vide Notification No. 3814 dated 17.9.2021, issued u/s 3(1) of the Enabling Act, further extension of time has been granted till 31.3.2022. In absence of any specific delegation made, to allow the delegate of the Parliament, to indefinitely extend such limitation, would be to allow the validity of an enacted law i.e. the Finance Act, 2021 to be defeated by a purely colourable exercise of power, by the delegate of the Parliament. (Para 70)

Reference to reassessment proceedings w.r.t. pre-existing and now substituted provisions of Sections 147 and 148 of the Act has been

introduced only by the later Notifications issued under the Act. Therefore, the validity of those provisions is also required to be examined. The provisions of Sections 147, 148, 148A, 149, 150 and 151 substituted the old/pre-existing provisions of the Act w.e.f. 1.4.2021. **In absence of any proceeding of reassessment having been initiated prior to the date 1.4.2021, it is the amended law alone that would apply. Central Government or the CBDT could not have issued the Notifications, plainly to over reach the principal legislation.** Unless harmonized as above, those Notifications would remain invalid. (Para 72)

**E. To consider legislation on the touchstone practicality is dangerous.** Practicality, if any, may lead to legislation. Once the matter reaches Court, it is the legislation and its language, and the interpretation offered to that language as may primarily be decisive to govern the outcome of the proceeding. To read practicality into enacted law is dangerous. Also, it would involve legislation by the Court, an idea and exercise we carefully tread away from. (Para 73)

**F. The mischief rule has limited application in the present case. Only in case of any doubt existing as to which of the two interpretations may apply or to clear a doubt as to the true interpretation of a provision, the Court may look at the mischief rule to find the correct law.** However, where plain legislative action exists, as in the present case (whereunder the Parliament has substituted the old provisions regarding reassessment with new provisions w.e.f. 1.4.2021), the mischief rule has no application. (Para 74)

There is no conflict in the application and enforcement of the Enabling Act and the Finance Act, 2021. Juxtaposed, if the Finance Act, 2021 had not made the Substitution to the reassessment procedure, the revenue authorities would have been within their rights to claim extension of time, under the Enabling Act. However, upon that sweeping amendment made the Parliament, by necessary implication or implied force, it limited the applicability of the Enabling Act and the power to grant time extensions thereunder, to only such reassessment proceedings as had been initiated till 31.3.2021. Consequently, the impugned Notifications have no applicability to the reassessment proceedings initiated from 1.4.2021 onwards. (Para 75)

**Writ petitions allowed.** (E-4)

**Precedent followed:**

1. GKN Driveshafts (India) Ltd. Vs Income-tax Officer, (2003) 259 ITR 19 (SC) (Para 7)

2. Govt. of India & ors. Vs Indian Tobacco Association, (2005) 7 SCC 396 (Para 19)

3. Gottumukkala Venkata Krishamraju Vs U.O.I. & ors., (2019) 17 SCC 590 (Para 20)

4. PTC India Ltd. Vs Central Electricity Regulatory Commissioner, (2010) 4 SCC 603 (Para 21)

5. C.B. Richards Ellis Mauritius Ltd. Vs Assistant Director of Income-tax, (2012) 208 Taxman 322 (Delhi) (Para 22)

6. Kolhapur Canesugar Works Ltd. & anr. Vs U.O.I. & ors., (2000) 2 SCC 536 (Para 23)

7. Assam Company Ltd. & anr. Vs St. of Assam & ors., (2001) 248 ITR 567 (SC) (Para 25)

8. U.O.I. & ors. Vs S. Srinivasan, (2012) 7 SCC 683 (Para 27)

9. A.K. Roy Etc. Vs U.O.I. & anr., AIR 1982 SC 710 (Para 28)

10. Parle Biscuits (P) Ltd.Vs St. of Bihar & ors., (2005) 9 SCC 669 (Para 32)

11. Chairman and Managing Director, F.C.I. & ors. Vs Jagdish Balaram Bahira & ors., (2017) 8 SCC 670 (Para 33)

12. Dilip Kumar Ghosh & ors. Vs Chairman & ors., (2005) 7 SCC 567 (Para 33)

13. Syndicate Bank Vs Prabha D. Naik & anr., AIR 2001 SC 1968 (Para 40)

14. A.B. Krishna & ors. Vs St. of Karnataka & ors., AIR 1998 SC 1050 (Para 42)

15. State of M.P. Vs Kedia Leather & Liquor Ltd. & ors. (2003) 7 SCC 389 (Para 44)

16. Gammon India Ltd. Vs Special Chief Secretary & others, (2006) 3 SCC 354 (Para 45)

17. A.G. Varadarajulu & anr. Vs St.of T.N. & ors., (1998) 4 SCC 231 (Para 49)

18. Memon Abdul Karim Haji Tayab, Central Cutlery Stories, Veraval Vs Deputy Custodian-General, New Delhi & ors., AIR 1964 SC 1256 (Para 51)

19. U.O.I. & ors. Vs Exide Industries Ltd. & anr., (2020) 5 SCC 274 (Para 55)

**Precedent distinguished:**

1. Ramesh Kymal Vs Siemens Gamesa Renewable Power Pvt. Ltd., (2021) 3 SCC 224 (Para 62)

2. Palak Khatuja Vs U.O.I. & ors., decided on 23.08.2021, High Court of Chhattisgarh, W.P. (T) No. 149 of 2021 (Para 28)

**Present petitions challenge initiation of re-assessment proceedings u/s 148 of the Income Tax Act, 1961 (upon notices issued after 01.04.2021), for different assessment years.**

(Delivered by Hon'ble Naheed Ara Moonis, J.
&
Hon'ble Saumitra Dayal Singh, J.)

Heard Sri Rakesh Ranjan Agarwal, learned Senior Advocate, assisted by Sri Suyash Agarwal, Sri Shambhu Chopra, learned Senior Advocate, assisted by Ms. Mahima Jaiswal, Sri Abhinav Mehrotra, Sri Akhilesh Kumar along with Sri Ashish Bansal, Sri Divyanshu Agarwal along with Sri Ankit Saran, Sri Deepak Kapoor along with Sri Shubham Agarwal, Sri V.K. Sabarwal and Shri R.B. Gupta along with Sri Rishi Raj Kapoor, Sri Shakeel Ahmad, Sri Parv Agarwal, Sri Salil Kapoor along with Sri Anuj Srivastava & Ms Soumya Singh alongwith Sri Satya Vrat Mehrotra, Sri Ankur Agarwal, Sri Krishna Deo Vyas, Sri Ashok Shankar Bhatnagar & Sri Harshul Bhatnagar, Sri Pranchal Agarwal, Sri V.K. Sabharwal, Sri R.B. Gupta, Ms. Shalini Goel and Ms. Rupal Agarwal, learned counsel for the petitioners; Sri Shashi Prakash Singh, learned Additional Solicitor General of India assisted by Sri Gopal Verma, Sri Dinesh Kumar Mishra, Sri Gaya Prasad Singh, Sri Sudarshan Singh, Sri Santosh Kumar Singh Paliwal, Sri Ajai Singh, Sri Gaurav Kumar Chand and Sri Krishna Agarwal, learned counsel appearing for the Union of India; Sri Gaurav Mahajan, Sri Praveen Kumar, Sri Krishna Agarwal, Sri Ashish Agarwal and Sri Manu Ghildyal, learned Standing Counsel for the revenue authorities.

2. This writ petition along with the other petitions mentioned in paragraph 4 below, have been filed by individual petitioners, to challenge initiation of re-assessment proceedings under Section 148 of the Income Tax Act, 1961 for different assessment years. All reassessment proceedings have been initiated upon notices issued after the date 01.04.2021.

3. These petitions had been entertained and interim protection granted. Pursuant to earlier orders passed in the leading petitions - Writ Tax Nos. 524 of 2021 and 521 of 2021 and other matters, the revenue and the Union of India were required to file counter affidavits in those cases. Copies of such counter affidavits were, under a direction of this Court, served on all learned counsel for the petitioners. Replies by way of rejoinder

affidavits have also been received in some of the cases. Those affidavits thus filed, have been read in all the writ petitions.

4. Since, the dispute arising in the present writ petitions is purely legal, with respect to the validity of the re-assessment proceedings initiated against the individual petitioners, after 01.04.2021, having resort to the provisions of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') as they existed, read with the provisions of Act No. 38 of 2020 and the notifications issued thereunder, the peculiar fact pleadings of each case are not material to the adjudication of the legal issues involved here. However, for the purposes of convenience, the basic relevant facts, obtaining in each individual case are recorded in the below given chart:

| Sl. No. | Writ Tax No. | Name of the Petitioner | A.Y. | Date of Notice U/s 148 | Date of filing of original return |
|---|---|---|---|---|---|
| 1. | 521/2021 | KAUKAB GHULAM MOHAMED QURESHI | **2015-16** | 29.06.2021 | 29.12.2017 |
| 2. | 524-2021 | ASHOK KUMAR AGARWAL | **2017-18** | 09.04.2021 | 08.03.2018 |
| 3. | 531-2021 | M/S ARIHANT PUBLICATIONS (INDIA) LTD. | **2015-16** | 30.06.2021 | 30.09.2015 |
| 4. | 540-2021 | BAJAJ STEELS AND INDUSTRIES LTD. | **2017-18** | 29.06.2021 | 07.11.2017 |
| 5. | 549-2021 | BAJAJ STEELS AND INDUSTRIES LTD. | **2016-17** | 29.06.2021 | 17.10.2016 |
| 6. | 554-2021 | SMT. NEERAJ AGARWAL | **2016-17** | 09.04.2021 | 21.03.20217 |
| 7. | 559-2021 | FIROZ AHMED ZAHIR AHMED SHAIKH | **2015-16** | 29.06.2021 | 20.07.2015 |
| 8. | 561-2021 | M/S JUBILANT PHARMOVA LIMITED | **2015-16** | 30.06.2021 | 29.11.2015 |
| 9. | 562-2021 | SHOBHIT SHUKLA | **2013-14** | 30.06.2021 | -- |
| 10. | 564-2021 | VARDHMAN INDUSTRIES | **2015-16** | 16.04.2021 | 25.09.2015 |
| 11. | 565-2021 | YOGESH JAISWAL | **2017-18** | 25.05.2021 | 29.10.2017 |
| 12. | 567-2021 | NEERAJ PRAKASH | **2013-14** | 30.06.2021 | 31.12.2015 |
| 13. | 573-2021 | PARVEEN QURESHI | **2016-17** | 30.06.2021 | 15.06.2017 |
| 14. | 592-2021 | SARLA JAIN | **2013-14** | 26.04.2021 | 31.03.2014 |
| 15. | 612-2021 | J.M. HOUSING LIMITED | **2016-17** | 30.06.2021 | 15.10.2016 |
| 16. | 613-2021 | J.M. HOUSING LIMITED | **2017-18** | 30.06.2021 | 27.01.2018 |
| 17. | 614-2021 | GSR MOVIES | **2013-14** | 28.06.2021 | 28.09.2013 |
| 18. | 615-2021 | PAWANPUTRA HOTELS AND RESORTS PVT. LTD. | **2013-14** | 30.06.2021 | 27.09.2013 |
| 19. | 623/2021 | HIRA LAL JAIN | **2013-14** | 27.04.2021 | 29.07.2013 |
| 20. | 624-2021 | DEVOY BENARA | **2013-14** | 27.04.2021 | -- |
| 21. | 625-2021 | JAI JAGDAMBA METALLOYS LIMITED | **2017-18** | 14.04.2021 | 31.10.2017 |
| 22. | 636-2021 | STAR CORPORATION | **2014-15** | 30.06.2021 | 29.09.2014 |
| 23. | 640-2021 | STAR CORPORATION | **2013-14** | 29.06.2021 | 29.09.2013 |
| 24. | 641-2021 | STAR ASSOCIATES | **2013-14** | 29.06.2021 | 28.09.2013 |
| 25. | 642-2021 | NAMAN GOVIL | **2013-14** | 19.04.2021 | 30.11.2013 |
| 26. | 643-2021 | RUPA GOYAL | **2017-18** | 25.05.2021 | 28.10.2018 |
| 27. | 655-2021 | NAMAN GOVIL | **2014-15** | 19.04.2021 | 22.09.2014 |
| 28. | 665-2021 | RAJEEV BANSAL | **2016-17** | 16.06.2021 | 08.10.2016 |
| 29. | 667-2021 | MOHD SHAKIR | **2017-18** | 10.06.2021 | 31.10.2017 |
| 30. | 668-2021 | AMIT SONI | **2016-17** | 30.06.2021 | 22.07.2016 |
| 31. | 669-2021 | AMIT SONI | **2015-16** | 30.06.2021 | 16.07.2015 |
| 32. | 670-2021 | ARUN KUMAR | **2013-14** | 25.06.2021 | 05.09.2013 |
| 33. | 677-2021 | CRESCENT TANNERIES PVT LTD | **2015-16** | 11.05.2021 | 26.09.2015 |
| 34. | 678-2021 | SURENDRA PRATAP SINGH | **2013-14** | 30.06.2021 | 29.03.2014 |
| 35. | 679-2021 | METAL CANS AND CLOSURES PRIVATE LIMITED | **2013-14** | 17.06.2021 | 30.09.2013 |
| 36. | 680-2021 | METAL CANS AND CLOSURES PRIVATE LIMITED | **2014-15** | 17.06.2021 | 28.11.2014 |
| 37. | 681-2021 | METAL CANS AND CLOSURES PRIVATE LIMITED | **2015-16** | 17.06.2021 | 29.09.2015 |
| 38. | 691-2021 | ARBIND KUMAR OMER | **2016-17** | 30.06.2021 | 17.10.2016 |
| 39. | 693-2021 | SUBHASH KUMAR GUPTA | **2014-15** | 29.06.2021 | 30.03.2015 |
| 40. | 695-2021 | KAMAL KUMAR AGARWAL (HUF) | **2013-14** | 30.06.2021 | 31.07.2013 |
| 41. | 696-2021 | SHRI BHUVENDRA KUMAR VARSHNEY | **2015-16** | 21.06.2021 | 31.03.2016 |
| 42. | 697-2021 | NITIN AGGARWAL HUF | **2013-14** | 30.06.2021 | 29.07.2013 |
| 43. | 707-2021 | SUNITA AGARWAL | **2013-14** | 30.06.2021 | -- |
| 44. | 724-2021 | NIRMAL KUMAR GOYAL | **2014-15** | 06.04.2021 | 26.07.2014 |
| 45. | 727-2021 | MADHUR MITTAL | **2013-14** | 22.06.2021 | 24.07.2013 |
| 46. | 728-2021 | SUMIT MITTAL | **2013-14** | 26.06.2021 | 25.07.2013 |
| 47. | 732-2021 | NAVDEEP VARSHNEYA | **2013-14** | 06.04.2021 | 16.08.2013 |
| 48. | 735-2021 | MADHU AGARWAL | **2013-14** | 06.04.2021 | 31.03.2014 |
| 49. | 740-2021 | KARAN MAHANA | **2015-16** | 04.04.2021 | 27.03.2016 |
| 50. | 742-2021 | ASHISH AGARWAL | **2013-14** | 29.06.2021 | 30.03.2018 |
| 51. | 743-2021 | AJAY GUPTA | **2013-14** | 28.06.2021 | 27.07.2013 |
| 52. | 744-2021 | ASHISH AGARWAL | **2014-15** | 29.06.2021 | 30.03.2018 |
| 53. | 746-2021 | BALA AGARWAL | **2014-15** | 30.06.2021 | 23.08.2014 |
| 54. | 749-2021 | SHREE JEE ASSOCIATES | **2013-14** | 23.04.2021 | 31.03.2014 |
| 55. | 757-2021 | JIVAN KUMAR AGARWAL | **2013-14** | 27.04.2021 | 21.10.2013 |
| 56. | 763-2021 | KAPIL SHARMA | **2013-14** | 25.06.2021 | 18.07.2013 |
| 57. | 764-2021 | KAPIL SHARMA | **2014-15** | 25.06.2021 | 03.02.2015 |
| 58. | 765-2021 | NEERU GUPTA | **2013-14** | 06.04.2021 | 27.09.2013 |
| 59. | 769-2021 | NEERU GUPTA | **2015-16** | 01.04.2021 | 27.03.2016 |
| 60. | 775-2021 | MUKESH PAL SINGH | **2014-15** | 30.06.2021 | 14.03.2015 |
| 61. | 776-2021 | SHIV SHAKTI CONSTRUCTIONS | **2013-14** | 30.06.2021 | 21.10.2013 |
| 62. | 777-2021 | MUKESH KUMAR | **2013-14** | 30.06.2021 | 01.02.2014 |
| 63. | 778-2021 | EXOTIC BUILDMART PVT. LTD | **2014-15** | 30.06.2021 | 25.03.2015 |
| 64. | 779-2021 | KIRTI SINGH | **2014-15** | 30.06.2021 | 14.03.2015 |
| 65. | 780-2021 | SUSHIL JOSHI | **2013-14** | 30.06.2021 | 31.03.2014 |
| 66. | 781-2021 | SHIV SHAKTI CONSTRUCTIONS | **2014-15** | 30.06.2021 | 29.11.2014 |
| 67. | 782-2021 | MUKESH KUMAR | **2014-15** | 30.06.2021 | 14.03.2015 |
| 68. | 795-2021 | AMBIKA ENCLAVE PRIVATE LIMITED | **2015-16** | 28.06.2021 | 30.03.2016 |
| 69. | 796-2021 | KUSUM ENCLAVE PRIVATE LIMITED | **2015-16** | 28.06.2021 | 20.09.2015 |
| 70. | 797-2021 | AMBIKA ENCLAVE PRIVATE LIMITED | **2017-18** | 28.06.2021 | 27.11.2017 |
| 71. | 801-2021 | KANTA DEVI | **2015-16** | 10.06.2021 | 19.03.2017 |
| 72. | 810-2021 | MRITUNJAY KUMAR | **2013-14** | 06.04.2021 | -- |
| 73. | 811-2021 | VINITA KEJRIWAL | **2014-15** | 28.06.2021 | 31.07.2014 |
| 74. | 813-2021 | MRITUNJAY KUMAR | **2014-15** | 06.04.2021 | -- |

5. As to the exact challenge raised, it may be noted, the petitioners have challenged the validity of the re-assessment notices issued to them, under Section 148 of the Act. Another challenge has been raised to the validity of the Explanation appended to clause (A)(a) of CBDT Notification No. 20 of 2021, dated

31.03.2021 and Explanation to clause (A)(b) of CBDT Notification No. 38 of 2021, dated 27.04.2021. Those notifications have been issued under the powers vested under Section 3(1) of the Act 38 of 2020 namely, the Taxation and Other Laws (Relaxation of Certain Provisions) Act, 2020 (hereinafter referred to as the 'Enabling Act').

6. Before recording the individual submissions advanced by learned counsel for the parties, we may take note of the legislative provisions giving rise to the issues before us. Prior to enforcement of the Finance Act, 2021, the law for making re-assessment under the Act was governed by the provisions of Sections 147, 148, 149 read with Sections 150, 151, 152 and 153 of the Act. Under that law, the jurisdiction to reassess an assessee could arise upon necessary 'reason to believe' being recorded by the jurisdictional Assessing Officer, of that assessee - as to escapement of any income from assessment. Subject to the rule of limitation and prior sanction (where applicable), the Assessing Officer would then assume jurisdiction to reassess such an assessee, by issuing a notice under Section 148 of the Act.

7. As to the challenge procedure available to that assessee, the Supreme Court, in the case of **GKN Driveshafts (India) Ltd. Vs. Income-tax Officer, (2003) 259 ITR 19 (SC),** had observed as below:

*"We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the Assessing Officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years."*

8. Around March, 2020, the pandemic COVID-19 reached our shores and spread all over country. It led to enforcement of a lockdown. Even thereafter, life is yet to normalise. The pandemic severely impacted the normal functioning of the Government as also all other institutions and it obstructed the normal life of the citizens as well. In such facts, judicial intervention had been made by the Supreme Court as also by this Court, to relax the rules of limitation - to institute various proceedings. The Central Government also recognized that difficulty and promulgated the Ordinance No. 2 of 2020 dated 31.03.2020 titled Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 (hereinafter referred to as the 'Ordinance'). Relevant to our discussion, the introductory text of the said Ordinance together with provisions of Sections 1, 2 and 3 of the Ordinance are quoted below:

***"TAXATION AND OTHER LAWS (RELAXATION OF CERTAIN PROVISIONS) ORDINANCE, 2020***

***NO.2 OF 2020, DATED 31-3-2020***

*Promulgated by the President in the Seventy-first Year of the Republic of India.*

*An Ordinance to provide relaxation in the provisions of certain Acts and for matters connected therewith or incidental thereto.*

*WHEREAS, in view of the spread of pandemic COVID-19 across many countries of the world including India, causing immense loss to the lives of people, it has become imperative to relax certain provisions, including extension of time limit, in the taxation and other laws;*

*AND WHEREAS, Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;*

*NOW, THEREFORE, in exercise of the powers conferred by clause (1) of article 123 of the Constitution, the President is pleased to promulgate the following Ordinance.*

*CHAPTER I*

***PRELIMINARY***

***Short title and commencement***

*1. (1) This Ordinance may be called the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020.*

*(2) Save as otherwise provided, it shall come into force at once.*

***Definitions***

*2. (1) In this Ordinance, unless the context otherwise requires,--*

*(a) "specified Act" means --*

*(i) the Wealth-tax Act, 1957 (27 of 1957);*

*(ii) the Income-tax Act, 1961 (43 of 1961);*

*(iii) the Prohibition of Benami Property Transactions Act, 1988 (45 of 1988);*

*(iv) Chapter VII of the Finance (No. 2) Act, 2004 (22 of 2004);*

*(v) Chapter VII of the Finance Act, 2013 (17 of 2013);*

*(vi) the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015);*

*(vii) Chapter VIII of the Finance Act, 2016 (28 of 2016); or*

*(viii) the Direct Tax Vivad se Vishwas Act, 2020 (3 of 2020).*

*b) "notification" means the notification published in the Official Gazette.*

*(2) The words and expressions used herein and not defined, but defined in the specified Act, the Central Excise Act, 1944 (1 of 1944), the Customs Act, 1962 (52 of 1962), the Customs Tariff Act, 1975 (51 of 1975) or the Finance Act, 1994 (32 of 1994), as the case may be, shall have the meaning respectively assigned to them in that Act.*

*CHAPTER II*

***RELAXATION OF CERTAIN PROVISIONS OF SPECIFIED ACT***

*Relaxation of certain provision of specified Act.*

*3. (1) Where, 'any time-limit' has been specified in, or prescribed or notified under, the specified Act which falls during the period from the 20th day of March, 2020 to the 29th day of June, 2020, or such other date after the 29th day of June, 2020, as the Central Government may, by notification, specify in this behalf, for the completion or compliance of such action as--*

*(a) completion of any proceeding or passing of any order or 'issuance of any notice', intimation, notification, sanction or approval or such other action, by whatever name called, by any authority, commission or tribunal, by whatever name called, under the provisions of the specified Act; or*

*b) filing of any appeal, reply or application or furnishing of any report, document, return statement or such other*

*record, by whatever name called, under the provisions of the specified Act; or*

*(c) in case where the specified Act is the Income-tax Act, 1961 (43 of 1961), --*

*(i) making of investment, deposit, payment, acquisition, purchase, construction or such other action, by whatever name called, for the purposes of claiming any deduction, exemption or allowance under the provisions contained in --*

*(I) sections 54 to 54GB or under any provisions of Chapter VI-A under the heading "B.--Deductions in respect of certain payments" thereof; or*

*(II) such other provisions of that Act, subject to fulfillment of such conditions, as the Central Government may, by notification, specify; or*

*(ii) beginning of manufacture or production of articles or things or providing any services referred to in section 10AA of that Act, in a case where the letter of approval, required to be issued in accordance with the provisions of the Special Economic Zones Act, 2005 (28 of 2005), has been issued on or before the 31st day of March, 2020 (28 of 2005),*

*and where completion or compliance of such action has not been made within such time, then, the time limit for completion or compliance of such action shall, notwithstanding anything contained in the specified Act, stand extended to the 30th day of June, 2020, or such other date after the 30th day of June, 2020, as the Central Government may, by notification, specify in this behalf:*

*Provided that the Central Government may specify different dates for completion or compliance of different actions.*

*Provided further that such action shall not include payment of any amount as is referred to in sub-section (2).*

*(2) Where any due date has been specified in, or prescribed or notified under, the specified Act for payment of any amount towards tax or levy, by whatever name called, which falls during the period from the 20th day of March, 2020 to the 29th day of June, 2020 or such other date after the 29th day of June, 2020 as the Central Government may, by notification, specify in this behalf, and such amount has not been paid within such date, but has been paid on or before the 30th day of June, 2020, or such other date after the 30th day of June, 2020, as the Central Government may, by notification, specify in this behalf, then, notwithstanding anything contained in the specified Act, --*

*(a) the rate of interest payable, if any, in respect of such amount for the period of delay shall not exceed three-fourth per cent for every month or part thereof;*

*(b) no penalty shall be levied and no prosecution shall be sanctioned in respect of such amount for the period of delay.*

*Explanation.-- For the purposes of this sub-section, "the period of delay" means the period between the due date and the date on which the amount has been paid."*

Further, in view of the submissions as have been received, it would be fruitful to also quote the provisions of Chapter III of the Ordinance - containing the amendments made to the Act. It reads:

*"CHAPTER III*

***AMENDMENT TO THE INCOME-TAX ACT, 1961***

***Amendment of sections 10 and 80G of Act 43 of 1961***

*4. In the Income-tax Act, 1961, with effect from the 1st day of April, 2020 (43 of 1961), -*

*(i) in section 10, in clause (23C), in sub-clause (i), after the word "Fund", the words and brackets "or the Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (PM CARES FUND)" shall be inserted;*

*(ii) in section 80G, in sub-section (2), in clause (a), in sub-clause (iiia), after the word "fund", the words and brackets "or the Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (PM CARES FUND)" shall be inserted."*

9. Acting in exercise of powers vested under the Ordinance, the Central Government then issued Notification Nos. 35 of 2020, 39 of 2020 and 56 of 2020, dated 24.06.2020, 29.06.2020 and 29.07.2020, respectively. Briefly, by those Notifications, general time extension was granted under the Act for certain purposes. Since, the present dispute does not arise in the context of those Notifications, no useful purpose would be served in extracting their contents.

10. The aforesaid Ordinance was succeeded by the Enabling Act. It received the assent of the President on 29.09.2020 and was published in the Official Gazette, on that date itself. It was enforced retrospectively, with effect from 31.03.2020. By the Enabling Act, further provisions were made in addition to the provisions of Section 3 of the Ordinance. We may therefore take note of Sections 1, 2 and 3 of the Enabling Act. They read as below:

***"THE TAXATION AND OTHER LAWS (RELAXATION AND AMENDMENT OF CERTAIN PROVISIONS) ACT, 2020***

*NO. 38 OF 2020*

*[29th September, 2020.]*

*AN ACT to provide for relaxation and amendment of provisions of certain Acts and for matters connected therewith or incidental thereto.*

*BE it enacted by Parliament in the Seventy-first Year of the Republic of India as follows:--*

*CHAPTER I*

*PRELIMINARY*

*1. (1) This Act may be called the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020.*

*(2) Save as otherwise provided, it shall be deemed to have come into force on the 31st day of March, 2020.*

*2. (1) In this Act, unless the context otherwise requires,--*

*(a) "notification" means the notification published in the Official Gazette;*

*(b) "specified Act" means--*

*(i) the Wealth-tax Act, 1957;*

*(ii) the Income-tax Act, 1961;*

*(iii) the Prohibition of Benami Property Transactions Act, 1988;*

*(iv) Chapter VII of the Finance (No. 2) Act, 2004;*

*(v) Chapter VII of the Finance Act, 2013;*

*(vi) the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015;*

*(vii) Chapter VIII of the Finance Act, 2016; or*

*(viii) the Direct Tax Vivad se Vishwas Act, 2020.*

*(2) The words and expressions used herein and not defined, but defined in the specified Act, the Central Excise Act, 1944, the Customs Act, 1962, the Customs Tariff Act, 1975 or the Finance Act, 1994, as the case may be, shall have the same meaning respectively assigned to them in that Act.*

***CHAPTER II***

***RELAXATION OF CERTAIN PROVISIONS OF SPECIFIED ACT***

*3. (1) Where, any time-limit has been specified in, or prescribed or notified under, the specified Act which falls during the period from the 20th day of March, 2020 to the 31st day of December, 2020, or such other date after the 31st day of December, 2020, as the Central Government may, by notification, specify in this behalf, for the completion or compliance of such action as--*

*(a) completion of any proceeding or passing of any order or issuance of any notice, intimation, notification, sanction or approval, or such other action, by whatever name called, by any authority, commission or tribunal, by whatever name called, under the provisions of the specified Act; or*

*(b) filing of any appeal, reply or application or furnishing of any report, document, return or statement or such other record, by whatever name called, under the provisions of the specified Act; or*

*(c) in case where the specified Act is the Income-tax Act, 1961,--*

*(i) making of investment, deposit, payment, acquisition, purchase, construction or such other action, by whatever name called, for the purposes of claiming any deduction, exemption or allowance under the provisions contained in--*

*(I) sections 54 to 54GB, or under any provisions of Chapter VI-A under the heading "B.--Deductions in respect of certain payments" thereof; or*

*(II) such other provisions of that Act, subject to fulfilment of such conditions, as the Central Government may, by notification, specify; or*

*(ii) beginning of manufacture or production of articles or things or providing any services referred to in section 10AA of that Act, in a case where the letter of approval, required to be issued in accordance with the provisions of the Special Economic Zones Act, 2005, has been issued on or before the 31st day of March, 2020,*

*and where completion or compliance of such action has not been made within such time, then, the time-limit for completion or compliance of such action shall, notwithstanding anything contained in the specified Act, stand extended to the 31st day of March, 2021, or such other date after the 31st day of March, 2021, as the Central Government may, by notification, specify in this behalf:*

*Provided that the Central Government may specify different dates for completion or compliance of different actions:*

*Provided further that such action shall not include payment of any amount as is referred to in sub-section (2):*

*Provided also that where the specified Act is the Income-tax Act, 1961 and the compliance relates to--*

*(i) furnishing of return under section 139 thereof, for the assessment year commencing on the--*

*(a) 1st day of April, 2019, the provision of this sub-section shall have the effect as if for the figures, letters and words "31st day of March, 2021", the figures, letters and words "30th day of September, 2020" had been substituted;*

*(b) 1st day of April, 2020, the provision of this sub-section shall have the effect as if for the figures, letters and words "31st day of March, 2021", the figures, letters and words "30th day of November, 2020" had been substituted;*

*(ii) delivering of statement of deduction of tax at source under sub-section (2A) of section 200 of that Act or statement of collection of tax at source*

*under sub-section (3A) of section 206C thereof for the month of February or March, 2020, or for the quarter ending on the 31st day of March, 2020, as the case may be, the provision of this sub-section shall have the effect as if for the figures, letters and words "31st day of March, 2021", the figures, letters and words "15th day of July, 2020" had been substituted;*

*(iii) delivering of statement of deduction of tax at source under sub-section (3) of section 200 of that Act or statement of collection of tax at source under proviso to sub-section (3) of section 206C thereof for the month of February or March, 2020, or for the quarter ending on the 31st day of March, 2020, as the case may be, the provision of this sub-section shall have the effect as if for the figures, letters and words "31st day of March, 2021", the figures, letters and words "31st day of July, 2020" had been substituted;*

*(iv) furnishing of certificate under section 203 of that Act in respect of deduction or payment of tax under section 192 thereof for the financial year commencing on the 1st day of April, 2019, the provision of this sub-section shall have the effect as if for the figures, letters and words "31st day of March, 2021", the figures, letters and words "15th day of August, 2020" had been substituted;*

*(v) sections 54 to 54GB of that Act, referred to in item (I) of sub-clause (i) of clause (c), or sub-clause (ii) of the said clause, the provision of this sub-section shall have the effect as if -*

*(a) for the figures, letters and words "31st day of December, 2020", the figures, letters and words "29th day of September, 2020" had been substituted for the time-limit for the completion or compliance; and*

*(b) for the figures, letters and words "31st day of March, 2021", the figures, letters and words "30th day of September, 2020" had been substituted for making such completion or compliance;*

*(vi) any provisions of Chapter VI-A under the heading "B.-- Deductions in respect of certain payments" of that Act, referred to in item (I) of sub-clause (i) of clause (c), the provision of this sub-section shall have the effect as if--*

*(a) for the figures, letters and words "31st day of December, 2020", the figures, letters and words "30th day of July, 2020" had been substituted for the time-limit for the completion or compliance; and*

*(b) for the figures, letters and words "31st day of March, 2021", the figures, letters and words "31st day of July, 2020" had been substituted for making such completion or compliance;*

*(vii) furnishing of report of audit under any provision thereof for the assessment year commencing on the 1st day of April, 2020, the provision of this sub-section shall have the effect as if for the figures, letters and words "31st day of March, 2021", the figures, letters and words "31st day of October, 2020" had been substituted:*

*Provided also that the extension of the date as referred to in sub-clause (b) of clause (i) of the third proviso shall not apply to Explanation 1 to section 234A of the Income-tax Act, 1961 in cases where the amount of tax on the total income as reduced by the amount as specified in clauses (i) to (vi) of sub-section (1) of the said section exceeds one lakh rupees:*

*Provided also that for the purposes of the fourth proviso, in case of an individual resident in India referred to in sub-section (2) of section 207 of the Income-tax Act, 1961, the tax paid by him under section 140A of that Act within the due date (before extension) provided in that Act, shall be deemed to be the advance tax:*

*Provided also that where the specified Act is the Direct Tax Vivad Se Vishwas Act, 2020, the provision of this sub-section shall have the effect as if--*

*(a) for the figures, letters and words "31st day of December, 2020", the figures, letters and words "30th day of December, 2020" had been substituted for the time limit for the completion or compliance of the action; and*

*(b) for the figures, letters and words "31st day of March, 2021", the figures, letters and words "31st day of December, 2020" had been substituted for making such completion or compliance.*

*(2) Where any due date has been specified in, or prescribed or notified under the specified Act for payment of any amount towards tax or levy, by whatever name called, which falls during the period from the 20th day of March, 2020 to the 29th day of June, 2020 or such other date after the 29th day of June, 2020 as the Central Government may, by notification, specify in this behalf, and if such amount has not been paid within such date, but has been paid on or before the 30th day of June, 2020, or such other date after the 30th day of June, 2020, as the Central Government may, by notification, specify in this behalf, then, notwithstanding anything contained in the specified Act,--*

*(a) the rate of interest payable, if any, in respect of such amount for the period of delay shall not exceed three-fourth per cent. for every month or part thereof;*

*(b) no penalty shall be levied and no prosecution shall be sanctioned in respect of such amount for the period of delay.*

*Explanation.--For the purposes of this sub-section, "the period of delay" means the period between the due date and the date on which the amount has been paid."*

11. Reference has also been made to provisions of Chapter III to the Enabling Act. Numerous amendments were made to the Act as were not contemplated by the Ordinance. While no useful purpose would be served in extracting the entire contents of Section 4 of the Enabling Act, it would be useful to reproduce, and indicate some of the provisions amended, together with reference to the date from which such amendments were made effective.

| Sl. No. | Section no. of the Income Tax Act, 1961, amended | Insertion/Omission/Substitution with effect from |
|---|---|---|
| 1. | Explanation 1(1) to Section 6 | 01.04.2021 |
| 2. | Section 10(4D) | 01.04.2021 |
| 3. | Section 10(23C) | 01.04.2020 |
| 4. | Provisos to Section 10 | 01.04.2021 & 01.06.2020 |
| 5. | Section 10(23FBC) | 01.04.2021 |
| 6. | Explanation to Section 10(23FE) | 01.04.2021 |
| 7. | Explanation II to Section 11(1) | 01.04.2021 |
| 8. | Section 11(7) | 01.06.2020 |
| 9. | Second Proviso to Section 11 | 01.06.2020 and 01.04.2021 |
| 10. | Omission of Section 12A(1)(ac) | 01.06.2020 |
| 11. | Insertion of Section 12A(1)(ac) | 01.04.2021 |
| 12. | Section 12A(2) | 01.06.2020 |
| 13. | Proviso to Section 12A | 01.04.2021 |
| 14. | Omission of Section 12AA(5) | 01.06.2020 |
| 15. | Insertion of Section 12AA(5) | 01.04.2021 |
| 16. | Omission of Section 12AB | 01.06.2020 |
| 17. | Insertion of Section 12AB | 01.04.2021 |
| 18. | Explanation I to Section 13 | 01.04.2021 |
| 19. | Section 35(1) | 01.06.2020 |

| | | |
|---|---|---|
| 20. | Sub-clause III to Explanation to Section 35 | 01.04.2021 |
| 21. | Omission of Fifth and Sixth Provisos to Section 35(1)(iv) | 01.06.2020 |
| 22. | Insertion of Fifth and Sixth Provisos to Section 35(1)(iv) | 01.04.2021 |
| 23. | Omission of Section 35(1A) | 01.06.2020 |
| 24. | Insertion of Section 35(1A) | 01.04.2021 |
| 25. | Section 35AC | 01.11.2020 |
| 26. | Section 56(2) | 01.06.2020 & 01.04.2021 |
| 27. | Section 80G | 01.04.2021 |
| 28. | Section 80G(5) | 01.06.2020 &01.04.2021 |
| 29. | Section 92CA | 01.11.2020 |
| 30. | Section 115AD | 01.04.2021 |
| 31. | Substitution in Explanation to Section 115BBDA(b)(iii) | 01.06.2020 & 01.04.2021 |
| 32. | Substitution in Section 115TD | 01.06.2020 & 01.04.2021 |
| 33. | Insertion of Section 130 | 01.11.2020 |
| 34. | Substitution of Proviso to Section 133A(6) | 01.11.2020 |
| 35. | Section 133C | 01.11.2020 |
| 36. | Insertion of Section 135 | 01.11.2020 |
| 37. | Insertion of Section 142A | 01.11.2020 |
| 38. | Substitution of Proviso to Section 143(3B) | 01.04.2021 |
| 39. | Insertion of Section 144A | 01.04.2021 |
| 40. | Insertion of Section 144C(14A) | 01.11.2020 |
| 41. | Insertion of Section 151A | 01.11.2020 |
| 42. | Insertion of Section 157A | 01.11.2020 |
| 43. | Insertion of Section 196D(1) | 01.11.2020 |
| 44. | Insertion of Section 197B | 14.05.2020 |
| 45. | Insertion of Section 206C(10) | 14.05.2020 |
| 46. | Insertion of Section 231 | 01.11.2020 |
| 47. | Substitution in Section 253(1)(c) | 01.06.2020 & 01.04.2021 |
| 48. | Insertion of Section 253(8), (9) and (10) | 01.11.2020 |
| 49. | Section 263(1) | 01.11.2020 |
| 50. | Section 264(1, 2, 3 and 4) | 01.11.2020 |
| 51. | Insertion of Section 264A & 264B | 01.11.2020 |
| 52. | Omission of Section 271K | 01.06.2020 |
| 53. | Insertion of Section 271K | 01.04.2021 |
| 54. | Substitution in Section 274(2A)(a) | 01.04.2021 |
| 55. | Insertion of Section 279 (4, 5 and 6) | 01.11.2020 |
| 56. | Insertion of Section 293D | 01.11.2020 |

12. On 29.10.2020, Notification No. 88 of 2020 was issued by the Central Government for the purposes of extension of time limits stipulated under Section 139 of the Act. For ready reference, the said provision reads as below:

*"MINISTRY OF FINANCE*

*(Department of Revenue)*

*(CENTRAL BOARD OF DIRECT TAXES)*

***NOTIFICATION***

*New Delhi, the 29th October, 2020*

***TAXATION AND OTHER LAWS***

***S.O. 3906(E).****-In exercise of the powers conferred by sub-section (1) of section 3 of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (38 of 2020) (hereinafter referred to as the Act), the Central Government hereby specifies, for the purpose of the said sub-section (1), that, in a case where the specified Act is the Income-tax Act, 1961 and the compliance for the assessment year commencing on the 1st day of April, 2020, relates to -*

*(i) furnishing of return under section 139 thereof, the time-limit for furnishing of such return, shall-*

*(a) in respect of the assessees referred to in clauses (a) and (aa) of Explanation 2 to sub-section (1) of the said section 139, stand extended to the 31st day of January, 2021; and*

*(b) in respect of other assessees, stand extended to the 31st day of December, 2020:*

*Provided that the provisions of the fourth proviso to sub-section (1) of the Act shall, mutatis mutandis apply to these extensions of due date, as they apply to the*

*date referred to in sub-clause (b) of clause (i) of the third proviso thereof.*

*(ii) furnishing of report of audit under any provision of that Act, the time-limit for furnishing of such report of audit shall stand extended to the 31" day of December, 2020.*

*2. This notification shall come into force from the date of its publication in the Official Gazette."*

13. Then, on 31.12.2020, another Notification No. 4805 (E) was issued under Section 3(1) of the Enabling Act. Without making any specific reference to reassessment proceedings under the Act, time extensions were granted. For ready reference, that provision reads as below:

***"NOTIFICATION S.O. 4805 (E) [NO. 93/2020/F. No. 370142/35/2020-TPL], DATED 31.12.2020***

*In exercise of the powers conferred by sub-section (1) of section 3 of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (38 of 2020) (hereinafter referred to the Act) and in supersession of the notification of the Government of India in the Ministry of Finance, (Department of Revenue) No. 88/2020 dated the 29th October, 2020, published in the Gazette of India, Extraordinary, Part-II, Section 3, Sub-section (ii), vide number S.O. 3906(E), dated the 29th October, 2020, except as respects things done or omitted to be done before such supersession, the Central Government hereby specifies, for the completion or compliance of action referred to in-*

*(A) clause (a) of sub-section (1) of section 3 of the Act, -*

*(i) the 30th day of March, 2021 shall be the end date of the period during which the time limit specified in, or prescribed or notified under, the specified Act falls for the completion or compliance of such action as specified under the said sub-section; and*

*(ii) the 31st day of March, 2021 shall be the end date to which the time limit for completion or compliance of such action shall stand extended:*

*Provided that where the specified Act is the Direct Tax Vivad Se Vishwas Act, 2020 (3 of 2020), the provision of this clause shall have the effect as if--*

*(a) for the figures, letters and words "30th day of March, 2021", the figures, letters and words "30th day of January, 2021" had been substituted; and*

*(b) for the figures, letters and words "31st day of March, 2021", the figures, letters and words "31st day of January, 2021" had been substituted:*

*Provided further that where the specified Act is the Income-tax Act, 1961 (43 of 1961) and completion or compliance of action referred to in clause (a) of sub-section (1) of section 3 of the Act is an order under sub-section (3) of section 92CA of the Income-tax Act, 1961, the provision of this clause shall have the effect as if--*

*(a) for the figures, letters and words "30th day of March, 2021", the figures, letters and words "30th day of January, 2021" had been substituted; and*

*(b) for the figures, letters and words "31st day of March, 2021", the figures, letters and words "31st day of January, 2021" had been substituted;*

*(B) clause (b) of sub-section (1) of section 3 of the Act, where the specified Act is the Income-tax Act, 1961 (43 of 1961) and the compliance for the assessment year commencing on the 1st day of April, 2020 relates to -*

*(i) furnishing of return under section 139 thereof, the time limit for furnishing of such return, shall -*

*(a) in respect of the assessees referred to in clauses (a) and (aa) of Explanation 2 to sub-section (1) of the said section 139, stand extended to the 15th day of February 2021; and*

*(b) in respect of other assessees, stand extended to the 10th day of January, 2021:*

*Provided that the provisions of the fourth proviso to sub-section (1) of section 3 of the Act shall, mutatis mutandis apply to these extensions of due date, as they apply to the date referred to in sub-clause (b) of clause (i) of the third proviso thereof;*

*(ii) furnishing of report of audit under any provision of that Act, the time limit for furnishing of such report of audit shall stand extended to the 15th day of January, 2021.*

*2. This notification shall come into force from the date of its publication in the Official Gazette."*

14. On 27.02.2021, Notification No. 966E was issued under Section 3(1) of the Enabling Act. It, for the first time, made specific reference to reassessment proceedings under Section 153 or Section 153B of the Act. For ready reference, the said provisions read as below:

***"NOTIFICATION NO. S.O. 966(E) [NO. 10/2021/F. NO. 370142/35/2020-TPL], DATED 27-2-2021***

*In exercise of the powers conferred by sub-section (1) of section 3 of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (38 of 2020) (hereinafter referred to as the said Act) and in partial modification of the notification of the Government of India in the Ministry of Finance, (Department of Revenue) No. 93/2020 dated the 31st December, 2020, published in the Gazette of India, Extraordinary, Part-II, Section 3, Sub-section (i), vide number S.O. 4805(E), dated the 31st December, 2020 (hereinafter referred to as the said notification), the Central Government hereby specifics, for the purpose of sub-section (1) of section 3 of the said Act, that -*

*(A) where the specified Act is the Income-tax Act, 1961 (43 of 1961) (hereinafter referred to as the Income-tax Act) and the completion of any action, as referred to in clause (a) of sub-section (1) of section 3 of the said Act, relates to passing of any order-*

*(a) for imposition of penalty under Chapter XXI of the Income-tax Act, -*

*(i) the 29th day of June, 2021 shall be the end date of the period during which the time limit specified in or prescribed or notified under the Income-tax Act falls, for the completion of such action; and*

*(ii) the 30th day of June, 2021 shall be the end date to which the time limit for completion of such action shall stand extended;*

*(b) for assessment or reassessment under the Income-tax Act, and the time limit for completion of such action under section 153 or section 153B thereof,-*

*(i) expires on the 31st day of March, 2021 due to its extension by the said notification, such time limit shall stand extended to the 30th day of April, 2021;*

*(ii) is not covered under (1) and expires on 31st day of March, 2021, such time limit shall stand extended to the 30th day of September, 2021;*

*(B) where the specified Act is the Prohibition of Benami Property Transaction Act, 1988, (45 of 1988) (hereinafter referred to as the Benami Act) and the completion of any action, as*

*referred to in clause (a) of sub-section (1) of section 3 of the said Act, relates to issue of notice under sub-section (1) or passing of any order under sub-section (3) of section 26 of the Benami Act,--*

*(i) the 30th day of June, 2021 shall be the end date of the period during which the time limit specified in or prescribed or notified under the Benami Act falls, for the completion of such action; and*

*(ii) the 30th day of September, 2021 shall be the end date to which the time limit for completion of such action shall stand extended."*

15. Next, at the time of enforcement of the Finance Act, 2021, another Notification No. 1432 dated 31.03.2021 came to be issued under Section 3(1) of the Enabling Act, containing specific stipulations, both with respect to issuance of notices under Section 148 of the Act and also with respect to completion of reassessment proceedings. For ready reference, the said provisions read as below:

***"NOTIFICATION S.O. 1432(E) [NO. 20/2021/F. NO. 370142/35/2020-TPL), DATED 31-3-2021***

*In exercise of the powers conferred by sub-section (1) of section 3 of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (38 of 2020) (hereinafter referred to as the said Act), and in partial modification of the notification of the Government of India in the Ministry of Finance, (Department of Revenue) No. 93/2020 dated the 31st December, 2020, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii), vide number S.O. 4805(E), dated the 31st December, the Central Government hereby specifies that,-*

*(A) where the specified Act is the Income-tax Act, 1961 (43 Income-tax Act) and, -*

*(a) the completion of any action referred to in clause (a) of sub-section (1) of section 3 of the Act relates to passing of an order under sub-section (13) of section 144C or issuance of notice under section 148 as per time-limit specified in section 149 or sanction under section 151 of the Income-tax Act, -*

*(i) the 31st day of March, 2021 shall be the end date of the period during which the time limit, specified in, or prescribed or notified under, the Income-tax Act falls for the completion of such action; and*

*(ii) the 30th day of April, 2021 shall be the end date to which the time-limit for the completion of such action shall stand extended.*

*Explanation. For the removal of doubts, it is hereby clarified that for the purposes of issuance of notice under section 148 as per time-limit specified in section 149 or sanction under section 151 of the Income-tax Act, under this sub-clause, the provisions of section 148, section 149 and section 151 of the Income-tax Act, as the case may be, as they stood as on the 31st day of March 2021, before the commencement of the Finance Act, 2021, shall apply.*

*(b) the compliance of any action referred to in clause (b) of sub-section (1) of section 3 of the said Act relates to intimation of Aadhaar number to the prescribed authority under sub-section (2) of section 139AA of the Income-tax Act, the time-limit for compliance of such action shall stand extended to the 30th day of June, 2021.*

*(B) where the specified Act is the Chapter VIII of the Finance Act, 2016 (28 of 2016) (hereinafter referred to as the*

*Finance Act) and the completion of any action referred to in clause (a) of sub section (1) of section 3 of the said Act relates to sending an intimation under sub-section (1) of section 168 of the Finance Act,-*

*(i) the 31st day of March, 2021 shall be the end date of the period during which the time-limit, specified in, or prescribed or notified under, the Finance Act falls for the completion of such action; and*

*(ii) the 30th day of April, 2021 shall be the end date to which the time-limit for the completion of such action shall stand extended."*

16. Last, Notification No. 1703 (E) dated 27.04.2021 came to be issued under Section 3(1) of the Enabling Act, again providing for extensions of time to initiate reassessment proceedings and to conclude said proceedings. It reads thus:

***"NOTIFICATION S.O. 1703(E) [NO. 38/2021/F.NO. 370142/35/2020-TPL], DATED 27-4-2021***

*In exercise of the powers conferred by sub-section (1) of section 3 of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (38 of 2020) (hereinafter referred to as the said Act), and in partial modification of the notifications of the Government of India in the Ministry of Finance, (Department of Revenue) No. 93/2020 dated the 31st December, 2020, No. 10/2021 dated the 27th February, 2021 and No. 20/2021 dated the 31st March, 2021, published in the Gazette of India, Extraordinary, Part-II, Section 3, Subsection (ii), vide number S.O. 4805(E), dated the 31st December, 2020, vide number S.O. 966(E) dated the 27th February, 2021 and vide number S.O. 1432(E) dated the 31st March, 2021, respectively (hereinafter referred to as the said notifications), the Central Government hereby specifies for the purpose of sub-section (1) of section 3 of the said Act that, --*

*(A) where the specified Act is the Income-tax Act, 1961 (43 of 1961) (hereinafter referred to as the Income-tax Act) and, --*

*(a) the completion of any action, referred to in clause (a) of sub-section (1) of section 3 of the said Act, relates to passing of any order for assessment or reassessment under the Income-tax Act, and the time limit for completion of such action under section 153 or section 153B thereof, expires on the 30th day of April, 2021 due to its extension by the said notifications, such time limit shall further stand extended to the 30th day of June, 2021;*

*(b) the completion of any action, referred to in clause (a) of sub-section (1) of section 3 of the said Act, relates to passing of an order under sub-section (13) of section 144C of the Income-tax Act or issuance of notice under section 148 as per time-limit specified in section 149 or sanction under section 151 of the Income-tax Act, and the time limit for completion of such action expires on the 30th day of April, 2021 due to its extension by the said notifications, such time limit shall further stand extended to the 30th day of June, 2021.*

***Explanation.**-- For the removal of doubts, it is hereby clarified that for the purposes of issuance of notice under section 148 as per time-limit specified in section 149 or sanction under section 151 of the Income-tax Act, under this sub-clause, the provisions of section 148, section 149 and section 151 of the Income-tax Act, as the case may be, as they stood*

*as on the 31st day of March 2021, before the commencement of the Finance Act, 2021, shall apply.*

*(B) where the specified Act is the Chapter VIII of the Finance Act, 2016 (28 of 2016) (hereinafter referred to as the Finance Act) and the completion of any action, referred to in clause (a) of sub-section (1) of section 3 of the said Act, relates to sending an intimation under sub-section (1) of section 168 of the Finance Act, and the time limit for completion of such action expires on the 30th day of April, 2021 due to its extension by the said notifications, such time limit shall further stand extended to the 30th day of June, 2021."*

17. In the meanwhile, the Finance Act, 2021, being Act No. 13 of 2021 came into force. Relevant to our discussion, we consider it appropriate to extract Sections 1 and 40 to 45 of the said Act. They read as below:

***"FINANCE ACT, 2021***

***[13 OF 2021]***

*An Act to give effect to the financial proposals of the Central Government for the financial year 2021-2022.*

*BE it enacted by Parliament in the Seventy-second Year of the Republic of India as follows:--*

***CHAPTER I***
***PRELIMINARY***

***Short title and commencement.***

*1. (1) This Act may be called the Finance Act, 2021.*

*(2) Save as otherwise provided in this Act,-*

*(a) sections 2 to 88 shall come into force on the 1st day of April, 2021;*

*(b) sections 108 to 123 shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.*

***Substitution of new section for section 147.***

*40. For section 147 of the Income-tax Act, the following section shall be substituted, namely:--*

***147. Income escaping assessment.****--If any income chargeable to tax, in the case of an assessee, has escaped assessment for any assessment year, the Assessing Officer may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance or any other allowance or deduction for such assessment year (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year).*

*Explanation.--For the purposes of assessment or reassessment or recomputation under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, irrespective of the fact that the provisions of section 148A have not been complied with.*

***Substitution of new section for section 148.***

*41. For section 148 of the Income-tax Act, the following section shall be substituted, namely:--*

***148. Issue of notice where income has escaped assessment.****--Before making the assessment, reassessment or recomputation under section 147, and subject to the provisions of section 148A, the Assessing Officer shall serve on the assessee a notice, along with a copy of the order passed, if required, under clause (d)*

*of section 148A, requiring him to furnish within such period, as may be specified in such notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139:*

***Provided*** *that no notice under this section shall be issued unless there is information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice.*

*Explanation 1.-- For the purposes of this section and section 148A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,--*

*(i) any information flagged in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time;*

*(ii) any final objection raised by the Comptroller and Auditor General of India to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act.*

*Explanation 2.-- For the purposes of this section, where,--*

*(i) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A, on or after the 1st day of April, 2021, in the case of the assessee; or*

*(ii) a survey is conducted under section 133A, other than under sub-section (2A) or sub-section (5) of that section, on or after the 1st day of April, 2021, in the case of the assessee; or*

*(iii) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner, that any money, bullion, jewellery or other valuable article or thing, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or*

*(iv) the Assessing Officer is satisfied, with the prior approval of Principal Commissioner or Commissioner, that any books of account or documents, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee,*

*the Assessing Officer shall be deemed to have information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the three assessment years immediately preceding the assessment year relevant to the previous year in which the search is initiated or books of account, other documents or any assets are requisitioned or survey is conducted in the case of the assessee or money, bullion, jewellery or other valuable article or thing or books of account or documents are seized or requisitioned in case of any other person.*

*Explanation 3. -- For the purposes of this section, specified authority means the specified authority referred to in section 151.*

***Insertion of new section 148A.***

***42.*** *After section 148 of the Income-tax Act, the following section shall be inserted, namely:--*

***"148A. Conducting inquiry, providing opportunity before issue of notice under section 148.****-- The Assessing Officer shall, before issuing any notice under section 148,--*

*(a)*

*conduct any enquiry, if required, with the prior approval of specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment;*

*(b)*

*provide an opportunity of being heard to the assessee, with the prior approval of specified authority, by serving upon him a notice to show cause within such time, as may be specified in the notice, being not less than seven days and but not exceeding thirty days from the date on which such notice is issued, or such time, as may be extended by him on the basis of an application in this behalf, as to why a notice under section 148 should not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year and results of enquiry conducted, if any, as per clause (a);*

*(c) consider the reply of assessee furnished, if any, in response to the show-cause notice referred to in clause (b);*

*(d) decide, on the basis of material available on record including reply of the assessee, whether or not it is a fit case to issue a notice under section 148, by passing an order, with the prior approval of specified authority, within one month from the end of the month in which the reply referred to in clause (c) is received by him, or where no such reply is furnished, within one month from the end of the month in which time or extended time allowed to furnish a reply as per clause (b) expires:*

***Provided*** *that the provisions of this section shall not apply in a case where,--*

*(a) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A in the case of the assessee on or after the 1st day of April, 2021; or*

*(b) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any money, bullion, jewellery or other valuable article or thing, seized in a search under section 132 or requisitioned under section 132A, in the case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or*

*(c) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any books of account or documents, seized in a search under section 132 or requisitioned under section 132A, in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee.*

*Explanation.--For the purposes of this section, specified authority means the specified authority referred to in section 151."*

***Substitution of new section for section 149.***

***43.*** *For section 149 of the Income-tax Act, the following section shall be substituted, namely:--*

***149. Time limit for notice.****--(1) No notice under section 148 shall be issued for the relevant assessment year,--*

*(a) if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);*

*(b) if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more for that year:*

***Provided*** *that no notice under section 148 shall be issued at any time in a case for the relevant assessment year beginning on or before 1st day of April, 2021, if such notice could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (b) of sub-section (1) of this section, as they stood immediately before the commencement of the Finance Act, 2021:*

***Provided further*** *that the provisions of this sub-section shall not apply in a case, where a notice under section 153A, or section 153C read with section 153A, is required to be issued in relation to a search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, on or before the 31st day of March, 2021:*

***Provided also*** *that for the purposes of computing the period of limitation as per this section, the time or extended time allowed to the assessee, as per show-cause notice issued under clause (b) of section 148A or the period during which the proceeding under section 148A is stayed by an order or injunction of any court, shall be excluded:*

*Provided also that where immediately after the exclusion of the period referred to in the immediately preceding proviso, the period of limitation available to the Assessing Officer for passing an order under clause (d) of section 148A is less than seven days, such remaining period shall be extended to seven days and the period of limitation under this sub-section shall be deemed to be extended accordingly.*

*Explanation.--For the purposes of clause (b) of this sub- section, "asset" shall include immovable property, being land or building or both, shares and securities, loans and advances, deposits in bank account.*

*(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.*

***Substitution of new section for section 151.***

***44.*** *For section 151 of the Income-tax Act, the following section shall be substituted, namely:--*

***151. Sanction for issue of notice.****--Specified authority for the purposes of section 148 and section 148A shall be,--*

*(i) Principal Commissioner or Principal Director or Commissioner or Director, if three years or less than three years have elapsed from the end of the relevant assessment year;*

*(ii) Principal Chief Commissioner or Principal Director General or where there is no Principal Chief Commissioner or Principal Director General, Chief Commissioner or Director General, if more than three years have elapsed from the end of the relevant assessment year*

***Amendment of section 151A.***

***45.*** *In section 151A of the Income-tax Act, in sub-section (1), in the opening portion, after the words and figures "issuance of notice under section*

*148", the words, figures and letter "or conducting of enquiries or issuance of show-cause notice or passing of order under section 148A" shall be inserted."*

18. In the above statutory context and reference, submissions have been advanced by learned counsel for the petitioners and have been responded to by the learned Additional Solicitor General of India representing the Union and the CBDT and learned counsel for the revenue.

19. Shri Rakesh Ranjan Agarwal, learned Senior Advocate has first submitted, upon enforcement of the Finance Act, 2021, the pre-existing Sections 147 to 151 of the Act stood repealed and replaced by the above noted provisions. The entire statutory scheme of initiating, inquiring, conducting, and concluding the reassessment proceedings underwent a sea change. The act of substitution of the old provision obliterated from the statute book the pre-existing provisions pertaining to reassessment under the Act. The unamended provision became dead and unenforceable, by that operation of law. Since the Enabling Act only sought to enlarge limitation with respect to the pre-existing provisions, it could not, and it did not resurrect the pre-existing provisions that were already dead. In short, it has been submitted, the procedural amendments cannot recreate a non-existing substantive law. He has placed reliance on a decision of the Supreme Court in **Government of India & Ors. Vs. Indian Tobacco Association, (2005) 7 SCC 396,** wherein it has been observed as follows:

*"15. The word "substitute" ordinarily would mean "to put (one) in place of another"; or "to replace". In Black's Law Dictionary, Fifth Edition, at page 1281, the word "substitute" has been defined to mean "To put in the place of another person or thing" or "to exchange". In Collins English Dictionary, the word "substitute" has been defined to mean "to serve or cause to serve in place of another person or thing"; "to replace (an atom or group in a molecule) with (another atom or group)"; or "a person or thing that serves in place of another, such as a player in a game who takes the place of an injured colleague".*

20. Further reliance has been placed on a decision of the Supreme Court in **Gottumukkala Venkata Krishamraju Vs. Union of India & Ors., (2019) 17 SCC 590,** wherein it was observed as under:-

*"13. This expression has also come up for interpretation by the Courts in **Zile Singh v. State of Haryana and Others, (2004) 8 SCC 1,** the import and impact of substituted provision were discussed in the following manner:*

*"23. The text of Section 2 of the Second Amendment Act provides for the word "upto" being substituted for the word "after". What is the meaning and effect of the expression employed therein -- "shall be substituted"?*

*24. The substitution of one text for the other pre-existing text is one of the known and well-recognised practices employed in legislative drafting. "Substitution" has to be distinguished from "supersession" or a mere repeal of an existing provision."*

*14. Ordinarily wherever the word "substitute' or "substitution' is used by the legislature, it has the effect of deleting the old provision and make the new provision operative. The process of substitution consists of two steps: first, the old rule is*

*made to cease to exist and, next, the new rule is brought into existence in its place. The rule is that when a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself, into the earlier, then the earlier Act must thereafter be read and construed as if the altered words had been written into the earlier Act with pen and ink and the old words scored out so that thereafter there is no need to refer to the amending Act at all. No doubt, in certain situations, the Court having regard to the purport and object sought to be achieved by the Legislature may construe the word "substitution" as an "amendment" having a prospective effect. Therefore, we do not think that it is a universal rule that the word "substitution' necessarily or always connotes two severable steps, that is to say, one of repeal and another of a fresh enactment even if it implies two steps. However, the aforesaid general meaning is to be given effect to, unless it is found that legislature intended otherwise. Insofar as present case is concerned, as discussed hereinafter, the legislative intent was also to give effect to the amended provision even in respect of those incumbents who were in service as on September 01, 2016."*

21. Reference has also been made to another decision of the Supreme Court in **PTC India Limited Vs. Central Electricity Regulatory Commissioner, (2010) 4 SCC 603**, wherein again it was observed as below:

*"... Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision. Substitution is a combination of repeal and fresh enactment."*

22. Last, reference has been made to a decision of the Delhi High Court, applying the same principle, in **C.B. Richards Ellis Mauritius Ltd. Vs. Assistant Director of Income-tax, (2012) 208 Taxman 322 (Delhi).**

23. Second, it has been submitted, the Enabling Act was enacted solely to extend the limitation under the pre-existing provisions of the Act, as they stood prior to the amendment made by the Finance Act, 2021. The later Act, i.e. the Finance Act, 2021 does not contain any saving clause as may allow the pre-existing provisions an extended life, after the enactment of the Finance Act, 2021. Thus, the pre-existing provisions cannot be pressed into service by the revenue. Reliance has been placed on a decision of the Supreme Court in **Kolhapur Canesugar Works Ltd. & Anr. Vs. Union Of India & Ors., (2000) 2 SCC 536.**

24. Third, it has been submitted, even otherwise, the Enabling Act does not, and it could not save the pre-existing Sections 147, 148 and other provisions pertaining to reassessment, nor overriding effect can arise or be given (to itself) by the Enabling Act, since on the date of enactment of the Enabling Act, the Finance Act, 2021 was not born. Therefore, it was only through the Finance Act, 2021 that the provisions of the pre-existing law may have been saved if it had been so intended by the Parliament. In absence of that saving clause, there exists no power either under Section 3(1) of the Enabling Act or any other law as may validate the issuance of the impugned Notification.

25. To validate such Notification, would be to resurrect and enforce a dead law, contrary to the statutory law in force, on the date of issuance of impugned Notification dated 27.04.2021. Clearly, that would be a legislative overreach by the

delegate and therefore, ultra vires the Constitution of India. In that regard, reliance has been placed on another decision of the Supreme Court in **Assam Company Ltd. & Anr. Vs. State of Assam & Ors., (2001) 248 ITR 567 (SC).** Therein, it was held as below:

*"We will now consider the effect of Rule 5 of the State Rules. As noticed hereinabove, Rule 5 of the Rules in its proviso has in unequivocal terms empowered the State authorities in given cases to refuse to accept the computation of agricultural income made by the Central Officers after examining the books already examined by such Central Officers. The appellants contend that this provision is beyond the rule-making power under the Act, hence, is in excess of the power delegated under the State Act. They also contend that assuming that such rule-making power has entrusted the delegation under Section 50 of the State Act, same would be ultra vires the Constitution.*

*We see force in the above contention. A perusal of Section 50 of the Act shows that the State Government has been empowered to make such Rules as are necessary for the purpose of carrying out the purposes of the Act. We have already noticed that the object and the scheme of the Act do not contemplate the State authorities being empowered to recompute the agricultural income contrary to the computation made by the Central Officers, nor do the subjects specified in sub-sections 2(a) to (m) of Section 50 provide for making such rules empowering the State Officers to make computation of agricultural income contrary to what is computed by the Central Officers under the Central Act. We have noticed that by virtue of the provisions made by the legislature in Explanation to Section 2(a)(2), the second proviso to Section 8 and Section 20D, it is clear that the State Legislature intended to adopt the computation of agricultural income made under the provisions of the Central Act. Having specifically said so in the above Sections of the Act, if the Legislature wanted to deviate from that scheme of the Act, it could have in clear terms provided for a power being vested with its officers in any given case to recompute the income keeping in mind the revenue of the State but the Legislature has not thought it necessary to do so. Even under Section 50, we do not see any provision which specifically authorises the State Government to make any such rules in the nature of the proviso to Rule 5 of the State Rules. It is an established principle that the power to make rules under an Act is derived from the enabling provision found in such Act. Therefore, it is fundamental that a delegate on whom such power is conferred has to act within the limits of the authority conferred by the Act and it cannot enlarge the scope of the Act. A delegate cannot override the Act either by exceeding the authority or by making provision which is inconsistent with the Act. Any Rule made in exercise of such delegated power has to be in consonance with the provisions of the Act, and if the Rule goes beyond what the Act contemplates, the Rule becomes in excess of the power delegated under the Act, and if it does any of the above, the Rule becomes ultra vires the Act."*

26. It is also submitted, the delegation authorized being only for the purpose of enlarging limitation under a valid law, such delegation could not be exercised to resurrect the provision of law that stood omitted from the statute book by virtue of its substitution made by the Finance Act, 2021, w.e.f. 01.04.2021.

27. Shri Agarwal has further relied on **Union of India & Ors. Vs. S. Srinivasan, (2012) 7 SCC 683,** wherein that principle was clearly recognized and applied:

*"21. At this stage, it is apposite to state about the rule making powers of a delegating authority. If a rule goes beyond the rule making power conferred by the statute, the same has to be declared ultra vires. If a rule supplants any provision for which power has not been conferred, it becomes ultra vires. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it.*

*22. In this context, we may refer with profit to the decision in General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav, (1988) 2 SCC 351, wherein it has been held as follows:-*

*"14.....Before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void."*

*23. In Additional District Magistrate (Rev.) Delhi Administration v. Shri Ram, (2000) 5 SCC 451, it has been ruled that it is a well recognised principle that the conferment of rule making power by an Act does not enable the rule making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.*

*24. In Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi, (1975) 1 SCC 421, the Constitution Bench has held that:*

*"18. ... statutory bodies cannot use the power to make rules and regulations to enlarge the powers beyond the scope intended by the legislature. Rules and regulations made by reason of the specific power conferred by the statute to make rules and regulations establish the pattern of conduct to be followed."*

*25. In State of Karnataka and another v. H. Ganesh Kamath, (1983) 2 SCC 402, it has been stated that:*

*"7. ... It is a well settled principle of interpretation of statutes that the conferment of rule making power by an Act does not enable the rule-making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto."*

28. Last, serious attempt has been made by Shri Agarwal, learned Senior Advocate to demonstrate that the decision of the learned Single Judge of the Chhattisgarh High Court in **W.P. (T) No. 149 of 2021 Palak Khatuja Vs Union of India & Ors.,** decided on 23.08.2021 does not lay down the correct law. He has taken us through that decision at length and sought to draw points of distinction. Thus, it has been submitted that the Chhattisgarh High Court has applied a wrong test to look at the notification dated 31.03.2021 issued under the Enabling Act to interpret the principal legislation made by Parliament, being the Finance Act, 2021. He would submit, the delegated legislation can never overreach any Act of principal legislature. Second, though it may be true that the Ordinance was enforced arising from the spread of the pandemic COVID-19 and the circumstances emerging therefrom, yet it would be over simplistic to ignore the provisions of, either the Enabling Act or the Finance Act, 2021 and to read and interpret the provisions of Finance Act, 2021 as

inoperative in view of those circumstances. Similarly, practicality of life may never be a good guiding principle to interpret any law less so taxation laws which must be interpreted of their own language and scheme. In absence of any specific clause in Finance Act, 2021, either to save the provisions of the Enabling Act or the Notifications issued thereunder, by no interpretative process can those Notifications be given an extended run of life, beyond 31 March 2020. In fact, any notification issued under the Enabling Act, after the date 31.03.2021 is plainly in conflict with the law as enforced by the Finance Act 2021. It would remain a dead letter of law. It may also not infuse any life into a provision that stood obliterated from the statute with effect from 31.03.2021. Such an exercise made by the delegate would be plainly unconstitutional. No discretion may arise in the executive authority as may be impliedly or expressly barred by statutory law. Inasmuch as the Finance Act, 2021 does not enable the Central Government to issue any notification to reactivate the pre-existing law (which that principal legislature had substituted), the exercise made by the delegate/Central Government is de hors any statutory basis. It is *ultra vires*. A completely wrong principle has been applied by the Chhattisgarh High Court while relying on the decision of the Supreme Court in **A.K. Roy Etc. Vs. Union of India & Anr., AIR 1982 SC 710,** as that fact or legal situation does not exist in the present case. Last, it has been submitted that in absence of any express saving of the pre-existing laws, the presumption drawn in favour of that saving, is plainly impermissible.

29. Shri Shambhu Chopra, learned Senior Advocate has, besides adopting the submissions so advanced by Shri Rakesh Ranjan Agarwal, further submitted, the notifications extending time as had been issued under the Ordinance and under the Enabling Act were only for the purpose of overcoming the immediate difficulty arising from the spread of the pandemic COVID-19. Both, the assessees as also the authorities under the Act were vastly inconvenienced and even obstructed. The authorities were inconvenienced in issuing and serving notices and orders as also in receiving replies and objections and conducting hearing in pending cases. Similarly, the assessees were inconvenienced. They could not have availed their rights both on account of initial lockdown enforced all over the country as also on account of the devastation caused by the spread of COVID-19 and its aftermath with which we are still dealing, today.

30. However, the only intervention offered by the Ordinance and the Enabling Act was to extend the timelines under then pre-existing provisions of the Act, with reference to pending proceedings. Those provisions of the Ordinance and the Enabling Act had been enforced much before the enforcement of the Finance Act, 2021. Therefore, the Enabling Act was not visualized to impact the provisions of the Finance Act, 2021. The Notifications that may have been issued under the Ordinance and the Enabling Act cannot be read to remedy the situation upon the enforcement of the Finance Act, 2021 which has substituted and thus repealed the pre-existing provisions of the Act and has re-enacted a new scheme for reassessment under the Act, with effect from 01.04.2021.

31. He would further submit, the provisions of Section 148 read with Section 148A as substituted by Finance Act, 2021 are completely mandatory. There can be no

exception to the same. If the impugned Notifications were to be held to be valid after 01.04.2021, it would create a conflict of laws wherein solely on account of that delegated legislation, the mandatory provision of the principal legislature would have been rendered ineffective or inoperative. That may never be done. Elaborating his submissions, Shri Chopra would state, the impugned Notifications read together only provide for an extension of time, limited to the permissions contained in the Enabling Act. Since the Enabling Act does not, in any way, seek to save the pre-existing provisions of the Act, notwithstanding any change of legislation, that intent cannot be created by those Notifications.

32. Next, it has been submitted by Sri Chopra, *cassus omisus* cannot be supplied, either by the delegated legislation or by Courts. Reliance has been placed on the decision of the Supreme Court in **Parle Biscuits (P) Ltd. Vs State of Bihar And Ors. (2005) 9 SCC 669.**

33. He would further submit, the delegate cannot override the principal legislation as has been sought to be done in the present case. Reliance has been placed on two decisions of the Supreme Court in **Chairman and Managing Director, Food Corporation of India & Ors. Vs. Jagdish Balaram Bahira & Ors., (2017) 8 SCC 670** and **Dilip Kumar Ghosh & Ors. Vs Chairman & Ors., (2005) 7 SCC 567,** wherein it was clearly recognized that a Circular cannot override the Rules. In **Jagdish Balaram Bahira (supra),** it was recognized that the administrative Circulars are subservient to legislative action, and they cannot act contrary either to the Constitutional or statutory provisions.

34. Sri Chopra has further sought to draw a distinction in the decision of the Chhattisgarh High Court by submitting, a wrong presumption has been drawn in the aforesaid decision that by issuance of the Notification under the Enabling Act, the operation of the pre-existing provision of the Act had been extended and thereby provisions of Section 148A of the Act (introduced by Finance Act 2021) and other provisions had been deferred. He would submit, there is no cannon of law as would allow such an interpretation to be made by this Court. Similarly, he would submit, the Chhattisgarh High Court has erred in reaching the conclusion that the Notifications insulated and saved (up to 30.06.2021), the pre-existing provisions pertaining to reassessment under the Act. It is his submission, unless there was a clear legislative enactment by the principal legislature - to keep in abeyance Sections 2 to 88 of the Finance Act, 2021, no such saving or insulation by whatever name called, may ever arise.

35. On facts, once the principal legislature expressed its intent otherwise by enforcing those provisions w.e.f. 01.04.2021, the situation in law arises otherwise. The pre-existing provisions no longer continue to exist. No amount of effort by the delegate could resurrect those provisions or infuse life into those dead letters of law, in absence of enabling law delegating such function to the delegate of the Parliament i.e. to the Central Government or any other authority.

36. Adopting the submissions advanced by Sri Agarwal and Sri Chopra and Sri Abhinav Mehrotra, learned counsel for the petitioner has laid stress on the fact - by virtue of Sections 4 and 6 read with Section 292 of the Act, both substantive and procedural provisions under that Act remain dynamic since the Act seeks

material validation every year through enactment of the Finance Act. Income tax laws suffer a process of continuous change and there is no inherent logic or principle embedded in that law, to save a pre-existing provision despite enactment of another law in the subsequent year. Such changes are suffered, both by substantive law as also procedural law.

37. Relying on the above, he vehemently urged, the provisions of the Enabling Act together with the Notifications issued thereunder must be seen as they confronted the Act as amended by the Finance Act, 2021, on the date of issuance of the impugned re-assessment notices. Upon enforcement of the Finance Act 2021, the entire situation and dynamics of statutory law underwent a change. While the Enabling Act did not undergo any statutory amendment or change upon enactment of the Finance Act, the latter Act substituted the provisions of Sections-147, 148, 149, 150 and 151 of the Act, w.e.f. 01.04.2021. Therefore, the Enabling Act became wholly unenforceable or incapable to the proceedings that would now arise under those provisions, after 01.04.2021.

38. Sri Mehrotra, has then referred to certain provisions under Chapter II of the Enabling Act to contend, even under that Act, different dates had been specified for different provisions introduced to the Act. We have already taken note of such changes in the earlier part of this order. Referring to those, it has been submitted, there is nothing in the Enabling Act and in fact there could never be any provision in that Act as may have put in abeyance the provisions of the Finance Act, 2021, that was yet to be born/enacted. Inasmuch as the Enabling Act has not undergone any amendment as may put in abeyance, provisions of Sections 2 to 88 of the Finance Act, 2021 and there is no other law to that effect, those provisions continue to be the only law occupying the field, w.e.f. 01.04.2021. All Notifications issued with reference to the pre-existing laws would therefore remain confined to the time limits to conclude pending proceedings, beyond the date 31.03.2021. Those Notifications may never be read to enable the executive authorities to initiate any fresh proceedings under the pre-existing laws, which proceedings did not exist on 01.04.2021.

39. Third, it is his submission, while enacting the Finance Act, 2021, the Parliament was aware of the ground realities. The Parliament was also aware of the existing statutory laws both under the Act as amended by the Finance Act, 2020 as also the Ordinance and the Enabling Act and Notifications issued thereunder. Still, it chose to enforce the new scheme for re-assessment w.e.f. 01.04.2021 without enacting a saving clause. Thereby it brought an end to the possibility of any fresh proceeding being initiated under the pre-existing/unamended reassessment provisions, after the date 01.04.2021.

40. In support of his submission, Shri Abhinav Mehrotra has referred to the decision of the Supreme Court in **Syndicate Bank v Prabha D. Naik & Anr., AIR 2001 SC 1968,** wherein it was held as below:

*"Incidentally, the legislature is supposed to be aware of the needs of the society and the existing state of law: There is no reason whatsoever to consider that the legislature was unaware of the existing situation as regards the Portuguese Civil laws with a different provision for limitation. Needless to record, the special reference has been made to the State of Jammu*

*and Kashmir but after incorporation of the State of Goa, Daman and Diu within the Indian Territory, if there was any intent of having the local law being made prevalent there pertaining to the question of limitation only, there would have been an express exclusion and in the absence of which no contra intention can be deduced, neither any contra inference can be drawn. In any event, as noticed above, the Portuguese Civil Code, in our view, could not be read to be providing a distinct and separate period of limitation for a cause of action arising under the Indian Contract Act or under the Negotiable Instruments Act since the Civil Code ought to be read as one instrument and cause of action arising therefrom ought only to be governed thereunder and not otherwise. The entire Civil Code ought to be treated as a local law or special law including the provisions pertaining to the question of limitation for enforcement of the right arising under that particular Civil Code and not dehors the same and in this respect the observations of the High Court in Cadar Constructions [AIR 1984 Bom 258 : 1984 Mah LJ 603] that the Portuguese Civil Code could not provide for a period of limitation for a cause of action which arose outside the provisions of that Code, stands approved. A contra approach to the issue will not only yield to an absurdity but render the law of the land wholly inappropriate. There would also be repugnancy insofar as application of the Limitation Act in various States of the country is concerned: Whereas in Goa, Daman and Diu, the period of limitation will be for a much larger period than the State of Maharashtra -- the situation even conceptually cannot be sustained having due regard to the rule of law and the jurisprudential aspect of the Limitation Act."*

41. Next, it has been submitted, the Enabling Act only extended the limitation up to 31.03.2021 to do certain things only. Thereafter, it delegated the power to cause such further extensions to do those things beyond the date 31.12.2020, upto 30.06.2021. Since after 31.03.2021, the provisions under which such things were required to be done underwent substitution of law, the delegate of the legislature cannot now, seek to do or allow doing such things under the law that no longer exists. To allow such a possibility to exist would be to allow the delegate to do colourably, that which it cannot directly do after the Parliament enforced Sections 2 to 88 of the Finance Act 2021, w.e.f. 01.04.2021.

42. Then, it has been submitted, once the principal legislation enacted the law as has been done in the present case, its delegate was denuded of its powers, in the field occupied by the principal legislature. Here, reliance has been placed on yet another decision of the Supreme Court in **A.B. Krishna & Ors. Vs. State of Karnataka & Ors., AIR 1998 SC 1050,** where it was observed as below:

*"The Fire Services under the State Government were created and established under the Fire Force Act, 1964 made by the State Legislature. It was in exercise of the power conferred under Section 39 of the Act that the State Government made Service Rules regulating the conditions of the Fire Services. Since the Fire Services had been specially established under an Act of the legislature and the Government, in pursuance of the power conferred upon it under that Act, has already made Service Rules, any amendment in the Karnataka Civil Services (General Recruitment) Rules, 1977 would not affect the special provisions Validly made for the Fire Services. As a matter of fact, under the scheme of Article 309 of the Constitution, once a legislature intervenes to enact a law regulating the conditions of*

*service, the power of the Executive, including the President or the Governor, as the case may be, is totally displaced on the principle of "doctrine of occupied field". If, however, any matter is not touched by that enactment, it will be competent for the Executive to either issue executive instructions or to make a rule under Article 309 in respect of that matter."*

43. Next, it has been submitted, the Enabling Act and the Finance Act 2021 do not conflict and, therefore, there is no repugnancy between the two. Both enactments operate in different time spaces. While the Enabling Act takes care of the law as it pre-existed i.e. before the enactment of the Finance Act 2021, the latter Act operates w.e.f. 01.04.2021. Since the old provisions did not exist beyond 31.03.2021 and since the provisions of the Finance Act 2021 have not been given retrospective effect, there is no occasion for any conflict between the two laws.

44. Then, neither the Enabling Act nor any other law, delegates to the Central Government any power to create any law except with respect to time extensions under the pre-existing law. In fact, it is only if the delegated legislation enforced under the Enabling Act is applied after 01.04.2021, that a situation of conflict of laws may arise. Relying on another decision of the Supreme Court in **State of M.P. Vs. Kedia Leather & Liquor Ltd. & Ors., (2003) 7 SCC 389,** he submits, the repeal is inferred by necessary implication if the provisions of the later Act are so repugnant to the provisions of the earlier Act that the two cannot stand together. Here, though, principally, there is no repugnancy between the Act as amended by the Finance Act 2021 and the enabling law viz-a-viz the Act as amended by the Finance Act 2021, as the later Act came into force only w.e.f. 01.04.2021 (with respect to re-assessment procedure), the repugnancy may arise only in the event, the delegated legislation under the Enabling Act is enforced after 01.04.2021. To the extent that was not the clear intent of the Enabling Act, there is no repugnancy. Relevant to our discussion, paragraph nos. 13, 14 and 15 of the aforesaid decision, are quoted as below:

*"13. There is presumption against a repeal by implication; and the reason of this rule is based on the theory that the legislature while enacting a law has complete knowledge of the existing laws on the same subject-matter, and therefore, when it does not provide a repealing provision, the intention is clear not to repeal the existing legislation. When the new Act contains a repealing section mentioning the Acts which it expressly repeals, the presumption against implied repeal of other laws is further strengthened on the principle expressio unius (persone vel rei) est exclusio alterius. (The express intention of one person or thing is the exclusion of another), as illuminatingly stated in Garnett v. Bradley [(1878) 3 AC 944 : (1874-80) All ER Rep 648 : 48 LJQB 186 : 39 LT 261 (HL)] . The continuance of the existing legislation, in the absence of an express provision of repeal being presumed, the burden to show that these has been repeal by implication lies on the party asserting the same. The presumption is, however, rebutted and a repeal is inferred by necessary implication when the provisions of the later Act are so inconsistent with or repugnant to the provisions of the earlier Act that the two cannot stand together. But, if the two can*

*be read together and some application can be made of the words in the earlier Act, a repeal will not be inferred.*

*14. The necessary questions to be asked are:*

*(1) Whether there is direct conflict between the two provisions.*

*(2) Whether the legislature intended to lay down an exhaustive Code in respect of the subject-matter replacing the earlier law.*

*(3) Whether the two laws occupy the same field.*

*15. The doctrine of implied repeal is based on the theory that the legislature, which is presumed to know the existing law, did not intend to create any confusion by retaining conflicting provisions and, therefore, when the court applies the doctrine, it does no more than give effect to the intention of the legislature by examining the scope and the object of the two enactments and by a comparison of their provisions. The matter in each case is one of the construction and comparison of the two statutes. The court leans against implying a repeal, unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied, or that there is a necessary inconsistency in the two Acts standing together. To determine whether a later statute repeals by implication an earlier statute, it is necessary to scrutinize the terms and consider the true meaning and effect of the earlier Act. Until this is done, it is impossible to ascertain whether any inconsistency exists between the two enactments. The area of operation in the Code and the pollution laws in question are different with wholly different aims and objects, and though they alleviate nuisance, that is not of identical nature. They operate in their respective fields and there is no impediment for their existence side by side."*

45. Last, relying on another decision of the Supreme Court in **Gammon India Ltd. Vs. Special Chief Secretary & Ors., (2006) 3 SCC 354,** Sri Mehrotra would further emphasize - the first submission advanced by Sri Rakesh Ranjan Agarwal, learned counsel for the petitioners, that substitution has the twin effect of repeal and enactment by replacement.

46. Sri Ashish Bansal, learned counsel has adopted the submissions advanced by learned counsel for the petitioners, as noted above. He has further relied on the provisions of Section 151-A of the Act introduced by the Enabling Act. It reads as below:

*"151A. (1) The Central Government may make a scheme, by notification in the Official Gazette, for the purposes of assessment, reassessment or re-computation under section 147 or issuance of notice under section 148 or sanction for issue of such notice under section 151, so as to impart greater efficiency, transparency and accountability by--*

*(a) eliminating the interface between the income-tax authority and the assessee or any other person to the extent technologically feasible;*

*(b) optimising utilisation of the resources through economies of scale and functional specialisation;*

*(c) introducing a team-based assessment, reassessment, re-computation or issuance or sanction of notice with dynamic jurisdiction.*

*(2) The Central Government may, for the purpose of giving effect to the scheme made under sub-section (1), by notification in the Official Gazette, direct that any of the provisions of this Act shall not apply or shall apply with such*

*exceptions, modifications and adaptations as may be specified in the notification:*

*Provided that no direction shall be issued after the 31st day of March, 2022.*

*(3) Every notification issued under sub-section (1) and sub-section (2) shall, as soon as may be after the notification is issued, be laid before each House of Parliament.;"*

47. He would submit that that provision alone-pertaining to re-assessment proceedings had been introduced by the Enabling Act w.e.f. 01.11.2020. Otherwise, the Enabling Act does not touch upon re-assessment proceedings in any way. Therefore, it is preposterous on part of the revenue authorities to rely on the Enabling Act for any other purpose. Only upon assumption of jurisdiction and issuance of jurisdictional notice under Section 148 of the Act, a proceeding could come into existence under the pre-existing laws. That procedure having been transformed completely, by the Finance Act, 2021, w.e.f. 01.04.2021 before any reassessment proceeding came into existence, there survives no room to rely on the pre-existing provisions of law. Thus, it has been emphasized by Sri Bansal, the scope of Section 3(1) of the Enabling Act is limited to extend the time qua reassessment proceedings, validly initiated under the unamended Income Tax Act, up to 31.03.2021. It neither creates any jurisdiction nor it confers validity on any reassessment proceedings instituted under the unamended law, after the enforcement of the Finance Act, 2021.

48. As to the non-obstante clause appearing in the latter part of Section 3(1) of the Enabling Act, it has been vehemently urged by Shri Bansal that that non-obstante clause cannot be given any applicability and it cannot be read into the first part of Section 3(1), which alone pertains to issuance of any notice under the Act as it existed upto 31.03.2021. A non-obstante clause has to be read in a manner as to allow for a overriding effect viz-a-viz other laws or such laws as may be specified in that non-obstante clause. However, its effect must remain confined to the intendment of such a clause. Plainly, a non-obstante clause cannot be interpreted to cause effect, not contemplated.

49. Insofar as the phrase 'notwithstanding anything contained in the specified act' appears only in the context of completion or compliance of such action, it can only be applied to a proceeding that was already in existence when that clause confronted the Act as amended by the Finance Act, 2021, on 01.04.2021. Inasmuch as, in all the petitions, re-assessment notices were issued after 01.04.2021, it can never be said that there were any proceedings of re-assessment pending on the date when the non-obstante clause may be applied. He has placed reliance on a decision of the Supreme Court in **A.G. Varadarajulu & Anr. Vs. State of T.N. & Ors., (1998) 4 SCC 231,** wherein it was held as below:

*"14. We shall now deal with the issues raised before us.*

*Do the words "notwithstanding anything in any other provision of this Act" occurring in Section 21-A override Section 3(42)?*

*15. It is true that the Tribunals below had accepted that the partition deed dated 24-9-1970 was executed after 15-2-1970 and before 2-10-1970 and was therefore a valid document. Section 21-A says that that section shall have effect*

*"notwithstanding anything contained in Section 22 or in any other provision of this Act and in any other law for the time being in force" (emphasis supplied). The contention of the appellants is that if the partition deed is valid in view of Section 21-A, then in view of the above non obstante clause, the respondents cannot insist that the land allotted to the second appellant under the deed on 24-9-1990 shall further conform to the conditions contained in the definition of "stridhana land" in Section 3(42), namely, that she must be holding the land as on 15-2-1970.*

*16. It is well settled that while dealing with a non obstante clause under which the legislature wants to give overriding effect to a section, the court must try to find out the extent to which the legislature had intended to give one provision overriding effect over another provision. Such intention of the legislature in this behalf is to be gathered from the enacting part of the section. In Aswini Kumar Ghose v. Arabinda Bose [AIR 1952 SC 369 : 1953 SCR 1] , Patanjali Sastri, J. observed:*

*"The enacting part of a statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously;"*

*In Madhav Rao Scindia v. Union of India [(1971) 1 SCC 85] (SCC at p. 139) Hidayatullah, C.J. observed that the non obstante clause is no doubt a very potent clause intended to exclude every consideration arising from other provisions of the same statute or other statute but "for that reason alone we must determine the scope" of that provision strictly. When the section containing the said clause does not refer to any particular provisions which it intends to override but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself. "A search has, therefore, to be made with a view to determining which provision answers the description and which does not."*

50. Sri Divyanshu Agarwal, learned counsel also appearing for the petitioners has adopted the submissions advanced by other learned counsel for the petitioners, as noted above. He has further emphasized; Section 3(1) of the Enabling Act only seeks to enlarge the time limit specified in or prescribed under the Act between the dates 20.03.2020 to 31.12.2020. Thereafter, a limited delegation was made in favour of the Central Government - to extend that time line, only for the purposes of completion or compliance etc. and issuance of certain notices. However, once the law underwent a change, upon enactment of the Finance Act, 2021, whereby the re-assessment procedure was completely changed, the time extension provision is of no help to the respondents as such time extension, cannot be exercised in absence of statutory substratum to which that time extension may be applied.

51. Adopting the submissions advanced by learned counsel for the petitioners noted above, Sri Parv Agarwal, learned counsel has laid stress; besides the above, Section 148-A, first introduced by the Finance Act, 2021 lays down a mandatory procedure to be followed for the purpose of making a re-assessment. Unless that procedure is first followed, no notice under Section 148 of the Act, either under the pre-existing law or under the substituted law, could ever be issued. Therefore, in any case, the impugned notices are without jurisdiction. He has placed reliance on a Constitution Bench decision of the Supreme Court in **Memon**

**Abdul Karim Haji Tayab, Central Cutlery Stories, Veraval Vs. Deputy Custodian-General, New Delhi & Ors., AIR 1964 SC 1256,** wherein it was observed as under:

*"It will be seen that this is mainly a procedural section replacing the earlier Section 48 and lays down that sums payable to the Government or to the Custodian can be recovered thereunder as arrears of land revenue. The section also provides that where there is any dispute as to whether any sum is payable or not to the Custodian or to the Government, the Custodian has to make an enquiry into the matter and give the person raising the dispute an opportunity of being heard and thereafter decide the question. Further, the section makes the decision of the Custodian final subject to any appeal or revision under the Act and not open to question by any court or any other authority. Lastly the section provides that the sum shall be deemed to be payable to the Custodian notwithstanding that its recovery is barred by the Indian Limitation Act or any other law for the time being in force relating to limitation of action. Sub-sections (1) and (2) are clearly procedural and would apply to all cases which have to be investigated in accordance therewith after October 22, 1956, even though the claim may have arisen before the amended section was inserted in the Act. It is well settled that procedural amendments to a law apply, in the absence of anything to the contrary, retrospectively in the sense that they apply to all actions after the date they come into force even though the actions may have begun earlier or the claim on which the action may be based may be of an anterior date. Therefore, when the Assistant Custodian issued notice to the appellant on January 22, 1958 claiming the amount from him, the recovery could be dealt with under sub-section (1) and (2) of the amended Section 48, as they are merely procedural provisions. But it is urged on behalf of the appellant that sub-section (1) in terms does not apply to the present case, and if so, sub-section (2) would also not apply. The argument is that under sub-section (1) it is only any sum payable to the Government or to the Custodian in respect of any evacuee property which can be recovered as arrears of land revenue."*

52. Sri Salil Kapoor alongwith Sri Anuj Srivastava and Ms. Saumya Singh, learned counsel for the petitioners, besides adopting the submissions noted above, laid great stress that the provisions of Sections 2 to 88 of the Finance Act, 2021 came into force w.e.f. 01.04.2021 and they completely replaced the pre-existing law. He further emphasized, different dates were prescribed by the Finance Act, 2021 for enforcement of different provisions. Thus, Sections 2 to 88 of that Act were enforced with effect from 01.04.2021 by virtue of the clear stipulation made in Section 1(2)(a) of that Act and different stipulations were made for enforcement of other provisions. By way of example, it has been stated that Section 54 of Finance Act, 2021 enforced the provisions of Section 194Q, with effect from 01.07.2021. Similarly, Section 56 of the Finance Act, 2021 introduced and enforced the proviso to Section 206 AA, with effect from 01.07.2021. Again, by Section 57 of the Finance Act, 2021, Section 206 AB was introduced and enforced with effect from 01.07.2021. Thus, it has been submitted, the legislature was conscious of the realities and in its own wisdom, the Parliament chose to substitute the provisions of Sections 147, 148, 149, 150 and introduced Section 148-A of the Act,

with effect from 01.04.2021. That having been done without saving the pre-existing provisions and without any legislative intent expressed either under the Finance Act, 2021 or the Enabling Act to preserve any part of the pre-existing provisions for the purpose of assumption of jurisdiction and initiation of reassessment proceedings, for any of the previous years, no reassessment proceedings could be initiated under Section 148 of the Act after 01.04.2021 by taking resort to the pre-existing and now omitted provisions, pertaining to reassessment.

53. Other learned counsel for the petitioners have adopted the aforesaid submissions, noted above.

54. Shri Shashi Prakash Singh, learned Additional Solicitor General of India, appearing for the Union of India as also the CBDT and learned counsel for the revenue, have submitted, the Ordinance was promulgated, occasioned solely by the circumstances arising from the spread of the pandemic COVID-19. The extension of limitation granted or, the strict rule of limitation relaxed by the Ordinance was for the benefit of the assessees as also the statutory authorities. These extensions were granted by way of legislative acceptance of the hard realities obtaining from the spread of the pandemic COVID-19, which largely disabled normal human activity and prevented statutory authorities from discharging their statutory obligations in accordance with law and obstructed and/or prevented the assessees from making compliances and pursing their rights.

55. Relying on the decision of the Supreme Court in **Union of India & Ors. Vs. Exide Industries Limited & Anr., (2020) 5 SCC 274,** it has been vehemently urged, the constitutional validity of a law may be challenged on only two grounds - either, it may be shown that there was legislative incompetence in enacting the law or that the law impinges on any of the fundamental rights enshrined in Part III of the Constitution of India. He would further submit, there always exists a presumption in favour of the constitutionality of the law and that no enacted law may be struck down on a simple reasoning of it being arbitrary or unreasonable. Strict application of that rule must be ensured while dealing with taxation legislation. Thus, he has placed reliance on paragraphs 15 and 16 of the aforesaid report, which read as below:

*"15. The approach of the Court in testing the constitutional validity of a provision is well settled and the fundamental concern of the Court is to inspect the existence of enacting power and once such power is found to be present, the next examination is to ascertain whether the enacted provision impinges upon any right enshrined in Part III of the Constitution. Broadly speaking, the process of examining validity of a duly enacted provision, as envisaged under Article 13 of the Constitution, is premised on these two steps. No doubt, the second test of infringement of Part III is a deeper test undertaken in light of settled constitutional principles. In State of Madhya Pradesh vs. Rakesh Kohli & Anr. (2012) 6 SCC 312, this Court observed thus:*

*"17. This Court has repeatedly stated that legislative enactment can be struck down by Court only on two grounds, namely (i) that the appropriate legislature does not have competence to make the law, and (ii) that it does not take away or abridge any of the fundamental rights enumerated in Part III of the Constitution or any other constitutional provisions...."*

*(emphasis supplied) The above exposition has been quoted by this Court with approval in a catena of other cases including Bhanumati & Ors. vs. State of Uttar Pradesh & Ors. (2010) 12 SCC 1, State of Andhra Pradesh & Ors. vs. McDowell & Co. (1996) 3 SCC 709 and Kuldip Nayar & Ors. vs. Union of India & Ors.(2006) 7 SCC 1, to state a few.*

*16. In furtherance of the twofold approach stated above, the Court, in Rakesh Kohli (supra) also called for a prudent approach to the following principleswhile examining the validity of statutes on taxability: (SCC p.327, para 32)*

*"32. While dealing with constitutional validity of a taxation law enacted by Parliament or State Legislature, the court must have regard to the following principles:*

*(i) there is always presumption in favour of constitutionality of a law made by Parliament or a State Legislature,*

*(ii) no enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found,*

*(iii) the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence,*

*(iv) hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law, and*

*(v) in the field of taxation, the legislature enjoys greater latitude for classification....." (emphasis supplied)"*

56. It has been further submitted, no ground has been raised in any of the petitions to test the validity of the law and, in fact, no such ground exists. The Enabling Act had become necessary to be enacted, considering the hardships arising from the spread of the pandemic COVID-19, affecting both the assessees as also the statutory authorities and their functioning. Once limitation had been extended in favour of the assessee, to submit replies and to make other compliances, correspondingly, extension of time was granted to the statutory authorities to initiate, amongst others, reassessment proceedings, beyond the normal limitation of time.

57. Placing further reliance on the aforesaid decision of the Supreme Court, the learned ASGI would submit, Section 3(1) of the Enabling Act contains a non-obstante clause which clearly overrides any period of limitation or any disability arising from such period of limitation as may have been prescribed under the Act. That non-obstante clause has an overriding effect against all other provisions of general application, and it cannot be controlled or overridden, unless specifically permitted. Since the petitioners have been unable to show any provision of law as may restrict the operation of such non-obstante clause, the writ petition must fail. In that regard, paragraph 21 of the decision in **Union of India & Ors. Vs. Exide Industries Limited & Anr. (supra),** is quoted below:

*"21. Section 43-B bears heading "certain deductions to be only on actual payment". It opens with a non -obstante clause. As per settled principles of interpretation, a non obstante clause assumes an overriding character against any other provision of general application. It declares that within the sphere allotted to it by the Parliament, it shall not be controlled or overridden by any other*

*provision unless specifically provided for. Out of the allowable deductions, the legislature consciously earmarked certain deductions from time to time and included them in the ambit of Section 43-B so as to subject such deductions to conditionality of actual payment. Such conditionality may have the inevitable effect of being different from the theme of mercantile system of accounting on accrual of liability basis qua the specific head of deduction covered therein and not to other heads. But that is a matter for the legislature and its wisdom in doing so."*

58. Relying further on the aforesaid decision, the learned ASGI would also submit, if any ambiguity may exist or may be perceived on account of enforcement of the Finance Act, 2021 it must be examined, and the law may be interpreted by applying the mischief rule. As noted above, the mischief being the unforeseen and difficult circumstances arising from spread of pandemic COVID-19, the Enabling Act only sought to remedy the same. Examined in that light, the extension of limitation to issue a reassessment notice under the Act, is incidental to the mischief addressed.

59. Unless free play is given to Section 3(1) of the Enabling Act read with the Notifications issued thereunder, a wholly lop-sided situation would arise whereby the assessee would remain saved from adverse consequences despite non-compliance shown but the statutory authorities would be hand-tied and restrained from taking any corrective action, solely on account of *force majeure.* In that regard, reliance has been placed on paragraph 26 of the decision in **Union of India & Ors. Vs. Exide Industries Limited & Anr. (supra),** which is quoted below:

*"26. Be it noted that the interpretation of a statute cannot be unrelated to the nature of the statute. In line with other clauses under Section 43-B, clause (f) was enacted to remedy a particular mischief and the concerns of public good, employees' welfare and prevention of fraud upon Revenue is writ large in the said clause. In our view, such statutes are to be viewed through the prism of the mischief they seek to suppress, that is, the Heydon's case, (1584) 3 Co Rep 7a: 76 ER 637, principle. In Crawford Statutory Construction, it has been gainfully delineated that "an enactment designed to prevent fraud upon the Revenue is more properly a statute against fraud rather than a taxing statute, and hence should receive a liberal construction in the government's favour."*

60. Applying the above principle, it has been further submitted, the time limitation existing under the Act had been extended under the Ordinance as also the Enabling Act, much prior to the introduction of the Finance Act, 2021. It is only that extension which was given one final push by the impugned Notification dated 27.04.2021 as it became necessary on account of the spread of the second wave of the pandemic COVID-19. It has further been submitted that no further extension has been granted beyond 30 June 2021. Therefore, the mischief that existed stands addressed and remedied, and no prejudice has been caused to the petitioners who were otherwise liable to suffer initiation of reassessment proceedings.

61. Then, it has been submitted, Explanation to Clause A(a) of Notification No. 20 of 2021 dated 31.03.2021 and Explanation to Clause A(b) of Notification No. 38 dated 27.04.2021 are only

clarificatory. Even if those Explanations were to be ignored, by virtue of the clear language of Section 3(1) of the Enabling Act, the time limits specified under the Act (prior to is amendment by Finance Act, 2021), stood extended by the Parliament, in cases where such limitations were expiring after 20th March 2020 and upto 31st December 2020, upto 31st December 2020. It is only with respect to such extension that a power was delegated on the Central Government to grant further extension/s. Therefore, the Explanations referred to above do not create any new law and they do not, in any way, offend the existing law. Hence, the argument; the delegated power has been exercised in excess of the delegation made, is plainly erroneous and unfounded.

62. Last, reliance has been placed on a recent decision of the Supreme Court in **Ramesh Kymal Vs. Siemens Gamesa Renewable Power Private Limited, (2021) 3 SCC 224,** wherein, according to learned ASGI, in similar facts, the Supreme Court has read a similar amendment made to the Insolvency and Bankruptcy Code 2016 to enlarge the limitation, as unexceptionally applicable, to all cases.

63. Having heard learned counsel for the parties and having perused the record, we find that the thrust of the submissions advanced by learned counsel for the petitioners, are:

(i) By substituting the provisions of the Act by means of the Finance Act, 2021 with effect from 01.04.2021, the old provisions were omitted from the statute book and replaced by fresh provisions with effect from 01.04.2021. Relying on the principle - substitution omits and thus obliterates the pre-existing provision, it has been further submitted, in absence of any saving clause shown to exist either under the Ordinance or the Enabling Act or the Finance Act 2021, there exists no presumption in favour of the old provision continuing to operate for any purpose, beyond 31.03.2021.

(ii) The Act is a dynamic enactment that sustains through enactment of the Finance Act every year. Therefore, on 1st April every year, it is the Act as amended by the Finance Act, for that year which is applied. In the present case, it is the Act as amended by the Finance Act 2021, that confronted the Enabling Act as was pre-existing. In absence of any legislative intent expressed either under the Finance Act, 2021 or under the Enabling Act, to preserve any part of the pre-existing Act, plainly, reference to provisions of Sections 147 and 148 of the Act and the words 'assessment' and 'reassessment' appearing in the Notifications issued under the Enabling Act may be read to be indicating only at proceedings already commenced prior to 01.04.2021, under the Act (before amendment by the Finance Act, 2021). The delegated action performed under the Enabling Act cannot, itself create an overriding effect in favour of the Enabling Act.

(iii) The Enabling Act read with its Notifications does not validate the initiation of any proceeding that may otherwise be incompetent under the law. That law only affects the time limitation to conduct or conclude any proceeding that may have been or may be validly instituted under the Act, whether prior to or after its amendment by Finance Act, 2021. Insofar as, Section 1(2)(a) unequivocally enforced Sections 2 to 88 of the Finance Act, 2021, w.e.f. 01.04.2021, there can be no dispute if any valid proceeding could be initiated under the pre-existing Section 148 read

with Section 147, after 01.04.2021. In support thereof other submission also appear to exist - based upon the enactment of Section 148A (w.e.f. 01.04.2021).

(iv) The delegation made could be exercised within the four corners of the principal legislation and not to overreach it. Insofar as the Enabling Act does not delegate any power to legislate - with respect to enforceability of any provision of the Finance Act, 2021 and those provisions (Sections 2 to 88) had come into force, on their own, on 01.04.2021, any exercise of the delegate under the Enabling Act, to defeat the plain enforcement of that law would be wholly unconstitutional.

(v) It also appears to be the submission of learned counsel for the petitioners that the Parliament being aware of all realities, both as to the fact situation and the laws that were existing, it had consciously enacted the Enabling Act, to extend certain time limitations and to enforce only a partial change to the reassessment procedure, by enacting section 151-A to the Act. It then enacted the Finance Act, 2021 to change the substantive and procedural law governing the reassessment proceedings. That having been done, together with introduction of section 148-A to the Act, legislative field stood occupied, leaving the delegate with no room to manipulate the law except as to the time lines with respect to proceedings that may have been initiated under the Act (both prior to and after enforcement of the Finance Act, 2021). To bolster their submission, learned counsel for the petitioners also rely on the principle - the delegated legislation can never defeat the principal legislation.

(vi) Last, it has also been asserted, the non-obstante clause created under section 3(1) of the Enabling Act must be read in the context and for the purpose or intent for which it is created. It cannot be given a wider meaning or application as may defeat the other laws.

64. As to the first line of reasoning applied by the learned counsel for the petitioner, as noted above, there can be no exception to the principle - an Act of legislative substitution is a composite act. Thereby, the legislature chooses to put in place another or, replace an existing provision of law. It involves simultaneous omission and re-enactment. By its very nature, once a new provision has been put in place of a pre-existing provision, the earlier provision cannot survive, except for things done or already undertaken to be done or things expressly saved to be done. In absence of any express saving clause and, since no reassessment proceeding had been initiated prior to the Act of legislative substitution, the second aspect of the matter does not require any further examination.

65. Therefore, other things apart, undeniably, on 01.04.2021, by virtue of plain/unexcepted effect of Section 1(2)(a) of the Finance Act, 2021, the provisions of Sections 147, 148, 149, 151 (as those provisions existed upto 31.03.2021), stood substituted, along with a new provision enacted by way of Section 148A of that Act. In absence of any saving clause, to save the pre-existing (and now substituted) provisions, the revenue authorities could only initiate reassessment proceeding on or after 01.04.2021, in accordance with the substituted law and not the pre-existing laws.

66. It is equally true that the Enabling Act that was pre-existing, had been enforced prior to enforcement of the Finance Act, 2021. It confronted the Act as amended by Finance Act, 2021, as it came

into existence on 01.04.2021. In the Enabling Act and the Finance Act, 2021, there is absence, both of any express provision in itself or to delegate the function - to save applicability of the provisions of sections 147, 148, 149 or 151 of the Act, as they existed up to 31.03.2021. Plainly, the Enabling Act is an enactment to extend timelines only. Consequently, it flows from the above - 01.04.2021 onwards, all references to issuance of notice contained in the Enabling Act must be read as reference to the substituted provisions only. Equally there is no difficulty in applying the pre-existing provisions to pending proceedings. Looked in that manner, the laws are harmonized.

67. It may also be not forgotten, a reassessment proceeding is not just another proceeding emanating from a simple show cause notice. Both, under the pre-existing law as also under the law enforced from 01.04.2021, that proceeding must arise only upon jurisdiction being validly assumed by the assessing authority. Till such time jurisdiction is validly assumed by assessing authority - evidenced by issuance of the jurisdictional notice under Section 148, no re-assessment proceeding may ever be said to be pending before the assessing authority. The admission of the revenue authorities that all re-assessment notices involved in this batch of writ petitions had been issued after the enforcement date 01.04.2021, is tell-tale and critical. As a fact, no jurisdiction had been assumed by the assessing authority against any of the petitioners, under the unamended law. Hence, no time extension could ever be made under section 3(1) of the Enabling Act, read with the Notifications issued thereunder.

68. The submission of the learned Additional Solicitor General of India that the provision of Section 3(1) of the Enabling Act gave an overriding effect to that Act and therefore saved the provisions as existed under the unamended law, also cannot be accepted. That saving could arise only if jurisdiction had been validly assumed before the date 01.04.2021. In the first place Section 3(1) of the Enabling Act does not speak of saving any provision of law. It only speaks of saving or protecting certain proceedings from being hit by the rule of limitation. That provision also does not speak of saving any proceeding from any law that may be enacted by the Parliament, in future. For both reasons, the submission advanced by learned Additional Solicitor General of India is unacceptable.

69. Even otherwise the word 'notwithstanding' creating the non obstante clause, does not govern the entire scope of Section 3(1) of the Enabling Act. It is confined to and may be employed only with reference to the second part of Section 3(1) of the Enabling Act i.e. to protect proceedings already under way. There is nothing in the language of that provision to admit a wider or sweeping application to be given to that clause - to serve a purpose not contemplated under that provision and the enactment, wherein it appears.

70. The upshot of the above reasoning is, the Enabling Act only protected certain proceedings that may have become time barred on 20.03.2021, upto the date 30.06.2021. Correspondingly, by delegated legislation incorporated by the Central Government, it may extend that time limit. That time limit alone stood extended upto 30 June, 2021. We also note, the learned Additional Solicitor General of India may not be entirely correct in stating that no extension of time was granted beyond 30.06.2021. Vide Notification No. 3814

dated 17.09.2021, issued under section 3(1) of the Enabling Act, further extension of time has been granted till 31.03.2022. In absence of any specific delegation made, to allow the delegate of the Parliament, to indefinitely extend such limitation, would be to allow the validity of an enacted law i.e. the Finance Act, 2021 to be defeated by a purely colourable exercise of power, by the delegate of the Parliament.

71. Here, it may also be clarified, Section 3(1) of the Enabling Act does not itself speak of reassessment proceeding or of Section 147 or Section 148 of the Act as it existed prior to 01.04.2021. It only provides a general relaxation of limitation granted on account of general hardship existing upon the spread of pandemic COVID -19. After enforcement of the Finance Act, 2021, it applies to the substituted provisions and not the pre-existing provisions.

72. Reference to reassessment proceedings with respect to pre-existing and now substituted provisions of Sections 147 and 148 of the Act has been introduced only by the later Notifications issued under the Act. Therefore, the validity of those provisions is also required to be examined. We have concluded as above, that the provisions of Sections 147, 148, 148A, 149, 150 and 151 substituted the old/pre-existing provisions of the Act w.e.f. 01.04.2021. We have further concluded, in absence of any proceeding of reassessment having been initiated prior to the date 01.04.2021, it is the amended law alone that would apply. We do not see how the delegate i.e. Central Government or the CBDT could have issued the Notifications, plainly to over reach the principal legislation. Unless harmonized as above, those Notifications would remain invalid.

73. Unless specifically enabled under any law and unless that burden had been discharged by the respondents, we are unable to accept the further submission advanced by the learned Additional Solicitor General of India that practicality dictates that the reassessment proceedings be protected. Practicality, if any, may lead to legislation. Once the matter reaches Court, it is the legislation and its language, and the interpretation offered to that language as may primarily be decisive to govern the outcome of the proceeding. To read practicality into enacted law is dangerous. Also, it would involve legislation by the Court, an idea and exercise we carefully tread away from.

74. Similarly, the mischief rule has limited application in the present case. Only in case of any doubt existing as to which of the two interpretations may apply or to clear a doubt as to the true interpretation of a provision, the Court may look at the mischief rule to find the correct law. However, where plain legislative action exists, as in the present case (whereunder the Parliament has substituted the old provisions regarding reassessment with new provisions w.e.f. 01.04.2021), the mischief rule has no application.

75. As we see there is no conflict in the application and enforcement of the Enabling Act and the Finance Act, 2021. Juxtaposed, if the Finance Act, 2021 had not made the substitution to the reassessment procedure, the revenue authorities would have been within their rights to claim extension of time, under the Enabling Act. However, upon that sweeping amendment made the Parliament, by necessary implication or implied force, it limited the applicability of the Enabling Act and the power to grant time extensions

thereunder, to only such reassessment proceedings as had been initiated till 31.03.2021. Consequently, the impugned Notifications have no applicability to the reassessment proceedings initiated from 01.04.2021 onwards.

76. Upon the Finance Act 2021 enforced w.e.f. 1.4.2021 without any saving of the provisions substituted, there is no room to reach a conclusion as to conflict of laws. It was for the assessing authority to act according to the law as existed on and after 1.4.2021. If the rule of limitation permitted, it could initiate, reassessment proceedings in accordance with the new law, after making adequate compliance of the same. That not done, the reassessment proceedings initiated against the petitioners are without jurisdiction.

77. Insofar as the decision of the Supreme Court in the case of **Ramesh Kymal Vs. Siemens Gamesa Renewable Power Private Limited (supra)** is concerned, we opine, the same is wholly distinguishable. Therein The Insolvency and Bankruptcy Code 2016 was amended by the Parliament and a new Section 10A, was introduced, apparently again on account of the difficulties arising from the spread of pandemic COVID-19. That Section reads as under:

*"10A. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified2in this behalf:*

*Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.*

*Explanation. - For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.]"*

78. Plainly, in that case, the earlier provisions were not substituted rather they continued to exist. The parliamentary intervention by introducing Section 10A of that Act only provided - no proceeding be instituted for any default arising after 21.3.2020, for a period of six months or such period not exceeding one year, as may be notified. Thus, in that case, by virtue of amendment made, delegated power created, could be exercised to relax the otherwise stringent provisions of the Act, in cases, wherein difficulties arose from the spread of the pandemic COVID-19. Thus, that ratio is plainly distinguishable.

79. As to the decision of the Chhattisgarh High Court, with all respect, we are unable to persuade ourselves to that view. According to us, it would be incorrect to look at the delegation legislation i.e. Notification dated 31.03.2021 issued under the Enabling Act, to interpret the principal legislation made by Parliament, being the Finance Act, 2021. A delegated legislation can never overreach any Act of the principal legislature. Second, it would be over simplistic to ignore the provisions of, either the Enabling Act or the Finance Act, 2021 and to read and interpret the provisions of Finance Act, 2021 as inoperative in view of the fact circumstances arising from the spread of the pandemic COVID-19.

Practicality of life de hors statutory provisions, may never be a good guiding principle to interpret any taxation law. In absence of any specific clause in Finance Act, 2021, either to save the provisions of the Enabling Act or the Notifications issued thereunder, by no interpretative process can those Notifications be given an extended run of life, beyond 31 March 2020. They may also not infuse any life into a provision that stood obliterated from the statute with effect from 31.03.2021. Inasmuch as the Finance Act, 2021 does not enable the Central Government to issue any notification to reactivate the pre-existing law (which that principal legislature had substituted), the exercise made by the delegate/Central Government would be de hors any statutory basis. In absence of any express saving of the pre-existing laws, the presumption drawn in favour of that saving, is plainly impermissible. Also, no presumption exists that by Notification issued under the Enabling Act, the operation of the pre-existing provision of the Act had been extended and thereby provisions of Section 148A of the Act (introduced by Finance Act 2021) and other provisions had been deferred. Such Notifications did not insulate or save, the pre-existing provisions pertaining to reassessment under the Act.

80. In view of the above, all the writ petitions must succeed and are **allowed.** It is declared that the Ordinance, the Enabling Act and Sections 2 to 88 of the Finance Act 2021, as enforced w.e.f. 01.04.2021, are not conflicted. Insofar as the Explanation appended to Clause A(a), A(b), and the impugned Notifications dated 31.03.2021 and 27.04.2021 (respectively) are concerned, we declare that the said Explanations must be read, as applicable to reassessment proceedings as may have been in existence on 31.03.2021 i.e. before the substitution of Sections 147, 148, 148A, 149, 151 & 151A of the Act. Consequently, the reassessment notices in all the writ petitions are quashed. It is left open to the respective assessing authorities to initiate reassessment proceedings in accordance with the provisions of the Act as amended by Finance Act, 2021, after making all compliances, as required by law.

81. Accordingly, reassessment notice issued to the present petitioner dated 09.04.2021 for A.Y. 2017-18 is quashed.

82. All writ petitions are **allowed.** No order as to costs.

***Re: CM Correction Application No. 4 of 2021***

This is an application for corrections in the order dated 30.9.2021.

It appears, inadvertent typographical errors have crept in the order dated 30.9.2021. Thus, the following corrections are made in the order dated 30.9.2021:

(i) In the third line of paragraph no. 36, the words "Section 4 and 6 read with Section 292" be read as "Section 4 and 3 read with Section 294".

(ii) In the fourth line of paragraph no. 41, words after the date 31.12.2020 - ", upto 30.06.2021" be deleted.

(iii) In the second line of paragraph no. 70, the date "20.03.2021" be corrected to read "20.03.2020".

The correction application is **allowed.**

Accordingly, the order dated 30.09.2021 as corrected reads as below:

1. "Heard Sri Rakesh Ranjan Agarwal, learned Senior Advocate, assisted by Sri Suyash Agarwal, Sri Shambhu Chopra, learned Senior Advocate, assisted by Ms. Mahima Jaiswal, Sri Abhinav Mehrotra, Sri Akhilesh Kumar along with Sri Ashish Bansal, Sri Divyanshu Agarwal along with Sri Ankit Saran, Sri Deepak Kapoor along with Sri Shubham Agarwal, Sri V.K. Sabarwal and Shri R.B. Gupta along with Sri Rishi Raj Kapoor, Sri Shakeel Ahmad, Sri Parv Agarwal, Sri Salil Kapoor along with Sri Anuj Srivastava & Ms Soumya Singh alongwith Sri Satya Vrat Mehrotra, Sri Ankur Agarwal, Sri Krishna Deo Vyas, Sri Ashok Shankar Bhatnagar & Sri Harshul Bhatnagar, Sri Pranchal Agarwal, Sri V.K. Sabharwal, Sri R.B. Gupta, Ms. Shalini Goel and Ms. Rupal Agarwal, learned counsel for the petitioners; Sri Shashi Prakash Singh, learned Additional Solicitor General of India assisted by Sri Gopal Verma, Sri Dinesh Kumar Mishra, Sri Gaya Prasad Singh, Sri Sudarshan Singh, Sri Santosh Kumar Singh Paliwal, Sri Ajai Singh, Sri Gaurav Kumar Chand and Sri Krishna Agarwal, learned counsel appearing for the Union of India; Sri Gaurav Mahajan, Sri Praveen Kumar, Sri Krishna Agarwal, Sri Ashish Agarwal and Sri Manu Ghildyal, learned Standing Counsel for the revenue authorities.

2. This writ petition along with the other petitions mentioned in paragraph 4 below, have been filed by individual petitioners, to challenge initiation of re-assessment proceedings under Section 148 of the Income Tax Act, 1961 for different assessment years. All reassessment proceedings have been initiated upon notices issued after the date 01.04.2021.

3. These petitions had been entertained and interim protection granted. Pursuant to earlier orders passed in the leading petitions - Writ Tax Nos. 524 of 2021 and 521 of 2021 and other matters, the revenue and the Union of India were required to file counter affidavits in those cases. Copies of such counter affidavits were, under a direction of this Court, served on all learned counsel for the petitioners. Replies by way of rejoinder affidavits have also been received in some of the cases. Those affidavits thus filed, have been read in all the writ petitions.

4. Since, the dispute arising in the present writ petitions is purely legal, with respect to the validity of the re-assessment proceedings initiated against the individual petitioners, after 01.04.2021, having resort to the provisions of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') as they existed, read with the provisions of Act No. 38 of 2020 and the notifications issued thereunder, the peculiar fact pleadings of each case are not material to the adjudication of the legal issues involved here. However, for the purposes of convenience, the basic relevant facts, obtaining in each individual case are recorded in the below given chart:

| Sl. No. | Writ Tax No. | Name of the Petitioner | A.Y. | Date of Notice U/s 148 | Date of filing of original return |
|---|---|---|---|---|---|
| 1. | 521/2021 | KAUKAB GHULAM MOHAMED QURESHI | **2015-16** | 29.06.2021 | 29.12.2017 |
| 2. | 524-2021 | ASHOK KUMAR AGARWAL | **2017-18** | 09.04.2021 | 08.03.2018 |
| 3. | 531-2021 | M/S ARIHANT PUBLICATIONS (INDIA) LTD. | **2015-16** | 30.06.2021 | 30.09.2015 |
| 4. | 540-2021 | BAJAJ STEELS AND INDUSTRIES LTD. | **2017-18** | 29.06.2021 | 07.11.2017 |
| 5. | 549-2021 | BAJAJ STEELS AND INDUSTRIES LTD. | **2016-17** | 29.06.2021 | 17.10.2016 |
| 6. | 554-2021 | SMT. NEERAJ AGARWAL | **2016-17** | 09.04.2021 | 21.03.20217 |
| 7. | 559-2021 | FIROZ AHMED ZAHIR AHMED SHAIKH | **2015-16** | 29.06.2021 | 20.07.2015 |
| 8. | 561-2021 | M/S JUBILANT PHARMOVA LIMITED | **2015-16** | 30.06.2021 | 29.11.2015 |
| 9. | 562-2021 | SHOBHIT SHUKLA | **2013-14** | 30.06.2021 | -- |
| 10. | 564-2021 | VARDHMAN INDUSTRIES | **2015-16** | 16.04.2021 | 25.09.2015 |
| 11. | 565-2021 | YOGESH JAISWAL | **2017-18** | 25.05.2021 | 29.10.2017 |
| 12. | 567-2021 | NEERAJ PRAKASH | **2013-14** | 30.06.2021 | 31.12.2015 |
| 13. | 573-2021 | PARVEEN QURESHI | **2016-17** | 30.06.2021 | 15.06.2017 |
| 14. | 592-2021 | SARLA JAIN | **2013-14** | 26.04.2021 | 31.03.2014 |
| 15. | 612-2021 | J.M. HOUSING LIMITED | **2016-17** | 30.06.2021 | 15.10.2016 |
| 16. | 613-2021 | J.M. HOUSING LIMITED | **2017-18** | 30.06.2021 | 27.01.2018 |
| 17. | 614-2021 | GSR MOVIES | **2013-14** | 28.06.2021 | 28.09.2013 |
| 18. | 615-2021 | PAWANPUTRA HOTELS AND RESORTS PVT. LTD. | **2013-14** | 30.06.2021 | 27.09.2013 |
| 19. | 623/2021 | HIRA LAL JAIN | **2013-14** | 27.04.2021 | 29.07.2013 |
| 20. | 624-2021 | DEVOY BENARA | **2013-14** | 27.04.2021 | -- |
| 21. | 625-2021 | JAI JAGDAMBA METALLOYS LIMITED | **2017-18** | 14.04.2021 | 31.10.2017 |
| 22. | 636-2021 | STAR CORPORATION | **2014-15** | 30.06.2021 | 29.09.2014 |
| 23. | 640-2021 | STAR CORPORATION | **2013-14** | 29.06.2021 | 29.09.2013 |
| 24. | 641-2021 | STAR ASSOCIATES | **2013-14** | 29.06.2021 | 28.09.2013 |
| 25. | 642-2021 | NAMAN GOVIL | **2013-14** | 19.04.2021 | 30.11.2013 |
| 26. | 643-2021 | RUPA GOYAL | **2017-18** | 25.05.2021 | 28.10.2018 |
| 27. | 655-2021 | NAMAN GOVIL | **2014-15** | 19.04.2021 | 22.09.2014 |
| 28. | 665-2021 | RAJEEV BANSAL | **2016-17** | 16.06.2021 | 08.10.2016 |
| 29. | 667-2021 | MOHD SHAKIR | **2017-18** | 10.06.2021 | 31.10.2017 |
| 30. | 668-2021 | AMIT SONI | **2016-17** | 30.06.2021 | 22.07.2016 |
| 31. | 669-2021 | AMIT SONI | **2015-16** | 30.06.2021 | 16.07.2015 |
| 32. | 670-2021 | ARUN KUMAR | **2013-14** | 25.06.2021 | 05.09.2013 |
| 33. | 677-2021 | CRESCENT TANNERIES PVT LTD | **2015-16** | 11.05.2021 | 26.09.2015 |
| 34. | 678-2021 | SURENDRA PRATAP SINGH | **2013-14** | 30.06.2021 | 29.03.2014 |
| 35. | 679-2021 | METAL CANS AND CLOSURES PRIVATE LIMITED | **2013-14** | 17.06.2021 | 30.09.2013 |
| 36. | 680-2021 | METAL CANS AND CLOSURES PRIVATE LIMITED | **2014-15** | 17.06.2021 | 28.11.2014 |
| 37. | 681-2021 | METAL CANS AND CLOSURES PRIVATE LIMITED | **2015-16** | 17.06.2021 | 29.09.2015 |
| 38. | 691-2021 | ARBIND KUMAR OMER | **2016-17** | 30.06.2021 | 17.10.2016 |
| 39. | 693-2021 | SUBHASH KUMAR GUPTA | **2014-15** | 29.06.2021 | 30.03.2015 |
| 40. | 695-2021 | KAMAL KUMAR AGARWAL (HUF) | **2013-14** | 30.06.2021 | 31.07.2013 |
| 41. | 696-2021 | SHRI BHUVENDRA KUMAR VARSHNEY | **2015-16** | 21.06.2021 | 31.03.2016 |
| 42. | 697-2021 | NITIN AGGARWAL HUF | **2013-14** | 30.06.2021 | 29.07.2013 |
| 43. | 707-2021 | SUNITA AGARWAL | **2013-14** | 30.06.2021 | -- |
| 44. | 724-2021 | NIRMAL KUMAR GOYAL | **2014-15** | 06.04.2021 | 26.07.2014 |
| 45. | 727-2021 | MADHUR MITTAL | **2013-14** | 22.06.2021 | 24.07.2013 |
| 46. | 728-2021 | SUMIT MITTAL | **2013-14** | 26.06.2021 | 25.07.2013 |
| 47. | 732-2021 | NAVDEEP VARSHNEYA | **2013-14** | 06.04.2021 | 16.08.2013 |
| 48. | 735-2021 | MADHU AGARWAL | **2013-14** | 06.04.2021 | 31.03.2014 |
| 49. | 740-2021 | KARAN MAHANA | **2015-16** | 04.04.2021 | 27.03.2016 |
| 50. | 742-2021 | ASHISH AGARWAL | **2013-14** | 29.06.2021 | 30.03.2018 |
| 51. | 743-2021 | AJAY GUPTA | **2013-14** | 28.06.2021 | 27.07.2013 |
| 52. | 744-2021 | ASHISH AGARWAL | **2014-15** | 29.06.2021 | 30.03.2018 |
| 53. | 746-2021 | BALA AGARWAL | **2014-15** | 30.06.2021 | 23.08.2014 |
| 54. | 749-2021 | SHREE JEE ASSOCIATES | **2013-14** | 23.04.2021 | 31.03.2014 |
| 55. | 757-2021 | JIVAN KUMAR AGARWAL | **2013-14** | 27.04.2021 | 21.10.2013 |
| 56. | 763-2021 | KAPIL SHARMA | **2013-14** | 25.06.2021 | 18.07.2013 |
| 57. | 764-2021 | KAPIL SHARMA | **2014-15** | 25.06.2021 | 03.02.2015 |
| 58. | 765-2021 | NEERU GUPTA | **2013-14** | 06.04.2021 | 27.09.2013 |
| 59. | 769-2021 | NEERU GUPTA | **2015-16** | 01.04.2021 | 27.03.2016 |
| 60. | 775-2021 | MUKESH PAL SINGH | **2014-15** | 30.06.2021 | 14.03.2015 |
| 61. | 776-2021 | SHIV SHAKTI CONSTRUCTIONS | **2013-14** | 30.06.2021 | 21.10.2013 |
| 62. | 777-2021 | MUKESH KUMAR | **2013-14** | 30.06.2021 | 01.02.2014 |
| 63. | 778-2021 | EXOTIC BUILDMART PVT. LTD | **2014-15** | 30.06.2021 | 25.03.2015 |
| 64. | 779-2021 | KIRTI SINGH | **2014-15** | 30.06.2021 | 14.03.2015 |
| 65. | 780-2021 | SUSHIL JOSHI | **2013-14** | 30.06.2021 | 31.03.2014 |
| 66. | 781-2021 | SHIV SHAKTI CONSTRUCTIONS | **2014-15** | 30.06.2021 | 29.11.2014 |
| 67. | 782-2021 | MUKESH KUMAR | **2014-15** | 30.06.2021 | 14.03.2015 |

| | | | | | |
|---|---|---|---|---|---|
| 68. | 795-2021 | AMBIKA ENCLAVE PRIVATE LIMITED | **2015-16** | 28.06.2021 | 30.03.2016 |
| 69. | 796-2021 | KUSUM ENCLAVE PRIVATE LIMITED | **2015-16** | 28.06.2021 | 20.09.2015 |
| 70. | 797-2021 | AMBIKA ENCLAVE PRIVATE LIMITED | **2017-18** | 28.06.2021 | 27.11.2017 |
| 71. | 801-2021 | KANTA DEVI | **2015-16** | 10.06.2021 | 19.03.2017 |
| 72. | 810-2021 | MRITUNJAY KUMAR | **2013-14** | 06.04.2021 | -- |
| 73. | 811-2021 | VINITA KEJRIWAL | **2014-15** | 28.06.2021 | 31.07.2014 |
| 74. | 813-2021 | MRITUNJAY KUMAR | **2014-15** | 06.04.2021 | – |

5. As to the exact challenge raised, it may be noted, the petitioners have challenged the validity of the re-assessment notices issued to them, under Section 148 of the Act. Another challenge has been raised to the validity of the Explanation appended to clause (A)(a) of CBDT Notification No. 20 of 2021, dated 31.03.2021 and Explanation to clause (A)(b) of CBDT Notification No. 38 of 2021, dated 27.04.2021. Those notifications have been issued under the powers vested under Section 3(1) of the Act 38 of 2020 namely, the Taxation and Other Laws (Relaxation of Certain Provisions) Act, 2020 (hereinafter referred to as the 'Enabling Act').

6. Before recording the individual submissions advanced by learned counsel for the parties, we may take note of the legislative provisions giving rise to the issues before us. Prior to enforcement of the Finance Act, 2021, the law for making re-assessment under the Act was governed by the provisions of Sections 147, 148, 149 read with Sections 150, 151, 152 and 153 of the Act. Under that law, the jurisdiction to reassess an assessee could arise upon necessary 'reason to believe' being recorded by the jurisdictional Assessing Officer, of that assessee - as to escapement of any income from assessment. Subject to the rule of limitation and prior sanction (where applicable), the Assessing Officer would then assume jurisdiction to reassess such an assessee, by issuing a notice under Section 148 of the Act.

7. As to the challenge procedure available to that assessee, the Supreme Court, in the case of **GKN Driveshafts (India) Ltd. Vs. Income-tax Officer, (2003) 259 ITR 19 (SC),** had observed as below:

*"We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the Assessing Officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years."*

8. Around March, 2020, the pandemic COVID-19 reached our shores and spread all over country. It led to enforcement of a lockdown. Even thereafter, life is yet to normalise. The pandemic severely impacted the normal functioning of the Government as also all other institutions and it obstructed the normal life of the citizens as well. In such facts, judicial intervention had been made by the Supreme Court as also by this Court, to relax the rules of limitation - to institute various proceedings. The Central

Government also recognized that difficulty and promulgated the Ordinance No. 2 of 2020 dated 31.03.2020 titled Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 (hereinafter referred to as the 'Ordinance'). Relevant to our discussion, the introductory text of the said Ordinance together with provisions of Sections 1, 2 and 3 of the Ordinance are quoted below:

***"TAXATION AND OTHER LAWS (RELAXATION OF CERTAIN PROVISIONS) ORDINANCE, 2020***

***NO.2 OF 2020, DATED 31-3-2020***

*Promulgated by the President in the Seventy-first Year of the Republic of India.*

*An Ordinance to provide relaxation in the provisions of certain Acts and for matters connected therewith or incidental thereto.*

*WHEREAS, in view of the spread of pandemic COVID-19 across many countries of the world including India, causing immense loss to the lives of people, it has become imperative to relax certain provisions, including extension of time limit, in the taxation and other laws;*

*AND WHEREAS, Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;*

*NOW, THEREFORE, in exercise of the powers conferred by clause (1) of article 123 of the Constitution, the President is pleased to promulgate the following Ordinance.*

*CHAPTER I*

***PRELIMINARY***

***Short title and commencement***

*1. (1) This Ordinance may be called the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020.*

*(2) Save as otherwise provided, it shall come into force at once.*

***Definitions***

*2. (1) In this Ordinance, unless the context otherwise requires,--*

*(a) "specified Act" means --*

*(i) the Wealth-tax Act, 1957 (27 of 1957);*

*(ii) the Income-tax Act, 1961 (43 of 1961);*

*(iii) the Prohibition of Benami Property Transactions Act, 1988 (45 of 1988);*

*(iv) Chapter VII of the Finance (No. 2) Act, 2004 (22 of 2004);*

*(v) Chapter VII of the Finance Act, 2013 (17 of 2013);*

*(vi) the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015);*

*(vii) Chapter VIII of the Finance Act, 2016 (28 of 2016); or*

*(viii) the Direct Tax Vivad se Vishwas Act, 2020 (3 of 2020).*

*b) "notification" means the notification published in the Official Gazette.*

*(2) The words and expressions used herein and not defined, but defined in the specified Act, the Central Excise Act, 1944 (1 of 1944), the Customs Act, 1962 (52 of 1962), the Customs Tariff Act, 1975 (51 of 1975) or the Finance Act, 1994 (32 of 1994), as the case may be, shall have the meaning respectively assigned to them in that Act.*

*CHAPTER II*

***RELAXATION OF CERTAIN PROVISIONS OF SPECIFIED ACT***

*Relaxation of certain provision of specified Act.*

*3. (1) Where, 'any time-limit' has been specified in, or prescribed or notified under, the specified Act which falls during the period from the 20th day of March, 2020 to the 29th day of June, 2020, or such other date after the 29th day of June, 2020, as the Central Government may, by notification, specify in this behalf, for the completion or compliance of such action as--*

*(a) completion of any proceeding or passing of any order or 'issuance of any notice', intimation, notification, sanction or approval or such other action, by whatever name called, by any authority, commission or tribunal, by whatever name called, under the provisions of the specified Act; or*

*b) filing of any appeal, reply or application or furnishing of any report, document, return statement or such other record, by whatever name called, under the provisions of the specified Act; or*

*(c) in case where the specified Act is the Income-tax Act, 1961 (43 of 1961), --*

*(i) making of investment, deposit, payment, acquisition, purchase, construction or such other action, by whatever name called, for the purposes of claiming any deduction, exemption or allowance under the provisions contained in --*

*(I) sections 54 to 54GB or under any provisions of Chapter VI-A under the heading "B.--Deductions in respect of certain payments" thereof; or*

*(II) such other provisions of that Act, subject to fulfillment of such conditions, as the Central Government may, by notification, specify; or*

*(ii) beginning of manufacture or production of articles or things or providing any services referred to in section 10AA of that Act, in a case where the letter of approval, required to be issued in accordance with the provisions of the Special Economic Zones Act, 2005 (28 of 2005), has been issued on or before the 31st day of March, 2020 (28 of 2005),*

*and where completion or compliance of such action has not been made within such time, then, the time limit for completion or compliance of such action shall, notwithstanding anything contained in the specified Act, stand extended to the 30th day of June, 2020, or such other date after the 30th day of June, 2020, as the Central Government may, by notification, specify in this behalf:*

*Provided that the Central Government may specify different dates for completion or compliance of different actions.*

*Provided further that such action shall not include payment of any amount as is referred to in sub-section (2).*

*(2) Where any due date has been specified in, or prescribed or notified under, the specified Act for payment of any amount towards tax or levy, by whatever name called, which falls during the period from the 20th day of March, 2020 to the 29th day of June, 2020 or such other date after the 29th day of June, 2020 as the Central Government may, by notification, specify in this behalf, and such amount has not been paid within such date, but has been paid on or before the 30th day of June, 2020, or such other date after the 30th day of June, 2020, as the Central Government may, by notification, specify in this behalf, then, notwithstanding anything contained in the specified Act, --*

*(a) the rate of interest payable, if any, in respect of such amount for the period of delay shall not exceed three-fourth per cent for every month or part thereof;*

*(b) no penalty shall be levied and no prosecution shall be sanctioned in*

*respect of such amount for the period of delay.*

*Explanation.-- For the purposes of this sub-section, "the period of delay" means the period between the due date and the date on which the amount has been paid."*

Further, in view of the submissions as have been received, it would be fruitful to also quote the provisions of Chapter III of the Ordinance - containing the amendments made to the Act. It reads:

*"CHAPTER III*

***AMENDMENT TO THE INCOME-TAX ACT, 1961***

***Amendment of sections 10 and 80G of Act 43 of 1961***

*4. In the Income-tax Act, 1961, with effect from the 1st day of April, 2020 (43 of 1961), -*

*(i) in section 10, in clause (23C), in sub-clause (i), after the word "Fund", the words and brackets "or the Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (PM CARES FUND)" shall be inserted;*

*(ii) in section 80G, in sub-section (2), in clause (a), in sub-clause (iiia), after the word "fund", the words and brackets "or the Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (PM CARES FUND)" shall be inserted."*

9. Acting in exercise of powers vested under the Ordinance, the Central Government then issued Notification Nos. 35 of 2020, 39 of 2020 and 56 of 2020, dated 24.06.2020, 29.06.2020 and 29.07.2020, respectively. Briefly, by those Notifications, general time extension was granted under the Act for certain purposes. Since, the present dispute does not arise in the context of those Notifications, no useful purpose would be served in extracting their contents.

10. The aforesaid Ordinance was succeeded by the Enabling Act. It received the assent of the President on 29.09.2020 and was published in the Official Gazette, on that date itself. It was enforced retrospectively, with effect from 31.03.2020. By the Enabling Act, further provisions were made in addition to the provisions of Section 3 of the Ordinance. We may therefore take note of Sections 1, 2 and 3 of the Enabling Act. They read as below:

***"THE TAXATION AND OTHER LAWS (RELAXATION AND AMENDMENT OF CERTAIN PROVISIONS) ACT, 2020***

*NO. 38 OF 2020*

*[29th September, 2020.]*

*AN ACT to provide for relaxation and amendment of provisions of certain Acts and for matters connected therewith or incidental thereto.*

*BE it enacted by Parliament in the Seventy-first Year of the Republic of India as follows:--*

*CHAPTER I*

*PRELIMINARY*

*1. (1) This Act may be called the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020.*

*(2) Save as otherwise provided, it shall be deemed to have come into force on the 31st day of March, 2020.*

*2. (1) In this Act, unless the context otherwise requires,--*

*(a) "notification" means the notification published in the Official Gazette;*

*(b) "specified Act" means--*

*(i) the Wealth-tax Act, 1957;*

*(ii) the Income-tax Act, 1961;*

*(iii) the Prohibition of Benami Property Transactions Act, 1988;*

*(iv) Chapter VII of the Finance (No. 2) Act, 2004;*

*(v) Chapter VII of the Finance Act, 2013;*

*(vi) the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015;*

*(vii) Chapter VIII of the Finance Act, 2016; or*

*(viii) the Direct Tax Vivad se Vishwas Act, 2020.*

*(2) The words and expressions used herein and not defined, but defined in the specified Act, the Central Excise Act, 1944, the Customs Act, 1962, the Customs Tariff Act, 1975 or the Finance Act, 1994, as the case may be, shall have the same meaning respectively assigned to them in that Act.*

***CHAPTER II***

***RELAXATION OF CERTAIN PROVISIONS OF SPECIFIED ACT***

*3. (1) Where, any time-limit has been specified in, or prescribed or notified under, the specified Act which falls during the period from the 20th day of March, 2020 to the 31st day of December, 2020, or such other date after the 31st day of December, 2020, as the Central Government may, by notification, specify in this behalf, for the completion or compliance of such action as--*

*(a) completion of any proceeding or passing of any order or issuance of any notice, intimation, notification, sanction or approval, or such other action, by whatever name called, by any authority, commission or tribunal, by whatever name called, under the provisions of the specified Act; or*

*(b) filing of any appeal, reply or application or furnishing of any report, document, return or statement or such other record, by whatever name called, under the provisions of the specified Act; or*

*(c) in case where the specified Act is the Income-tax Act, 1961,--*

*(i) making of investment, deposit, payment, acquisition, purchase, construction or such other action, by whatever name called, for the purposes of claiming any deduction, exemption or allowance under the provisions contained in--*

*(I) sections 54 to 54GB, or under any provisions of Chapter VI-A under the heading "B.--Deductions in respect of certain payments" thereof; or*

*(II) such other provisions of that Act, subject to fulfilment of such conditions, as the Central Government may, by notification, specify; or*

*(ii) beginning of manufacture or production of articles or things or providing any services referred to in section 10AA of that Act, in a case where the letter of approval, required to be issued in accordance with the provisions of the Special Economic Zones Act, 2005, has been issued on or before the 31st day of March, 2020,*

*and where completion or compliance of such action has not been made within such time, then, the time-limit for completion or compliance of such action shall, notwithstanding anything contained in the specified Act, stand extended to the 31st day of March, 2021, or such other date after the 31st day of March, 2021, as the Central Government may, by notification, specify in this behalf:*

*Provided that the Central Government may specify different dates for completion or compliance of different actions:*

*Provided further that such action shall not include payment of any amount as is referred to in sub-section (2):*

*Provided also that where the specified Act is the Income-tax Act, 1961 and the compliance relates to--*

*(i) furnishing of return under section 139 thereof, for the assessment year commencing on the--*

*(a) 1st day of April, 2019, the provision of this sub-section shall have the effect as if for the figures, letters and words "31st day of March, 2021", the figures, letters and words "30th day of September, 2020" had been substituted;*

*(b) 1st day of April, 2020, the provision of this sub-section shall have the effect as if for the figures, letters and words "31st day of March, 2021", the figures, letters and words "30th day of November, 2020" had been substituted;*

*(ii) delivering of statement of deduction of tax at source under sub-section (2A) of section 200 of that Act or statement of collection of tax at source under sub-section (3A) of section 206C thereof for the month of February or March, 2020, or for the quarter ending on the 31st day of March, 2020, as the case may be, the provision of this sub-section shall have the effect as if for the figures, letters and words "31st day of March, 2021", the figures, letters and words "15th day of July, 2020" had been substituted;*

*(iii) delivering of statement of deduction of tax at source under sub-section (3) of section 200 of that Act or statement of collection of tax at source under proviso to sub-section (3) of section 206C thereof for the month of February or March, 2020, or for the quarter ending on the 31st day of March, 2020, as the case may be, the provision of this sub-section shall have the effect as if for the figures, letters and words "31st day of March, 2021", the figures, letters and words "31st day of July, 2020" had been substituted;*

*(iv) furnishing of certificate under section 203 of that Act in respect of deduction or payment of tax under section 192 thereof for the financial year commencing on the 1st day of April, 2019, the provision of this sub-section shall have the effect as if for the figures, letters and words "31st day of March, 2021", the figures, letters and words "15th day of August, 2020" had been substituted;*

*(v) sections 54 to 54GB of that Act, referred to in item (I) of sub-clause (i) of clause (c), or sub-clause (ii) of the said clause, the provision of this sub-section shall have the effect as if -*

*(a) for the figures, letters and words "31st day of December, 2020", the figures, letters and words "29th day of September, 2020" had been substituted for the time-limit for the completion or compliance; and*

*(b) for the figures, letters and words "31st day of March, 2021", the figures, letters and words "30th day of September, 2020" had been substituted for making such completion or compliance;*

*(vi) any provisions of Chapter VI-A under the heading "B.-- Deductions in respect of certain payments" of that Act, referred to in item (I) of sub-clause (i) of clause (c), the provision of this sub-section shall have the effect as if--*

*(a) for the figures, letters and words "31st day of December, 2020", the figures, letters and words "30th day of July, 2020" had been substituted for the time-limit for the completion or compliance; and*

*(b) for the figures, letters and words "31st day of March, 2021", the figures, letters and words "31st day of July, 2020" had been substituted for making such completion or compliance;*

*(vii) furnishing of report of audit under any provision thereof for the assessment year commencing on the*

*1st day of April, 2020, the provision of this sub-section shall have the effect as if for the figures, letters and words "31st day of March, 2021", the figures, letters and words "31st day of October, 2020" had been substituted:*

*Provided also that the extension of the date as referred to in sub-clause (b) of clause (i) of the third proviso shall not apply to Explanation 1 to section 234A of the Income-tax Act, 1961 in cases where the amount of tax on the total income as reduced by the amount as specified in clauses (i) to (vi) of sub-section (1) of the said section exceeds one lakh rupees:*

*Provided also that for the purposes of the fourth proviso, in case of an individual resident in India referred to in sub-section (2) of section 207 of the Income-tax Act, 1961, the tax paid by him under section 140A of that Act within the due date (before extension) provided in that Act, shall be deemed to be the advance tax:*

*Provided also that where the specified Act is the Direct Tax Vivad Se Vishwas Act, 2020, the provision of this sub-section shall have the effect as if--*

*(a) for the figures, letters and words "31st day of December, 2020", the figures, letters and words "30th day of December, 2020" had been substituted for the time limit for the completion or compliance of the action; and*

*(b) for the figures, letters and words "31st day of March, 2021", the figures, letters and words "31st day of December, 2020" had been substituted for making such completion or compliance.*

*(2) Where any due date has been specified in, or prescribed or notified under the specified Act for payment of any amount towards tax or levy, by whatever name called, which falls during the period from the 20th day of March, 2020 to the 29th day of June, 2020 or such other date after the 29th day of June, 2020 as the Central Government may, by notification, specify in this behalf, and if such amount has not been paid within such date, but has been paid on or before the 30th day of June, 2020, or such other date after the 30th day of June, 2020, as the Central Government may, by notification, specify in this behalf, then, notwithstanding anything contained in the specified Act,--*

*(a) the rate of interest payable, if any, in respect of such amount for the period of delay shall not exceed three-fourth per cent. for every month or part thereof;*

*(b) no penalty shall be levied and no prosecution shall be sanctioned in respect of such amount for the period of delay.*

*Explanation.--For the purposes of this sub-section, "the period of delay" means the period between the due date and the date on which the amount has been paid."*

11. Reference has also been made to provisions of Chapter III to the Enabling Act. Numerous amendments were made to the Act as were not contemplated by the Ordinance. While no useful purpose would be served in extracting the entire contents of Section 4 of the Enabling Act, it would be useful to reproduce, and indicate some of the provisions amended, together with reference to the date from which such amendments were made effective.

| Sl. No. | Section no. of the Income Tax Act, 1961, amended | Insertion/Omission/Substitution with effect from |
|---|---|---|
| 1. | Explanation 1(1) to Section 6 | 01.04.2021 |
| 2. | Section 10(4D) | 01.04.2021 |
| 3. | Section 10(23C) | 01.04.2020 |
| 4. | Provisos to Section 10 | 01.04.2021 & 01.06.2020 |
| 5. | Section 10(23FBC) | 01.04.2021 |
| 6. | Explanation to Section 10(23FE) | 01.04.2021 |
| 7. | Explanation II to Section 11(1) | 01.04.2021 |
| 8. | Section 11(7) | 01.06.2020 |
| 9. | Second Proviso to Section 11 | 01.06.2020 and 01.04.2021 |
| 10. | Omission of Section 12A(1)(ac) | 01.06.2020 |
| 11. | Insertion of Section 12A(1)(ac) | 01.04.2021 |
| 12. | Section 12A(2) | 01.06.2020 |
| 13. | Proviso to Section 12A | 01.04.2021 |
| 14. | Omission of Section 12AA(5) | 01.06.2020 |
| 15. | Insertion of Section 12AA(5) | 01.04.2021 |
| 16. | Omission of Section 12AB | 01.06.2020 |
| 17. | Insertion of Section 12AB | 01.04.2021 |
| 18. | Explanation I to Section 13 | 01.04.2021 |
| 19. | Section 35(1) | 01.06.2020 |
| 20. | Sub-clause III to Explanation to Section 35 | 01.04.2021 |
| 21. | Omission of Fifth and Sixth Provisos to Section 35(1)(iv) | 01.06.2020 |
| 22. | Insertion of Fifth and Sixth Provisos to Section 35(1)(iv) | 01.04.2021 |
| 23. | Omission of Section 35(1A) | 01.06.2020 |
| 24. | Insertion of Section 35(1A) | 01.04.2021 |
| 25. | Section 35AC | 01.11.2020 |
| 26. | Section 56(2) | 01.06.2020 & 01.04.2021 |
| 27. | Section 80G | 01.04.2021 |
| 28. | Section 80G(5) | 01.06.2020 &01.04.2021 |
| 29. | Section 92CA | 01.11.2020 |
| 30. | Section 115AD | 01.04.2021 |
| 31. | Substitution in Explanation to Section 115BBDA(b)(iii) | 01.06.2020 & 01.04.2021 |
| 32. | Substitution in Section 115TD | 01.06.2020 & 01.04.2021 |
| 33. | Insertion of Section 130 | 01.11.2020 |
| 34. | Substitution of Proviso to Section 133A(6) | 01.11.2020 |
| 35. | Section 133C | 01.11.2020 |
| 36. | Insertion of Section 135 | 01.11.2020 |
| 37. | Insertion of Section 142A | 01.11.2020 |
| 38. | Substitution of Proviso to Section 143(3B) | 01.04.2021 |
| 39. | Insertion of Section 144A | 01.04.2021 |
| 40. | Insertion of Section 144C(14A) | 01.11.2020 |
| 41. | Insertion of Section 151A | 01.11.2020 |
| 42. | Insertion of Section 157A | 01.11.2020 |
| 43. | Insertion of Section 196D(1) | 01.11.2020 |
| 44. | Insertion of Section 197B | 14.05.2020 |
| 45. | Insertion of Section 206C(10) | 14.05.2020 |
| 46. | Insertion of Section 231 | 01.11.2020 |
| 47. | Substitution in Section 253(1)(c) | 01.06.2020 & 01.04.2021 |
| 48. | Insertion of Section 253(8), (9) and (10) | 01.11.2020 |
| 49. | Section 263(1) | 01.11.2020 |
| 50. | Section 264(1, 2, 3 and 4) | 01.11.2020 |
| 51. | Insertion of Section 264A & 264B | 01.11.2020 |
| 52. | Omission of Section 271K | 01.06.2020 |
| 53. | Insertion of Section 271K | 01.04.2021 |
| 54. | Substitution in Section 274(2A)(a) | 01.04.2021 |
| 55. | Insertion of Section 279 (4, 5 and 6) | 01.11.2020 |
| 56. | Insertion of Section 293D | 01.11.2020 |

12. On 29.10.2020, Notification No. 88 of 2020 was issued by the Central Government for the purposes of extension of time limits stipulated under Section 139 of the Act. For ready reference, the said provision reads as below:

*"MINISTRY OF FINANCE*

*(Department of Revenue)*

*(CENTRAL BOARD OF DIRECT TAXES)*

***NOTIFICATION***

*New Delhi, the 29th October, 2020*

***TAXATION AND OTHER LAWS***

***S.O. 3906(E).-****In exercise of the powers conferred by sub-section (1) of section 3 of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (38 of 2020) (hereinafter referred to as the Act), the Central Government hereby specifies, for the purpose of the said sub-section (1), that, in a case where the specified Act is the Income-tax Act, 1961 and the compliance for the assessment year commencing on the 1st day of April, 2020, relates to -*

*(i) furnishing of return under section 139 thereof, the time-limit for furnishing of such return, shall-*

*(a) in respect of the assessees referred to in clauses (a) and (aa) of Explanation 2 to sub-section (1) of the said section 139, stand extended to the 31st day of January, 2021; and*

*(b) in respect of other assessees, stand extended to the 31st day of December, 2020:*

*Provided that the provisions of the fourth proviso to sub-section (1) of the Act shall, mutatis mutandis apply to these extensions of due date, as they apply to the date referred to in sub-clause (b) of clause (i) of the third proviso thereof.*

*(ii) furnishing of report of audit under any provision of that Act, the time-limit for furnishing of such report of audit shall stand extended to the 31" day of December, 2020.*

*2. This notification shall come into force from the date of its publication in the Official Gazette."*

13. Then, on 31.12.2020, another Notification No. 4805 (E) was issued under Section 3(1) of the Enabling Act. Without making any specific reference to reassessment proceedings under the Act, time extensions were granted. For ready reference, that provision reads as below:

***"NOTIFICATION S.O. 4805 (E) [NO. 93/2020/F. No. 370142/35/2020-TPL], DATED 31.12.2020***

*In exercise of the powers conferred by sub-section (1) of section 3 of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (38 of 2020) (hereinafter referred to the Act) and in supersession of the notification of the Government of India in the Ministry of Finance, (Department of Revenue) No. 88/2020 dated the 29th October, 2020, published in the Gazette of India, Extraordinary, Part-II, Section 3, Sub-section (ii), vide number S.O. 3906(E), dated the 29th October, 2020, except as respects things done or omitted to be done before such supersession, the Central Government hereby specifies, for the completion or compliance of action referred to in-*

*(A) clause (a) of sub-section (1) of section 3 of the Act, -*

*(i) the 30th day of March, 2021 shall be the end date of the period during*

*which the time limit specified in, or prescribed or notified under, the specified Act falls for the completion or compliance of such action as specified under the said sub-section; and*

*(ii) the 31st day of March, 2021 shall be the end date to which the time limit for completion or compliance of such action shall stand extended:*

*Provided that where the specified Act is the Direct Tax Vivad Se Vishwas Act, 2020 (3 of 2020), the provision of this clause shall have the effect as if--*

*(a) for the figures, letters and words "30th day of March, 2021", the figures, letters and words "30th day of January, 2021" had been substituted; and*

*(b) for the figures, letters and words "31st day of March, 2021", the figures, letters and words "31st day of January, 2021" had been substituted:*

***Provided further** that where the specified Act is the Income-tax Act, 1961 (43 of 1961) and completion or compliance of action referred to in clause (a) of sub-section (1) of section 3 of the Act is an order under sub-section (3) of section 92CA of the Income-tax Act, 1961, the provision of this clause shall have the effect as if--*

*(a) for the figures, letters and words "30th day of March, 2021", the figures, letters and words "30th day of January, 2021" had been substituted; and*

*(b) for the figures, letters and words "31st day of March, 2021", the figures, letters and words "31st day of January, 2021" had been substituted;*

*(B) clause (b) of sub-section (1) of section 3 of the Act, where the specified Act is the Income-tax Act, 1961 (43 of 1961) and the compliance for the assessment year commencing on the 1st day of April, 2020 relates to -*

*(i) furnishing of return under section 139 thereof, the time limit for furnishing of such return, shall -*

*(a) in respect of the assessees referred to in clauses (a) and (aa) of Explanation 2 to sub-section (1) of the said section 139, stand extended to the 15th day of February 2021; and*

*(b) in respect of other assessees, stand extended to the 10th day of January, 2021:*

*Provided that the provisions of the fourth proviso to sub-section (1) of section 3 of the Act shall, mutatis mutandis apply to these extensions of due date, as they apply to the date referred to in sub-clause (b) of clause (i) of the third proviso thereof;*

*(ii) furnishing of report of audit under any provision of that Act, the time limit for furnishing of such report of audit shall stand extended to the 15th day of January, 2021.*

*2. This notification shall come into force from the date of its publication in the Official Gazette."*

14. On 27.02.2021, Notification No. 966E was issued under Section 3(1) of the Enabling Act. It, for the first time, made specific reference to reassessment proceedings under Section 153 or Section 153B of the Act. For ready reference, the said provisions read as below:

***"NOTIFICATION NO. S.O. 966(E) [NO. 10/2021/F. NO. 370142/35/2020-TPL], DATED 27-2-2021***

*In exercise of the powers conferred by sub-section (1) of section 3 of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (38 of 2020) (hereinafter referred to as the said Act) and in partial modification of the notification of the Government of*

*India in the Ministry of Finance, (Department of Revenue) No. 93/2020 dated the 31st December, 2020, published in the Gazette of India, Extraordinary, Part-II, Section 3, Sub-section (i), vide number S.O. 4805(E), dated the 31st December, 2020 (hereinafter referred to as the said notification), the Central Government hereby specifics, for the purpose of sub-section (1) of section 3 of the said Act, that -*

*(A) where the specified Act is the Income-tax Act, 1961 (43 of 1961) (hereinafter referred to as the Income-tax Act) and the completion of any action, as referred to in clause (a) of sub-section (1) of section 3 of the said Act, relates to passing of any order-*

*(a) for imposition of penalty under Chapter XXI of the Income-tax Act, -*

*(i) the 29th day of June, 2021 shall be the end date of the period during which the time limit specified in or prescribed or notified under the Income-tax Act falls, for the completion of such action; and*

*(ii) the 30th day of June, 2021 shall be the end date to which the time limit for completion of such action shall stand extended;*

*(b) for assessment or reassessment under the Income-tax Act, and the time limit for completion of such action under section 153 or section 153B thereof,-*

*(i) expires on the 31st day of March, 2021 due to its extension by the said notification, such time limit shall stand extended to the 30th day of April, 2021;*

*(ii) is not covered under (1) and expires on 31st day of March, 2021, such time limit shall stand extended to the 30th day of September, 2021;*

*(B) where the specified Act is the Prohibition of Benami Property Transaction Act, 1988, (45 of 1988) (hereinafter referred to as the Benami Act) and the completion of any action, as referred to in clause (a) of sub-section (1) of section 3 of the said Act, relates to issue of notice under sub-section (1) or passing of any order under sub-section (3) of section 26 of the Benami Act,--*

*(i) the 30th day of June, 2021 shall be the end date of the period during which the time limit specified in or prescribed or notified under the Benami Act falls, for the completion of such action; and*

*(ii) the 30th day of September, 2021 shall be the end date to which the time limit for completion of such action shall stand extended."*

15. Next, at the time of enforcement of the Finance Act, 2021, another Notification No. 1432 dated 31.03.2021 came to be issued under Section 3(1) of the Enabling Act, containing specific stipulations, both with respect to issuance of notices under Section 148 of the Act and also with respect to completion of reassessment proceedings. For ready reference, the said provisions read as below:

***"NOTIFICATION S.O. 1432(E) [NO. 20/2021/F. NO. 370142/35/2020-TPL), DATED 31-3-2021***

*In exercise of the powers conferred by sub-section (1) of section 3 of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (38 of 2020) (hereinafter referred to as the said Act), and in partial modification of the notification of the Government of India in the Ministry of Finance, (Department of Revenue) No. 93/2020 dated the 31st December, 2020, published in the Gazette of India, Extraordinary, Part*

*II, Section 3, Sub-section (ii), vide number S.O. 4805(E), dated the 31st December, the Central Government hereby specifies that,-*

*(A) where the specified Act is the Income-tax Act, 1961 (43 Income-tax Act) and, -*

*(a) the completion of any action referred to in clause (a) of sub-section (1) of section 3 of the Act relates to passing of an order under sub-section (13) of section 144C or issuance of notice under section 148 as per time-limit specified in section 149 or sanction under section 151 of the Income-tax Act, -*

*(i) the 31st day of March, 2021 shall be the end date of the period during which the time limit, specified in, or prescribed or notified under, the Income-tax Act falls for the completion of such action; and*

*(ii) the 30th day of April, 2021 shall be the end date to which the time-limit for the completion of such action shall stand extended.*

*Explanation. For the removal of doubts, it is hereby clarified that for the purposes of issuance of notice under section 148 as per time-limit specified in section 149 or sanction under section 151 of the Income-tax Act, under this sub-clause, the provisions of section 148, section 149 and section 151 of the Income-tax Act, as the case may be, as they stood as on the 31st day of March 2021, before the commencement of the Finance Act, 2021, shall apply.*

*(b) the compliance of any action referred to in clause (b) of sub-section (1) of section 3 of the said Act relates to intimation of Aadhaar number to the prescribed authority under sub-section (2) of section 139AA of the Income-tax Act, the time-limit for compliance of such action shall stand extended to the 30th day of June, 2021.*

*(B) where the specified Act is the Chapter VIII of the Finance Act, 2016 (28 of 2016) (hereinafter referred to as the Finance Act) and the completion of any action referred to in clause (a) of sub section (1) of section 3 of the said Act relates to sending an intimation under sub-section (1) of section 168 of the Finance Act,-*

*(i) the 31st day of March, 2021 shall be the end date of the period during which the time-limit, specified in, or prescribed or notified under, the Finance Act falls for the completion of such action; and*

*(ii) the 30th day of April, 2021 shall be the end date to which the time-limit for the completion of such action shall stand extended."*

16. Last, Notification No. 1703 (E) dated 27.04.2021 came to be issued under Section 3(1) of the Enabling Act, again providing for extensions of time to initiate reassessment proceedings and to conclude said proceedings. It reads thus:

***"NOTIFICATION S.O. 1703(E) [NO. 38/2021/F.NO. 370142/35/2020-TPL], DATED 27-4-2021***

*In exercise of the powers conferred by sub-section (1) of section 3 of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (38 of 2020) (hereinafter referred to as the said Act), and in partial modification of the notifications of the Government of India in the Ministry of Finance, (Department of Revenue) No. 93/2020 dated the 31st December, 2020, No. 10/2021 dated the 27th February, 2021 and No. 20/2021 dated the 31st March, 2021, published in the Gazette of India, Extraordinary, Part-II, Section 3, Subsection (ii), vide number S.O. 4805(E),*

*dated the 31st December, 2020, vide number S.O. 966(E) dated the 27th February, 2021 and vide number S.O. 1432(E) dated the 31st March, 2021, respectively (hereinafter referred to as the said notifications), the Central Government hereby specifies for the purpose of sub-section (1) of section 3 of the said Act that, --*

*(A) where the specified Act is the Income-tax Act, 1961 (43 of 1961) (hereinafter referred to as the Income-tax Act) and, --*

*(a) the completion of any action, referred to in clause (a) of sub-section (1) of section 3 of the said Act, relates to passing of any order for assessment or reassessment under the Income-tax Act, and the time limit for completion of such action under section 153 or section 153B thereof, expires on the 30th day of April, 2021 due to its extension by the said notifications, such time limit shall further stand extended to the 30th day of June, 2021;*

*(b) the completion of any action, referred to in clause (a) of sub-section (1) of section 3 of the said Act, relates to passing of an order under sub-section (13) of section 144C of the Income-tax Act or issuance of notice under section 148 as per time-limit specified in section 149 or sanction under section 151 of the Income-tax Act, and the time limit for completion of such action expires on the 30th day of April, 2021 due to its extension by the said notifications, such time limit shall further stand extended to the 30th day of June, 2021.*

***Explanation.**-- For the removal of doubts, it is hereby clarified that for the purposes of issuance of notice under section 148 as per time-limit specified in section 149 or sanction under section 151 of the Income-tax Act, under this sub-clause, the provisions of section 148, section 149 and section 151 of the Income-tax Act, as the case may be, as they stood as on the 31st day of March 2021, before the commencement of the Finance Act, 2021, shall apply.*

*(B) where the specified Act is the Chapter VIII of the Finance Act, 2016 (28 of 2016) (hereinafter referred to as the Finance Act) and the completion of any action, referred to in clause (a) of sub-section (1) of section 3 of the said Act, relates to sending an intimation under sub-section (1) of section 168 of the Finance Act, and the time limit for completion of such action expires on the 30th day of April, 2021 due to its extension by the said notifications, such time limit shall further stand extended to the 30th day of June, 2021."*

17. In the meanwhile, the Finance Act, 2021, being Act No. 13 of 2021 came into force. Relevant to our discussion, we consider it appropriate to extract Sections 1 and 40 to 45 of the said Act. They read as below:

***"FINANCE ACT, 2021***

***[13 OF 2021]***

*An Act to give effect to the financial proposals of the Central Government for the financial year 2021-2022.*

*BE it enacted by Parliament in the Seventy-second Year of the Republic of India as follows:--*

***CHAPTER I***
***PRELIMINARY***

***Short title and commencement.***

*1. (1) This Act may be called the Finance Act, 2021.*

*(2) Save as otherwise provided in this Act,-*

*(a) sections 2 to 88 shall come into force on the 1st day of April, 2021;*

*(b) sections 108 to 123 shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.*

***Substitution of new section for section 147.***

*40. For section 147 of the Income-tax Act, the following section shall be substituted, namely:--*

***147. Income escaping assessment.--****If any income chargeable to tax, in the case of an assessee, has escaped assessment for any assessment year, the Assessing Officer may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance or any other allowance or deduction for such assessment year (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year).*

*Explanation.--For the purposes of assessment or reassessment or recomputation under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, irrespective of the fact that the provisions of section 148A have not been complied with.*

***Substitution of new section for section 148.***

*41. For section 148 of the Income-tax Act, the following section shall be substituted, namely:--*

***148. Issue of notice where income has escaped assessment.--****Before making the assessment, reassessment or recomputation under section 147, and subject to the provisions of section 148A, the Assessing Officer shall serve on the assessee a notice, along with a copy of the order passed, if required, under clause (d) of section 148A, requiring him to furnish within such period, as may be specified in such notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139:*

***Provided*** *that no notice under this section shall be issued unless there is information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice.*

*Explanation 1.-- For the purposes of this section and section 148A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,--*

*(i) any information flagged in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time;*

*(ii) any final objection raised by the Comptroller and Auditor General of India to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act.*

*Explanation 2.-- For the purposes of this section, where,--*

*(i) a search is initiated under section 132 or books of account, other*

*documents or any assets are requisitioned under section 132A, on or after the 1st day of April, 2021, in the case of the assessee; or*

*(ii) a survey is conducted under section 133A, other than under sub-section (2A) or sub-section (5) of that section, on or after the 1st day of April, 2021, in the case of the assessee; or*

*(iii) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner, that any money, bullion, jewellery or other valuable article or thing, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or*

*(iv) the Assessing Officer is satisfied, with the prior approval of Principal Commissioner or Commissioner, that any books of account or documents, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee, the Assessing Officer shall be deemed to have information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the three assessment years immediately preceding the assessment year relevant to the previous year in which the search is initiated or books of account, other documents or any assets are requisitioned or survey is conducted in the case of the assessee or money, bullion, jewellery or other valuable article or thing or books of account or documents are seized or requisitioned in case of any other person.*

*Explanation 3. -- For the purposes of this section, specified authority means the specified authority referred to in section 151.*

***Insertion of new section 148A.***

*42. After section 148 of the Income-tax Act, the following section shall be inserted, namely:--*

*"**148A. Conducting inquiry, providing opportunity before issue of notice under section 148.--** The Assessing Officer shall, before issuing any notice under section 148,--*

*(a) conduct any enquiry, if required, with the prior approval of specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment;*

*(b) provide an opportunity of being heard to the assessee, with the prior approval of specified authority, by serving upon him a notice to show cause within such time, as may be specified in the notice, being not less than seven days and but not exceeding thirty days from the date on which such notice is issued, or such time, as may be extended by him on the basis of an application in this behalf, as to why a notice under section 148 should not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year and results of enquiry conducted, if any, as per clause (a);*

*(c) consider the reply of assessee furnished, if any, in response to the show-cause notice referred to in clause (b);*

*(d) decide, on the basis of material available on record including reply of the assessee, whether or not it is a fit case to issue a notice under section 148, by passing an order, with the prior approval of specified authority, within one month from the end of the month in which the reply referred to in clause (c) is received by him, or where no such reply is furnished, within one month from the end of the month in which time or extended time*

*allowed to furnish a reply as per clause (b) expires:*

***Provided*** *that the provisions of this section shall not apply in a case where,-- (a) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A in the case of the assessee on or after the 1st day of April, 2021; or*

*(b) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any money, bullion, jewellery or other valuable article or thing, seized in a search under section 132 or requisitioned under section 132A, in the case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or*

*(c) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any books of account or documents, seized in a search under section 132 or requisitioned under section 132A, in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee.*

*Explanation.--For the purposes of this section, specified authority means the specified authority referred to in section 151."*

***Substitution of new section for section 149.***

*43. For section 149 of the Income-tax Act, the following section shall be substituted, namely:--*

*149.* ***Time limit for notice.--****(1) No notice under section 148 shall be issued for the relevant assessment year,--*

*(a) if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);*

*(b) if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more for that year:*

***Provided*** *that no notice under section 148 shall be issued at any time in a case for the relevant assessment year beginning on or before 1st day of April, 2021, if such notice could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (b) of sub-section (1) of this section, as they stood immediately before the commencement of the Finance Act, 2021:*

***Provided further*** *that the provisions of this sub-section shall not apply in a case, where a notice under section 153A, or section 153C read with section 153A, is required to be issued in relation to a search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, on or before the 31st day of March, 2021:*

***Provided also*** *that for the purposes of computing the period of limitation as per this section, the time or extended time allowed to the assessee, as per show-cause notice issued under clause (b) of section 148A or the period during which the proceeding under section 148A is stayed by an order or injunction of any court, shall be excluded:*

*Provided also that where immediately after the exclusion of the period referred to in the immediately preceding proviso, the period of limitation*

*available to the Assessing Officer for passing an order under clause (d) of section 148A is less than seven days, such remaining period shall be extended to seven days and the period of limitation under this sub-section shall be deemed to be extended accordingly.*

*Explanation.--For the purposes of clause (b) of this sub- section, "asset" shall include immovable property, being land or building or both, shares and securities, loans and advances, deposits in bank account.*

*(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.*

***Substitution of new section for section 151.***

*44. For section 151 of the Income-tax Act, the following section shall be substituted, namely:--*

***151. Sanction for issue of notice.**--Specified authority for the purposes of section 148 and section 148A shall be,--*

*(i) Principal Commissioner or Principal Director or Commissioner or Director, if three years or less than three years have elapsed from the end of the relevant assessment year;*

*(ii) Principal Chief Commissioner or Principal Director General or where there is no Principal Chief Commissioner or Principal Director General, Chief Commissioner or Director General, if more than three years have elapsed from the end of the relevant assessment year*

***Amendment of section 151A.***

*45. In section 151A of the Income-tax Act, in sub-section (1), in the opening portion, after the words and figures "issuance of notice under section 148", the words, figures and letter "or conducting of enquiries or issuance of show-cause notice or passing of order under section 148A" shall be inserted."*

18. In the above statutory context and reference, submissions have been advanced by learned counsel for the petitioners and have been responded to by the learned Additional Solicitor General of India representing the Union and the CBDT and learned counsel for the revenue.

19. Shri Rakesh Ranjan Agarwal, learned Senior Advocate has first submitted, upon enforcement of the Finance Act, 2021, the pre-existing Sections 147 to 151 of the Act stood repealed and replaced by the above noted provisions. The entire statutory scheme of initiating, inquiring, conducting, and concluding the reassessment proceedings underwent a sea change. The act of substitution of the old provision obliterated from the statute book the pre-existing provisions pertaining to reassessment under the Act. The unamended provision became dead and unenforceable, by that operation of law. Since the Enabling Act only sought to enlarge limitation with respect to the pre-existing provisions, it could not, and it did not resurrect the pre-existing provisions that were already dead. In short, it has been submitted, the procedural amendments cannot recreate a non-existing substantive law. He has placed reliance on a decision of the Supreme Court in **Government of India & Ors. Vs. Indian Tobacco Association, (2005) 7 SCC 396,** wherein it has been observed as follows:

*"15. The word "substitute" ordinarily would mean "to put (one) in place of another"; or "to replace". In Black's Law Dictionary, Fifth Edition, at page 1281, the word "substitute" has been defined to mean "To put in the place of*

*another person or thing" or "to exchange". In Collins English Dictionary, the word "substitute" has been defined to mean "to serve or cause to serve in place of another person or thing"; "to replace (an atom or group in a molecule) with (another atom or group)"; or "a person or thing that serves in place of another, such as a player in a game who takes the place of an injured colleague".*

20. Further reliance has been placed on a decision of the Supreme Court in **Gottumukkala Venkata Krishamraju Vs. Union of India & Ors., (2019) 17 SCC 590,** wherein it was observed as under:-

*"13. This expression has also come up for interpretation by the Courts in **Zile Singh v. State of Haryana and Others, (2004) 8 SCC 1,** the import and impact of substituted provision were discussed in the following manner:*

*"23. The text of Section 2 of the Second Amendment Act provides for the word "upto" being substituted for the word "after". What is the meaning and effect of the expression employed therein -- "shall be substituted"?*

*24. The substitution of one text for the other pre-existing text is one of the known and well-recognised practices employed in legislative drafting. "Substitution" has to be distinguished from "supersession" or a mere repeal of an existing provision."*

*14. Ordinarily wherever the word "substitute' or ''substitution' is used by the legislature, it has the effect of deleting the old provision and make the new provision operative. The process of substitution consists of two steps: first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place. The rule is that when a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself, into the earlier, then the earlier Act must thereafter be read and construed as if the altered words had been written into the earlier Act with pen and ink and the old words scored out so that thereafter there is no need to refer to the amending Act at all. No doubt, in certain situations, the Court having regard to the purport and object sought to be achieved by the Legislature may construe the word "substitution" as an "amendment" having a prospective effect. Therefore, we do not think that it is a universal rule that the word ''substitution' necessarily or always connotes two severable steps, that is to say, one of repeal and another of a fresh enactment even if it implies two steps. However, the aforesaid general meaning is to be given effect to, unless it is found that legislature intended otherwise. Insofar as present case is concerned, as discussed hereinafter, the legislative intent was also to give effect to the amended provision even in respect of those incumbents who were in service as on September 01, 2016."*

21. Reference has also been made to another decision of the Supreme Court in ***PTC India Limited Vs. Central Electricity Regulatory Commissioner, (2010) 4 SCC 603,*** wherein again it was observed as below:

*"... Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision. Substitution is a combination of repeal and fresh enactment."*

22. Last, reference has been made to a decision of the Delhi High Court, applying the same principle, in **C.B. Richards Ellis**

**Mauritius Ltd. Vs. Assistant Director of Income-tax, (2012) 208 Taxman 322 (Delhi).**

23. Second, it has been submitted, the Enabling Act was enacted solely to extend the limitation under the pre-existing provisions of the Act, as they stood prior to the amendment made by the Finance Act, 2021. The later Act, i.e. the Finance Act, 2021 does not contain any saving clause as may allow the pre-existing provisions an extended life, after the enactment of the Finance Act, 2021. Thus, the pre-existing provisions cannot be pressed into service by the revenue. Reliance has been placed on a decision of the Supreme Court in **Kolhapur Canesugar Works Ltd. & Anr. Vs. Union Of India & Ors., (2000) 2 SCC 536.**

24. Third, it has been submitted, even otherwise, the Enabling Act does not, and it could not save the pre-existing Sections 147, 148 and other provisions pertaining to reassessment, nor overriding effect can arise or be given (to itself) by the Enabling Act, since on the date of enactment of the Enabling Act, the Finance Act, 2021 was not born. Therefore, it was only through the Finance Act, 2021 that the provisions of the pre-existing law may have been saved if it had been so intended by the Parliament. In absence of that saving clause, there exists no power either under Section 3(1) of the Enabling Act or any other law as may validate the issuance of the impugned Notification.

25. To validate such Notification, would be to resurrect and enforce a dead law, contrary to the statutory law in force, on the date of issuance of impugned Notification dated 27.04.2021. Clearly, that would be a legislative overreach by the delegate and therefore, ultra vires the Constitution of India. In that regard, reliance has been placed on another decision of the Supreme Court in Assam Company Ltd. & Anr. Vs. State of **Assam & Ors., (2001) 248 ITR 567 (SC).** Therein, it was held as below:

*"We will now consider the effect of Rule 5 of the State Rules. As noticed hereinabove, Rule 5 of the Rules in its proviso has in unequivocal terms empowered the State authorities in given cases to refuse to accept the computation of agricultural income made by the Central Officers after examining the books already examined by such Central Officers. The appellants contend that this provision is beyond the rule-making power under the Act, hence, is in excess of the power delegated under the State Act. They also contend that assuming that such rule-making power has entrusted the delegation under Section 50 of the State Act, same would be ultra vires the Constitution.*

*We see force in the above contention. A perusal of Section 50 of the Act shows that the State Government has been empowered to make such Rules as are necessary for the purpose of carrying out the purposes of the Act. We have already noticed that the object and the scheme of the Act do not contemplate the State authorities being empowered to recompute the agricultural income contrary to the computation made by the Central Officers, nor do the subjects specified in sub-sections 2(a) to (m) of Section 50 provide for making such rules empowering the State Officers to make computation of agricultural income contrary to what is computed by the Central Officers under the Central Act. We have noticed that by virtue of the provisions made by the legislature in Explanation to Section 2(a)(2), the second*

*proviso to Section 8 and Section 20D, it is clear that the State Legislature intended to adopt the computation of agricultural income made under the provisions of the Central Act. Having specifically said so in the above Sections of the Act, if the Legislature wanted to deviate from that scheme of the Act, it could have in clear terms provided for a power being vested with its officers in any given case to recompute the income keeping in mind the revenue of the State but the Legislature has not thought it necessary to do so. Even under Section 50, we do not see any provision which specifically authorises the State Government to make any such rules in the nature of the proviso to Rule 5 of the State Rules. It is an established principle that the power to make rules under an Act is derived from the enabling provision found in such Act. Therefore, it is fundamental that a delegate on whom such power is conferred has to act within the limits of the authority conferred by the Act and it cannot enlarge the scope of the Act. A delegate cannot override the Act either by exceeding the authority or by making provision which is inconsistent with the Act. Any Rule made in exercise of such delegated power has to be in consonance with the provisions of the Act, and if the Rule goes beyond what the Act contemplates, the Rule becomes in excess of the power delegated under the Act, and if it does any of the above, the Rule becomes ultra vires the Act."*

26. It is also submitted, the delegation authorized being only for the purpose of enlarging limitation under a valid law, such delegation could not be exercised to resurrect the provision of law that stood omitted from the statute book by virtue of its substitution made by the Finance Act, 2021, w.e.f. 01.04.2021.

27. Shri Agarwal has further relied on **Union of India & Ors. Vs. S. Srinivasan, (2012) 7 SCC 683,** wherein that principle was clearly recognized and applied:

*"21. At this stage, it is apposite to state about the rule making powers of a delegating authority. If a rule goes beyond the rule making power conferred by the statute, the same has to be declared ultra vires. If a rule supplants any provision for which power has not been conferred, it becomes ultra vires. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it.*

*22. In this context, we may refer with profit to the decision in General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav, (1988) 2 SCC 351, wherein it has been held as follows:-*

*"14.....Before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void."*

*23. In Additional District Magistrate (Rev.) Delhi Administration v. Shri Ram, (2000) 5 SCC 451, it has been ruled that it is a well recognised principle that the conferment of rule making power by an Act does not enable the rule making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.*

*24. In Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi, (1975) 1 SCC 421, the Constitution Bench has held that:*

*"18. ... statutory bodies cannot use the power to make rules and regulations to enlarge the powers beyond the scope intended by the legislature. Rules and regulations made by reason of the specific power conferred by the statute to make rules and regulations establish the pattern of conduct to be followed."*

*25. In State of Karnataka and another v. H. Ganesh Kamath, (1983) 2 SCC 402, it has been stated that:*

*"7. ... It is a well settled principle of interpretation of statutes that the conferment of rule making power by an Act does not enable the rule-making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto."*

28. Last, serious attempt has been made by Shri Agarwal, learned Senior Advocate to demonstrate that the decision of the learned Single Judge of the Chhattisgarh High Court in **W.P. (T) No. 149 of 2021 Palak Khatuja Vs Union of India & Ors.,** decided on 23.08.2021 does not lay down the correct law. He has taken us through that decision at length and sought to draw points of distinction. Thus, it has been submitted that the Chhattisgarh High Court has applied a wrong test to look at the notification dated 31.03.2021 issued under the Enabling Act to interpret the principal legislation made by Parliament, being the Finance Act, 2021. He would submit, the delegated legislation can never overreach any Act of principal legislature. Second, though it may be true that the Ordinance was enforced arising from the spread of the pandemic COVID-19 and the circumstances emerging therefrom, yet it would be over simplistic to ignore the provisions of, either the Enabling Act or the Finance Act, 2021 and to read and interpret the provisions of Finance Act, 2021 as inoperative in view of those circumstances. Similarly, practicality of life may never be a good guiding principle to interpret any law less so taxation laws which must be interpreted of their own language and scheme. In absence of any specific clause in Finance Act, 2021, either to save the provisions of the Enabling Act or the Notifications issued thereunder, by no interpretative process can those Notifications be given an extended run of life, beyond 31 March 2020. In fact, any notification issued under the Enabling Act, after the date 31.03.2021 is plainly in conflict with the law as enforced by the Finance Act 2021. It would remain a dead letter of law. It may also not infuse any life into a provision that stood obliterated from the statute with effect from 31.03.2021. Such an exercise made by the delegate would be plainly unconstitutional. No discretion may arise in the executive authority as may be impliedly or expressly barred by statutory law. Inasmuch as the Finance Act, 2021 does not enable the Central Government to issue any notification to reactivate the pre-existing law (which that principal legislature had substituted), the exercise made by the delegate/Central Government is *de hors* any statutory basis. It is *ultra vires.* A completely wrong principle has been applied by the Chhattisgarh High Court while relying on the decision of the Supreme Court in **A.K. Roy Etc. Vs. Union of India & Anr., AIR 1982 SC 710,** as that fact or legal situation does not exist in the present case. Last, it has been submitted that in absence of any express saving of the pre-existing laws, the presumption drawn in favour of that saving, is plainly impermissible.

29. Shri Shambhu Chopra, learned Senior Advocate has, besides adopting the submissions so advanced by Shri Rakesh Ranjan Agarwal, further submitted, the

notifications extending time as had been issued under the Ordinance and under the Enabling Act were only for the purpose of overcoming the immediate difficulty arising from the spread of the pandemic COVID-19. Both, the assessees as also the authorities under the Act were vastly inconvenienced and even obstructed. The authorities were inconvenienced in issuing and serving notices and orders as also in receiving replies and objections and conducting hearing in pending cases. Similarly, the assessees were inconvenienced. They could not have availed their rights both on account of initial lockdown enforced all over the country as also on account of the devastation caused by the spread of COVID-19 and its aftermath with which we are still dealing, today.

30. However, the only intervention offered by the Ordinance and the Enabling Act was to extend the timelines under then pre-existing provisions of the Act, with reference to pending proceedings. Those provisions of the Ordinance and the Enabling Act had been enforced much before the enforcement of the Finance Act, 2021. Therefore, the Enabling Act was not visualized to impact the provisions of the Finance Act, 2021. The Notifications that may have been issued under the Ordinance and the Enabling Act cannot be read to remedy the situation upon the enforcement of the Finance Act, 2021 which has substituted and thus repealed the pre-existing provisions of the Act and has re-enacted a new scheme for reassessment under the Act, with effect from 01.04.2021.

31. He would further submit, the provisions of Section 148 read with Section 148A as substituted by Finance Act, 2021 are completely mandatory. There can be no exception to the same. If the impugned Notifications were to be held to be valid after 01.04.2021, it would create a conflict of laws wherein solely on account of that delegated legislation, the mandatory provision of the principal legislature would have been rendered ineffective or inoperative. That may never be done. Elaborating his submissions, Shri Chopra would state, the impugned Notifications read together only provide for an extension of time, limited to the permissions contained in the Enabling Act. Since the Enabling Act does not, in any way, seek to save the pre-existing provisions of the Act, notwithstanding any change of legislation, that intent cannot be created by those Notifications.

32. Next, it has been submitted by Sri Chopra, *cassus omisus* cannot be supplied, either by the delegated legislation or by Courts. Reliance has been placed on the decision of the Supreme Court in **Parle Biscuits (P) Ltd. Vs State of Bihar And Ors. (2005) 9 SCC 669.**

33. He would further submit, the delegate cannot override the principal legislation as has been sought to be done in the present case. Reliance has been placed on two decisions of the Supreme Court in **Chairman and Managing Director, Food Corporation of India & Ors. Vs. Jagdish Balaram Bahira & Ors., (2017) 8 SCC 670** and **Dilip Kumar Ghosh & Ors. Vs Chairman & Ors., (2005) 7 SCC 567,** wherein it was clearly recognized that a Circular cannot override the Rules. In **Jagdish Balaram Bahira (supra),** it was recognized that the administrative Circulars are subservient to legislative action, and they cannot act contrary either to the Constitutional or statutory provisions.

34. Sri Chopra has further sought to draw a distinction in the decision of the Chhattisgarh High Court by submitting, a wrong presumption has been drawn in the

aforesaid decision that by issuance of the Notification under the Enabling Act, the operation of the pre-existing provision of the Act had been extended and thereby provisions of Section 148A of the Act (introduced by Finance Act 2021) and other provisions had been deferred. He would submit, there is no cannon of law as would allow such an interpretation to be made by this Court. Similarly, he would submit, the Chhattisgarh High Court has erred in reaching the conclusion that the Notifications insulated and saved (up to 30.06.2021), the pre-existing provisions pertaining to reassessment under the Act. It is his submission, unless there was a clear legislative enactment by the principal legislature - to keep in abeyance Sections 2 to 88 of the Finance Act, 2021, no such saving or insulation by whatever name called, may ever arise.

35. On facts, once the principal legislature expressed its intent otherwise by enforcing those provisions w.e.f. 01.04.2021, the situation in law arises otherwise. The pre-existing provisions no longer continue to exist. No amount of effort by the delegate could resurrect those provisions or infuse life into those dead letters of law, in absence of enabling law delegating such function to the delegate of the Parliament i.e. to the Central Government or any other authority.

36. Adopting the submissions advanced by Sri Agarwal and Sri Chopra and Sri Abhinav Mehrotra, learned counsel for the petitioner has laid stress on the fact - by virtue of Sections 4 and 3 read with Section 294 of the Act, both substantive and procedural provisions under that Act remain dynamic since the Act seeks material validation every year through enactment of the Finance Act. Income tax laws suffer a process of continuous change and there is no inherent logic or principle embedded in that law, to save a pre-existing provision despite enactment of another law in the subsequent year. Such changes are suffered, both by substantive law as also procedural law.

37. Relying on the above, he vehemently urged, the provisions of the Enabling Act together with the Notifications issued thereunder must be seen as they confronted the Act as amended by the Finance Act, 2021, on the date of issuance of the impugned re-assessment notices. Upon enforcement of the Finance Act 2021, the entire situation and dynamics of statutory law underwent a change. While the Enabling Act did not undergo any statutory amendment or change upon enactment of the Finance Act, the latter Act substituted the provisions of Sections-147, 148, 149, 150 and 151 of the Act, w.e.f. 01.04.2021. Therefore, the Enabling Act became wholly unenforceable or incapable to the proceedings that would now arise under those provisions, after 01.04.2021.

38. Sri Mehrotra, has then referred to certain provisions under Chapter II of the Enabling Act to contend, even under that Act, different dates had been specified for different provisions introduced to the Act. We have already taken note of such changes in the earlier part of this order. Referring to those, it has been submitted, there is nothing in the Enabling Act and in fact there could never be any provision in that Act as may have put in abeyance the provisions of the Finance Act, 2021, that was yet to be born/enacted. Inasmuch as the Enabling Act has not undergone any amendment as may put in abeyance, provisions of Sections 2 to 88 of the Finance Act, 2021 and there is no other law

to that effect, those provisions continue to be the only law occupying the field, w.e.f. 01.04.2021. All Notifications issued with reference to the pre-existing laws would therefore remain confined to the time limits to conclude pending proceedings, beyond the date 31.03.2021. Those Notifications may never be read to enable the executive authorities to initiate any fresh proceedings under the pre-existing laws, which proceedings did not exist on 01.04.2021.

39. Third, it is his submission, while enacting the Finance Act, 2021, the Parliament was aware of the ground realities. The Parliament was also aware of the existing statutory laws both under the Act as amended by the Finance Act, 2020 as also the Ordinance and the Enabling Act and Notifications issued thereunder. Still, it chose to enforce the new scheme for re-assessment w.e.f. 01.04.2021 without enacting a saving clause. Thereby it brought an end to the possibility of any fresh proceeding being initiated under the pre-existing/unamended reassessment provisions, after the date 01.04.2021.

40. In support of his submission, Shri Abhinav Mehrotra has referred to the decision of the Supreme Court in **Syndicate Bank v Prabha D. Naik & Anr., AIR 2001 SC 1968,** wherein it was held as below:

*"Incidentally, the legislature is supposed to be aware of the needs of the society and the existing state of law: There is no reason whatsoever to consider that the legislature was unaware of the existing situation as regards the Portuguese Civil laws with a different provision for limitation. Needless to record, the special reference has been made to the State of Jammu and Kashmir but after incorporation of the State of Goa, Daman and Diu within the Indian Territory, if there was any intent of having the local law being made prevalent there pertaining to the question of limitation only, there would have been an express exclusion and in the absence of which no contra intention can be deduced, neither any contra inference can be drawn. In any event, as noticed above, the Portuguese Civil Code, in our view, could not be read to be providing a distinct and separate period of limitation for a cause of action arising under the Indian Contract Act or under the Negotiable Instruments Act since the Civil Code ought to be read as one instrument and cause of action arising therefrom ought only to be governed thereunder and not otherwise. The entire Civil Code ought to be treated as a local law or special law including the provisions pertaining to the question of limitation for enforcement of the right arising under that particular Civil Code and not dehors the same and in this respect the observations of the High Court in Cadar Constructions [AIR 1984 Bom 258 : 1984 Mah LJ 603] that the Portuguese Civil Code could not provide for a period of limitation for a cause of action which arose outside the provisions of that Code, stands approved. A contra approach to the issue will not only yield to an absurdity but render the law of the land wholly inappropriate. There would also be repugnancy insofar as application of the Limitation Act in various States of the country is concerned: Whereas in Goa, Daman and Diu, the period of limitation will be for a much larger period than the State of Maharashtra -- the situation even conceptually cannot be sustained having due regard to the rule of law and the jurisprudential aspect of the Limitation Act."*

41. Next, it has been submitted, the Enabling Act only extended the limitation up to 31.03.2021 to do certain things only.

Thereafter, it delegated the power to cause such further extensions to do those things beyond the date 31.12.2020. Since after 31.03.2021, the provisions under which such things were required to be done underwent substitution of law, the delegate of the legislature cannot now, seek to do or allow doing such things under the law that no longer exists. To allow such a possibility to exist would be to allow the delegate to do colourably, that which it cannot directly do after the Parliament enforced Sections 2 to 88 of the Finance Act 2021, w.e.f. 01.04.2021.

42. Then, it has been submitted, once the principal legislation enacted the law as has been done in the present case, its delegate was denuded of its powers, in the field occupied by the principal legislature. Here, reliance has been placed on yet another decision of the Supreme Court in **A.B. Krishna & Ors. Vs. State of Karnataka & Ors., AIR 1998 SC 1050,** where it was observed as below:

*"The Fire Services under the State Government were created and established under the Fire Force Act, 1964 made by the State Legislature. It was in exercise of the power conferred under Section 39 of the Act that the State Government made Service Rules regulating the conditions of the Fire Services. Since the Fire Services had been specially established under an Act of the legislature and the Government, in pursuance of the power conferred upon it under that Act, has already made Service Rules, any amendment in the Karnataka Civil Services (General Recruitment) Rules, 1977 would not affect the special provisions Validly made for the Fire Services. As a matter of fact, under the scheme of Article 309 of the Constitution, once a legislature intervenes to enact a law regulating the conditions of service, the power of the Executive, including the President or the Governor, as the case may be, is totally displaced on the principle of "doctrine of occupied field". If, however, any matter is not touched by that enactment, it will be competent for the Executive to either issue executive instructions or to make a rule under Article 309 in respect of that matter."*

43. Next, it has been submitted, the Enabling Act and the Finance Act 2021 do not conflict and, therefore, there is no repugnancy between the two. Both enactments operate in different time spaces. While the Enabling Act takes care of the law as it pre-existed i.e. before the enactment of the Finance Act 2021, the latter Act operates w.e.f. 01.04.2021. Since the old provisions did not exist beyond 31.03.2021 and since the provisions of the Finance Act 2021 have not been given retrospective effect, there is no occasion for any conflict between the two laws.

44. Then, neither the Enabling Act nor any other law, delegates to the Central Government any power to create any law except with respect to time extensions under the pre-existing law. In fact, it is only if the delegated legislation enforced under the Enabling Act is applied after 01.04.2021, that a situation of conflict of laws may arise. Relying on another decision of the Supreme Court in **State of M.P. Vs. Kedia Leather & Liquor Ltd. & Ors., (2003) 7 SCC 389,** he submits, the repeal is inferred by necessary implication if the provisions of the later Act are so repugnant to the provisions of the earlier Act that the two cannot stand together. Here, though, principally, there is no repugnancy between the Act as amended by the Finance Act 2021 and the enabling

law viz-a-viz the Act as amended by the Finance Act 2021, as the later Act came into force only w.e.f. 01.04.2021 (with respect to re-assessment procedure), the repugnancy may arise only in the event, the delegated legislation under the Enabling Act is enforced after 01.04.2021. To the extent that was not the clear intent of the Enabling Act, there is no repugnancy. Relevant to our discussion, paragraph nos. 13, 14 and 15 of the aforesaid decision, are quoted as below:

*"13. There is presumption against a repeal by implication; and the reason of this rule is based on the theory that the legislature while enacting a law has complete knowledge of the existing laws on the same subject-matter, and therefore, when it does not provide a repealing provision, the intention is clear not to repeal the existing legislation. When the new Act contains a repealing section mentioning the Acts which it expressly repeals, the presumption against implied repeal of other laws is further strengthened on the principle expressio unius (persone vel rei) est exclusio alterius. (The express intention of one person or thing is the exclusion of another), as illuminatingly stated in Garnett v. Bradley [(1878) 3 AC 944 : (1874-80) All ER Rep 648 : 48 LJQB 186 : 39 LT 261 (HL)] . The continuance of the existing legislation, in the absence of an express provision of repeal being presumed, the burden to show that these has been repeal by implication lies on the party asserting the same. The presumption is, however, rebutted and a repeal is inferred by necessary implication when the provisions of the later Act are so inconsistent with or repugnant to the provisions of the earlier Act that the two cannot stand together. But, if the two can be read together and some application can be made of the words in the earlier Act, a repeal will not be inferred.*

*14. The necessary questions to be asked are:*

*(1) Whether there is direct conflict between the two provisions.*

*(2) Whether the legislature intended to lay down an exhaustive Code in respect of the subject-matter replacing the earlier law.*

*(3) Whether the two laws occupy the same field.*

*15. The doctrine of implied repeal is based on the theory that the legislature, which is presumed to know the existing law, did not intend to create any confusion by retaining conflicting provisions and, therefore, when the court applies the doctrine, it does no more than give effect to the intention of the legislature by examining the scope and the object of the two enactments and by a comparison of their provisions. The matter in each case is one of the construction and comparison of the two statutes. The court leans against implying a repeal, unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied, or that there is a necessary inconsistency in the two Acts standing together. To determine whether a later statute repeals by implication an earlier statute, it is necessary to scrutinize the terms and consider the true meaning and effect of the earlier Act. Until this is done, it is impossible to ascertain whether any inconsistency exists between the two enactments. The area of operation in the Code and the pollution laws in question are different with wholly different aims and objects, and though they alleviate nuisance, that is not of identical nature. They operate in their respective fields and there is no impediment for their existence side by side."*

45. Last, relying on another decision of the Supreme Court in **Gammon India Ltd. Vs. Special Chief Secretary & Ors., (2006) 3 SCC 354,** Sri Mehrotra would further emphasize - the first submission advanced by Sri Rakesh Ranjan Agarwal, learned counsel for the petitioners, that substitution has the twin effect of repeal and enactment by replacement.

46. Sri Ashish Bansal, learned counsel has adopted the submissions advanced by learned counsel for the petitioners, as noted above. He has further relied on the provisions of Section 151-A of the Act introduced by the Enabling Act. It reads as below:

*"151A. (1) The Central Government may make a scheme, by notification in the Official Gazette, for the purposes of assessment, reassessment or re-computation under section 147 or issuance of notice under section 148 or sanction for issue of such notice under section 151, so as to impart greater efficiency, transparency and accountability by--*

*(a) eliminating the interface between the income-tax authority and the assessee or any other person to the extent technologically feasible;*

*(b) optimising utilisation of the resources through economies of scale and functional specialisation;*

*(c) introducing a team-based assessment, reassessment, re-computation or issuance or sanction of notice with dynamic jurisdiction.*

*(2) The Central Government may, for the purpose of giving effect to the scheme made under sub-section (1), by notification in the Official Gazette, direct that any of the provisions of this Act shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification:*

*Provided that no direction shall be issued after the 31st day of March, 2022.*

*(3) Every notification issued under sub-section (1) and sub-section (2) shall, as soon as may be after the notification is issued, be laid before each House of Parliament.;"*

47. He would submit that that provision alone-pertaining to re-assessment proceedings had been introduced by the Enabling Act w.e.f. 01.11.2020. Otherwise, the Enabling Act does not touch upon re-assessment proceedings in any way. Therefore, it is preposterous on part of the revenue authorities to rely on the Enabling Act for any other purpose. Only upon assumption of jurisdiction and issuance of jurisdictional notice under Section 148 of the Act, a proceeding could come into existence under the pre-existing laws. That procedure having been transformed completely, by the Finance Act, 2021, w.e.f. 01.04.2021 before any reassessment proceeding came into existence, there survives no room to rely on the pre-existing provisions of law. Thus, it has been emphasized by Sri Bansal, the scope of Section 3(1) of the Enabling Act is limited to extend the time qua reassessment proceedings, validly initiated under the unamended Income Tax Act, up to 31.03.2021. It neither creates any jurisdiction nor it confers validity on any reassessment proceedings instituted under the unamended law, after the enforcement of the Finance Act, 2021.

48. As to the non-obstante clause appearing in the latter part of Section 3(1) of the Enabling Act, it has been vehemently urged by Shri Bansal that that non-obstante

clause cannot be given any applicability and it cannot be read into the first part of Section 3(1), which alone pertains to issuance of any notice under the Act as it existed upto 31.03.2021. A non-obstante clause has to be read in a manner as to allow for a overriding effect viz-a-viz other laws or such laws as may be specified in that non-obstante clause. However, its effect must remain confined to the intendment of such a clause. Plainly, a non-obstante clause cannot be interpreted to cause effect, not contemplated.

49. Insofar as the phrase 'notwithstanding anything contained in the specified act' appears only in the context of completion or compliance of such action, it can only be applied to a proceeding that was already in existence when that clause confronted the Act as amended by the Finance Act, 2021, on 01.04.2021. Inasmuch as, in all the petitions, re-assessment notices were issued after 01.04.2021, it can never be said that there were any proceedings of re-assessment pending on the date when the non-obstante clause may be applied. He has placed reliance on a decision of the Supreme Court in **A.G. Varadarajulu & Anr. Vs. State of T.N. & Ors., (1998) 4 SCC 231,** wherein it was held as below:

*"14. We shall now deal with the issues raised before us.*

*Do the words "notwithstanding anything in any other provision of this Act" occurring in Section 21-A override Section 3(42)?*

*15. It is true that the Tribunals below had accepted that the partition deed dated 24-9-1970 was executed after 15-2-1970 and before 2-10-1970 and was therefore a valid document. Section 21-A says that that section shall have effect "notwithstanding anything contained in Section 22 or in any other provision of this Act and in any other law for the time being in force" (emphasis supplied). The contention of the appellants is that if the partition deed is valid in view of Section 21-A, then in view of the above non obstante clause, the respondents cannot insist that the land allotted to the second appellant under the deed on 24-9-1990 shall further conform to the conditions contained in the definition of "stridhana land" in Section 3(42), namely, that she must be holding the land as on 15-2-1970.*

*16. It is well settled that while dealing with a non obstante clause under which the legislature wants to give overriding effect to a section, the court must try to find out the extent to which the legislature had intended to give one provision overriding effect over another provision. Such intention of the legislature in this behalf is to be gathered from the enacting part of the section. In Aswini Kumar Ghose v. Arabinda Bose [AIR 1952 SC 369 : 1953 SCR 1] , Patanjali Sastri, J. observed:*

*"The enacting part of a statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously;"*

*In Madhav Rao Scindia v. Union of India [(1971) 1 SCC 85] (SCC at p. 139) Hidayatullah, C.J. observed that the non obstante clause is no doubt a very potent clause intended to exclude every consideration arising from other provisions of the same statute or other statute but "for that reason alone we must determine the scope" of that provision strictly. When the section containing the said clause does not refer to any particular provisions which it intends to override but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the*

*whole Act and stands all alone by itself. "A search has, therefore, to be made with a view to determining which provision answers the description and which does not."*

50. Sri Divyanshu Agarwal, learned counsel also appearing for the petitioners has adopted the submissions advanced by other learned counsel for the petitioners, as noted above. He has further emphasized; Section 3(1) of the Enabling Act only seeks to enlarge the time limit specified in or prescribed under the Act between the dates 20.03.2020 to 31.12.2020. Thereafter, a limited delegation was made in favour of the Central Government - to extend that time line, only for the purposes of completion or compliance etc. and issuance of certain notices. However, once the law underwent a change, upon enactment of the Finance Act, 2021, whereby the re-assessment procedure was completely changed, the time extension provision is of no help to the respondents as such time extension, cannot be exercised in absence of statutory substratum to which that time extension may be applied.

51. Adopting the submissions advanced by learned counsel for the petitioners noted above, Sri Parv Agarwal, learned counsel has laid stress; besides the above, Section 148-A, first introduced by the Finance Act, 2021 lays down a mandatory procedure to be followed for the purpose of making a re-assessment. Unless that procedure is first followed, no notice under Section 148 of the Act, either under the pre-existing law or under the substituted law, could ever be issued. Therefore, in any case, the impugned notices are without jurisdiction. He has placed reliance on a Constitution Bench decision of the Supreme Court in **Memon Abdul Karim Haji Tayab, Central Cutlery Stories, Veraval Vs. Deputy Custodian-General, New Delhi & Ors., AIR 1964 SC 1256,** wherein it was observed as under:

*"It will be seen that this is mainly a procedural section replacing the earlier Section 48 and lays down that sums payable to the Government or to the Custodian can be recovered thereunder as arrears of land revenue. The section also provides that where there is any dispute as to whether any sum is payable or not to the Custodian or to the Government, the Custodian has to make an enquiry into the matter and give the person raising the dispute an opportunity of being heard and thereafter decide the question. Further, the section makes the decision of the Custodian final subject to any appeal or revision under the Act and not open to question by any court or any other authority. Lastly the section provides that the sum shall be deemed to be payable to the Custodian notwithstanding that its recovery is barred by the Indian Limitation Act or any other law for the time being in force relating to limitation of action. Sub-sections (1) and (2) are clearly procedural and would apply to all cases which have to be investigated in accordance therewith after October 22, 1956, even though the claim may have arisen before the amended section was inserted in the Act. It is well settled that procedural amendments to a law apply, in the absence of anything to the contrary, retrospectively in the sense that they apply to all actions after the date they come into force even though the actions may have begun earlier or the claim on which the action may be based may be of an anterior date. Therefore, when the Assistant Custodian issued notice to the appellant on January 22, 1958 claiming the amount*

*from him, the recovery could be dealt with under sub-section (1) and (2) of the amended Section 48, as they are merely procedural provisions. But it is urged on behalf of the appellant that sub-section (1) in terms does not apply to the present case, and if so, sub-section (2) would also not apply. The argument is that under sub-section (1) it is only any sum payable to the Government or to the Custodian in respect of any evacuee property which can be recovered as arrears of land revenue."*

52. Sri Salil Kapoor alongwith Sri Anuj Srivastava and Ms. Saumya Singh, learned counsel for the petitioners, besides adopting the submissions noted above, laid great stress that the provisions of Sections 2 to 88 of the Finance Act, 2021 came into force w.e.f. 01.04.2021 and they completely replaced the pre-existing law. He further emphasized, different dates were prescribed by the Finance Act, 2021 for enforcement of different provisions. Thus, Sections 2 to 88 of that Act were enforced with effect from 01.04.2021 by virtue of the clear stipulation made in Section 1(2)(a) of that Act and different stipulations were made for enforcement of other provisions. By way of example, it has been stated that Section 54 of Finance Act, 2021 enforced the provisions of Section 194Q, with effect from 01.07.2021. Similarly, Section 56 of the Finance Act, 2021 introduced and enforced the proviso to Section 206 AA, with effect from 01.07.2021. Again, by Section 57 of the Finance Act, 2021, Section 206 AB was introduced and enforced with effect from 01.07.2021. Thus, it has been submitted, the legislature was conscious of the realities and in its own wisdom, the Parliament chose to substitute the provisions of Sections 147, 148, 149, 150 and introduced Section 148-A of the Act, with effect from 01.04.2021. That having been done without saving the pre-existing provisions and without any legislative intent expressed either under the Finance Act, 2021 or the Enabling Act to preserve any part of the pre-existing provisions for the purpose of assumption of jurisdiction and initiation of reassessment proceedings, for any of the previous years, no reassessment proceedings could be initiated under Section 148 of the Act after 01.04.2021 by taking resort to the pre-existing and now omitted provisions, pertaining to reassessment.

53. Other learned counsel for the petitioners have adopted the aforesaid submissions, noted above.

54. Shri Shashi Prakash Singh, learned Additional Solicitor General of India, appearing for the Union of India as also the CBDT and learned counsel for the revenue, have submitted, the Ordinance was promulgated, occasioned solely by the circumstances arising from the spread of the pandemic COVID-19. The extension of limitation granted or, the strict rule of limitation relaxed by the Ordinance was for the benefit of the assessees as also the statutory authorities. These extensions were granted by way of legislative acceptance of the hard realities obtaining from the spread of the pandemic COVID-19, which largely disabled normal human activity and prevented statutory authorities from discharging their statutory obligations in accordance with law and obstructed and/or prevented the assessees from making compliances and pursing their rights.

55. Relying on the decision of the Supreme Court in **Union of India & Ors. Vs. Exide Industries Limited & Anr., (2020) 5 SCC 274,** it has been vehemently

urged, the constitutional validity of a law may be challenged on only two grounds - either, it may be shown that there was legislative incompetence in enacting the law or that the law impinges on any of the fundamental rights enshrined in Part III of the Constitution of India. He would further submit, there always exists a presumption in favour of the constitutionality of the law and that no enacted law may be struck down on a simple reasoning of it being arbitrary or unreasonable. Strict application of that rule must be ensured while dealing with taxation legislation. Thus, he has placed reliance on paragraphs 15 and 16 of the aforesaid report, which read as below:

*"15. The approach of the Court in testing the constitutional validity of a provision is well settled and the fundamental concern of the Court is to inspect the existence of enacting power and once such power is found to be present, the next examination is to ascertain whether the enacted provision impinges upon any right enshrined in Part III of the Constitution. Broadly speaking, the process of examining validity of a duly enacted provision, as envisaged under Article 13 of the Constitution, is premised on these two steps. No doubt, the second test of infringement of Part III is a deeper test undertaken in light of settled constitutional principles. In State of Madhya Pradesh vs. Rakesh Kohli & Anr. (2012) 6 SCC 312, this Court observed thus:*

*"17. This Court has repeatedly stated that legislative enactment can be struck down by Court only on two grounds, namely (i) that the appropriate legislature does not have competence to make the law, and (ii) that it does not take away or abridge any of the fundamental rights enumerated in Part III of the Constitution or any other constitutional provisions...." (emphasis supplied) The above exposition has been quoted by this Court with approval in a catena of other cases including Bhanumati & Ors. vs. State of Uttar Pradesh & Ors. (2010) 12 SCC 1, State of Andhra Pradesh & Ors. vs. McDowell & Co. (1996) 3 SCC 709 and Kuldip Nayar & Ors. vs. Union of India & Ors.(2006) 7 SCC 1, to state a few.*

*16. In furtherance of the twofold approach stated above, the Court, in Rakesh Kohli (supra) also called for a prudent approach to the following principleswhile examining the validity of statutes on taxability: (SCC p.327, para 32)*

*"32. While dealing with constitutional validity of a taxation law enacted by Parliament or State Legislature, the court must have regard to the following principles:*

*(i) there is always presumption in favour of constitutionality of a law made by Parliament or a State Legislature,*

*(ii) no enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found,*

*(iii) the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence,*

*(iv) hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law, and*

*(v) in the field of taxation, the legislature enjoys greater latitude for classification....." (emphasis supplied)"*

56. It has been further submitted, no ground has been raised in any of the petitions to test the validity of the law and,

in fact, no such ground exists. The Enabling Act had become necessary to be enacted, considering the hardships arising from the spread of the pandemic COVID-19, affecting both the assessees as also the statutory authorities and their functioning. Once limitation had been extended in favour of the assessee, to submit replies and to make other compliances, correspondingly, extension of time was granted to the statutory authorities to initiate, amongst others, reassessment proceedings, beyond the normal limitation of time.

57. Placing further reliance on the aforesaid decision of the Supreme Court, the learned ASGI would submit, Section 3(1) of the Enabling Act contains a non-obstante clause which clearly overrides any period of limitation or any disability arising from such period of limitation as may have been prescribed under the Act. That non-obstante clause has an overriding effect against all other provisions of general application, and it cannot be controlled or overridden, unless specifically permitted. Since the petitioners have been unable to show any provision of law as may restrict the operation of such non-obstante clause, the writ petition must fail. In that regard, paragraph 21 of the decision in ***Union of India & Ors. Vs. Exide Industries Limited & Anr. (supra),*** is quoted below:

*"21. Section 43-B bears heading "certain deductions to be only on actual payment". It opens with a non obstante clause. As per settled principles of interpretation, a non obstante clause assumes an overriding character against any other provision of general application. It declares that within the sphere allotted to it by the Parliament, it shall not be controlled or overridden by any other provision unless specifically provided for. Out of the allowable deductions, the legislature consciously earmarked certain deductions from time to time and included them in the ambit of Section 43-B so as to subject such deductions to conditionality of actual payment. Such conditionality may have the inevitable effect of being different from the theme of mercantile system of accounting on accrual of liability basis qua the specific head of deduction covered therein and not to other heads. But that is a matter for the legislature and its wisdom in doing so."*

58. Relying further on the aforesaid decision, the learned ASGI would also submit, if any ambiguity may exist or may be perceived on account of enforcement of the Finance Act, 2021 it must be examined, and the law may be interpreted by applying the mischief rule. As noted above, the mischief being the unforeseen and difficult circumstances arising from spread of pandemic COVID-19, the Enabling Act only sought to remedy the same. Examined in that light, the extension of limitation to issue a reassessment notice under the Act, is incidental to the mischief addressed.

59. Unless free play is given to Section 3(1) of the Enabling Act read with the Notifications issued thereunder, a wholly lop-sided situation would arise whereby the assessee would remain saved from adverse consequences despite non-compliance shown but the statutory authorities would be hand-tied and restrained from taking any corrective action, solely on account of *force majeure*. In that regard, reliance has been placed on paragraph 26 of the decision in **Union of India & Ors. Vs. Exide Industries Limited & Anr. (supra),** which is quoted below:

*"26. Be it noted that the interpretation of a statute cannot be unrelated to the nature of the statute. In line with other clauses under Section 43-B, clause (f) was enacted to remedy a particular mischief and the concerns of public good, employees' welfare and prevention of fraud upon Revenue is writ large in the said clause. In our view, such statutes are to be viewed through the prism of the mischief they seek to suppress, that is, the Heydon's case, (1584) 3 Co Rep 7a: 76 ER 637, principle. In Crawford Statutory Construction, it has been gainfully delineated that "an enactment designed to prevent fraud upon the Revenue is more properly a statute against fraud rather than a taxing statute, and hence should receive a liberal construction in the government's favour."*

60. Applying the above principle, it has been further submitted, the time limitation existing under the Act had been extended under the Ordinance as also the Enabling Act, much prior to the introduction of the Finance Act, 2021. It is only that extension which was given one final push by the impugned Notification dated 27.04.2021 as it became necessary on account of the spread of the second wave of the pandemic COVID-19. It has further been submitted that no further extension has been granted beyond 30 June 2021. Therefore, the mischief that existed stands addressed and remedied, and no prejudice has been caused to the petitioners who were otherwise liable to suffer initiation of reassessment proceedings.

61. Then, it has been submitted, Explanation to Clause A(a) of Notification No. 20 of 2021 dated 31.03.2021 and Explanation to Clause A(b) of Notification No. 38 dated 27.04.2021 are only clarificatory. Even if those Explanations were to be ignored, by virtue of the clear language of Section 3(1) of the Enabling Act, the time limits specified under the Act (prior to is amendment by Finance Act, 2021), stood extended by the Parliament, in cases where such limitations were expiring after 20th March 2020 and upto 31st December 2020, upto 31st December 2020. It is only with respect to such extension that a power was delegated on the Central Government to grant further extension/s. Therefore, the Explanations referred to above do not create any new law and they do not, in any way, offend the existing law. Hence, the argument; the delegated power has been exercised in excess of the delegation made, is plainly erroneous and unfounded.

62. Last, reliance has been placed on a recent decision of the Supreme Court in **Ramesh Kymal Vs. Siemens Gamesa Renewable Power Private Limited, (2021) 3 SCC 224,** wherein, according to learned ASGI, in similar facts, the Supreme Court has read a similar amendment made to the Insolvency and Bankruptcy Code 2016 to enlarge the limitation, as unexceptionally applicable, to all cases.

63. Having heard learned counsel for the parties and having perused the record, we find that the thrust of the submissions advanced by learned counsel for the petitioners, are:

(i) By substituting the provisions of the Act by means of the Finance Act, 2021 with effect from 01.04.2021, the old provisions were omitted from the statute book and replaced by fresh provisions with effect from 01.04.2021. Relying on the principle - substitution omits and thus obliterates the pre-existing provision, it has

been further submitted, in absence of any saving clause shown to exist either under the Ordinance or the Enabling Act or the Finance Act 2021, there exists no presumption in favour of the old provision continuing to operate for any purpose, beyond 31.03.2021.

(ii) The Act is a dynamic enactment that sustains through enactment of the Finance Act every year. Therefore, on 1st April every year, it is the Act as amended by the Finance Act, for that year which is applied. In the present case, it is the Act as amended by the Finance Act 2021, that confronted the Enabling Act as was pre-existing. In absence of any legislative intent expressed either under the Finance Act, 2021 or under the Enabling Act, to preserve any part of the pre-existing Act, plainly, reference to provisions of Sections 147 and 148 of the Act and the words 'assessment' and 'reassessment' appearing in the Notifications issued under the Enabling Act may be read to be indicating only at proceedings already commenced prior to 01.04.2021, under the Act (before amendment by the Finance Act, 2021). The delegated action performed under the Enabling Act cannot, itself create an overriding effect in favour of the Enabling Act.

(iii) The Enabling Act read with its Notifications does not validate the initiation of any proceeding that may otherwise be incompetent under the law. That law only affects the time limitation to conduct or conclude any proceeding that may have been or may be validly instituted under the Act, whether prior to or after its amendment by Finance Act, 2021. Insofar as, Section 1(2)(a) unequivocally enforced Sections 2 to 88 of the Finance Act, 2021, w.e.f. 01.04.2021, there can be no dispute if any valid proceeding could be initiated under the pre-existing Section 148 read with Section 147, after 01.04.2021. In support thereof other submission also appear to exist - based upon the enactment of Section 148A (w.e.f. 01.04.2021).

(iv) The delegation made could be exercised within the four corners of the principal legislation and not to overreach it. Insofar as the Enabling Act does not delegate any power to legislate - with respect to enforceability of any provision of the Finance Act, 2021 and those provisions (Sections 2 to 88) had come into force, on their own, on 01.04.2021, any exercise of the delegate under the Enabling Act, to defeat the plain enforcement of that law would be wholly unconstitutional.

(v) It also appears to be the submission of learned counsel for the petitioners that the Parliament being aware of all realities, both as to the fact situation and the laws that were existing, it had consciously enacted the Enabling Act, to extend certain time limitations and to enforce only a partial change to the reassessment procedure, by enacting section 151-A to the Act. It then enacted the Finance Act, 2021 to change the substantive and procedural law governing the reassessment proceedings. That having been done, together with introduction of section 148-A to the Act, legislative field stood occupied, leaving the delegate with no room to manipulate the law except as to the time lines with respect to proceedings that may have been initiated under the Act (both prior to and after enforcement of the Finance Act, 2021). To bolster their submission, learned counsel for the petitioners also rely on the principle - the delegated legislation can never defeat the principal legislation.

(vi) Last, it has also been asserted, the non-obstante clause created under section 3(1) of the Enabling Act must be read in the context and for the purpose

or intent for which it is created. It cannot be given a wider meaning or application as may defeat the other laws.

64. As to the first line of reasoning applied by the learned counsel for the petitioner, as noted above, there can be no exception to the principle - an Act of legislative substitution is a composite act. Thereby, the legislature chooses to put in place another or, replace an existing provision of law. It involves simultaneous omission and re-enactment. By its very nature, once a new provision has been put in place of a pre-existing provision, the earlier provision cannot survive, except for things done or already undertaken to be done or things expressly saved to be done. In absence of any express saving clause and, since no reassessment proceeding had been initiated prior to the Act of legislative substitution, the second aspect of the matter does not require any further examination.

65. Therefore, other things apart, undeniably, on 01.04.2021, by virtue of plain/unexcepted effect of Section 1(2)(a) of the Finance Act, 2021, the provisions of Sections 147, 148, 149, 151 (as those provisions existed upto 31.03.2021), stood substituted, along with a new provision enacted by way of Section 148A of that Act. In absence of any saving clause, to save the pre-existing (and now substituted) provisions, the revenue authorities could only initiate reassessment proceeding on or after 01.04.2021, in accordance with the substituted law and not the pre-existing laws.

66. It is equally true that the Enabling Act that was pre-existing, had been enforced prior to enforcement of the Finance Act, 2021. It confronted the Act as amended by Finance Act, 2021, as it came into existence on 01.04.2021. In the Enabling Act and the Finance Act, 2021, there is absence, both of any express provision in itself or to delegate the function - to save applicability of the provisions of sections 147, 148, 149 or 151 of the Act, as they existed up to 31.03.2021. Plainly, the Enabling Act is an enactment to extend timelines only. Consequently, it flows from the above - 01.04.2021 onwards, all references to issuance of notice contained in the Enabling Act must be read as reference to the substituted provisions only. Equally there is no difficulty in applying the pre-existing provisions to pending proceedings. Looked in that manner, the laws are harmonized.

67. It may also be not forgotten, a reassessment proceeding is not just another proceeding emanating from a simple show cause notice. Both, under the pre-existing law as also under the law enforced from 01.04.2021, that proceeding must arise only upon jurisdiction being validly assumed by the assessing authority. Till such time jurisdiction is validly assumed by assessing authority - evidenced by issuance of the jurisdictional notice under Section 148, no re-assessment proceeding may ever be said to be pending before the assessing authority. The admission of the revenue authorities that all re-assessment notices involved in this batch of writ petitions had been issued after the enforcement date 01.04.2021, is tell-tale and critical. As a fact, no jurisdiction had been assumed by the assessing authority against any of the petitioners, under the unamended law. Hence, no time extension could ever be made under section 3(1) of the Enabling Act, read with the Notifications issued thereunder.

68. The submission of the learned Additional Solicitor General of India that the provision of Section 3(1) of the Enabling Act gave an overriding effect to that Act and therefore saved the provisions

as existed under the unamended law, also cannot be accepted. That saving could arise only if jurisdiction had been validly assumed before the date 01.04.2021. In the first place Section 3(1) of the Enabling Act does not speak of saving any provision of law. It only speaks of saving or protecting certain proceedings from being hit by the rule of limitation. That provision also does not speak of saving any proceeding from any law that may be enacted by the Parliament, in future. For both reasons, the submission advanced by learned Additional Solicitor General of India is unacceptable.

69. Even otherwise the word 'notwithstanding' creating the non obstante clause, does not govern the entire scope of Section 3(1) of the Enabling Act. It is confined to and may be employed only with reference to the second part of Section 3(1) of the Enabling Act i.e. to protect proceedings already under way. There is nothing in the language of that provision to admit a wider or sweeping application to be given to that clause - to serve a purpose not contemplated under that provision and the enactment, wherein it appears.

70. The upshot of the above reasoning is, the Enabling Act only protected certain proceedings that may have become time barred on 20.03.2020, upto the date 30.06.2021. Correspondingly, by delegated legislation incorporated by the Central Government, it may extend that time limit. That time limit alone stood extended upto 30 June, 2021. We also note, the learned Additional Solicitor General of India may not be entirely correct in stating that no extension of time was granted beyond 30.06.2021. Vide Notification No. 3814 dated 17.09.2021, issued under section 3(1) of the Enabling Act, further extension of time has been granted till 31.03.2022. In absence of any specific delegation made, to allow the delegate of the Parliament, to indefinitely extend such limitation, would be to allow the validity of an enacted law i.e. the Finance Act, 2021 to be defeated by a purely colourable exercise of power, by the delegate of the Parliament.

71. Here, it may also be clarified, Section 3(1) of the Enabling Act does not itself speak of reassessment proceeding or of Section 147 or Section 148 of the Act as it existed prior to 01.04.2021. It only provides a general relaxation of limitation granted on account of general hardship existing upon the spread of pandemic COVID -19. After enforcement of the Finance Act, 2021, it applies to the substituted provisions and not the pre-existing provisions.

72. Reference to reassessment proceedings with respect to pre-existing and now substituted provisions of Sections 147 and 148 of the Act has been introduced only by the later Notifications issued under the Act. Therefore, the validity of those provisions is also required to be examined. We have concluded as above, that the provisions of Sections 147, 148, 148A, 149, 150 and 151 substituted the old/pre-existing provisions of the Act w.e.f. 01.04.2021. We have further concluded, in absence of any proceeding of reassessment having been initiated prior to the date 01.04.2021, it is the amended law alone that would apply. We do not see how the delegate i.e. Central Government or the CBDT could have issued the Notifications, plainly to over reach the principal legislation. Unless harmonized as above, those Notifications would remain invalid.

73. Unless specifically enabled under any law and unless that burden had been

discharged by the respondents, we are unable to accept the further submission advanced by the learned Additional Solicitor General of India that practicality dictates that the reassessment proceedings be protected. Practicality, if any, may lead to legislation. Once the matter reaches Court, it is the legislation and its language, and the interpretation offered to that language as may primarily be decisive to govern the outcome of the proceeding. To read practicality into enacted law is dangerous. Also, it would involve legislation by the Court, an idea and exercise we carefully tread away from.

74. Similarly, the mischief rule has limited application in the present case. Only in case of any doubt existing as to which of the two interpretations may apply or to clear a doubt as to the true interpretation of a provision, the Court may look at the mischief rule to find the correct law. However, where plain legislative action exists, as in the present case (whereunder the Parliament has substituted the old provisions regarding reassessment with new provisions w.e.f. 01.04.2021), the mischief rule has no application.

75. As we see there is no conflict in the application and enforcement of the Enabling Act and the Finance Act, 2021. Juxtaposed, if the Finance Act, 2021 had not made the substitution to the reassessment procedure, the revenue authorities would have been within their rights to claim extension of time, under the Enabling Act. However, upon that sweeping amendment made the Parliament, by necessary implication or implied force, it limited the applicability of the Enabling Act and the power to grant time extensions thereunder, to only such reassessment proceedings as had been initiated till 31.03.2021. Consequently, the impugned Notifications have no applicability to the reassessment proceedings initiated from 01.04.2021 onwards.

76. Upon the Finance Act 2021 enforced w.e.f. 1.4.2021 without any saving of the provisions substituted, there is no room to reach a conclusion as to conflict of laws. It was for the assessing authority to act according to the law as existed on and after 1.4.2021. If the rule of limitation permitted, it could initiate, reassessment proceedings in accordance with the new law, after making adequate compliance of the same. That not done, the reassessment proceedings initiated against the petitioners are without jurisdiction.

77. Insofar as the decision of the Supreme Court in the case of **Ramesh Kymal Vs. Siemens Gamesa Renewable Power Private Limited (supra)** is concerned, we opine, the same is wholly distinguishable. Therein The Insolvency and Bankruptcy Code 2016 was amended by the Parliament and a new Section 10A, was introduced, apparently again on account of the difficulties arising from the spread of pandemic COVID-19. That Section reads as under:

*"10A. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified2in this behalf:*

*Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of*

*a corporate debtor for the said default occurring during the said period.*

*Explanation. - For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.]"*

78. Plainly, in that case, the earlier provisions were not substituted rather they continued to exist. The parliamentary intervention by introducing Section 10A of that Act only provided - no proceeding be instituted for any default arising after 21.3.2020, for a period of six months or such period not exceeding one year, as may be notified. Thus, in that case, by virtue of amendment made, delegated power created, could be exercised to relax the otherwise stringent provisions of the Act, in cases, wherein difficulties arose from the spread of the pandemic COVID-19. Thus, that ratio is plainly distinguishable.

79. As to the decision of the Chhattisgarh High Court, with all respect, we are unable to persuade ourselves to that view. According to us, it would be incorrect to look at the delegation legislation i.e. Notification dated 31.03.2021 issued under the Enabling Act, to interpret the principal legislation made by Parliament, being the Finance Act, 2021. A delegated legislation can never overreach any Act of the principal legislature. Second, it would be over simplistic to ignore the provisions of, either the Enabling Act or the Finance Act, 2021 and to read and interpret the provisions of Finance Act, 2021 as inoperative in view of the fact circumstances arising from the spread of the pandemic COVID-19. Practicality of life de hors statutory provisions, may never be a good guiding principle to interpret any taxation law. In absence of any specific clause in Finance Act, 2021, either to save the provisions of the Enabling Act or the Notifications issued thereunder, by no interpretative process can those Notifications be given an extended run of life, beyond 31 March 2020. They may also not infuse any life into a provision that stood obliterated from the statute with effect from 31.03.2021. Inasmuch as the Finance Act, 2021 does not enable the Central Government to issue any notification to reactivate the pre-existing law (which that principal legislature had substituted), the exercise made by the delegate/Central Government would be de hors any statutory basis. In absence of any express saving of the pre-existing laws, the presumption drawn in favour of that saving, is plainly impermissible. Also, no presumption exists that by Notification issued under the Enabling Act, the operation of the pre-existing provision of the Act had been extended and thereby provisions of Section 148A of the Act (introduced by Finance Act 2021) and other provisions had been deferred. Such Notifications did not insulate or save, the pre-existing provisions pertaining to reassessment under the Act.

80. In view of the above, all the writ petitions must succeed and are **allowed**. It is declared that the Ordinance, the Enabling Act and Sections 2 to 88 of the Finance Act 2021, as enforced w.e.f. 01.04.2021, are not conflicted. Insofar as the Explanation appended to Clause A(a), A(b), and the impugned Notifications dated 31.03.2021 and 27.04.2021 (respectively) are concerned, we declare that the said Explanations must be read, as applicable to reassessment proceedings as may have been in existence on 31.03.2021 i.e. before the substitution of Sections 147, 148, 148A, 149, 151 & 151A of the Act. Consequently,

the reassessment notices in all the writ petitions are quashed. It is left open to the respective assessing authorities to initiate reassessment proceedings in accordance with the provisions of the Act as amended by Finance Act, 2021, after making all compliances, as required by law.

81. Accordingly, reassessment notice issued to the present petitioner dated 09.04.2021 for A.Y. 2017-18 is quashed.

82. All writ petitions are **allowed.** No order as to costs."

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**(2021)10ILR A899**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 29.10.2021**

**BEFORE**

**THE HON'BLE VIVEK CHAUDHARY, J**

Misc. Single No. 29505 of 2017

**General Manager Telecom & Anr. ...Petitioners**
**Versus**
**Vishram & Anr. ...Respondents**

**Counsel for the Petitioners:**
Rajeev Kumar Sinha

**Counsel for the Respondents:**
P.R. Gupta, Jai Priya Swapnil, Pushpila Bisht

**Industrial Disputes Act, 1947 - regularization of service - Management accepted respondent workman to be a regular employee - competent authority of the management passed order regularizing services of the respondent workman and directed its subordinates to act accordingly - Held - Industrial Tribunal has not directed for regularization of services - Respondent workman's services were already regularized but the ministerial actions, were not being taken and the effect of the award is that the same would be taken - relief granted in the award would be covered by the Section 2(k) - order passed by the Tribunal grants substantial justice - Court declined to interfere with the same (Para 12)**

**Dismissed.** (E-5)

**List of Cases cited:**

1. Secretary, St. of Karmataka & ors. Vs Uma Devi & ors. [(2004) 4 SCC 1]

2. Management, Asstt. Salt Commissioner Vs Secretary, Central Salt Mazdoor Union [(2008) 11 SCC 278]

3. Maharaja Chintamani Saran Nath Shahdeo Vs St. of Bihar & ors.

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Present writ petition is filed by the petitioner employer challenging the award of the Central Government Industrial Tribunal Cum Labour Court, Lucknow dated 13.06.2017 published on 31.07.2017. By the said award the Tribunal has decided the reference in favour of the respondent workman. The award is passed on the following reference:-

*"WHETHER THE DEMAND OF THE NORTHERN RAILWAY EMPLOYEES UNION FROM THE MANAGEMENT OF GENERAL MANAGER, TELECOM, BSNL, LUCKNOW FOR REGULARIZATION OF SERVICES OF SRI VISHRAM S/O SRI DINANATH FROM THE YEARS 1992-93, IS LEGAL AND JUSTIFIED?' WHAT RELIEF THE WORKMAN IS ENTITLED TO?'*

2. I have heard counsels for parties and perused the record with their assistance.

3. Learned counsel for the petitioner employer submits that the Tribunal could not have directed for regularization of services of the respondent workman as the respondent workman has no right to claim regularization in view of the judgment passed in case of ***'Secretary, State of Karmataka and Others Vs. Uma Devi and Others';*** reported in ***[(2004) 4 SCC 1].*** He further submits that even otherwise it is beyond the jurisdiction of Industrial Tribunal to give an award with regard to regularization of services.

4. On the other hand, opposing the same, learned counsel for respondent workman submits that the Industrial Tribunal has not actually granted regularization to respondent workman but has only recognized the orders dated 13.02.2003 and 10.10.2003 passed by the management itself by which the respondent workman was already regularized. The Tribunal has only reflected upon the negligence of the officers of the petitioner employer for not implementing the orders already taken way back.

5. Facts of the case are that respondent workman was engaged as a daily wager in the year 1991. He was dis-engaged in the year 1992 against which he raised an industrial dispute and succeeded by an award dated 27.07.2005. Thereafter, he raised a claim for being regularized in services. His application for regularization was considered along with other entitled persons by the management. He relies upon number of letters of the management issued from time to time, including the letter dated 13.02.2003 and letter dated 10.10.2003 issued by the corporate office of B.S.N.L. addressed to CGM, BSNL, Lucknow regarding regularization of left out casual labourers. The Tribunal has given its award on the basis of letter dated 10.10.2003. The letter dated 10.10.2003 reads:-

*"This office has further scrutinized the detailed information sent by your office for remaining cases and further 17 (Seventeen) TSMs/CLs (Sr. No. 6, 7, 11, 12, 118 and 127 to 138) have been found to be eligible for regularization at this stage. 3 cases (Sl. No. 50, 66 and 122) are under consideration for being CGA appointment. For the remaining 26 cases some additional information is required for processing the cases further.*

*2. Accordingly, approval of the Competent Authority is hereby conveyed for following:-*

*(i) (GM, U.P. (East) Telecom Circle is further authorized to create upto 17 (Seventeen) numbers of post of RM to regularize the eligible TSMs/CLs. If required after adjusting all the vacant post of RM in the Circle. The circle's ceiling limit will stand enhanced to this extent. These regularized employees will be BSNL, employees.*

*(ii) CGM is also authorized to grant age relaxation as required in individual cases for the purpose of regularization as per rules."*

6. The Tribunal found that the name of the respondent workman appeared at Sl. No. 17, i.e., he was included in the 17 persons found eligible for regularization by the competent authority regarding to whom the approval of competent authority was also conveyed by letter dated 10.10.2003. This letter and fact that name of petitioner is in the list of regularized employees is not disputed in the writ petition or during course of arguments by the petitioner employer. In fact the entire writ petition is silent with regard to letter dated 10.10.2003. Thus, it is accepted by the

management that way back in October, 2003 the respondent workman was found entitled to and was regularized in services. Only consequential steps were to be taken by officers sub-ordinate to the competent authority. Since, consequential steps were not taken, industrial dispute was raised and the present reference was made.

7. In the given facts and circumstances of the case, I do not find any force in the submission of the petitioner employer. The judgment of Uma Devi case (supra) is on the issue that the casual or daily wage employees do not have any right to claim regularization. In the present case, the management as per its' policy has already passed an order finding the respondent workman to be covered by the policy of regularization and the competent authority has already regularized respondent workman along with other entitled persons. The competent authority has even issued directions that the age relaxation be granted and circle ceiling limit for adjusting respondent workman and other similar employees be also enhanced to the said extent. Therefore, it is wrong to say that the respondent workman has claimed any regularization. In the given facts his claim is only to give effect to the order of regularization already passed by the competent authority by providing him benefits. The non-denial of letter dated 10.10.2003, either before the Tribunal or before this Court itself shows that there is no dispute with regard to the fact that the competent authority has already regularized the services of respondent workman. The sub-ordinate officers were only required to take ministerial steps to give effect to the said order of the competent authority. Thus, there is no force in this submission of statement of learned counsel for petitioner employer.

8. The next submission of counsel for petitioner employer is that even otherwise under the Industrial Disputes Act, 1947, the Tribunal does not have jurisdiction to grant relief of regularization. He submits that the word 'regularization' is nowhere defined under the Industrial Disputes Act, 1947. He further submits that Section 2(A) only covers the field in respect of dismissal, discharge, retrenchment and termination but it is silent about regularization. Similarly Section 7(A) read with II and III schedule also cannot grant any relief with regard to regularization. Reliance is placed upon the judgment passed in case of ***Management, Assistant Salt Commissioner Vs. Secretary, Central Salt Mazdoor Union,*** reported in ***[(2008) 11 SCC 278]***.

9. I do not find any force in this submission of learned counsel for petitioner employer also. As already held above, the Industrial Tribunal has not directed for regularization of services of the respondent workman. Respondent workman's services were already regularized but the ministerial actions, on the basis of the order of regularization passed by the competent authority, were not being taken and the effect of the award is that the same would be taken. Therefore, the relief granted in the award would be covered by the Section 2(k) of Industrial Disputes Act, 1947 wherein industrial dispute defined as:-

*"industrial dispute" means any dispute or difference between employers and employees, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."*

10. The relief granted is with regard to employment and the treatment of the

employer or the conditions of the labourer or the workman. The benefits of order passed by the competent authority which were to be granted to the respondent workman are would now be granted under the award of the Industrial Tribunal.

11. Even otherwise, presuming for the sake of argument that the Industrial Tribunal lacks jurisdiction to pass an award in the present matter, still, this Court exercising its power under writ jurisdiction would not set aside the award. The reason for the same is that setting aside of the award, even on ground of lack of jurisdiction, would revive an illegal situation, where though respondent workman is having an order of regularization in his favour, but, is denied the benefit of the same. The law in this regard is well settled by the following judgments:-

*"(i) Gadde Venkateswara Rao v. Government of Andhra Pradesh & Ors., AIR 1966 SC 828;*

*(ii) Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar & Ors., AIR 1999 SC 3609*

*(iii) Mallikarjuna Mudhagal Nagappa & Ors. v. State of Karnataka & Ors., AIR 2000 SC 2976;*

*(iv) Chandra Singh v. State of Rajasthan, AIR 2003 SC 2889;*

*(v) State of Uttaranchal & Anr. v. Ajit Singh Bhola & Anr., (2004) 6 SCC 800)."*

Suffice would be to quote from the judgment passed in case of ***'Maharaja Chintamani Saran Nath Shahdeo Vs. State of Bihar and Others';*** reported in [(1999) 8 SCC 16]. In paragraph-13 to 15, the Court held that:-

*"13. In Gadde Venkateswara Rao v. Government of Andhra Pradesh and Others, AIR (1966) SC 828:[1966] 2 SCR 172 this Court considered the action of the State Government under Andhra Pradesh Panchayats Samithis and Zilla Parishads Act, 1959 and came to the conclusion that the Government had no power under Section 72 of the Act to review an order made under Section 62 of the Act but refused to interfere with the orders of the High Court on the ground that if High Court had quashed the said order, it would have restored an illegal order and, therefore, the High Court rightly refused to exercise its extraordinary jurisdictional power.*

*14. In Mohammad Swalleh and Others v. IIIrd Addl. District Judge, Meerut and Another, AIR (1988) SC 94:[1988] 1 SCR 841, similar view was also expressed by this Court. In that case the order passed by the Prescribed Authority under U.P. (Temporary) Control of Rent and Eviction Act, 1947 was set aside by the District Judge in appeal though the appeal did not lie. The High Court came to the finding that the order of the Prescribed Authority was invalid and improper but the District Judge had no power to sit in appeal. The High Court did not interfere with the Orders of the District Judge. The order of the High Court was affirmed by this Court on the ground that though technically the appellant had a point regarding the jurisdiction of the District Judge but the order of the Prescribed Authority itself being bad, refusal of the High Court to exercise powers under Article 226 no exception can be taken.*

*15. Therefore, in view of the above ratio laid down by this Court, we hold that even if the Member of Board of Revenue had no power to issue direction for giving notice for refund of the excess amount paid, no exception can be taken to the said order if it is found that legally the*

*appellant was paid excess compensation under the Act."*

12. In the present case, the management has accepted respondent workman to be a regular employee and competent authority of the management has passed order regularizing services of the respondent workman and directed its sub-ordinates to act accordingly. For more than a decade the sub-ordinate officers did not act upon the same. There is no reason placed before this Court for failure to comply with the orders of the competent authority. Therefore, order passed by the Tribunal grants substantial justice and this Court is not inclined to interfere with the same.

13. Thus, there is no force in the writ petition and the same is ***dismissed.***

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**(2021)10ILR A903**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 26.10.2021**

**BEFORE**

**THE HON'BLE VIVEK CHAUDHARY, J.**

Misc. Single No. 18588 of 2020

**Bappa Sri Narain Vocational Institute ...Petitioner**

**Versus**

**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Lalta Prasad Misra, Prafulla Tiwari

**Counsel for the Respondents:**
C.S.C., Savitra Vardhan Singh

**Civil Law - Vocational Institution - Starting new subjects by existing Vocational Institute in existence before 21.10.2005 - As per G.O. dated 21.10.2005 & 22.12.2016 - for starting new courses, along with the proposal for the new course, the applicant college in existence since prior to Government Order dated 21.10.2005, is required to submit its' no objection certificate along with an affidavit that the land available with the college since its establishment is still available with it and the new course would be run on the said land only - thus association in a new subject can be granted to a colleges which are existing since prior to 21.10.2005, even where land is neither owned by the parent body nor by the managing institution colleges & they are not required to submit any documents with regard to land along with their proposal for new courses - Held - petitioner institution running since 1954 and on the same land new course of B.Com was started from the year 2008 with temporary association - Held - the petitioner institution is covered by the Government Order dated 22.12.2016.**

**Allowed.** (E-5)

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard Dr. L.P. Mishra, Assisted by Sri Prafulla Tiwari, learned counsel for petitioner, Sri Savitra Vardhan Singh, learned counsel for respondent Lucknow University and Mr. Pankaj Khare, learned Additional Chief Standing Counsel for the State.

2. Present writ petition is filed by the Bappa Sri Narain Vocational Institute for quashing of the order dated 05.08.2020 passed by the Registrar of Lucknow University imposing penalty of Rs.1,00,000/- (One Lakh) upon the petitioner institution and condition no. 1 of order dated 10.09.2020 also by Registrar of Lucknow University providing that temporary association of the Bappa Sri Narain Vocational Institute (hereinafter

referred to as "petitioner institution') is being extended as a last opportunity and the institution shall get a spot inspection conducted within three months and a report shall be submitted by 31.12.2020 or its recognition for the Session 2021-2022 shall be automatically barred. Further, mandamus is also sought to declare that the petitioner institution be declared as permanent associate college of the University.

3. The facts of the case are that petitioner no.1 is a society running number of educational institutions. Initially the municipal area of the Lucknow city was governed by Lucknow Improvement Trust (hereinafter referred to as "Trust'). For the purposes of development of education in the city of Lucknow, the trust executed a permanent lease deed dated 05.10.1933, w.e.f. 01.04.1931, in favour of Pt. Jai Narayan Mishra, the then Secretary and Manager of Kanya Kubj Inter College Lucknow. The title area of the land was 31 Bigha, 8 Biswa and 17 Biswansi sitatuated at Cantonment Road, Lucknow. The said Kanya Kubj College was one of the Colleges being run by the petitioner society. The factum of lease was also later duly recognized by the Lucknow Development Authority by its letter dated 26.09.2009. Pt. Jai Narayan Mishra, popularly known as "Kaka Ji' and Shri Narayan Mishra, popularly known as "Bappa Ji' were real brothers. In order to provide education, they established number of educational institutions on the said lease land, which are duly recognized, affiliated and existing till date. Petitioner institution was initially known as Bappa Sri Narain Degree College, an associate college of Lucknow University recognized in the year 1954. Later the college was upgraded to the post graduate level and named Bappa Sri Narain Vocational Post Graduate College an associate college of Lucknow University recognized in the year 1995-96. For the purposes of granting association for certain subjects and for similar other purposes it was found necessary that area over which the petitioner institution was initially established be separately earmarked and was so done.

4. So far as the present dispute is concerned, petitioner institution was initially established as a degree college in the year 1954 and the Executive Council of Lucknow University, in its meeting dated 14.05.1954, took a decision to grant it recognition as an associate college, to run its courses of Bachelor of Arts. In the year 1962 the College was also granted recognition for Bachelor of Science. In the year 1968 additional subjects for both B.A. and B.Sc. classes were permitted. The dispute started with the Government Order dated 21.10.2005, whereby the State Government laid down the standards for opening of new degree colleges and recognition and association for additional subjects/courses at graduated and post graduate level in the existing colleges. Paragraph 2(छ) and 2(ज) of the Government Order dated 21.10.2005 reads as under:-

*(छ) किसी नये पाठ्यक्रम को प्रारम्भ करने हेतु अनापत्ति प्रदान किये जाने के प्रस्ताव के समय सम्बन्धित/ट्रस्ट निकास के नाम भूमि अनिवार्य रूप से होगी। राजस्व अधिकारी के रूप में खतौनी तहसीलदार द्वारा सत्यापित होगी तथा प्रस्ताव के साथ खतौनी की मूल प्रति शासन को संदर्भित की जायेगी।*

*(ज) मानकानुसार अपेक्षित भूमि प्रस्तावित महाविद्यालय के नाम राजस्व अभिलेखें*

*में विधितः अन्तरित होने पर ही सम्बद्धता के प्रस्ताव पर विचार किया जायेगा। पैतृक संस्था अपने नाम की भूमि को 30 वर्ष के पट्टे पर महाविद्यालय को विधितः अन्तरित कर सकती है किन्तु 30 वर्ष से कम के पट्टे को मान्य नहीं किया जायेगा।*

5. Thus, the said Government Order dated 21.10.2005 required that for starting of new courses, at the time of issuance of grant of no objection certificate, the concerned trust/body shall have land in its own name. The Tehsildar as a Revenue Officer shall verify the revenue record and along with proposal the original revenue record shall be forwarded to the State Government. As per the prescriptions, the land proposal shall be considered only after the proposed land is legally transferred in the name of proposed institution in the revenue records. The parent body having the land in its name may lease the same for a period of 30 years in the name of the institution but a lease for less than 30 years would not be recognized.

6. The petitioner institution also took a decision to start B.Com course and applied for recognition of the said additional course. The State Government vide its letter dated 09.04.2008 granted a no objection certificate/Clearance to the petitioner institution for starting B.Com course under the self finance scheme. The Executive Council of Lucknow University in its meeting dated 30.08.2008, after considering the report of the panel inspector and clearance granted by the State Government, granted temporary association to the petitioner institution for the academic session 2009-10 for its B.Com. course also. The said decision of the Executive Council was communicated to the Principal of the institution by letter of the Registrar of Lucknow University dated 29.12.2008. From the Academic Session 2010-11 up to the Academic Session 2018-19 every year the said temporary association was duly extended.

7. Looking into the fact that large number of old institutions were running since long on the basis of earlier settled rights and title of different nature with regard to their land, and difficulty being suffered by them from the strict prescription made by Government Order dated 21.10.2005, the State Government issued another Government order dated 22.12.2016 modifying/substituting some of the conditions of the earlier issued Government Order dated 21.10.2005. The said substitution also included the condition 2(छ) and 2(ज) and after amendment new condition 2(छ) and 2(ज) of Government Order dated 21.10.2005 read as follows:-

*"(छ) किसी नये पाठ्यक्रम को प्रारम्भ करने हेतु अनापत्ति प्रदान किये जाने के प्रस्ताव पर भूमि से सम्बन्धित अभिलेख की आवश्कता नही होगी। नये पाठ्यक्रम के प्रस्ताव के साथ आवेदक को महाविद्यालय प्रारम्भ करने हेतु प्राप्त अनापति प्रमाण पत्र के साथ इस आशय का शपथ संलग्न करना होगा कि महाविद्यालय प्रारम्भ करते समय उपलब्ध भूमि वर्तमान में उपलब्ध है, और उसी भूमि पर नया पाठ्यक्रम संचालित किया जायेगा।*

*(ज) मानकानुसार अपेक्षित भूमि प्रस्तावित महाविद्यालय के नाम राजस्व अभिलेखों में विधितः अन्तरित होने पर ही सम्बद्धता के प्रस्ताव पर विचार किया जायेगा। पैत्रिक संख्या अपने नाम की भूमि को 30 वर्ष के पट्टे पर महाविद्यालय को विधितः अन्तरित कर सकती है किन्तु 30 वर्ष से कम के पट्टे को मान्य नही किया जायेगा। यह प्राविधान शासनादेश*

*दिनांक 21-10-2005 के पूर्व से संचालित महाविद्यालयो में नये पाठ्यक्रमों की सम्बद्धता के प्रस्ताव पर लागू नहीं होगा।"*

8. The amendment made by Government Order dated 22.12.2016 now provided that for starting new courses, existing colleges are not required to submit the land related documents. The institutions are only required to submit a no objection certificate, with a declaration on an affidavit that the land available at the time of starting of the institution is still available with the institution and the new course shall be run on the said land only. Condition 2(ज) specifically provided that the conditions with regard to 30 years lease in favour of the institution would not be applicable with regard to the recognition and association of new courses to be run by the institutions already in existence since before coming into force of the Government Order dated 21.10.2005.

9. When petitioner institution applied for extension of association for its' B.Com course, which was due to expire after Academic Session 2018-19, a letter dated 18.03.2018 was issued by the University to the petitioner institution intimating it that a committee has been constituted for inspection of the institution for submitting its report for grant of permanent association. The said committee conducted an inspection and submitted its report dated 22.06.2018 making its recommendation in favour of the petitioner institution. The said committee, in its recommendations, also specifically stated that petitioner institution is an old institution running since 1954. It further noted the status of the land and also that petitioner institution is covered by the Government Order dated 22.12.2016.

10. By letter dated 07.09.2019 the Registrar of the Lucknow University sought clarification from the State Government on the issue, as to whether, in view of the Government Order dated 22.12.2016, association in a new subject can be granted to a college where land is neither owned by the parent body nor by the managing institution. On 08.08.2019 a letter was sent by the University to the petitioner institution also, informing it that University has sought clarification from the State Government. Ignoring the said clarification sought by the University from the State Government, by impugned order dated 05.08.2020 a penalty of Rs. 1,00,000/- (One Lakh) was imposed upon the petitioner institution for delay in getting permanent association and impugned order dated 10.09.2020 was also issued specifying that the temporary association is being extended for the last time, which are now challenged by the present writ petition.

11. Learned counsel for the petitioner submits, that, admittedly the petitioner institution is running since 1954 and on the same land new course of B.Com was started from the year 2008 with temporary association. Thus, the petitioner institution is covered by the Government Order dated 22.12.2016. In view thereof, University is required to take final decision on the inspection report submitted by its' committee. Once the decision was pending at the end of the University, after all the formalities on part of the petitioner institution were completed, neither any penalty could be imposed upon the petitioner nor any warning could be given to it.

12. The stand of the University is that since it is awaiting clarification from the State Government, it is unable to give permanent association to the petitioner institution. It is also submitted on behalf of the University that petitioner institution had not taken timely steps for its recognition, therefore, as per the decision of the Executive Council, penalty is imposed upon the institution and it is also warned to get the needful done forthwith for its permanent recognition, failing which, consequences as indicated in the impugned letter would follow.

13. Learned Standing Counsel was also asked to seek instructions from the State Government and he has placed before this Court the clarification Order dated 20.09.2021, wherein the State Government has quoted condition 2(ज) of the Government Order dated 22.12.2016, and has provided that Lucknow University is expected to decide the matter in the light of the aforesaid. Thus, the said State Government has not issued any specific clarification but has only quoted the conditions of earlier Government Order dated 22.12.2016.

14. In the said circumstances learned counsels for parties submit that now it is for this Court to interpret the provisions applicable upon the petitioner institution.

15. I have considered the submissions made by counsels for both the parties and learned Standing Counsel and perused the records referred to by them. There is no dispute that the petitioner institution is in existence since before independence. By Government Order dated 21.10.2005, the Government had put strict conditions with regard to the manner in which the ownership of the land was required to be proved, while submitting an application for opening of new colleges or for initiating new subject/classes in an existing college. The said Government Order dated 21.10.2005 was modified by the Government Order dated 22.12.2016. In the present case, the petitioner institution has applied for starting of new subjects. Therefore, present case is covered by condition 2(छ) and 2(ज) as modified by the Government Order dated 22.12.2016, which after modification provides that, along with the proposal for the new course, the applicant college in existence since prior to Government Order dated 21.10.2005, is required to submit its' no objection certificate along with an affidavit that the land available with the college since its establishment is still available with it and the new course would be run on the said land only. Condition 2(ज) also, after it was modified by the aforesaid Government Order dated 22.12.2016, provided that the new conditions would not be applicable with regard to starting of new courses in colleges existing since before 21.10.2005. Thus, condition 2(छ) and 2(ज) of Government Order dated 21.10.2005 as modified by the Government Order dated 22.12.2016 only require, that, the colleges which are existing since prior to 21.10.2005 are not required to submit any documents with regard to land along with their proposal for new courses. They are only required to submit their no objection certificate and an affidavit that the new course would be run on the land already available with the college.

16. Admittedly, petitioner institution fulfills the said modified conditions of the Government Order dated 22.12.2016. The

said fact is also noted by the Inspecting Committee by its report dated 22.06.2018. Thus, the University was required to decide the application of the petitioners' college as per the Government Order dated 22.12.2016. The University instead of deciding the same had referred the matter to the State Government on 07.09.2019. Once, the University had referred the matter to the State Government, it cannot turn back and say that there is any delay on part of the college in getting the college associated permanently within the period of four year. The college had done everything at its' end and it was for the University to take further steps. Therefore, imposition of penalty of Rs. 1,00,000/- (One Lakh) by order dated 05.08.2020 upon the college, for not doing the needful for permanent association within the period of four years, cannot stand and is set aside.

17. Similarly, the letter of the University dated 10.09.2020 by which the University has given temporary association only for the session 2020-2021 with the condition imposed that the same is being extended for the last time is incorrect. The said condition that extension is being extended for that the last time in letter dated 10.09.2020 is also set aside. The University will take a final decision on grant of permanent association to the petitioner college, in the light of above, within a period of three months.

18. In the given facts and circumstance of the case, the question as to whether the University has any right to give a temporary association or can only give a permanent association need not be gone into in the present case and the said question is left open to the decided in appropriate case.

19. With the aforesaid, the present writ petition stands ***disposed of.***

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**(2021)10ILR A908**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 01.10.2021**

**BEFORE**

**THE HON'BLE JASPREET SINGH, J.**

Misc. Single No. 20786 of 2020

**Rajendra Prasad Agrawal & Anr.**
**...Petitioners**
**Versus**
**Samarpan Varishtha Jan Parisar & Ors.**
**...Respondents**

**Counsel for the Petitioners:**
Sudeep Kumar, Avdesh Kumar Pandey, Radhika Verma

**Counsel for the Respondents:**
C.S.C., Dr. L.P. Misra, J.K. Sinha, Namit Sharma, Rohit Kumar Verma, Satyanshu Ojha

**Civil Law - Code of Civil Procedure , O.39 R.1, O.39 R.2 - Temporary injunction - grant of an interim injunction - while dealing with an application for injunction, the Court is required to be guided by the principles of prima facie case, balance of convenience and irreparable injury - when the Court is considering an application for interim injunction, it is not required to hold a mini trial - Courts should make an endeavour to test the relevant pleadings in and if it finds that there is a contestable issue which requires evidence of the parties to be decided and the balance of convenience and irreparable injury is in favour of the party seeking the injunction, then the status be preserved, as at that stage the rights of the parties are in an incohate stage - Appellate Court ought to be slow in interfering with the order**

**granting interim injunction which is discretionary (Para 58, 59)**

Trial court considering parties submissions and the pleadings on record allowed the application for temporary injunction and restrained the contesting defendants from evicting the petitioners from Room No.108 of the old age home without due process of law, till the disposal of the suit - lower Appellate Court set aside the injunction order on the ground that the trial court did not dealt with the two ingredients of balance of convenience and irreparable injury - lower Appellate Court adopted reasoning that the petitioners have daughters and brothers in Lucknow, hence it cannot be said that they do not have an alternative accommodation - It also noticed that the petitioners can take accommodation elsewhere and considering the pleadings it found that balance of convenience and irreparable injury was not in favour of the petitioners – Held - Appellate Court did not consider the issue of grant of injunction in proper perspective (Para 63, 64)

**Allowed.** (E-5)

**List of Cases cited:-**

1. Seema Arshad Zaheer & Ors. vs. Municipal Corporation of Greater Mumbai & Ors., (2006) 5 SCC 282

2. Meera Mishra Vs Satish Kumar & Ors(2019) 2 SCC 375

3. Ranjit Kaur Vs Major Harmohinder Singh & Ors (2011) 15 SCC 95

4. American Cyanamid Co. Vs Ethicon Ltd 1975 (1) All England Reporter 504

5. Wander Ltd. & Anr. vs. Antox India P. Ltd 1990 (Supp) SCC 727

6. Dalpat Kumar & Anr. vs. Prahlad Singh & Ors., (1992) 1 SCC 719

7. Gujarat Bottling Co. Ltd. & Ors. vs. Coca Cola - 17 - Co. & Ors., (1995) 5 SCC 545

8. Colgate Palmolive (India) Ltd. vs. Hindustan Lever Ltd., (1999) 7 SCC 1

9. Ram Rattan & Ors. vs. State of U.P., (1977) 1 SCC 188

10. Krishna Ram Mahale (dead) by His LRs Vs Mrs. Shobha Venkat Rao (1989) 4 SCC 131

11. Rame Gowda (dead) By LRs vs. M. Varadappa Naidu (Dead) By LRs & Anr., (2004) 1 SCC 769

12. Anand Prasad Agarwalla vs. Tarkeshwar Prasad & Ors., (2001) 5 SCC 568

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

1. The petitioners before this Court are abandoned parents, who have been forsaken by their own children and have been residing in an old age home. As if, this was not enough, the old age home is also seeking the ouster of the petitioners and it is in this backdrop that the petitioners had instituted a suit for permanent injunction before the trial court seeking an injunction to restrain the management of the old age home from dispossessing the petitioners from their room allotted to them, without due process of law.

2. An interim injunction is a striking remedy yielded by contemporary Courts. With prolific litigation in most of the Courts, interim injunction becomes a very important component of a litigation. So also in this case an application for interim injunction was allowed by the trial Court, but the decision has been reversed by the lower Appellate Court and being aggrieved, the petitioners have knocked the doors of this Court by means of the instant petition challenging the order passed by the lower Appellate Court in Misc. Civil Appeal No.7/2020 dated 20.10.2020.

3. The lower Appellate Court, while allowing the Misc. Civil Appeal No.7/2020 of the defendants/respondents No.1, 2 and 3, before this Court, has set aside the order of injunction passed by the trial Court dated 17.12.2019 in Regular Suit No.2938/2019 and

4. In order to appreciate the controversy involved in the instant petition, the relevant facts are that the petitioners, who are the plaintiffs in Regular Suit No.2938/2019 instituted a suit for permanent injunction before the Court of Civil Judge (Junior

5. The petitioners in their suit pleaded that they are bonafide and lawful occupants of Room No.108, situate in the old age home being run under the name and style of "Samarpan", of which the defendants No.2 and 3 are the Senior Management Officials.

6. It is the case of the petitioners that the said old age home is being run by Gayatri Parivar Trust after having obtained a lease from the Nagar Nigam, Lucknow, for managing and running an old age home for senior citizens having its own manual of instructions.

7. The petitioners state that they have paid a sum of Rs.75,000/- as a security and have been paying the monthly charges for which receipts have been issued by the old age home.

8. They are in settled possession of Room No.108 and some time in August, 2019, the Management started interfering in the peaceful possession and occupation of the petitioners with a view to evict the petitioners from the said room, hence, they started creating false grounds including raising questions on the behaviour of the petitioners and more particularly relating to the mental state of the petitioner No.2.

9. It has also been pleaded that since the petitioners had raised certain objections and complaints regarding running, management and upkeep of the said old age home and the difficulties being faced by the petitioners and other senior inmates, which have been ignored. Instead of correcting its management and upkeep, the old age home, vindictively, gave a notice to the petitioners regarding their behaviour and intemperate language and aggression of the petitioner No.2 and even threatened that they would be evicted from the old age home.

10. It is in this backdrop that the suit for permanent injunction was filed and an application under Order 39 Rules 1 and 2 CPC was also moved seeking ad-interim injunction to the effect that the petitioners may not be dispossessed from Room No.108, situate in the old age home, Samarpan at Adil Nagar, Lucknow, without due process of law.

11. The trial court, issued notices to the defendants of the suit, who are the respondents No.1 to 4 before this Court. The suit came to the contested by the old age home and its Senior Management Officials, who filed their objections to the application under Order 39 Rules 1 and 2 CPC and raised a defence that the allegations, as made in the plaint as well as in the application under Order 39 Rules 1 and 2 CPC, were not correct.

12. It was stated by the old age home, that the petitioners were admitted in the old age home in the year 2016 after complying with due formalities including receiving the security amount and monthly charges and

consequently were allotted Room No.108. It was also stated that right from inception, the petitioner No.2 was aggressive and used abusive language and used to pick up quarrel with the staff of the old age home as well as created an atmosphere which was not conducive for the well-being of the other inmates of the old age home.

13. It was also pleaded by the contesting respondents that initially the petitioners apologized for their behaviour and undertook to improve the same, however, with passage of time, the behaviour became worse so much so that the staff members as well as the other inmates made oral as well as written complaints against the petitioners.

14. The contesting respondents issued a notice to the petitioners dated 08.08.2018 and 29.09.2019 and in this notice it was clearly indicated that in terms of Rule 8, 9 and 19 of the Instructions Manual, the membership of the petitioners was being terminated and this may be treated as a thirty days' notice requiring the petitioners to vacate the Room No.108. This was followed by another notice dated 30.10.2019 and 22.11.2019. It was also pleaded that despite the aforesaid notices, the petitioners did not vacate.

15. An Advisory Board also constituted in terms of the grant of lease, and this matter was even placed before the said Advisory Board, which opined that a month's time be granted to the petitioners to improve their behaviour and further the petitioner No.2 may be examined by a competent psychiatrist and in case the situation does not improve, then, an appropriate decision be taken and the petitioners be asked to vacate the room in terms of Rule 21. It was thus urged that despite the aforesaid precautions, the petitioners did not vacate nor the behaviour improved rather the petitioners have instituted the suit for permanent injunction and in the aforesaid backdrop their application for injunction deserves to be dismissed.

16. The trial court by means of its order dated 17.12.2019 considering the respective submissions and the pleadings on record found that insofar as the possession of the petitioners is concerned, the same was not disputed. Their admission in the old age home was also in accordance with the Rules. Hence, there was a prima facie case. Insofar as the issue regarding mental status of the petitioner no.2 is concerned and whether they can be asked to leave are all contentious issues which can be decided at the time of trial. Also, holding that both the balance of convenience and irreparable injury was also tilted in favour of the petitioners, hence, allowed the application for temporary injunction and restrained the contesting defendants from evicting the petitioners from Room No.108 of the old age home without due process of law, till the disposal of the suit.

17. The defendants No.1, 2 and 3 of the suit preferred a Misc. Civil Appeal under Order 43 Rule 1(r) CPC before the District Judge, Lucknow which was admitted and registered as Misc. Appeal No.07/2020 and was placed before the Additional District Judge, Court No.19, Lucknow for its hearing.

18. The lower Appellate Court after hearing the parties allowed the appeal and set aside the injunction order dated 17.12.2019 and rejected the application for temporary injunction. The reasoning of the

lower Appellate Court was that even though the petitioners may have been able to make out a prima facie case, but since for the grant of injunction, the three golden principles of prima facie case, balance of convenience and irreparable injury have to co-exist and the trial court did not deal with the two ingredients of balance of convenience and irreparable injury which was re-assessed by the lower Appellate Court and found that it was not in favour of the petitioners, hence, it not only allowed the appeal but also rejected the application for temporary injunction by means of the judgment and order dated 20.10.2020. Being aggrieved, the petitioners have approached this Court assailing the appellate order.

19. Heard Shri Sudeep Kumar, learned counsel for the petitioners and Dr. L.P. Misra along with Shri Rohit Verma, learned counsel for the respondents No.1 to 3 and the State Counsel for the respondent No.5 and perused the record.

20. The precise submission of Shri Sudeep Kumar, learned counsel for the petitioners is that a relief for injunction is equitable in nature. For grant of an injunction, it is true that three golden ingredients have to exist, however, it was not disputed that the petitioners were in possession of the disputed property i.e. Room No.108 in the old age home and have been residing therein since 2016, thus, the possession therein was settled and in view of the settled possession, the petitioners could not be dispossessed without due process of law.

21. It is further urged that the trial court had categorically recorded a finding that the petitioners had been able to make out a prima facie case and even the balance of convenience was in favour of the petitioners and in case if the interim injunction is not granted, the petitioners would suffer irreparable injury. It is also urged that in cases which involves eviction, demolition of buildings and acts of such nature, once prima facie case is established for the purpose of grant of injunction, the balance of convenience and irreparable injury also automatically lies in favour of the petitioners. In support of his submissions, learned counsel for the petitioners relies upon Para-31 of the decision of the Apex Court in ***Seema Arshad Zaheer & Ors. vs. Municipal Corporation of Greater Mumbai & Ors., reported in (2006) 5 SCC 282.***

22. It is further urged by the learned counsel for the petitioners that at the time when the Court is considering an application for interim injunction, it is not required to hold a mini trial. In the instant case, the possession was admittedly with the petitioners. This proved the prima facie case which was also noticed by the trial court as well as the lower Appellate Court. Once in the given set of facts, the injunction was sought that the petitioners may not be dispossessed without due process of law, it would indicate that balance of convenience was also in favour of the petitioners as in case if the interim injunction was not given, it would be the petitioners, who would suffer greater hardship, being abandoned parents and senior citizens who would have been put on the street overnight and this would also result in an irreparable injury while all contentious matters were required to be tested in trial, where all pleas raised by the defendants could be considered on merits and in any case it would require evidence as it was the defendants who had falsely concocted a plea of mental imbalance of

the petitioner no.2 which can only be established by leading evidence and was a pure question of fact and there was no material worth its name to arrive at such a finding on the basis of the affidavits exchanged between the parties.

23. It is also urged that the petitioners had paid a sum of Rs.75,000/- at the time of admission of the petitioners in the old age home. They were medically examined and were found to be both mentally and physically fit. Thus, in the admission form, the petitioners had opted for lifetime stay and though the old age home was not entitled to take more than Rs.25,000/- as security in terms of the condition of lease granted by the Nagar Nigam, Lucknow yet they had charged a higher sum and were also paid the monthly charges but the crux of the controversy arose when the petitioners had made complaints in respect of the functioning of the old age home which was not proper as well as that the complaints and discomfort of the petitioners as well as other inmates was not being attended by the authorities and instead of sorting and fixing the same, the respondents adopted a ruse of intemperate behaviour and mental imbalance of the petitioner no.2 to evict them which was not proper and even otherwise all these issues were questions which could only be decided at the time of final disposal once the parties are permitted to lead their evidence.

24. It has also been urged by the learned counsel for the petitioners that even assuming that the lower Appellate Court was of the view that the balance of convenience and irreparable injury had not been dealt with by the trial court appropriately then it ought to have remanded the matter for a decision a fresh rather than to have rejected the application. In support of his submissions, he has relied upon a decision of the Apex Court in ***Meera Mishra vs. Satish Kumar & Ors., reported in (2019) 2 SCC 375.***

25. It is also urged that even otherwise on a bare perusal of the plaint averments, it is seen that the possession of the petitioners was admitted and the petitioners had clearly indicated that they were seeking injunction solely on the ground of their possession and that they may not be dispossessed without due process of law; hence, once their possession was settled since 2016 and apart from sending the notices, the defendants having not instituted any proceedings to lawfully evict the petitioners, thus, it was clear that in case if the petitioners were not granted the protection the respondents would evict them without adopting due process of law.

26. It is thus urged that the lower Appellate Court erred and misdirected itself from the issue at hand and committed an error manifest on the face of the record and consequently the appellate order deserves to be set aside and the injunction granted by the trial court deserves to be affirmed by this Court. In support of his submissions, learned counsel for the petitioners has relied upon the decisions of the Apex Court in ***Ranjit Kaur vs. Major Harmohinder Singh & Ors., reported in (2011) 15 SCC 95.***

27. Per contra, Dr. L.P. Mishra, learned counsel for the contesting-respondents No.1 to 3 along with Shri Rohit Verma, Advocates have submitted that there is no legal right vested with the petitioners to continue to occupy and retain the room in the old age home. It is further

submitted that at best, the status of the petitioners in the old age home was that of a licencee. The Management of the old age home reserved all rights for maintenance and upkeep of the old age home and was also responsible for well-being of its staff and other inmates.

28. It is further urged that the duty of the old age home to take care of elderly and senior citizens is not only confined to the petitioners but it extends to other inmates and residents. The Management of the old age home has never evicted any person. In case of any circumstances which are covered in Rule 8, 9 and 19 of the Instructions, then the old age home reserves the right to issue a month's notice to such inmate and ask the said inmates to leave.

29. In the instant case, the Management had received several complaints from the staff members as well as the other inmates regarding ill-behaviour of the petitioners. The behaviour was such that it fell within the category of mental imbalance. For the aforesaid purpose, the petitioner No.2 was required to undergo an examination by the doctor of the King George's Medical University, Lucknow, Psychiatric Department, who had prescribed medication for anxiety and panic attack as well as for the treatment of depression. The petitioners had interpolated the said prescription and had stated that the petitioner No.2 was not suffering from any psychiatric disorder. This was indicative of the fact that the petitioners were deliberately intending to retain the room and by adopting such sharp tactics had not approached the Court with clean hands and injunction being an equitable remedy could not be extended in favour of such litigants as the petitioners.

30. It has further been urged that though it is not disputed that the petitioners are in possession of Room No.108, but their behaviour has vitiated the congenial atmosphere of the old age home which cause discomfort to other inmates and for the said reasons, the balance of convenience was not in favour of the petitioners. It was further urged that the video recording showing the petitioner no.2 using abusive language followed by threats clearly established that the balance of convenience was not at all in favour of the petitioners and since there were other old age homes where the petitioners can conveniently shift especially where the petitioners have four children in the city of Lucknow itself, hence, they can easily shift and it has also been urged that the petitioners have not being paying the monthly charges/the electricity bill and in the given circumstances, the lower Appellate Court has not committed any error in allowing the appeal and rejecting the application for injunction and thus being findings of fact which does not suffer from any palpable error requiring the intervention of this Court under Article 227 of the Constitution of India and for the said reasons, the petition deserves to be dismissed.

31. It is further urged that the decisions relied upon by the petitioners do not apply in the present case inasmuch as once the licence of the petitioners had been cancelled in accordance with law by serving a thirty days' notice which was also admitted to the petitioners, hence, after the expiry of the said period, the petitioners did not have any right to continue as such they did not even have a prima facie case. Accordingly, in absence of any prima facie case, even the issue of balance of convenience and irreparable injury pales

into insignificance and for all the reasons the petition deserves to be dismissed.

32. Before adverting to the respective submissions, it is seen that the question of grant of injunction keeps cropping up in large number of cases and it has been considered in equal strength both by the High Courts as well as the Apex Court.

33. It will be apposite to revisit the settled legal principles and then ascertain as to whether in light of the principles so embodied therein, the order impugned passed by the lower Appellate Court requires any interference or not.

34. The law regarding grant of temporary injunction and interlocutory orders is covered by the Order 39 of the CPC. Upon perusal of Rule 1 of Order 39 CPC, it would indicate that where in any suit, it is proved by affidavit or otherwise- (i) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or (b) that the defendant threatens, or intends, to remove or dispose of the property with a view to defrauding the creditors, (c) that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit; the Court may grant an order of temporary injunction to restrain such acts.

35. It has now been well settled that before a Court grants a temporary injunction, it needs to be satisfied that a person seeking an injunction has a prima facie case in his favour and that the balance of convenience and irreparable injury also lies in his favour.

36. The word "prima facie case" apparently indicates something which at the first impression makes out a triable case. The term "prima facie case" should not be confused with the term "prima facie title" which has to be established at the trial upon permitting the parties to lead evidence. Thus, it means a substantial question which has been raised and which upon first sight needs to be investigated and decided on merits.

37. The word "balance of convenience" denotes that the Court must be satisfied that the comparative mischief and hardship which is likely to be caused to the person seeking injunction is more than the inconvenience likely to be caused to the other party by granting such injunction.

38. The word "irreparable injury" on the other hand guides the Court to be satisfied that the refusal to grant injunction would result in such injury which cannot be compensated in terms of costs or otherwise and the person seeking injunction needs to be protected from the consequences of apprehended injury.

39. The aforesaid three ingredients have been noticed by the House of Lords in the celebrated case of ***American Cyanamid Co. vs. Ethicon Ltd., reported in 1975 (1) All England Reporter 504.*** The principles regarding grant of injunction as laid down by the Lord Diplock in Cyanamid case can be summarized as under:-

*(1) The plaintiff must first satisfy the court that there is a serious issue to decide and that if the defendants were not restrained and the plaintiff won the action, damages at common law would be inadequate compensation for the plaintiff's loss.*

*(2) The court, once satisfied of these matters will then consider whether the balance of convenience lies in favour of*

*granting injunction or not, that is, whether justice would be best served by an order of injunction.*

*(3) The court does not and cannot judge the merits of the parties' respective cases and that any decision of justice will be taken in a state of uncertainty about the parties' rights.*

40. The Apex Court in ***Wander Ltd. & Anr. vs. Antox India P. Ltd., reported in 1990 (Supp) SCC 727*** had the occasion to consider the principles regarding grant of injunction and in Paragraphs 9, 13 and 14 of the report has held as under:-

*"9. Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. The object of the interlocutory injunction, it is stated*

*"...is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the ''balance of convenience' lies."*

*The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie case. The court also, in restraining a defendant from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted."*

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*"13. On a consideration of the matter, we are afraid, the appellate bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the appellate court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocination as to the quality of Antox's alleged user of the trademark on which the passing-off action is founded. We shall deal with these two separately.*

*14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or*

*refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph [(1960) 3 SCR 713 : AIR 1960 SC 1156] : (SCR 721)*

*"... These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co. v. Jhanaton [1942 AC 130] "...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case'."*

*The appellate judgment does not seem to defer to this principle."*

41. Once again, the Apex Court in ***Dalpat Kumar & Anr. vs. Prahlad Singh & Ors., reported in (1992) 1 SCC 719***, considering the provisions of Order 39 Rule 1(c) CPC in Paragraphs 4 and 5 of the said report has held as under:-

*"4. Order 39 Rule 1(c) provides that temporary injunction may be granted where, in any suit, it is proved by the affidavit or otherwise, that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing ... or dispossession of the plaintiff or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the court thinks fit until the disposal of the suit or until further orders. Pursuant to the recommendation of the Law Commission clause (c) was brought on statute by Section 86(i)(b) of the Amending Act 104 of 1976 with effect from February 1, 1977. Earlier thereto there was no express power except the inherent power under Section 151 CPC to grant ad interim injunction against dispossession. Rule 1 primarily concerned with the preservation of the property in dispute till legal rights are adjudicated. Injunction is a judicial process by which a party is required to do or to refrain from doing any particular act. It is in the nature of preventive relief to a litigant to prevent future possible injury. In other words, the court, on exercise of the power of granting ad interim injunction, is to preserve the subject matter of the suit in the status quo for the time being. It is settled law that the grant of injunction is a discretionary relief. The exercise thereof is subject to the court satisfying that (1) there is a serious disputed question to be tried in the suit and that an act, on the facts before the court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant; (2) the court's interference is necessary to protect the party from the species of injury. In other*

*words, irreparable injury or damage would ensue before the legal right would be established at trial; and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it.*

*5. Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favour which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."*

42. Again, in the case of ***Gujarat Bottling Co. Ltd. & Ors. vs. Coca Cola Co. & Ors., reported in (1995) 5 SCC 545*** noticing the English as well as earlier authorities of the Apex Court in Paragraphs 42, 43 and 47 has held as under:-

*"42. In the matter of grant of injunction, the practice in England is that where a contract is negative in nature, or contains an express negative stipulation, breach of it may be restrained by injunction and injunction is normally granted as a matter of course, even though the remedy is equitable and thus in principle a discretionary one and a defendant cannot resist an injunction simply on the ground that observance of the contract is burdensome to him and its breach would cause little or no prejudice to the plaintiff and that breach of an express negative stipulation can be restrained even though the plaintiff cannot show that the breach will cause him any loss. [See: Chitty on Contracts, 27th Edn., Vol. I, General Principles, paragraph 27-040 at p. 1310; Halsbury's Laws of England, 4th Edn., Vol. 24, paragraph 992.] In India Section 42 of the Specific Relief Act, 1963 prescribes that notwithstanding anything contained in clause (e) of Section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative*

*agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement. This is subject to the proviso that the plaintiff has not failed to perform the contract so far as it is binding on him. The Court is, however, not bound to grant an injunction in every case and an injunction to enforce a negative covenant would be refused if it would indirectly compel the employee either to idleness or to serve the employer. [See: Ehrman v. Bartholomew [(1898) 1 Ch 671 : (1895-99) All ER Rep Ext 1680] ;N.S. Golikari [(1967) 2 SCR 378 : AIR 1967 SC 1098 : (1967) 1 LLJ 740] at p. 389.]*

*43. The grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the court. While exercising the discretion the court applies the following tests -- (i) whether the plaintiff has a prima facie case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of convenience" lies. [See: Wander Ltd. v. Antox India (P) Ltd.[1990 Supp SCC 727] , (SCC at pp. 731-32.] In order to protect the defendant while granting an interlocutory injunction in his favour the court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favour at the trial."*

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*"47. In this context, it would be relevant to mention that in the instant case GBC had approached the High Court for the injunction order, granted earlier, to be vacated. Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair*

*or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39 Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad interim or temporary injunction order already granted in the pending suit or proceedings."*

43. In ***Colgate Palmolive (India) Ltd. vs. Hindustan Lever Ltd., reported in (1999) 7 SCC 1***, the Apex Court while dealing with the issue of grant of temporary injunction relied upon the earlier decisions and quoted with approved the decision of House of Lords in the case of ***American Cyanamid Co. vs. Ethicon Ltd.***, and in Paragraph 24 held as under:-

*"24. We, however, think it fit to note herein below certain specific considerations in the matter of grant of interlocutory injunction, the basic being non-expression of opinion as to the merits of the matter by the court, since the issue of grant of injunction, usually, is at the earliest possible stage so far as the time-frame is concerned. The other considerations which ought to weigh with the court hearing the application or petition for the grant of injunctions are as below:*

*(i) extent of damages being an adequate remedy;*

*(ii) protect the plaintiff's interest for violation of his rights though, however, having regard to the injury that may be suffered by the defendants by reason therefor;*

*(iii) the court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the other's;*

*(iv) no fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case -- the relief being kept flexible;*

*(v) the issue is to be looked at from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;*

*(vi) balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;*

*(vii) whether the grant or refusal of injunction will adversely affect the interest of the general public which can or cannot be compensated otherwise."*

44. In the aforesaid backdrop and the principles as summarized hereinabove, if the facts of the present in light of the submissions made by the parties are considered, it would reveal that the case set up by the petitioners is that they may not be dispossessed without due process of law.

45. Insofar as the factual narration of the facts are concerned, it is not disputed between the parties that the petitioners are in occupation of the Room No.108 in the old age home. It is also not disputed that the petitioners while being admitted in the said old age home had filled up an admission form and at the relevant time, they had been physically and mentally

examined and were found to be fit for admission. The admission form also indicates that the petitioners had opted for lifetime stay. Though it is disputed that whether the option for lifetime stay would continue to be till their natural lives or it merely grants them some rights to remain in the old age home which is different than mere casual or short stay, is a debatable question.

46. The said admission form indicates that the mental as well as physical condition of both the petitioners was sound and no abnormality was detected. It is also not disputed that the petitioners had deposited the necessary amount as security and monthly charges for which receipts were issued and have been filed before the Court, however, the issue whether the security amount of a sum of Rs.25,000/- was required to be paid by the petitioners as per the terms of the lease granted by the Nagar Nigam, Lucknow to the old age home or the old age home had charged an amount of Rs.75,000/- in excess of the amount fixed by the Nagar Nigam, Lucknow from the petitioners, is also a disputed question.

47. The record would further indicate, that the admission of the petitioners in the old age home from 2016 till 2019 was peaceful as there is no complaint within the aforesaid period, however, it is only in the month of August, 2019 onwards that there have been complaints against the petitioners. The ground taken by the defendants to seek the ouster of the petitioners is of intemperate behaviour of the petitioner No.2 as well as her mental condition, which is disputed by the plaintiffs and it is submitted that both the petitioners are mentally sound and it is nothing but a garb under which the respondents seek to oust the petitioners. Thus, this issue as well becomes a disputed question.

48. The complaints, which are said to have been made by the staff and the other inmates are also post August 2019 and since they have been disputed by the petitioners and appropriate findings can only be returned after the evidence is led in respect thereto and the only admitted fact is that the petitioners have received the notice issued by the respondents for vacating the old age home by relying upon Rules 8, 9 and 19 of the Instructions prepared for the inmates by the old age home.

49. Reliance has also been placed upon the meeting of the Advisory Board on 26.10.2019 to state that the behaviour of the petitioners was considered by the Advisory Board which is headed by a Retd. Judge of the High Court amongst other persons, wherein a decision was taken to get the petitioner No.2 examined from a psychiatrist and some time be given to them to improve their behaviour and thereafter the decision be taken. Insofar as the medical prescription which has been filed by the respondents for which it is stated that the petitioners have interpolated the same, it is urged that the petitioners were compelled to visit the Department of Psychiatry on 13.11.2018, but was not examined by Dr. Amit Arya. It is stated that the petitioner No.2 was examined by some other doctor, who on the same prescription in his own hand-writing had stated that there was no psychiatric problem. It is also urged by the petitioners that the letter dated 01.02.2020, which has been filed in the petition is not a part of the record of the trial court and apparently with a view to evict the petitioners by all means, the said document has been introduced.

50. Whether the said prescription has been interpolated or not is also a disputed question and this assumes significance for the reason that the ground of the defendants seeking ouster of the petitioners from the old age home is on the basis of the intemperate behaviour and mental imbalance of the petitioner No.2. Noticing that apart from the bare prescription, there is no conclusive or even suggestive finding of any competent doctor indicating the mental imbalance of the petitioner No.2.

51. In this view of the matter, where there are contentious issues and the primary question requiring adjudication is whether the defendants are entitled to seek ouster of the petitioners from the old age home on the ground of intemperate behaviour and mental imbalance and in absence of any cogent evidence upon which an opinion can be formed whether the mental condition of the petitioner No.2 is, as what is being stated by the respondents while on the other hand it has been specifically denied by the petitioners and rather they have attributed motive to the defendants that since the plaintiffs had made a complaint regarding improper functioning of the old age home, hence, the defendants want to oust the petitioners. Such an issue can only be decided after the parties are called upon to lead their respective evidence.

52. Thus, apparently, a prima facie case is made out where the petitioners have raised contentious issues which require adjudication and to return finding on the disputed questions, the parties are required to lead evidence.

53. It will also be relevant to notice that insofar as the possession is concerned, it is not disputed that the petitioners are in possession of Room No.108. It is also not disputed that the admission of the petitioners to the said room was with consent of the defendants and that it was not based on any misrepresentation or forcible entry.

54. There is another angle to look at the situation, as the petitioners are in possession and what they are seeking is an injunction to the effect that they may not be dispossessed without due process of law. Apart from issuing notice by the defendants, there is no material to indicate that the defendants have instituted any proceedings or have taken recourse to any proceedings in law for seeking the lawful ouster of the petitioners from the old age home.

55. In India, the Courts frown upon an act of forcible dispossession. Even the owner has to take recourse to legal methods for seeking ouster of a person. It will be worthwhile to notice the words of Justice Fazal Ali of the Apex Court in ***Ram Rattan & Ors. vs. State of U.P., reported in (1977) 1 SCC 188*** wherein it was held that a true owner has every right to dispossess or throw out a trespasser while a trespasser is in the act or process of trespassing and has not accomplished his possession, but this right is not available to the true owner if the trespasser has been successful in accomplishing his possession to the knowledge of the true owner. In such circumstances the law requires that the true owner should dispossess the trespasser by taking recourse to the remedies available under the law.

56. The Apex Court in ***Krishna Ram Mahale (dead) by His LRs vs. Mrs. Shobha Venkat Rao, reported in (1989) 4 SCC 131*** also struck a similar chord while dealing with an issue of grant of injunction.

In the said case, the issue before the Court was whether a licensee whose licence had come to an end, had any right to remain in charge of the licensed premise and whether he could seek an injunction against his unlawful dispossession. The Apex Court held as under:-

*"8. . . . It is a well-settled law in this country that where a person is in settled possession of property, even on the assumption that he had no right to remain on the property, he cannot be dispossessed by the owner of the property except by recourse to law. If any authority were needed for that proposition, we could refer to the decision of a Division Bench of this Court in Lallu Yeshwant Singh v. Rao Jagdish Singh [AIR 1968 SC 620 : (1968) 2 SCR 203,208-210] . This Court in that judgment cited with approval the well-known passage from the leading Privy Council case of Midnapur Zamindary Co. Ltd. v. Naresh Narayan Roy [AIR 1924 PC 144 : 51 IA 293, 299 : 23 ALJ 76] where it has been observed (p. 208):*

*"In India persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a court."*

*9. The proposition was also accepted by a Division Bench of this Court inRam Rattan v. State of U.P. [(1977) 1 SCC 188 : 1977 SCC (Cri) 85 : (1977) 2 SCR 232] . The Division Bench comprising of three learned Judges held that a true owner has every right to dispossess or throw out a trespasser while he is in the act or process of trespassing but this right is not available to the true owner if the trespasser has been successful in accomplishing his possession to the knowledge of the true owner. In such circumstances, the law requires that the true owner should dispossess the trespasser by taking recourse to the remedies under the law. In the present case, we may point out that there was no question of the plaintiff entering upon the premises as a tresspasser at all, as she had entered into the possession of the restaurant business and the premises where it was conducted as a licensee and in due course of law. Thus, Defendant 3 was not entitled to dispossess the plaintiff unlawfully and behind her back as has been done by him in the present case."*

57. The issue whether a person is in settled possession or not and what meaning can be ascribed to the word "settled possession" came up for consideration before the Apex Court in the case of ***Rame Gowda (dead) By LRs vs. M. Varadappa Naidu (Dead) By LRs & Anr., reported in (2004) 1 SCC 769 a***nd Justice R.C. Lahoti as his Lordship then was, speaking for the Court and noticing the jurisprudential aspect of the matter and also relying upon a decision of the Privy Council as well as other decisions of the Apex Court, in Paragraphs 5, 7 to 11 of the said report held as under:-

*"5. Salmond states in Jurisprudence (12th Edn.),*

*"few relationships are as vital to man as that of possession, and we may expect any system of law, however primitive, to provide rules for its protection.... Law must provide for the safeguarding of possession. Human nature being what it is, men are tempted to prefer their own selfish and immediate interests to the wide and long-term interests of society in general. But since an attack on a man's possession is an attack on something which*

*may be essential to him, it becomes almost tantamount to an assault on the man himself; and the possessor may well be stirred to defend himself with force. The result is violence, chaos and disorder." (at pp. 265-66)*

*"In English law possession is a good title of right against anyone who cannot show a better. A wrongful possessor has the rights of an owner with respect to all persons except earlier possessors and except the true owner himself. Many other legal systems, however, go much further than this, and treat possession as a provisional or temporary title even against the true owner himself. Even a wrongdoer, who is deprived of his possession, can recover it from any person whatever, simply on the ground of his possession. Even the true owner, who takes his own, may be forced in this way to restore it to the wrongdoer, and will not be permitted to set up his own superior title to it. He must first give up possession, and then proceed in due course of law for the recovery of the thing on the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by a judgment according to law." (Salmond, ibid., pp. 294-95)*

*"Legal remedies thus appointed for the protection of possession even against ownership are called possessory, while those available for the protection of ownership itself may be distinguished as proprietary. In the modern and medieval civil law the distinction is expressed by the contrasted terms petitorium (a proprietary suit) and possessorium (a possessory suit)." (Salmond, ibid., p. 295)"*

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*"7. The thought has prevailed incessantly, till date, the last and latest one in the chain of decisions being Ramesh Chand Ardawatiya v. Anil Panjwani [(2003) 7 SCC 350] . In between, to quote a few out of several, in Lallu Yeshwant Singh v. Rao Jagdish Singh [AIR 1968 SC 620 : (1968) 2 SCR 203] this Court has held that a landlord did commit trespass when he forcibly entered his own land in the possession of a tenant whose tenancy has expired. The Court turned down the submission that under the general law applicable to a lessor and a lessee there was no rule or principle which made it obligatory for the lessor to resort to court and obtain an order for possession before he could eject the lessee. The Court quoted with approval the law as stated by a Full Bench of the Allahabad High Court in Yar Mohd. v. Lakshmi Das [AIR 1959 All 1 : 1958 All LJ 628 (FB)] (AIR at p. 4):*

*"Law respects possession even if there is no title to support it. It will not permit any person to take the law in his own hands and to dispossess a person in actual possession without having recourse to a court. No person can be allowed to become a judge in his own cause." (AIR p. 5, para 13)*

*In the oft-quoted case of Nair Service Society Ltd. v. K.C. Alexander [AIR 1968 SC 1165 : (1968) 3 SCR 163] this Court held that a person in possession of land in assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner.When the facts disclose no title in either party, possession alone decides. The Court quoted Loft's maxim -- "Possessio contra omnes valet praeter eur cui ius sit possessionis (he that hath possession hath right against all*

*but him that hath the very right)" and said: (AIR p. 1175, para 20)*

*"A defendant in such a case must show in himself or his predecessor a valid legal title, or probably a possession prior to the plaintiff's and thus be able to raise a presumption prior in time."*

*In M.C. Chockalingam v. V. Manickavasagam [(1974) 1 SCC 48] this Court held that the law forbids forcible dispossession, even with the best of title. In Krishna Ram Mahale v. Shobha Venkat Rao [(1989) 4 SCC 131] it was held that where a person is in settled possession of property, even on the assumption that he had no right to remain on the property, he cannot be dispossessed by the owner of the property except by recourse to law. In Nagar Palika, Jind v. Jagat Singh [(1995) 3 SCC 426] this Court held that disputed questions of title are to be decided by due process of law, but the peaceful possession is to be protected from the trespasser without regard to the question of the origin of the possession. When the defendant fails in proving his title to the suit land the plaintiff can succeed in securing a decree for possession on the basis of his prior possession against the defendant who has dispossessed him. Such a suit will be founded on the averment of previous possession of the plaintiff and dispossession by the defendant.*

*8. It is thus clear that so far as the Indian law is concerned, the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injuncting even a rightful owner from using force or taking the law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with the title unless rebutted. The owner of any property may prevent even by using reasonable force a trespasser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character, or recurring, intermittent, stray or casual in nature, or has just been committed, while the rightful owner did not have enough time to have recourse to law. In the last of the cases, the possession of the trespasser, just entered into would not be called as one acquiesced to by the true owner.*

*9. It is the settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner. The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions. Illustratively, we may refer to Munshi Ram v. Delhi Admn. [AIR 1968 SC 702 : (1968) 2 SCR 455 : 1968 Cri LJ 806] , Puran Singh v. State of Punjab [(1975) 4 SCC 518 : 1975 SCC (Cri) 608] and Ram*

*Rattan v. State of U.P. [(1977) 1 SCC 188 : 1977 SCC (Cri) 85] The authorities need not be multiplied. In Munshi Ram case[AIR 1968 SC 702 : (1968) 2 SCR 455 : 1968 Cri LJ 806] it was held that no one, including the true owner, has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case unless he is evicted in the due course of law, he is entitled to defend his possession even against the rightful owner. But merely stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be settled possession, extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and reinstate himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or a possession which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force. In Puran Singh case [(1975) 4 SCC 518 : 1975 SCC (Cri) 608] the Court clarified that it is difficult to lay down any hard-and-fast rule as to when the possession of a trespasser can mature into settled possession. The "settled possession" must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of the owner or without any attempt at concealment by the trespasser. The phrase "settled possession" does not carry any special charm or magic in it; nor is it a ritualistic formula which can be confined in a straitjacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The Court laid down the following tests which may be adopted as a working rule for determining the attributes of "settled possession" (SCC p. 527, para 12):*

*(i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;*

*(ii) that the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of animus possidendi. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;*

*(iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and*

*(iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner, has no right to destroy the crop grown by the trespasser and take forcible possession.*

*10. In the cases of Munshi Ram [AIR 1968 SC 702 : (1968) 2 SCR 455 : 1968 Cri LJ 806] and Puran Singh [(1975) 4 SCC 518 : 1975 SCC (Cri) 608] the Court has approved the statement of law made in Horam v. R. [AIR 1949 All 564 : 50 Cri LJ 868] wherein a distinction was drawn between the trespasser in the*

*process of acquiring possession and the trespasser who had already accomplished or completed his possession wherein the true owner may be treated to have acquiesced in; while the former can be obstructed and turned out by the true owner even by using reasonable force, the latter may be dispossessed by the true owner only by having recourse to the due process of law for reacquiring possession over his property.*

*11. In the present case the trial court has found the plaintiff as having failed in proving his title. Nevertheless, he has been found to be in settled possession of the property. Even the defendant failed in proving his title over the disputed land so as to substantiate his entitlement to evict the plaintiff. The trial court, therefore, left the question of title open and proceeded to determine the suit on the basis of possession, protecting the established possession and restraining the attempted interference therewith. The trial court and the High Court have rightly decided the suit. It is still open to the defendant-appellant to file a suit based on his title against the plaintiff-respondent and evict the latter on the former establishing his better right to possess the property."*

58. Thus, noticing the aforesaid decisions and the settled proposition in respect of grant of an injunction which has been prefaced in the preceding paragraphs, it will be clear that while dealing with an application for injunction, the Court is required to be guided by the principles of prima facie case, balance of convenience and irreparable injury.

59. It is also to be noted that while dealing with the aforesaid three ingredients, the Court must refrain from holding a mini trial. The Courts should make an endeavour to test the relevant pleadings in light of the principles as noted above and if it finds that there is a contestable issue which requires evidence of the parties to be decided and the balance of convenience and irreparable injury is in favour of the party seeking the injunction, then the status be preserved, as at that stage the rights of the parties are in an incohate stage. The Court would require the evidence to determine the rights of the parties which can only be crystallized after trial and can enable the Court to form a definite opinion whether the plaintiff has a case strong enough to enable the Court to pass a decree in his favour and if not, then dismiss the suit.

60. As already stated above, there are contestable issues which require the evidence and merely because the defendants have issued a notice and the thirty days' notice period has expired, it does not mean that the petitioners do not have any right to contest. In case, if the injunction is not granted and the eventuality as appended occurs, then such a situation cannot be reversed or compensated either in terms of costs or otherwise.

61. In the instant case, noticing the fact that an elderly couple who have been abandoned by their own children and are at mercy of destiny and are residing and occupying a room in the old age home, if not protected against forcible dispossession, such injury cannot be compensated nor reversed, hence such injury definitely comes within the ambit of connotation of the words 'irreparable injury'.

62. So also the balance of convenience, if seen in the present

situation, would indicate that in case if the injunction is granted, the inconvenience caused to the defendants would be that the plaintiffs will continue to occupy the room and the defendants will have to seek the eviction and its objective of getting the room vacated will be merely postponed. Whereas, in case the injunction is not granted then there is likelihood of the petitioners being dispossessed, which as already noticed above, would not only cause irreparable injury but would also result in extinguishment of the rights of the petitioners and the basic purpose of filing a suit would also stand frustrated.

63. Whereas the lower Appellate Court has adopted a reasoning that the petitioners have three daughters and two brothers in Lucknow, hence it cannot be said that they do not have an alternative accommodation. It also noticed that the petitioners can take accommodation elsewhere and considering the pleadings it found that balance of convenience and irreparable injury was not in favour of the petitioners. The manner in which the lower Appellate Court has considered the issue of grant of injunction and its approach towards the issue of balance of convenience and irreparable injury is not as settled by the Apex Court and noted hereinabove first.

64. Thus, in light of the elaborate discussions and also noticing the dictum of the decisions cited by the petitioners, the Court is of the view that the Appellate Court did not consider the issue of grant of injunction in proper perspective.

65. of injunction under Order 39 Rules 1 and 2 CPC also has powers to put the parties to such terms and for such a duration of injunction as it may think in terms of sub-rule (2) of Rule 2 to Order 39 CPC, which, for ease of reference reads as under:-

*"The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit."*

66. In the aforesaid case, the anxiety as expressed by the defendants that the petitioners are not making the payment of the electricity charges and monthly charges, can be taken care of by resorting to the above mentioned provision of Order 39 Rule 2 of sub-rule (2) CPC.

67. It has also been brought to the notice of the Court that during pendency of the instant petition, the respondents had cut the electricity and had stopped providing food to the petitioners and upon an application of the petitioners, a Coordinate Bench of this Court, by means of the order dated 15.04.2021 directed the respondents to provide the petitioners with food arrangement as they were having earlier and were also directed to restore the electricity forthwith.

68. Taking a holistic view of the matter and considering the decision of the lower Appellate Court, this Court finds that the Appellate Court has deviated from consideration of the proposition for grant of injunction and has erred in reversing the judgment and order of the trial court for grant of injunction especially where the remedy of injunction was equitable in nature. In such circumstances, the Court ought to have been slow in interfering with the order which is discretionary and the discretion exercised by the trial Court was not such which could allow the Appellate

Court to intervene in the facts and circumstances as adumbrated above.

69. This Court is of the view that necessary ingredients for grant of injunction were present and though it may not have been elaborately dealt by the trial court and though it would have been sound exercise of jurisdiction and discretion if the trial Court would have considered all the three ingredients with little more clarity but nevertheless it was not required for the lower Appellate Court to enter into the material available before it in such a manner that it amounts to holding a mini trial, [see:Anand Prasad Agarwalla vs. Tarkeshwar Prasad & Ors., reported in (2001) 5 SCC 568], hence, this Court is of the view that the impugned order passed by the lower Appellate Court cannot be sustained and is accordingly set aside.

70. The order of injunction dated 07.12.2019 passed by the trial Court is restored with the condition that the petitioners shall pay the monthly charges, for their occupation inclusive of the charges for the meals and electricity, at a tentative rate of Rs.12,000/- per month for both the petitioners, payable at the end of the every month to the respondents by a cheque, for which the respondents shall issue a receipt, and the amount so paid shall be subject to the final determination made in this regard by the trial Court who shall ascertain the amount payable by the petitioners to the respondents towards room charges, electricity and for meals for the period of their stay.

71. Since, the written statement has already been filed, this Court deems it appropriate to direct the Court concerned where Regular Suit No.2938/2019 is pending to expedite the trial and conclude the same preferably within a period of one year from the date a copy of this judgment and order is placed before the Court concerned, noticing that no unnecessary adjournments is to be asked for by the parties nor to be granted by the Court to either of the parties except in exceptional circumstances. In case, if the trial Court finds that any party is misusing the liberty, it shall be within the powers of the trial Court to impose costs which is commensurate in the facts and circumstances to ensure that the time line provided by the Court is scrupulously adhered.

72. In light of the discussions hereinabove, the impugned order dated 20.10.2020 passed in Misc. Civil Appeal No.7/2020 is set aside. The order of the trial Court dated 07.09.2019 subject to the above condition in Para-70 shall stand restored. Resultantly, the petition stands allowed, however, in the facts and circumstances, there shall be no order as to costs.

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**(2021)10ILR A929**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 01.10.2021**

**BEFORE**

**THE HON'BLE RAJNISH KUMAR, J.**

Misc. Single No. 19906 of 2019

**U.P.S.R.T.C. & Anr. ...Petitioners**
**Versus**
**Sri Rizwan Nabi Siddiqui & Ors. ...Respondents**

**Counsel for the Petitioners:**
Ambika Prasad

**Counsel for the Respondents:**

C.S.C., Birendra Prasad Singh

**Industrial Disputes Act (14 of 1947) - Award - Wrongful Termination - Reinstatement with full back wages - in cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule - if the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service (Para 11)**

Enquiry against employee, conductor held without any basis & complaint - charges could not be proved by the employer-Corporation in the domestic enquiry as well as before the tribunal on opportunity given. Charged employee was forced not to work due to illegal & arbitrary action of the employer-corporation with some ulterior motive, while the employee had not denied to work-Corporation could not prove that the charged employee was gainfully employed anywhere after removal - Grant of reinstatement with back wages, proper (Para 15)

**Dismissed.** (E-5)

**List of Cases cited:**

1. H.V.P.N. Ltd & ors. Vs Bal Govind AIR 2017 SC 617

2. Smt. Kewlapati Vs U.P.Lok Sewa Adhikaran, Indira Bhawan Lko & ors. 2918 (2) ALJ 516

3. Deepali Gundu Surwase Vs Kranti Junior Adhyapak Mahavidyalaya (D.Ed) & Ors (2013) 10 SCC 324

4. Raj Kumar Vs. Director of Education & ors. (2016) 6 SCC 541

5. Marwari Balika Vidyalaya Vs. Asha Srivastava & ors. (2020) 14 SCC 449

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

1. Heard, Shri Ambika Prasad, learned counsel for the petitioners and Shri Birendra Prasad Singh, learned counsel for the opposite party no.1. Learned Standing Counsel is present for the opposite parties no.2 and 3.

2. This petition has been filed challenging the award dated 31.01.2019 passed by the Presiding Officer, Industrial Tribunal (2), U.P., Lucknow i.e. the opposite party no.3, in adjudication Case No.97 of 2015.

3. Learned counsel for the petitioners submitted that there were several charges against the opposite party no.1, which were proved in the inquiry but without considering the same the award has been passed and the opposite party no.1 has been directed to be reinstated with full back wages, which could not have been done. The full back wages could not have been allowed on the principle of 'No Work No Pay'. He relied on **H.V.P.N. Ltd and Others Versus Bal Govind; AIR 2017 Supreme Court 617 and Smt. Kewlapati Versus U.P.Lok Sewa Adhikaran, Indira Bhawan Lko and Others; 2918 (2) ALJ 516.**

4. Learned counsel for the respondent no.1 submitted that the action was taken against the opposite party no.1 without any basis or complaint with mala fide intention after the opposite party no.1 had deposited the amount collected by him. The inquiry was not conducted in accordance with law. Therefore the Tribunal had rejected the inquiry report of the respondents by means of order dated 03.08.2016 and provided opportunity to the petitioners to prove the charges on merit. Even thereafter the petitioners could not prove the charges before the Tribunal also. Therefore the

award has rightly been passed in accordance with law. There is no illegality or error in the award and full back wages have rightly been allowed in accordance with law because the opposite party no.1 was forced not to work by the action taken by the petitioners illegally and without any basis or complaint whereas the opposite party no.1 was ready and willing to work. He relied on **Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed) and Others; (2013) 10 SCC 324, Raj Kumar Vs. Director of Education and Others; (2016) 6 SCC 541 and Marwari Balika Vidyalaya Vs. Asha Srivastava and Others; (2020) 14 SCC 449.**

5. I have considered the submissions of learned counsel for the parties and perused the record.

6. The opposite party no.1 Shri Rizwan Nabi Siddiqui was employed as Conductor on temporary basis in the petitioners corporation. He was placed under suspension by means of the order dated 19.03.2004 and a charge sheet was served requiring him to submit the explanation / reply. Assistant Regional Manager (Finance) Gorakhpur was appointed as Inquiry Officer. The opposite party no.1 had submitted his reply on 01.05.2004 in which he denied all the charges and submitted that the charges have been levelled against him with mala fide intention. Thereafter an inquiry was conducted. On the the basis of which the opposite party no.1 was removed from service by means of the order dated 27.10.2006. The opposite party no.1 had filed an appeal which was dismissed by means of the order dated 17.04.2007. Thereafter he preferred a representation on 16.08.2007 to the Chief Manager, Headquarters, Lucknow which was dismissed by means of the order dated 02.04.2009. Thereafter the opposite party no.1 preferred a Writ Petition No.49049 of 2009 which was dismissed by means of the order dated 28.07.2010 on the ground of availability of alternative remedy before the Industrial Tribunal. Thereafter an application was preferred to the Conciliation Officer and the dispute was referred to the Industrial Tribunal. After filing of the written statement by the parties and considering the preliminary issues of the validity of enquiry, it was found that the inquiry is not proper and legal therefore it is vitiated and the petitioners were afforded opportunity to prove the charges on merit. But even thereafter the charges could not be proved before the tribunal. Therefore by means of the impugned award the opposite party no.1 has been directed to be reinstated with all consequential benefits. Hence the present writ petition has been filed challenging the same.

7. The order dated 03.08.2016, by means of which the inquiry held by the petitioners, was held to be vitiated, has not been challenged, therefore the inquiry held by the petitioners can not be looked into. The petitioners also could not prove the charges on merit before the tribunal. Perusal of the pleadings in the writ petition and the arguments advanced before this Court, it is apparent that the inquiry before the tribunal, in which also the charges could not be proved, has not been challenged. The impugned award has been challenged mainly on the ground that the opposite party no.1 is not entitled for back wages on the principles of "No Work No Pay'. The charges levelled against the opposite party no.1 were levelled in regard to the operation of the bus on Delhi-Sonauli route on different dates. The first charge

was in regard to 04.10.2003. The charges were to the effect that the total number of passengers and the amount has not been entered in words and the stamp has not been put on Khalilabad and Harraiya check post. The income is very less than the target. A charge has also been levelled that there is difference in colour of stamp as it is dark in middle and light in the side. The similar charges have been level for different dates i.e. 14.10.2003, 03.12.2003, 28.09.2003, 07.10.2003, 22.11.2003, 30.10.2003 and 22.10.2003.

8. The petitioners have failed to prove the charges in domestic inquiry as well as before the tribunal on opportunity given by the tribunal to prove the charges on merit. It could also not be disclosed as to what was the target of income which could not be achieved. The petitioners also could not produce any evidence or rule to show that putting of stamp on the check post was necessary. A plea was taken by the opposite party no.1 that when the bus used to pass from the Harraiya and Khalilabad check post, the check post used to close due to late night and to avoid the jam on main high way, the employees of the check post used to allow the vehicles to pass without checking. The petitioners also failed to prove by any evidence or show any rule that mentioning of the amount in numbers and words was necessary, whereas it was proved by the PW-2 that after checking at various levels the cash was deposited and no complaint was registered at the time of depositing the amount.

9. Perusal of the record also does not indicate as to how the inquiry was instituted against the petitioners and he was placed under suspension. It also could not be clarified by learned counsel for the petitioners. Therefore, it is apparent that the inquiry was instituted against the opposite party no.1 without any basis and complaint with some ulterior motive and he was removed from service on 7.10.2006 in arbitrary and illegal manner without application of mind. Therefore, this Court is of the view that the order of removal has rightly been set aside by the tribunal holding that the opposite party no.1 is entitled for reinstatement with all consequential benefits.

10. Adverting to the plea of the petitioners regarding non entitlement of full back wages on the principle of "No Work No Pay', this court finds that the inquiry was instituted against the opposite party no.1 without any basis and complaint with some ulterior motive and the charges could not be proved twice and he was not employed anywhere after removal. It was stated by the opposite party no.1 in his written statement in paragraph-14. During inquiry before the Industrial Tribunal also he has stated in his evidence and no evidence could be adduced by the petitioners or culled out in the cross-examination of the opposite party no.1 which may show that the opposite party no.1 was employed anywhere. Therefore the opposite party no.1 has rightly and in accordance with law has been held entitled for reinstatement with all consequential benefits.

11. The Hon'ble Supreme Court in the case of **Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed) and Others (Supra)**, has held that in cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule. It has been further held that if the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence

to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. The relevant paragraphs 22 and 38 are extracted below:-

*"22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments..*

*38. The propositions which can be culled out from the aforementioned judgments are:*

*i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.*

*ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.*

*iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments*

*about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.*

*iv) The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the inquiry held against the employee/workman is consistent with the rules of natural justice and / or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.*

*v) The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.*

*vi) In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works Private Li minted v. Employees of Hindustan tin Works Private Limited (supra).*

*vii) The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal (supra) that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the*

*judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.*"

12. The Hon'ble Supreme Court, in the case of **Raj Kumar Vs. Director of Education and Others (Supra)**, has held that the respondents have been unable to produce any evidence to show that he was gainfully employed during that period and therefore he is entitled to back wages and other consequential benefits in view of the law laid down by this Court in the case of Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed) and Another; (2013) 10 SCC 324.

13. The Hon'ble Supreme Court, in the case of **Marwari Balika Vidyalaya Vs. Asha Srivastava and Others (Supra),** has held that the manner in which termination had been made was clearly arbitrary and the order was illegal and void and thus back wages should follow.

14. The Hon'ble Supreme Court in the case of **H.V.P.N. Ltd and Others Versus Bal Govind (Supra),** relied by the petitioners, has denied the back wages because the respondent therein was out of service on account of his involvement in a criminal case as warranted by the service rules and the request in the notice sent by the respondent was only for the salary of the month of August, 1992. This Court also in the case of **Smt. Kewlapati Versus U.P. Lok Sewa Adhikaran, Indira Bhawan Lko and Others (Supra),** relied by learned counsel for the petitioners denied the back wages because the punishment order and the appellate order were set-aside by the tribunal on the ground that the inquiry conducted by the Inquiry Officer was in utter violence of principles of natural justice i.e. on technical ground. So as per the settled proposition of law the matter should have been remanded to the Punishing Authority but the Tribunal had reinstated the petitioner with all consequential service benefits denying the back wages. Therefore these case laws are not applicable on the facts and circumstances of the present case and of no assistance to the petitioners.

15. In view of above, this Court is of the considered opinion that there is no illegality or error in the impugned award and allowing all consequential benefits because the enquiry was held without any basis and complaint and the charges could not be proved by the petitioners in the domestic enquiry as well as before the tribunal on opportunity given. Therefore the opposite party no.1 was forced not to work due to illegal and arbitrary action of the petitioners with some ulterior motive, while he had not denied to work. The petitioners also could not prove that the opposite party no.1 was gainfully employed anywhere after removal. Therefore the writ petition has been filed on misconceived ground and lacks merit and it is liable to be dismissed.

16. The writ petition is **dismissed.** No order as to costs.

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**(2021)10ILR A935**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 23.10.2021**

**BEFORE**

**THE HON'BLE VIVEK CHAUDHARY, J.**

Misc. Single No. 72 of 1993

**Smt. Saeeda Ashraf & Anr. ...Petitioners**
**Versus**
**V A.D.J., Faizabad & Ors. ...Respondents**

**Counsel for the Petitioners:**
M.A. Siddiqui

**Counsel for the Respondents:**
C.S.C., Abhinav N. Trivedi, G.P. Tripathi, S. Mirza

**Civil Law - Practice & Procedure - Vakalatnama - Vakalatnama filed alongwith recall application signed only by the plaintiffs and not by Advocate - Revisional court held that the Advocate was not properly appointed and it is an error which cannot be corrected and, therefore, the recall application was liable to be rejected- Held - Mere defect in filing of power by not signing the same by counsel is not a defect which cannot be cured - Order passed by revisional court set aside**

**Allowed.** (E-5)

**List of Cases cited:**

1. Chheeta vs Musammat Maiko & ors. AIR 1931 Allahabad 767

2. Official Receiver, Aligarh Vs Hiralal & ors. AIR 1935 Allahabad 727

3. Mahela Salnarayanan Vs Bamnoori Bank Someshya, AIR 1957 Andhra Pradesh 172,

4. Hira Lal and Gendalal vs Bhagirathi Ram Chander & Com., AIR 1946 Bombay 174

5. Kanhaiyalal Vs Panchayati Akhada by Dharamdas 1949 ALJ 105

6. Uday Shankar Triyar Vs Ram Kalewar Prasad Singh 2006 (1) SCC 75

7. Gauri Shanker & ors. Vs 3rd ADJ, Balia & ors. 2010 (6) ALJ 270

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Present writ petition is filed by the petitioners challenging the order dated 13.11.1992 passed by the Vth Additional District Judge, Faizabad whereby the learned

2. Facts of the case are that in absence of the plaintiffs, the suit was dismissed on 30.5.1984. A restoration application was filed, which was numbered as Misc. Case No.30 of 1984. The same was also dismissed in default on 19.1.1985. On 21.1.1985, another recall application for recalling the order dated 19.1.1985 was filed which was numbered as Misc. Case No.12 of 1985. By an order dated 8.5.1987, the court below allowed the Misc. Case No.12 of 1985 and recalled the order dated 19.1.1985. Against the said order, a revision was filed. Objection raised in the revision was that Misc. Case No.12 of 1985 was not filed by the plaintiffs, but by Sri Mohd Haneef, Advocate, though he was not an advocate for the plaintiffs. Therefore, the recall application was not filed properly. The ground taken was that Sri Mohd. Haneef, Advocate had not signed the Vakalatnama for the plaintiffs. The said revision was opposed by the plaintiffs. The revisionists before the revisional court had relied upon the judgments reported in *AIR 1931 Allahabad 767, Chheeta vs Musammat Maiko and others and AIR 1935 Allahabad 727 Official Receiver, Aligarh versus Hiralal and others. The respondents in revision had relied upon the judgments reported in AIR 1957 Andhra Pradesh 172, Mahela Salnarayanan vs Bamnoori Bank Someshya, AIR 1946 Bombay 174 Hira Lal and Gendalal versus Bhagirathi Ram Chander and Company, and 1949 ALJ 105 Kanhaiyalal versus Panchayati Akhada by Dharamdas.*

3. Considering the facts and circumstances of the case, the court below held that since the Vakalatnama was signed only by the plaintiffs and not by Sri Mohd. Haneef, Advocate, therefore, Sri Mohd. Haneef, Advocate was not properly

appointed as a lawyer and thus, it is an error which cannot be corrected and, therefore, the application was liable to be rejected. Against the said order, present writ petition is filed.

4. Learned counsel for the petitioners, in support of his submissions, has placed reliance upon a judgment of the Supreme Court in the case of ***Uday Shankar Triyar versus Ram Kalewar Prasad Singh 2006 (1) SCC 75.*** In the said case, against eviction order, two persons, namely, A.N. Singh and DCC (District Congress Committee) filed Eviction Appeal No.4 of 1998. During pendency of appeal, first appellant A.N. Singh died and his legal heirs did not come on record. However, one Ram Kalewar Prasad Singh claiming to be the working President of DCC filed an application to delete the name of the first appellant and to show DCC as sole appellant. The said application for substitution was opposed by the landlord. On hearing the said substitution application, the learned Additional District Judge by order dated 27.4.2002 dismissed the appeal. He found that even though A.N. Singh and DCC were arrayed as appellant nos.1 and 2 respectively, Vakalatnama accompanying the memorandum of appeal was signed only by A.N. Singh and no Vakalatnama was filed on behalf of DCC. Therefore, the court held that appeal on behalf of appellant no.2-DCC is nullity in the eyes of law and is liable to be dismissed and is dismissed, as no legal heirs have come by substitution in place of appellant no.1. The said order was challenged before the high court and the high court had taken a different view and had found the appeal maintainable. Thereafter, the matter went to Supreme Court and the Supreme Court in the said facts and circumstances of the case, held as follows:

*"15. It is, thus, now well settled that any defect in signing the memorandum of appeal or any defect in the authority of the person signing the memorandum of appeal, or the omission to file the vakalatnama executed by the appellant, along with the appeal, will not invalidate the memorandum of appeal, if such omission or defect is not deliberate and the signing of the memorandum of appeal or the presentation thereof before the appellate court was with the knowledge and authority of the appellant. Such omission or defect being one relatable to procedure, can subsequently be corrected. It is the duty of the office to verify whether the memorandum of appeal was signed by the appellant or his authorised agent or pleader holding appropriate vakalatnama. If the office does not point out such defect and the appeal is accepted and proceeded with, it cannot be rejected at the hearing of the appeal merely by reason of such defect, without giving an opportunity to the appellant to rectify it. The requirement that the appeal should be signed by the appellant or his pleader (duly authorised by a vakalatnama executed by the appellant) is, no doubt, mandatory. But it does not mean that non-compliance should result in automatic rejection of the appeal without giving an opportunity to the appellant to rectify the defect. If and when the defect is noticed or pointed out, the court should, either on an application by the appellant or suo motu, permit the appellant to rectify the defect by either signing the memorandum of appeal or by furnishing the vakalatnama. It should also be kept in view that if the pleader signing the memorandum of appeal has appeared for the party in the trial court, then he need not present a fresh vakalatnama along with the memorandum of appeal, as the vakalatnama in his favour filed in the trial*

*court will be sufficient authority to sign and present the memorandum of appeal having regard to Rule 4(2) of Order 3 CPC, read with Explanation (c) thereto. In such an event, a mere memo referring to the authority given to him in the trial court may be sufficient. However, filing a fresh vakalatnama with the memo of appeal will always be convenient to facilitate the processing of the appeal by the office.*

*16. .....*

*17. Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a handmaiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well-recognised exceptions to this principle are:*

*(i) where the statute prescribing the procedure, also prescribes specifically the consequence of non-compliance;*

*(ii) where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;*

*(iii) where the non-compliance or violation is proved to be deliberate or mischievous;*

*(iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court;*

*(v) in case of memorandum of appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant.*

*18. .....*

*19. .....*

*20. There is yet another reason to hold that the appeal by DCC against the eviction decree was validly filed. DCC was represented by Shri Bindeshwar Prasad Singh and his colleagues in the trial court. The same counsel filed the appeal. The vakalatnama granted by DCC in favour of the said counsel in the trial court was sufficient authorisation to the said counsel to file the appeal having regard to Order 3 Rule 4(2) CPC read with Explanation (c), even without a separate vakalatnama for the appeal."*

5. Further, reliance is placed by learned counsel for the petitioners upon a judgment of this Court in the case of ***Gauri Shanker and others versus 3rd ADJ, Balia and others 2010 (6) ALJ 270.*** In the said case this Court has relied upon the judgment of the Supreme Court in the case of ***Uday Shankar Triyar*** (supra) and held as under:

*"15. So far as the objections of the learned Counsel for the respondent with regard to the maintainability of restoration application in derogation of Order III, Rule 4(1) of C.P.C. is concerned, it is well settled that the procedural law are not always mandatory and sometime it is directory and curative in nature in view of the decisions of the Apex Court in Kailash v. Nanhku [2005 (29) AIC 95 (SC) : 2005 (4) SCC 480.] , Rani Kusum (Smt.) v. Kanchan Devi (Smt.) [2005 (99) RD 616 (SC) : 2005 (33) AIC 85 (SC).] , Dove*

*Investments (P) Ltd. v. Gujrat Industrial Investment Corporation Ltd. [2006 (39) AIC 102 (SC) : 2006 (2) SCC 619.] .*

*16. Here in this case it cannot be disputed that for appearing in the Court of law on behalf of a party proper written authorisation is necessary but under certain circumstances Counsel can put in appearance on oral instructions also provided he is authorised for the said purpose and at later stage bring on record a signed authorization i.e., vakalatnama executed in his/her favour.*

*17. Learned Counsel for the respondent may be right in his submissions that no one should be heard for a party unless he is duly authorised through signed vakalatnama to appear before the Court. However in this case although the Counsel appeared but on oral instruction of the applicant and not through signed vakalatnama, now the signed vakalatname has been executed in favour of Vivek Kumar Singh and filed in the Court therefore in my view the defect if any stood cured."*

6. Learned counsel for the respondents has strongly relied upon the case laws referred to by the revisional court and has opposed this petition.

7. I have considered the submissions made by learned counsel for the parties and perused the record.

8. The Supreme Court as well as this Court by its judgment passed in the year 2006 and 2010 have specifically held that mere defect in filing of power by not signing the same by counsel is not a defect which cannot be cured.

9. In view of the law settled by the Supreme Court in the case of ***Uday Shankar Triyar*** (supra) and this Court in the case of ***Gauri Shanker*** (supra), the view taken by the revisional court is no more sustainable in law.

10. In view thereof, the judgment and order dated 13.11.1992 passed by the revisional court is set aside. The order of the court below dated 8.5.1987, by which restoration in Misc Case No.12 of 1985 was allowed, is maintained. Since it might be one of the oldest suits before the court concerned, it shall proceed with the same expeditiously, without granting any unnecessary adjournments including on the ground of strike of lawyers.

11. With the aforesaid, present writ petition stands ***allowed.***

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**(2021)10ILR A939**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 23.10.2021**

**BEFORE**

**THE HON'BLE RAMESH SINHA, J.**
**THE HON'BLE MRS. SAROJ YADAV, J.**

Misc. Single No. 4177 of 2012

**Trilochan Kaur ...Petitioner**
**Versus**
**Manpreet Kaur & Anr. ...Respondents**

**Counsel for the Petitioner:**
Shri Niteesh Kumar

**Counsel for the Respondents:**
Shri SN. Tilhari, Additional Government Advocate, Sri Sumit K. Srivastava

**A. Criminal Law - Protection of Women From Domestic Violence Act,2005 – Section 12 - Limitation for moving**

**application u/s 12 - Limitation Act, 1963 - legislature in its wisdom has provided no limitation for moving application u/s 12 - rigour of provisions of the Limitation Act, 1963 shall not apply and the application so moved cannot be turned down in limine on the ground of limitation alone - best approach would be to apply the criteria of within *'reasonable period'* and what will be the 'reasonable period', will be decided on the basis of 'factual matrix' of each case, keeping in mind the principle of 'equity, justice and good conscience" (Para 90)**

**B. Criminal Law - Criminal Procedure Code, 1973 – Section 468 - Complaint - Applicability of limitation under S.468 of Criminal Procedure Code - Held - Section 468 Cr.P.C. has no applicability for filing complaint under Section 12 of the D.V.Act. (Par 56)**

**Reference Answered.** (E-5)

**List of Cases cited:-**

1. Akhilesh Kumar Singh & anr. Vs St. of U.P. & anr. Criminal Revision No.885 of 2015

2. Santosh Kumar Yadav & 5 ors. Vs St. of U.P. & anr. : 2015 (9 ) ADJ 400

3. Inderjit Singh Grewal Vs St. of Pun. & anr. (2011) 12 SCC 588

4. Krishna Bhattacharjee Vs Sarathi Choudhury & anr. (2016) 2 SCC 705

5. Manish Kumar Soni and others Vs St. of Bihar & anr. 2016 SCC Online Pat 8220

6. Rajendran Vs Meenakshi R.C.No.333 of 2011 dt 27.6.2018 Madras HC

7. Kunapareddy VsKunapareddy Swarna Kumari & anr. (2016) 11 SCC 774.

8. V.D. Bhanot Vs Savita Bhanot (2012) 3 SCC 183

9. Preetam Singh & anr. Vs St. of U.P. & anr. 2013 (1) Crimes 393 (All)

10. Santosh Kumar Yadav and others Vs State of U.P. & anr. 2015 (9) ADJ 400

11. Yogesh Anantrai Bhatt & ors. Vs St. of Gujarat & ors. 2016 SCC Online Guj 2398

12 Athish Rakesh Agarwaal Vs Pallavi Rakesh Agarwaal & anr. 2020 SCC Online Bom 5743

13. Shaikh Ishaq Budhanbhai Vs Shayeen Ishaq Shaikh and 2012 SCC Online Bom 1150

14 Sau Aruna Vs Omprakash Devanand Shukla & ors. 2021 SCC Online Bom 1292

15 Alok Vs Sunita Crm. M No.29008 of 2014 dt 17.1.2020 P& H HC

16. Suraj Subash Tendulkar Vs Mrs. Sangeeta S.Tendulkar, LD-VCCRI No.40 of 2020 dt 12.10.2020 Bom HC

17. Sri Puttaraju Vs Smt. Shivakumari, Crl. Revision Petition No.730 of 2019 (Kar) dt 1.4.2021

18. Vikas & ors. Vs Smt. Usha Rani & anr. Criminal Revision No.3084 (O&M) of 2016 P&H HC dt 17.4.2018

19. Nandkishor Prahlad Vyawhare Vs Mangala : 2018 Crl. L.J. 2992

20. Huntington Vs Attrill 146 US 657, 673-74 (1892) the Supreme Court of United States

21. Allahabad Bank Vs All India Allahabad Bank Retired Employees Association (2010) 2 SCC 44

22. Indra Sarma Vs V.K.V.Sarma (2013) 15 SCC 755

23. Hiral P. Harsora and others Vs Kusum Narottam Das Harsora and Others AIR 2016 SC 4774

24 S.Vanitha Vs Deputy Commissioner, Bengaluru Urban District & others 2020 SCC Online SC 1023

25. Suraj Subash Tendulkar Vs Mrs. Sangeeta S.Tendulkar & anr. dt 12.10.2020 Bom HC at Goa

26. Noida Entrepreneurs Association Vs Noida And Others (2011) 6 SCC 508

27. S. Khushboo Vs Kanniammal & anr. (2010) 5 SCC 600

28. Santosh Kumar Yadav & anr. Vs State of Uttar Pradesh :2015 (9) ADJ 400

29. A.C. Deepak Kumar Vs P. Priyanka Manu/ Ka/7005/2019

30. State of Gujrat Vs Patel Raghav Nath AIR 1969 SC 1297

31. Govt. of India Vs Citedal Fine Pharmaceuticals, Madras and others (1989) 3 SCC 483

32. Dehri Rohtas Light Railway Co. Ltd. Vs District Board Bhojpur, 16 (1992) 2 SCC 598

33. Balwant Singh (Dead) Vs Jagdish Singh (2010) 8 SCC 685

34. Joint Collector Ranga Reddy District & anr. Vs D. Rarsing Rao and others (2015) 3 SCC 695

35. Chedi Lal Yadav and others Vs Hari Kishore Yadav and others reported in (2018) 12 SCC 527

36. Thakur Raghuraj Singh Vs Rai Bahadur Lala Hari Kishan Das & anr., AIR 1944 PC 35

37. Workmen of Indian Standards Institutions Vs The Management of Indian Standards Institution (1975) 2 SCC 847

38. B. Shah Vs Presiding Officer, Labour Court, Coimbatore and others (1977) 4 SCC 384

39. Bharat Singh Vs Management of New Delhi Tuberculosis Centre New Delhi, (1986) 2 SCC 614

40. Lucknow Development Authority Vs M.K.Gupta (1994) 1 SCC 243

41. Shashi Gupta Vs L.I.C. 1995 Supp (1) SCC 754

42. Union of India Vs Pradeep Kumari (1995) 2 SCC 736

43. Ghantesher Ghosh Vs Madan Mohan Ghosh and others (1996) 11 SCC 446

44. Bombay Anand Bhawan Restaurant Vs E.S.I.C. (2009) 9 SCC 61

45. R.P.F.C. Vs Hooghly Mills Company Ltd. (2012) 2 SCC 489

46. Om Prakash Vs Reliance General Insurance (2017) 9 SCC 724

47. Page Vs United States, 729 F.2d 818, 821-22 (D.C.Cir.1984)

48. Bustamente Vs Tucker, 607So. 2d 532 (La. 1992)

49. Shalini Vs Kishore and others (2015) 11 SCC 718

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This reference before us arises out of a situation where the learned Single Judge found himself skeptical to accept the view taken by the two learned Single Judges of this court in ***Akhilesh Kumar Singh and another Vs. State of U.P. and another in Criminal Revision No.885 of 2015 and Santosh Kumar Yadav and five others Vs. State of U.P. and another : 2015 (9 ) ADJ 400*** wherein it was held that in absence of specific limitation being provided for filing complaint under Section 12 of The Protection of Women from Domestic Violence Act, 2005 ( in short '***D.V. Act***'), a complaint can be filed at any point of time.

2. What prompted learned Single Judge to feel unconvinced with the principle of law laid down by two learned Single Judges of this court is that the learned Single Judge felt that the views

expressed by the two learned Single Judges of this court are not in consoance with the views expressed by the Hon'ble Apex Court in the two judgements i.e. (i) ***Inderjit Singh Grewal Vs. State of Punjab and another : (2011) 12 SCC 588 ; and (ii) Krishna Bhattacharjee Vs. Sarathi Choudhury and another : (2016) 2 SCC 705.***

3. The questions referred by learned Single Judge are as under :-

"***(i). Whether the provisions of Section 468 of the 'Cr.P.C.' are applicable for filing complaint under Section 12 of the Act as seems to have been held by the Supreme Court in the aforesaid-mentioned two cases ?***

***(ii). Whether a complaint filed under Section 12 of the Act having civil consequences and, therefore, in absence of specific period of limitation being provided, the complaint should be filed within a period of three years from the date of cause of action or whether it can be filed at any point in time?"***

4. Heard Shri Niteesh Kumar, learned counsel for the petitioner, Shri Sumit K. Srivastava, assisted with Shri Prashant Kumar Singh, learned counsel for respondent no.1 and Shri Shiv Nath Tilhari, learned A.G.A. for the respondent no.2.

5. Shri Niteesh Kumar, learned counsel for the petitioner argued that Section 28 of the D.V. Act provides that all proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 shall be governed by the provisions of Code of Criminal Procedure, 1973 (in short ***'Cr.P.C.'),*** hence it is clear that Cr.P.C. is applicable. He also argued that Rule 12 of '***The Protection of Women from Domestic Violence Rules, 2006'*** ( in short 'D.V. Rules') provides for service of notice adopting the procedure either provided in Order V of the Code of Civil Procedure, 1908 ( in short '***C.P.C.'***) or provided under Chapter VI of Cr.P.C., hence it denotes that this legislation is quasi civil and quasi criminal, in nature. Section 29 provides limitation of 30 days for filing of appeal against order passed under the Act, whereas no limitation has been prescribed for filing of 'application' under Section 12 of the D.V.Act. So in such a situation, limitation shall take effect in accordance with Article 137 provided in the Schedule of the Limitation Act. He also argued that where the act of domestic violence is in the nature of offence, Section 468 Cr.P.C. shall apply.

6. Learned counsel for the petitioner has relied on the following case laws :-

***(a). Manish Kumar Soni and others Vs. State of Bihar and another : 2016 SCC Online Pat 8220.***

***(b). Rajendran Vs. Meenakshi***

***Order dated 27.6.2018 passed in R.C.No.333 of 2011 by Madras High Court.***

7. On the other hand, Shri Shiv Nath Tilhari, learned A.G.A. and Shri Sumit Kumar Srivastava, assisted by Shri Prashant Kumar Singh, learned counsel for respondent no.1 argued that Section 28 (1) of the D.V.Act provides that provisions of Cr.P.C. shall apply and section 28(2) says that the court may develop its own procedure for disposal of an application moved under sub ***Section 12, and sub section (2) of Section 23 of the D.V. Act,*** hence the Limitation Act shall not apply.

8. They further argued that even Section 468 of Cr.P.C. also, shall not apply

because that relates to taking of cognizance of offences and no act of domestic violence for which relief is provided under Sections 18, 19, 20, 21 and 22 of the D.V.Act has been made punishable as an offence under the D.V.Act. The applications are dealt with to provide remedies of civil nature, hence the act is remedial in nature. They also argued that as far as the case law of Inderjit Singh Grewal (supra) is concerned, in that case, Hon'ble Apex Court has not considered and discussed the point of limitation and it was allowed on the basis of factual matrix of the case i.e. the decree of divorce already granted on the basis of mutual consent was challenged as fraudulent act of the parties.

9. They further submitted that in Krishna Bhattachrjee's case (supra) also the Hon'ble Apex Court did not consider the application of Section 468 Cr.P.C. or application of Limitation Act to the proceedings. The Hon'ble Apex Court treated the offence as 'continuing offence' (for return of stridhan) and dismissed the petition of the husband petitioner who challenged the same taking the plea that claim is time barred.

10. Learned A.G.A. further argued that the D.V. Act is a beneficial legislation, applications filed under this Act cannot be flouted on technical ground or to say on the point of limitation.

11. Learned counsel for the opposite parties and learned A.G.A. relied upon the following case laws :-

***(1). Kunapareddy Vs.Kunapareddy Swarna Kumari and another***
reported in (2016) 11 SCC 774.

***(2). V.D. Bhanot Vs. Savita Bhanot***
reported in (2012) 3 SCC 183.

(***3). Preetam Singh and another Vs. State of U.P. and another***
reported in 2013 (1) Crimes 393 (All).

***(4). Santosh Kumar Yadav and others Vs. State of U.P. and another***
reported in 2015 (9) ADJ 400.

***(5). Yogesh Anantrai Bhatt and others Vs. State of Gujarat and others***

***(6). Athish Rakesh Agarwaal Vs. Pallavi Rakesh Agarwaal and another***
reported in 2020 SCC Online Bom 5743.

***(7). Shaikh Ishaq Budhanbhai Vs. Shayeen Ishaq Shaikh and others***
reported in 2012 SCC Online Bom 1150.

***(8). Sau Aruna Vs. Omprakash Devanand Shukla and others***
reported in 2021 SCC Online Bom 1292.

***(9). Alok Vs. Sunita***

judgement and order dated 17.1.2020 decided by Punjab and Haryana High Court decided on 17.1.2020 passed in Crm. M No.29008 of 2014.

***(10). Suraj Subash Tendulkar Vs. Mrs. Sangeeta S.Tendulkar,***

judgement and order dated 12.10.2020 passed by High court of Bombay in LD-VC- CRI No.40 of 2020.

(***11). Sri Puttaraju Vs. Smt. Shivakumari,***

Judgement dated 1.4.2021 passed by Karnataka High Court in Crl. Revision Petition No.730 of 2019.

***(12).Vikas and others Vs. Smt. Usha Rani***

and another decided on 17.4.2018 by Punjab and Haryana High Court passed in Criminal Revision No.3084 (O&M) of 2016.

***(13). Nandkishor Prahlad Vyawhare Vs.***

Mangala : 2018 Crl. L.J. 2992.

12. Considered the rival submissions and gone through the cited case laws as well as the provisions of D.V.Act and Chapter XXXVI of of Cr.P.C. (Section 467 to 473 ) and Limitation Act, 1963.

***Nature of D.V.Act***

13. First of all, we have to consider the object of legislation for which D.V. Act has been enacted.

14. The main objective of the D.V. Act is to bestow effective protection of the rights of women guaranteed under the Constitution of India, who are the victims of violence of any kind, happening within the family and the incidental thereto. The 'Statement of objects and reasons of the D.V. Act' is as under :-

*"Domestic violence is undoubtedly a human rights issue and serious deterrent to development. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged this. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in its General Recommendation No.XII (1989) has recommended that State parties should act to protect women against violence of any kind especially that occurring within the family.*

*2. The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under Section 498-A of the Indian Penal Code. The civil law does not however address this phenomenon in its entirety.*

*3. It is, therefore, proposed to enact a law keeping in view the rights guaranteed under Article 14, 15 and 21 of the Constitution to provide for a remedy under the civil law which is intended to protect the woman from being victims of domestic violence and to prevent the occurrence of domestic violence in the society"*

14. In the case of ***Huntington Vs. Attrill 146 US 657, 673-74 (1892) the Supreme Court of United States*** observed that whether a statute is remedial or penal "depends upon the question whether its purpose is to punish the offense against the public justice of the State or to afford a private remedy to a person injured by the wrongful act."0

16. According to '***Corpus Juris Secundum***' (Encyclopedia of United States Law), a beneficial/ remedial statute "is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good."

17. In ***SINGH 2016:629 (6 Singh G.P., "Principle of Statutory Interpretation" (2016), the observation of Justice G.P.Singh is*** : "..... there are

legislations which are directed to cure some immediate mischief and bring into effect some type of social reforms by ameliorating the conditions of certain class of persons who according to present day notions may not have been fairly treated in the past. Such legislations prohibit certain acts by declaring them invalid and provide for redress or compensation to the persons aggrieved. If a statute of this nature does not make the offender liable to any penalty in favour of the State, the legislation will be classified as remedial. Remedial statutes are also known as welfare, beneficent or social justice oriented legislations".

18. Hon'ble Apex Court in the case of ***Allahabad Bank Vs. All India Allahabad Bank Retired Employees Association (2010) 2 SCC 44*** has highlighted the distinction between 'Beneficial'/ 'Remedial' statute and Penal Statute as under :-

*"16. ..... Remedial statutes, in conrtradistinction to penal statutes, are known as welfare, beneficent or social justice oriented legislations. Such welfare statutes always receive a liberal construction. They are required to be so construed so as to secure the relief contemplated by the statute....."*

Thus, 'Beneficial legislations' are reformative in character and 'Penal Statutes' are punishment centric legislation.

19. In I***ndra Sarma Vs. V.K.V.Sarma : (2013) 15 SCC 755,*** the Hon'ble Apex Court has observed that the D.V. Act has been enacted to provide a remedy in civil law for protection of women from being victims of domestic violence and to prevent occurrence of domestic violence in the society. The D.V. Act has been enacted also to provide an effective protection of the rights of the women guaranteed under the Constitution, who are the victims of violence of any kind occurring within the family.

20. In the case of Manish Kumar Soni Vs. State of Bihar and another (supra) (Cited by learned counsel for the petitioner), Patna High Court has held as under :-

*"All the above remedies envisaged in Sections 17 to 22 are basically civil reliefs. There are only two penal provisions in the Act i.e. Section 31 which stipulates penalty for breach of protection order by respondent and Section 33 which stipulates penalty for not discharging duty by Protection Officer.*

*Hence, a Magistrate is not required to proceed which an application is filed under Section 12 of the Act like a regular complaint under Section 200 or 202 of the Cr.P.C. though in the present case, the Magistrate has proceeded on the application under Section 12 of the Act like a regular complaint but the same has in no way, prejudiced the petitioners.*

*Hence, though the provision under Section 28(1), the Act stipulates that the proceeding under Section 12 of the Act shall be governed by the provisions of the Code of Criminal Procedure, but the same is directory in nature and any departure from the provisions of Code of Criminal Procedure will not vitiate the proceeding initiated under Section 12 of the Act."*

21. In ***Hiral P. Harsora and others Vs. Kusum Narottam Das Harsora and Others : AIR 2016 SC 4774,*** the Hon'ble Apex Court has discussed the object of D.V.Act and observed as under :-

*"16. A cursory reading of the statement of objects and reasons makes it clear that the phenomenon of domestic violence against women is widely prevalent and needs redressal. Whereas criminal law does offer some redressal, civil law does not address this phenomenon in its entirety. The idea therefore is to provide various innovative remedies in favour of women who suffer from domestic violence, against the perpetrators of such violence.*

*17. The preamble of the statute is again significant. It states : Preamble "An Act to provide for more effective protection of the rights of women guaranteed under the constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto".*

*18. What is of great significance is that the 2005 Act is to provide for effective protection of the rights of women who are victims of violence of any kind occurring within the family. The preamble also makes it clear that the reach of the Act is that violence, whether physical, sexual, verbal, emotional or economic, are all to be redressed by the statute. That the perpetrators and abettors of such violence can, in given situations, be women themselves, is obvious. With this object in mind, let us now examine the provisions of the statute itself."*

22. The Hon'ble Apex Court in ***S.Vanitha Vs. Deputy Commissioner, Bengaluru Urban District & others : 2020 SCC Online SC 1023***, elucidating the nature of D.V.Act has observed as under :-

*".....The PWDV Act 2005 was intended to deal with the problems of domestic violence which, as the Statements of Objects and Reasons set out, "is widely prevalent but has remained largely invisible in the public domain". The Statements of Objects and Reasons indicates that while Section 498A of the Indian Penal Code created a penal offence out of a woman's subjection to cruelty by her husband or relative, the civil law did not address its phenomenon in its entirety. Hence, consistent with the provisions of Articles 14, 15 and 21 of the Constitution, Parliament enacted a legislation which would "provide for a remedy under the civil law which is intended to protect the woman from being victims of domestic violence and to prevent the occurrence of domestic violence in the society"....."*

23. In ***Suraj Subash Tendulkar Vs. Mrs. Sangeeta S.Tendulkar and another decided on 12.10.2020 by the Bombay HIgh Court at Goa*** has concluded as follows :-

*"49. From the above, we can safely conclude that the Magistrate under the DV Act enjoys procedural freedom. He may adopt the procedure under the CPC or Cr.PC or any other procedure "with a view to expediting the proceedings".*

*Conclusion :*

*(a). The D.V.Act is a civil remedy for the victims of domestic violence. Only the forum is under criminal law.*

*(b). The forum has abundant procedural freedom ; it can follow its own procedure for disposing applications under section 12 or under sub-section (2) of section 23.*

*(c). Once, the court decides to follow its own procedure under section 12,*

*any discussion on the procedural limitations under CrPC becomes otiose.*

*(d). The DV Act is in addition to and not in derogation of other enactments.*

*(e). The concepts of issuing process, taking cognisance, treating the respondents as accused or suspects do not apply.*

*(f). Nor should the courts insist on the respondents' presence for every adjournment as if they were accused.*

*(g). Section 12, until it reaches sub-section (4), focuses on the reliefs sought and the orders that may be passed granting those reliefs.*

*(h). The proviso to sub-section (1) of section 12 governs only that sub-section, not the rest of the provision.*

*(h). If a summoned respondent demonstrates before the court that he has nothing to do with the allegations in the application, the Magistrate may close the proceedings against him.*

*(i). The concepts of discharge, acquittal, conviction do not apply to the proceedings under section 12. Nor does the idea of recalling the process.*

*(j) Fixing a date for the first hearing cannot be equated with issuing of process. So relying on the domestic incident relief or rendering a detailed 'order' under section 12(4) is not a condition precedent for the Magistrate to fix the date of first hearing."*

24. It is discernible from the 'Statement of Objects and Reasons' of D.V.Act, that the 'Act' was enacted to provide remedies of civil nature to the women who are victims of domestic violence. In other words, to redress the grievances of the women-victims of domestic violence through civil remedies as opposed to penal remedies, already available under the existing laws.

25. The reliefs provided under the D.V. Act are as under :

(a) Protection order - Section 18 readwith 2 (O)

(b) Residence Order - Section 19 readwith 2 (P)

(c) Monetary reliefs -Section 20 readwith 2(K)

(d) Custody order - Section 21 readwith 2 (D)

(e) Compensation Order-Section 22 readwith 2(C )

26. From a plain reading of these provisions related to claims/reliefs provided in the D.V. Act, it is clear that none of them can be treated or construed as an 'offence' punishable under the D.V .Act. In other words, no act of violence has been made punishable under the D.V. Act except the non compliance under Sections 31 and 'Penalty for not discharging duty by Protection Officer' under Section 33 of the D.V. Act. The D.V.Act only provides the remedies to protect the aggrieved person from domestic violence. It is evident from the Act that there is no penal provisions provided in the Act for the person who committed domestic violence against the victim/ aggrieved person.

27. What has culled out in nutshell is that the D.V.Act is a beneficent legislation,

remedial in nature which provides remedies of civil nature.

28. Now keeping in mind the above principles, we proceed to deal with the questions referred.

Question No.-(i)."***Whether the provisions of Section 468 of the 'Cr.P.C.' are applicable for filing complaint under Section 12 of the Act as seems to have been held by the Supreme Court in the aforesaid- mentioned two cases ?"***

29. It poses a question whether Section 468 Cr.P.C. shall be applicable for filing complaint under Section 12 of the D.V.Act especially in the light of principles of law laid down by Hon'ble Apex Court in the cases of Inderjit Singh Grewal (supra) and Krishna Bhattachrjee (supra).

30. As concluded earlier, the D.V.Act is a legislation which provides remedies of civil nature. The D.V.Act was passed "in order to provide a remedy in the civil law for the protection of women for being victims of domestic violence and to prevent the occurrence of domestic violence in the society."

31. Section 12 of the D.V.Act is an enabling Section which provides for moving an application for the remedies provided under the Act. Section 12 of the D.V. Act runs as under :-

*"12. Application to Magistrate.--*

*(1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act: Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.*

*(2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent: Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.*

*(3) Every application under sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.*

*(4) The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court.*

*(5) The Magistrate shall endeavour to dispose of every application made under sub-section (1) within a period of sixty days from the date of its first hearing."*

32. The Magistrate on the application moved under Section 12 may pass order for

protection, order for residence, order for monetary reliefs, order for custody of children and order for compensation. Here under D.V.Act., the relief provided is of remedial nature and not in a nature of conviction or imposition of penalty. No order is passed on the application moved to punish the person who committed domestic violence as there is no such provision under the Act. In other words, no act of domestic violence has been declared as an offence under this Act except as provided under Sections 31 and 33 of the Act.

33. In ***NOIDA ENTREPRENEURS ASSOCIATION Vs. NOIDA AND OTHERS : (2011) 6 SCC 508,*** the Hon'ble Apex Court has held as under ( relevant paragraphs 19,20 and 21 ) :

*"19. So far as the initiation of criminal proceedings is concerned, it is governed by the provisions of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC"). Section 468 thereof puts an embargo on the court to take cognizance of an offence after expiry of limitation provided therein. However, there is no limitation prescribed for an offence punishable with more than 3 years' imprisonment. Section 469 declares as to when the period of limitation would start. Sections 470 and 471 provide for exclusion of period of limitation in certain cases. Section 473 enables the court to condone the delay provided the court is satisfied with the explanation furnished by the prosecution or where the interest of justice demands extension of the period of limitation.*

*20. This Court in Japani Sahoo Vs. Chandra Sekhar Mohanty, dealt with the issue and observed as under : (SCC p.401, para 14).*

*"14. The general rule of criminal justice is that 'a crime never dies'. The principle is reflected in the well- known maxim 'nullum tempus out locus occurrit regi' (lapse of time is no bar to Crown in proceeding against offenders)..... It is settled law that a criminal offence is considered as a wrong against the State and the society even though it has been committed against an individual. Normally, in serious offences, prosecution is launched by the State and a court of law has no power to throw away prosecution solely on the ground of delay. Mere delay in approaching a court of law would not by itself afford a ground for dismissing the case though it may be a relevant circumstance in reaching a final verdict.*

*The aforesaid judgement was followed by this court in Sajjan Kumar Vs. CBI.*

*21. Thus, it is evident that question of delay in launching criminal prosecution may be a circumstance to be taken into consideration in arriving at a final decision, but it cannot itself be a ground for dismissing the complaint. More so, the issue of limitation has to be examined in the light of the gravity of the charge."*

34. Now, it appears necessary to go through the provisions contained in Chapter XXXVI of the Cr.P.C. Sections 467, 468, 469, 471, 472 and 473 of the Cr.P.C. read as under :-

*"**467. Definitions**. For the purposes of this Chapter, unless the context otherwise requires, "**period of limitation**" means the period specified in section 468 for taking cognizance of an offence.*

*468. Bar to taking cognizance after lapse of the period of limitation.--*

*(1) Except as otherwise provided elsewhere in this Code, no Court, shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.*

*(2) The period of limitation shall be-*

*(a) six months, if the offence is punishable with fine only;*

*(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;*

*(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.*

*(3) For the purposes of this Section, the period of limitation in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.*

*469. Commencement of the period of limitation.*

*(1) The period of limitation, in relation to an offence, shall commence,-*

*(a) on the date of the offence; or*

*(b) where the commission of the offence was not known to the person aggrieved by the offence or to any police officer, the first day on which such offence comes to the knowledge of such person or to any police officer, whichever is earlier; or*

*(c) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the police officer making investigation into the offence, whichever is earlier.*

*(2) In computing the said period, the day from which such period is to be computed shall be excluded.*

*470. Exclusion of time in certain cases.*

*(1) In computing the period of limitation, the time during which any person has been prosecuting with due diligence another prosecution, whether in a Court of first instance or in a Court of appeal or revision, against the offender, shall be excluded:*

*Provided that no such exclusion shall be made unless the prosecution relates to the same facts and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature, is unable to entertain it.*

*(2) Where the institution of the prosecution in respect of an offence has been stayed by an injunction or order, then, in computing the period of limitation, the period of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.*

*(3) Where notice of prosecution for an offence has been given, or where, under any law for the time being in force,*

*the previous consent or sanction of the Government or any other authority is required for the institution of any prosecution for an offence, than, in computing the period of limitation, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded.*

*Explanation-*

*In computing the time required for obtaining the consent or sanction of the Government or any other authority, the date on which the application was made for obtaining the consent or sanction and the date of receipt of the order of the Government or other authority shall both be excluded.*

*(4) In computing the period of limitation, the time during which the offender-*

*(a) has been absent from the India or from any territory outside India which is under the administration of the Central Government, or*

*(b) has avoided arrest by absconding or concealing himself, shall be excluded.*

*471. Exclusion of date on which Court is closed.*

*Where the period of limitation expires on a day when the Court is closed, the Court may take cognizance on the day on which the Court reopens.*

*Explanation-*

*A Court shall be deemed to be closed on any day within the meaning of this section, if, during its normal working hours, it remains closed on that day.*

*472. Continuing offence.*

*In the case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues.*

*473. Extension of period of limitation in certain cases. Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may make cognizance of an offence after the expiry of the period of limitations, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice."*

35. Conjoint reading of Sections 467 and 468 Cr.P.C. shows that the limitation is there for taking cognizance of offences. The term 'offence' has been defined under Section 40 of the I.P.C., which runs as under :-

"40. "Offence".--Except in the Chapters and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.

In Chapter IV, Chapter VA and in the following sections, namely, sections 64, 65, 66, [67, 71], 109, 110, 112, 114, 115, 116, 117,118, 119, 120, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225,327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

And in sections 141, 176, 177, 201, 202, 212, 216 and 441, the word

"offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine."

36. The term 'offence' has also been defined under the General Clauses Act, 1897 in Section 3(38) which runs as under :-

***"3(38). "Offence" shall mean any act or omission made punishable by any law for the time being in force.***"

37. A three Judges' Bench of Hon'ble Apex Court in ***S. Khushboo Vs. Kanniammal and another (2010) 5 SCC 600,*** has held as under :-

*""Offence" means "an act or instance of offending": "commit an illegal act" and "illegal" means, "contrary to or forbidden by law". "Offence" has to be read and understood in the context as it has been prescribed under the provisions of Sections 40, 41 and 42 IPC which cover the offences punishable under I.P.C. or under special or local law or as defined under Section 2(n) Cr.P.C. or Section 3(38) of the General Clauses Act, 1897 (vide Proprietary Articles Trade Association Vs. Attorney General for Canada AIR 1931 PC 94 ; Thomas Dana Vs. State of Punjab AIR 1959 SC 375 ; Jawala Ram and others Vs. The State of Pepsu (now Punjab) & Ors. AIR 1962 SC 1246 ; and Standard Chartered Bank & Ors. Vs. Directorate of Enforcement & Ors. AIR 2006 SC 1301)."*

38. Thus, 'offence' denotes an act or omission for which punishment is provided under the law. As we have noted earlier that no act of domestic violence has been treated as offence and made punishable under the D.V.Act (except as provided in Sections 31 & 33), and Section 468 Cr.P.C. applies for taking of cognizance of offences.

39. In ***Sri Puttaraju Vs. Smt. Shivakumari (supra),*** the Karnataka High Court at Bengaluru has held as under :-

*"26. In the judgements of the Hon'ble Supreme Court referred to above, the interplay of Section 3(38) of the General Clauses Act, Section 31 of the DV Act and Section 468 of Cr.P.C. had not fallen for consideration. In view of the later judgement of the Hon'ble Supreme Court in Krishna Bhattacharjee's case referred to supra the judgements of this court in Srinivas's case and Gurudev's case cannot be followed. Therefore this court does not find any merit in the contention that the petition was time barred."*

40. In ***Yogesh Anant Rai Bhatt Vs. State of Gujarat (supra),*** the Gujarat High Court has held as under :-

*"13. Therefore, any other decision, even if it is dealing with the issue of limitation with reference to DV Act, it is to be clarified that it may be applicable only in case of proceedings under Section 31 of the DV Act since sub- section (1) of Section 31 contemplates punishment in the event of breach of the order under such Act. Therefore, provisions of Section 31 of the DV Act do not come into play till an order in an application under section 12 is passed and till the same is breached. Therefore, when the respondent is simply seeking various reliefs contemplated by the DV Act, unless those reliefs are granted and only if such order is violated, the respondent may not have to invoke provisions of section 31 of the DV Act and*

*at that stage only question of limitation would arise and thereby respondent may not be entitled to invoke provisions of section 31 of the DV Act seeking punishment by way of sentencing the other side for breach of any such order after a period of one year from the date of violation of any such order. Practically the provisions of section 31(1) of the DV Act is similar to the provisions of Section 125(3) of the Code and, therefore like an application for maintenance under Section 125 of the Code, it cannot be barred by limitation and an application under Section 12 of the DV Act is not subject to limitation as contemplated by the petitioners."*

41. In ***Santosh Kumar Yadav and another Vs. State of Uttar Pradesh : 2015 (9) ADJ 400,*** the Allahabad High Court has held as under :-

*"6.....Under the circumstances, if the wife/aggrieved person alleges that she has been deprived of all or any economic or financial resources to which she is entitled under the law, it would amount to an economic abuse within the meaning of the aforesaid clause. Continued deprivation thereof would give recurring cause of action and therefore, an application under Section 12 of the D.V.Act 2005 seeking protection orders by such an aggrieved person cannot be said to be barred by limitation. In fact, the Apex Court in the case of V.D. Bhanot Vs. Savita Bhanot, (2012) 3 SCC 183, had observed that the conduct of the parties even prior to the coming into force of the D.V.Act, 2005 could be taken into consideration while passing an order under Sections 18, 19, 20 thereof. The Apex Court in that case observed that the High court rightly held that even if a wife, who had shared a household in the past, but was no longer doing so when the Act came into force, would still be entitled to the protection of the D.V.Act, 2005. Under the circumstances, there being no limitation provided for filing an application under Section 12 of the D.V.Act, 2005, the application of the opposite party no.2 seeking various protection orders on the ground of being deprived of the benefits of matrimonial home, which she shared with the applicants till the date she was driven out of her matrimonial home, as well her Stridhan, cannot be said to barred by limitation or bad in law.*

*7. The observations made by the Apex Court in the case of Inderjit Singh Grewal (supra) would not help the applicants in any manner inasmuch as they relate to a complaint under the D.V.Act, 2005, which may be for an offence punishable under Section 31 of the said Act. An application under Section 12 of the D.V.Act, 2005 is not a complaint of any offence, but it is in the form of a petition for seeking various reliefs available to an aggrieved person under the said Act, which would be clear from a bare perusal of the section."*

42. In ***Athish Rakesh Agarwaal Vs. Pallavi Athish Agarwal (supra)***, the Bombay HIgh Court has held as under :-

*"6. Therefore, when there is no penal provision in the form of Section 12 or Sections 18 to 22 of D.V.Act, there is no reason to restrict the aggrieved person from filing such application with reference to period of limitation prescribed under Section 468 of the Code."*

43. In ***Shaikh Ishaq Budhanbhai Vs. Shayeen Ishaq Shaikh and***

***another(supra),*** the Bombay High Court has held as under :-

*"9. In the instant case, learned Magistrate passed an interim protection order granting maintenance which by itself does not constitute an offence. Section 31 of the Domestic Violence Act makes a breach of protection order, final or interim, an offence under the said Act. Issue of the applicability of Section 468 of the Code of Criminal Procedure, 1973 prescribing bar to taking cognizance after the lapse of the period of limitation prescribed therein would only arise at the time of taking cognizance of such an offence as spelt out under section 31 of the Domestic Violence Act. On the date of the alleged desertion of the respondents, there was no protection order and as such there could be no breach of it translating the said occurrence into a crime as spelt out under Section 31 of the said Act. Thus, the application made by the applicant under the Domestic Violence Act for protection order cannot be viewed as a complaint of the offence u/s 31 of the Domestic Violence Act. Submission on behalf of the petitioner that the present proceedings are hit by Section 468 of the Code of Criminal Procedure, 1973 is, therefore, without any merit. Learned Sessions Judge, Ahmednagar, therefore rightly dismissed such submission made on behalf of the petitioners by making pertinent observations at para 22 of the impugned judgement".*

44. In ***Sau Aruna Vs. Omprakash Devanand Shukla and others (supra)***, Bombay High Court has held as under :-

*"15. In the case of Inderjit Singh Grewal Vs. State of Punjab (supra), the Hon'ble Supreme Court was dealing with a case where the husband and wife were already divorced in pursuance of a decree of divorce by mutual consent passed by the competent Court. The complainant in that case claimed that the decree of divorce by mutual consent was obtained by fraud by the husband, in respect of which she had approached the police for registration of an offence, but the police had refused to register any criminal case. The complainant further claimed that she had been living together with the husband even after divorce and in such a factual backdrop she had made allegations of harassment and abuse against the husband. The Hon'lbe Supreme Court found that in the facts of the said case, initiation of proceedings by the wife under the D.V.Act amounted to abuse of the process of law and accordingly, allowed the appeal of the husband and dismissed the complaint. It is in this backdrop that the Hon'ble Supreme Court recorded one of the contentions raised on behalf of the husband pertaining to limitation and made an observation that such a contention appeared to be preponderous, in view of Section 28 and 32 of the D.V.Act read with rule 15(6) of the aforesaid Rules.*

*16. It needs to be appreciated whether the said judgement lays down the proposition that a complaint under the provisions of D.V.Act can be filed, subject to limitation of one year, in view of Section 468 of the Cr.P.C. In this context, another judgement of Hon'ble Supreme Court becomes relevant, which is delivered in the case of Krishna Bhattacharjee Vs. Sarathi Choudury, (2016) 2 SCC 705. In this judgement, the Hon'ble Supreme Court has taken note of aforesaid earlier judgement in the case of Inderjit Singh Grewal Vs. State of Punjab (supra) and thereupon it is found that while considering complaints under the D.V.Act, the concept of*

*continuing cause of action needs to be applied. In the said case, a contention regarding limitation was raised in the backdrop of prayer of the aggrieved person (wife) for return of Stridhan. The Hon'ble Supreme Court after relying upon earlier judgments, held that a continuing offence is one which is susceptible of continuance and is distinguishable from one which is committed once and for all. It was found that retention of Stridhan by the husband and his family members was a continuing offence, so long as it was covered under the expression of "economic abuse" as defined under Section 3 of the D.V.Act, pertaining definition of "Domestic Violence". On this basis, it was held that the complaint filed by the wife could not be thrown out on the ground of limitation, by applying Section 468 of the Cr.P.C."*

45. In ***Vikas and others Vs. Smt. Usha Rani and another (supra),*** the Punjab and Haryana High Court has held as under :-

*"As already stated, this Court has to answer the question, whether the complaint is barred by limitation based upon the provisions of the Domestic Violence Act and the law, as cited. Section 28 of the Domestic Violence Act mandates all proceedings under Sections 12, 18, 19, 20, 21, 22, and offences under Section 31 shall be governed by the Code of Criminal Procedure. Whereas Section 31 provides for penalty of breach of protection order against the 'respondent' and Rule 15 of the Rules of 2006 provides for procedure under Section 31 of the Domestic Violence Act.*

*16. An aggrieved person is permitted to present an application to the Magistrate seeking one or more reliefs under this Act and the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer also. Section 12 of the Domestic Violence Act is enabling provision to file an application, whereas Sections 18 to 22 of the Domestic Violence Act provide for rights of the aggrieved person to seek different reliefs like protection, residence, monetary relief, custody of minor and compensation. No limitation has been prescribed for seeking any such relief. Penal provisions under Section 31 of the Domestic Violence Act would get attracted on a breach of a protection order. It is only in a situation when there is a breach of any protection order on an application under Section 12 or any of the reliefs under Sections 18 to 22 of the Domestic Violence Act, then and then only, an application under Section 31 of the Domestic Violence Act is to be filed within one year from the date of such breach and not thereafter. Therefore, the court is of the opinion that there is no limitation prescribed to institute a claim seeking relief under Sections 17 to 22 of the Domestic Violence Act."*

46. In ***Akhilesh Kumar Singh and another Vs. State of U.P. and another (supra),*** Allahabad High Court has held as under :-

*"At this juncture I would further like to emphasise that the scope and limit of the revisional court is very restricted. There is concurrent finding of the trial court as well as of the appellate court. Both the courts below had rejected the preliminary objection raised by the revisionist by a well reasoned and discussed order. There seems to be no patent illegality or prima facie infirmity in the order. It is observed that divorce petition is still pending, interim alimony had been granted under Section 24 of the*

*1955 Act and as per the legal proposition there is no bar for petition under Section 12 of the Act, 2005 for the return of stridhan. Petition under Section 27 of the Act, 1955 is also pending and the legal proposition is that there could not be a bar for a petition under Section 12 of the Act, 2005 as retention of stridhan is a continuing offence when a wife had shared a household in the past. Although the Act, 2005 is prospective, but at the same time, law laid down by the Apex Court is that even she could be entitled to be protection under the Domestic Violence Act and so far as applicability of Section 468 Cr.P.C is concerned, the provision of Section 468 as held by the Hon'ble Supreme Court comes only when any breach of the order has been committed by the respondent passed under the proceeding of Section 12 of the Domestic Violence Act and the specific provision for the offence committed under the Domestic Violence Act is an offence under Section 31 of the Act which is penalty for breach of protection order by respondent. On the basis of aforesaid legal proposition, I am of the view that the orders of the trial court as well as appellate court do not suffer from any illegality or perversity which require any interference from this court. So far as the law cited by the revisionist is concerned, in view of the aforesaid legal proposition as cited above and the fact and circumstances being the different to the present case, it is of no help to the revisionist.."*

47. In ***A.C. Deepak Kumar Vs. P. Priyanka : Manu/ Ka/7005/2019***, the Karnataka High Court has held asunder :

*"11. On going through the aforesaid paragraph the said offence under the DV Act is considered to be a 'continuing offence' and if the said context has been read alongwith Section 472 of Cr.P.C., so also Sections 28 and 32 of the DV Act, it makes clear that the offence is considered to be a continuing offence and demands are made and the applications which are going to be filed are not barred by limitation and the Court can grant the maintenance. Learned counsel for the petitioner-husband has relied upon the decision in the case of Inderjit Singh Grewal Vs. State of Punjab and Another (cited supra) wherein at paragraph 32 it has been observed as under :-*

*"32. Submissions made by Shri Ranjit Kumar on the issue of limitation, in view of the provisions of Section 468 CrPC, that the complaint could be filed only within a period of one year from the date of the incident seem to be preponderous in view of the provisions of Section 28 and 32 of the 2005 Act read with Rule 15(6) of the Protection of Women from Domestic Violence Rules, 2006 which make the provisions of CrPC applicable and stand fortified by the judgements of this Court in Japani Sahoo V. Chandra Sekhar Mohanty [MANU/ SC/3080/2007....."*

*12. As could be seen from the aforesaid paragraph, the said observations have been made while making submissions made by the learned counsel no ratio laid down by the Hon'ble Apex Court. In the case of Krishna Bhattachrjee Vs. Sarathi Choudhury and Another, (cited supra) the issue was one and the same and while dealing with the said matter, a ratio has been laid down that if it is continuing offence, then under such circumstances, the court cannot hold that Section 468 of Cr.P.C. is a bar to disclaim the respondent-wife. Under the said facts and circumstances of the case and in view of the ratio laid down by the Hon'ble Apex*

*Court, I am of the considered opinion that the contention taken up by the learned counsel for the petitioner that there is a bar under Section 468 of Cr.P.C. is not having any force, and the same is liable to be rejected."*

48. Against the aforesaid judgement dated 16.9.2019 passed by Karnataka High Court, a special leave petition Criminal Diary Nos.1341/2020 was filed before the Hon'ble Supreme Court and the Apex court was pleased to pass order on 17.6.2020, which runs as under :

*" Delay condoned.*

*In the given facts and circumstances of the case, we are not inclined to examine the question of law as sought to be raised by learned counsel for the petitioner, in exercise of our jurisdiction under Article 136 of the Constitution of India. The special leave petition is accordingly dismissed. Pending applications shall also stand disposed of."*

49. In Inderjit Singh's case, the Hon'ble Apex Court observed as under ( para 32) :

*"32. Submissions made by Shri Ranjit Kumar on the issue of limitation, in view of the provisions of Section 468 CrPC, that the complaint could be filed only within a period of one year from the date of the incident seem to be preponderous in view of the provisions of Sections 28 and 32 of the 2005 Act read with Rule 15(6) of the Protection of Women from Domestic Violence Rules, 2006 which make the provisions of CrPC applicable and stand fortified by the judgments of this Court in Japani Sahoo v. Chandra Sekhar Mohanty [(2007) 7 SCC 394 : (2007) 3 SCC (Cri) 388 : AIR 2007 SC 2762] and NOIDA Entrepreneurs Assn. v. NOIDA [(2011) 6 SCC 508 : (2011) 2 SCC (Cri) 1015]."*

50. However, in this case, it is noteworthy that the case was not quashed as not maintainable being time barred under Section 468 of Cr.P.C., rather the proceedings under DV Act were quashed on the basis of the factual matrix of the case wherein it was held that a proceeding under DV Act cannot be compatible and in consonance when the decree of divorce is still subsists that will be abuse of process of law. The relevant para 33 of the Inderjit Singh's Case (supra) reads as under :-

*"33. In view of the above, we are of the considered opinion that permitting the Magistrate to proceed further with the complaint under the provisions of the Act 2005 is not compatible and in consonance with the decree of divorce which still subsists and thus, the process amounts to abuse of the process of the court. Undoubtedly, for quashing a complaint, the court has to take its contents on its face value and in case the same discloses an offence, the court generally does not interfere with the same. However, in the backdrop of the factual matrix of this case, permitting the court to proceed with the complaint would be travesty of justice. Thus, interest of justice warrants quashing of the same.*

51. In Krishna Bhattacharjee case, the Hon'ble Supreme Court taking into consideration the judgement passed in the Inderjit Singh case, has observed as under :-

*"32. Regard being had to the aforesaid statement of law, we have to see whether retention of stridhan by the husband or any other family members is a*

*continuing offence or not. There can be no dispute that wife can file a suit for realisation of the stridhan but it does not debar her to lodge a criminal complaint for criminal breach of trust. We must state that was the situation before the 2005 Act came into force. In the 2005 Act, the definition of "aggrieved person" clearly postulates about the status of any woman who has been subjected to domestic violence as defined under Section 3 of the said Act. "Economic abuse" as it has been defined in Section 3(iv) of the said Act has a large canvass. Section 12, relevant portion of which has been reproduced hereinbefore, provides for procedure for obtaining orders of reliefs. It has been held in Inderjit Singh Grewal [Inderjit Singh Grewal v. State of Punjab, (2011) 12 SCC 588 : (2012) 2 SCC (Civ) 742 : (2012) 2 SCC (Cri) 614] that Section 468 of the Code of Criminal Procedure applies to the said case under the 2005 Act as envisaged under Sections 28 and 32 of the said Act read with Rule 15(6) of the Protection of Women from Domestic Violence Rules, 2006. We need not advert to the same as we are of the considered opinion that as long as the status of the aggrieved person remains and stridhan remains in the custody of the husband, the wife can always put forth her claim under Section 12 of the 2005 Act. We are disposed to think so as the status between the parties is not severed because of the decree of dissolution of marriage. The concept of "continuing offence" gets attracted from the date of deprivation of stridhan, for neither the husband nor any other family members can have any right over the stridhan and they remain the custodians. For the purpose of the 2005 Act, she can submit an application to the Protection Officer for one or more of the reliefs under the 2005 Act.*

*33. In the present case, the wife had submitted the application on 22-5-2010 and the said authority had forwarded the same on 1-6-2010. In the application, the wife had mentioned that the husband had stopped payment of monthly maintenance from January 2010 and, therefore, she had been compelled to file the application for stridhan. Regard being had to the said concept of "continuing offence" and the demands made, we are disposed to think that the application was not barred by limitation and the courts below as well as the High Court had fallen into a grave error by dismissing the application being barred by limitation."*

52. It is significant that the judgement passed by the Hon'ble Apex Court in the aforesaid two cases do not directly deal with the applicability of provisions of Section 468 CrPC, to the application filed under Section 12 of the D.V.Act. In fact, in the Inderjit Singh case, the Hon'ble Supreme Court has just stated "seem to be preponderous in view of the provisions of Section 28 and 32 of the Act 2005 read with Rule 15(6) of the Protection of Women from Domestic Violence Rules, 2006." However, the Hon'ble Court neither scrutinized nor viewed nor decided the case on the basis of alleged applicability of limitation under Section 468 Cr.P.C. in context of DV Act. Similarly, in the Krishna Bhattacharjee case, the Hon'ble Court without interfering/ scrutinizing/ commenting on that aspect of limitation under DV Act vis-a-vis Section 468 of Cr.P.C., opted to consider the case from the concept of "continuing offences" under criminal jurisprudence.

53. Thus, it is clear that in none of the aforesaid cases, the issue was considered or

argued before the Hon'ble Court from the standpoints :-

- That the reliefs claimed/provided in the DV Act are remedial in nature as opposed to penal in nature.

- That the mode of information/ complaint/ application under DV Act is not confined to be moved by the aggrieved person only.

- The duty is cast upon the State to protect the aggrieved woman from the domestic violence and it has to act on the information received from any other source also besides an aggrieved woman as provided in the Act and its related Rules.

54. From the above analysis, it is discerned out that the reliefs provided under the D.V.Act are remedial in nature and no act of domestic violence is punishable either by imprisonment or by penalty except as provided under Section 31 i.e. breach of remedial order passed and Section 33 (Penalty for not discharging duty by protection officer).

55. Section 468 Cr.P.C. speaks about taking of "cognizance of an offence" and the acts of domestic violence described in the D.V.Act are not offences under the D.V.Act, hence taking of the cognizance of offence is out of question, therefore, applicability of Section 468 Cr.P.C. for acting upon the applications moved under Section 12 of the D.V.Act does not seem just and legal. In other words, Section 468 Cr.P.C. has no application as far as the applications under Section 12 of the D.V.Act are concerned.

56. Thus, it is concluded that Section 468 Cr.P.C. has no applicability for filing complaint under Section 12 of the D.V.Act. **The question no.(i) is answered accordingly.**

57. Now comes for consideration the question no.(ii), which runs as follows :-

***"(ii). Whether a complaint filed under Section 12 of the Act having civil consequences and, therefore, in absence of specific period of limitation being provided, the complaint should be filed within a period of three years from the date of cause of action or whether it can be filed at any point in time?"***

58. Learned counsel for the petitioner argued in alternative that if the statute is civil in nature or to say the remedies provided under the D.V.Act. are remedial in nature as opposed to penal then in case of absence of any limitation provided under the D.V. Act, the limitation provided under the Limitation Act, 1963 in Article 137 of Schedule appended to the Act should apply as is applicable in other civil matters.

59. Article 137 provides that where there no period of limitation is provided elsewhere for moving an application, the period of limitation shall be 3 years from the date when the right to apply accrues.

60. Learned counsel for the private respondent and learned A.G.A. opposed the argument by submitting that the remedies provided under the D.V.Act are for the causes which are of continuing nature and the D.V.Act is a beneficial legislation so the relief provided under this Act cannot be curtailed by putting a bar of limitation of any kind.

61. Section 2 (j) of the Limitation Act, 1963 defines "period of limitation", as under :-

*"(j). "period of limitation" means the period of limitation prescribed for any suit, appeal or application by the Schedule, and "prescribed period" mans the period of limitation computed in accordance with the provisions of this Act."*

62. Despite of specific enactment legislated for the purpose i.e. Limitation Act, difficulty is faced in cases where a special statute or to be more particular a beneficial statute does not provide any time frame for seeking a particular relief. Section 12 of the D.V.Act does not provide any limitation period for moving an application.

**Position of law/jurisprudence where no limitation is provided under the Statute.**

63. In ***State of Gujrat Vs. Patel Raghav Nath reported in AIR 1969 SC 1297***, the Hon'ble Supreme Court while considering the provisions of Bombay Land Revenue Code, 1879 wherein no limitation for exercising the revisional power by the Commissioner is prescribed, the court held that in spite of the fact there is no provision for any limitation for exercising such revisional powers, this power must be exercised in reasonable time and the length of the reasonable time must be determined by the facts of the case and the nature of the order which is being revised.

64. In ***Govt. of India Vs. Citedal Fine Pharmaceuticals, Madras and others reported in (1989) 3 SCC 483,*** the Hon'ble Apex Court has held as under :-

*"6..... In the absence of any period of limitation it is settled that every authority is to exercise the power within a reasonable period. What would be reasonable period, would depend upon the facts of each case. Whenever a question regarding the inordinate delay in issuance of notice of demand is raised, it would be open to the assessee to contend that it is bad on the ground of delay and it will be for the relevant officer to consider the question whether in the facts and circumstances of the case notice of demand for recovery was made within reasonable period. No hard and fast rules can be laid down in this regard as the determination of the question will depend upon the facts of each case."*

65. In ***Dehri Rohtas Light Railway Co. Ltd. Vs. District Board Bhojpur, 16 (1992) 2 SCC 598***, the Hon'ble Apex Court has shed the light on the point as under :-

*"13. The rule which says that the Court may not enquire into belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion. Each case must depend upon its own facts. It will all depend on what the breach of the fundamental right and the remedy claimed are and how delay arose. The principle on which the relief to the party on the grounds of laches or delay is denied is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is a reasonable explanation for the delay....."*

66. The Hon'ble Apex Court cautioned in ***Balwant Singh (Dead) Vs. Jagdish Singh (2010) 8 SCC 685*** and held that "justice must be done to both parties

equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights, remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law. As a result of his acting vigilantly."

67. Throwing light on the point, Hon'ble Apex Court in ***Joint Collector Ranga Reddy District and another Vs. D. Rarsing Rao and others (2015) 3 SCC 695***, held that (para 25 and 31) :-

*"25. The legal position is fairly well settled by a long line of decisions of this Court which have laid down that even when there is no period of limitation prescribed for the exercise of any power, revisional or otherwise, such power must be exercised within a reasonable period. This is so even in cases where allegations of fraud have necessitated the exercise of any corrective power. we may briefly refer to some of the decisions only to bring home the point that the absence of a stipulated period of limitation makes little or no difference insofar as the exercise of the power is concerned which ought to be permissible only when the power is invoked within a reasonable period.*

*31. To sum up, delayed exercise of revisional jurisdiction is frowned upon because if actions or transactions were to remain forever open to challenge, it will mean avoidable and endless uncertainty in human affairs, which is not the policy of the law. Because, even when there is no period of limitation prescribed for exercise of such powers, the intervening delay, may have led to creation of third-party rights, that cannot be trampled by a belated exercise of a discretionary power especially when no cogent explanation for the delay is in sight. Rule of law it is said must run closely with the rule of life. Even in cases where the orders sought to be revised are fraudulent, the exercise of power must be within a reasonable period of discovery of the time for its correction to infinity ; for otherwise the exercise of revisionisal power would itself be tantamount to a fraud upon the statute that vests such power in an authority."*

68. In ***Chedi Lal Yadav and others Vs. Hari Kishore Yadav and others reported in (2018) 12 SCC 527,*** the Hon'ble Apex Court has held as under :-

*"13. In our view, where no period of limitation is prescribed, the action must be taken, whether suo moto or on the application of the parties, within a reasonable time. Undoubtedly, what is reasonable time would depend on the circumstances of each case and the purpose of the statute. In the case before us, we are clear that the action is grossly delayed and taken beyond reasonable time, particularly, in view of the fact that the land was transferred several times during this period, obviously, in the faith that it is not encumbered by any rights.*

*14. We are of the view that merely because the legislation is beneficial and no limitation is prescribed, the rights acquired by persons cannot be ignored lightly and proceedings cannot be initiated after unreasonable delay as observed by this Court in Situ Sahu Vs. State of Jharkhand."*

**HOW TO 'INTERPRET' OR 'CONSTRUCT' A 'BENEFICIAL LEGISLATION'?**

69. As the D.V.Act is a beneficial legislation, before proceeding further, we

have to consider how to 'interpret' or 'construct' a 'beneficial legislation'. 'Construction' is the drawing of conclusions regarding the subjects which lie beyond the direct expression of any of the text, conclusion which are not written in the text of the Act but imbibed in very spirit of the piece of legislation. It slightly differs from 'interpretation' where the true sense is deduced from the word used in the legislation.

70. ***Maxwell Sir Peter Benson, "On the interpretation of Statutes"*** ( 2007 at page 123) has said "it is said to be the duty of the judge to make such construction of a statute as shall suppress the mischief and advance the remedy. Even where the usual meaning of the language falls short of the whole object of the Legislature, a more extended meaning may be attributed to the words, if fairly susceptible of it".

71. In ***Jeffrey W. Stempel, 'The Insurance Policy as Statute' (2010)***, it has been written "Beneficial statutes, as the name implies, were those designed to provide rights, privileges or entitlements to segments of the public or to the public as a whole. Today, such laws are commonly referred to as remedial and are subject to the canon of construction that remedial legislation is to be liberally construed in order to effectuate its purpose."

72. In ***Thakur Raghuraj Singh Vs. Rai Bahadur Lala Hari Kishan Das and another, AIR 1944 PC 35,*** it has been observed that a remedial statute must be construed so as "to secure that the relief contemplated by the statute shall not be denied to the class intended to be relieved."

73. In ***Workmen of Indian Standards Institutions Vs. The Management of Indian Standards Institution : (1975) 2 SCC 847***, the Hon'ble Apex Court while interpreting The Industrial Disputes Act ( a beneficial legislation ) laid down as under :-

*"1. .....We cannot forget that it is a social welfare legislation we are interpreting and we must place such an interpretation as would advance the object and purpose of the legislation and give full meaning and effect to it in the achievement of its avowed social objective."*

74. In ***B. Shah Vs. Presiding Officer, Labour Court, Coimbatore and others : (1977) 4 SCC 384***, the Hon'ble Apex Court while interpreting the maternity benefits act laid down as under :-

*"18. .....It has also to be borne in mind in this connection that in interpreting provisions of beneficial pieces of legislation like one in hand which is intended to achieve the object of doing social justice to women workers employed in the plantations and which squarely fall within the purview of Article 42 of the Constitution, the beneficent rule of construction which would enable the woman worker not only to subsist but also to make up her dissipated energy, nurse her child, preserve her efficiency as a worker and maintain the level of her previous efficiency and output has to be adopted by the Court."*

*To sift out, "no limitation" does not mean "any time". It means "reasonable period". What is to be treated as "reasonable period" will depend upon the factual matrix of each case keeping in mind the nature of the legislation to ensure the justice. It should also be taken into*

*consideration that other party should not suffer for want of bona fides, deliberate inaction or negligent attitude on the part of the aggrieved party.*

75. The Hon'ble Apex Court in ***Bharat Singh Vs. Management of New Delhi Tuberculosis Centre New Delhi, (1986) 2 SCC 614***, held as under :-

*"11. .....Now, it is trite to say that acts aimed at social amelioration giving benefits for the have-nots should receive liberal construction. It is always the duty of the court to give such a construction to a statute as would promote the purpose or object of the Act. a construction that promotes the purpose of the legislation should be preferred to a literal construction. a construction which would defeat the rights of the have-nots and the underdog and which would leave to injustice should always be avoided....."*

76. In ***Lucknow Development Authority Vs. M.K.Gupta : (1994 ) 1 SCC 243,*** the Hon'ble Apex Court has held as under :-

*"Legislation that is enacted to protect the public interest (in this case Consumer Protection Act) cannot be construed in a narrow manner so as to frustrate its objective. The Consumer Protection Act is social benefit legislation.... It should be construed in favour of the consumer."*

77. In ***Shashi Gupta Vs. L.I.C. : 1995 Supp (1) SCC 754, i***t was held that while interpreting the terms of insurance policies, courts will accept the one which favours the policy holders.

78. In ***Union of India Vs. Pradeep Kumari ( 1995) 2 SCC 736,*** it was observed that " it is well settled that in beneficial legislation, the court should adopt with construction which advances the policy of legislator to extend the benefit rather than a construction which has the effect of curtailing it".

79. In ***Ghantesher Ghosh Vs. Madan Mohan Ghosh and others : (1996) 11 SCC 446***, it was held that "It is also well settled rule of interpretation of statute that the court should lean in favour of that interpretation which fructifies the beneficial purpose for which the provision is enacted by the legislature and should not adopt an interpretation which frustrates or unnecessarily truncates it."

80. In ***Bombay Anand Bhawan Restaurant Vs. E.S.I.C. : (2009) 9 SCC 61***, it was held by the Apex Court that E.S.I. Act is a social welfare legislation. It is beneficial legislation. The court must even, if necessary, strain the language of the Act in order to achieve the purpose. The act must receive a liberal construction so as to promote its objects".

81. In **R.P.F.C. Vs. Hooghly Mills Company Ltd. : (2012) 2 SCC 489**, the Hon'ble Supreme Court has observed that "Provident Fund Act is a beneficial social welfare legislation to ensure benefits to the employees. These statutes are normally called remedial statutes or social welfare legislation. The normal canon of interpretation is that a remedial statute received liberal construction whereas a penal statute calls for strict interpretation.

82. In ***Om Prakash Vs. Reliance General Insurance : (2017) 9 SCC 724,*** the Hon'ble Apex Court observed that Consumer Protection Act is a beneficial legislation to protect the interests of consumers. It deserves liberal interpretation.

**HOW TO DEAL WITH DELAY UNDER THE D.V. ACT?**

83. in ***"Domestic Violence, Domestic Torts and Divorce" : Constraints and Possibilities"*** an article authored by **Clare Dalton** (Professor of Law and Executive Director of the Domestic Violence Institute at Northeastern University School of Law )(31 New ENG L. REV.319 (1997), the same issue was considered. The article denotes that traditionally, statutes of limitation required that, actions for battery or assault be brought within two, or at most three years after the incident on which they are based. The corresponding limitation periods for intentional infliction of emotional distress are sometimes a little more generous -ranging between one and six years. Based on the nature of abusive relationships and nature, it may take time for an aggrieved partner to take action, if these limitation periods are applied without modification, she is likely to be able to sue for only a small portion of her total injury. The author indicates that the most successful litigation strategy to date has been to argue that :

*"partner abuse should be understood as a continuing tort, and a cumulative injury, so that statutes of limitation begin to run only when the abuse stops, which will be when the partners separate, unless the abuser continues to terrorize his partner, either to punish her, or in the hopes of bringing her back into the relationship."*

84. In ***Page Vs. United States, 729 F.2d 818, 821-22 (D.C.Cir.1984)***, it has been observed that :

*"when a tort involves continuing injury, the cause of action accrues, and the limitation period begins to run, at the time the tortious conduct ceases." Since usually no single incident in a continuous chain of tortious activity can "fairly or realistically be identified as the cause of significant harm," it seems proper to regard the cumulative effect of the conduct as actionable. Moreover, since "one should not be allowed to acquire a right to continue the tortious conduct, it follows logically that status of limitation should not run prior to its cessation."*

85. Likewise, in ***Bustamente Vs. Tucker, 607So. 2d 532 (La. 1992)***, it was observed that :

*"intentional infliction of emotional distress as a continuing tort in a sexual harassment context, holding that when similar harassing conduct by the same individual occurred almost daily, "and the conduct becomes tortious and actionable because of its continuous, cumulative, synergistic nature," the limitation period would not begin to run until the last act occurred or the conduct abated." (emphasis supplied).*

*86. In V.D. Bhanot Vs. Savita Bhanot (supra), the Hon'ble Apex Court has confirmed the view taken by the Delhi High Court and held as under :-*

*"12. We agree with the view expressed by the High Court that in looking into a complaint under Section 12 of the PWD Act, 2005, the conduct of the parties even prior to the coming into force of the PWD Act, could be taken into*

*consideration while passing an order under Sections 18, 19 and 20 thereof. In our view, the Delhi High Court has also rightly held that even if a wife, who had shared a household in the past, but was no longer doing so when the Act came into force, would still be entitled to the protection of the PWD Act, 2005."*

87. In ***Shalini Vs. Kishore and others (2015) 11 SCC 718***, the Hon'ble Supreme Court has held as under :-

*"In Saraswathy Vs. Babu, in the similar circumstances where the wife was driven out of the matrimonial home about fourteen years before, complaint was filed under the Protection of Women from Domestic Violence Act, 2005, and this Court has laid down in the law on the point as under :(CSCC p.72, para24)*

*"24. We are of the view that the act of the respondent husband squarely comes within the ambit of Section 3 of the DVA, 2005, which defines 'domestic violence' in wide terms. The High Court made an apparent error in holding that the conduct of the parties prior to the coming into force of the DV, 2005 cannot be taken into consideration while passing an order. This is a case where the respondent husband has not complied with the order and direction passed by the trial court and the appellate court. .....The appellant wife having being harassed since 2000 is entitled for protection order and residence order under Sections 18 and 19 of the DVA, 2005 alongwith the maintenance as allowed b the trial court under Section 20(1) (d) of the DVA, 2005."*

88. The Hon'ble Apex Court in ***S.Vanitha Vs. Deputy Commissioner, Bengaluru Urban District & others(supra)***, has further observed as under :-

*"22. .....The PWDV Act 2005 is also in the nature of a special legislation, that is enacted with the purpose of correcting gender discrimination that pans out in the form of social and economic inequities in a largely patriarchal society....."*

89. In ***Preetam Singh and another Vs. State of Uttar Pradesh and another (supra),*** the Allahabad High Court has held as under :-

*"12. If the provision of Section 2 (a) are read together with the provisions of Section 3(iv) (a) of the Protection of Women from Domestic Violence Act, 2005, it is clear that a wife, even if, she was driven out of her matrimonial home prior to the commencement of the Protection of Women from Domestic Violence Act, 2005, if continues to be deprived of all or any economic or financial resources to which she is entitled under any law or custom whether payable under an order of a court or otherwise or which she requires out of necessity, is entitled to move an application under Section 12 of the Protection of Women from Domestic Violence Act, 2005. The view that I am taking is also supported by a decision of the Bombay High Court in the case of Maroti Lande Vs. Sau Ganguai Moroti Lande where the court was of the view that deprivation to the benefits of a matrimonial home amounts to economic abuse and it generates a continuous cause of action."*

90. Hence, at the cost of repetition, since the D.V Act is a beneficial legislation providing remedies of civil nature for ensuring effective protection to the women

against the domestic violence. The legislature in its wisdom has provided no limitation for moving application under its Section 12, so the rigour of provisions of the Limitation Act, 1963 shall not apply and the application so moved cannot be turned down in limine on the ground of limitation alone. The best approach would be to apply the criteria of within 'reasonable period' and what will be the 'reasonable period', will be decided on the basis of 'factual matrix' of each case, keeping in mind the principle of 'equity, justice and good conscience".

**The question no.(ii) is answered accordingly.**

91. To conclude neither Section 468 of Cr.P.C. nor the provisions of the Limitation Act, 1963 shall apply to application moved under Section 12 of the D.V.Act. The questions referred are decided accordingly.

Let the matter be placed before the learned Single Judge for final disposal.

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**(2021)10ILR A966**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 29.07.2021**

**BEFORE**

**THE HON'BLE RAVI NATH TILHARI, J.**

Misc. Single No. 13556 of 2021

**Ram Pal Soni & Anr. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Ambika Prasad Mishra

**Counsel for the Respondents:**
C.S.C., Anand Kumar Singh

**A. Civil Law - Tribunal - Jurisdiction - Recoveries of Debts Due to Banks and Financial Institutions Act, 1993 - Section 3 - Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Sections 17(1) & 17 (1-A) - territorial jurisdiction of Tribunal - Reference to Larger Bench for authoritative pronouncement - Whether Section 3 of 1993 Act, can be read as conferring exclusive jurisdiction on the Tribunals established there under, irrespective of Section 19 of the Recoveries of Debts Due to Banks and Financial Institutions Act, 1993 and Section 17(1A) of the SARFAESI Act, rendering Sections 19 and 17(1A) of the respective Acts as redundant or nugatory ? (Para 58)**

**B. Civil Law - Tribunal - Jurisdiction - Recoveries of Debts Due to Banks and Financial Institutions Act, 1993 - Section 3 - Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, 17(1), 17 (1-A) - territorial jurisdiction of Tribunal - Reference to Larger Bench- Whether the judgment in Saurabh Gupta which lays down that the Debts Recovery Tribunal, Allahabad shall have exclusive jurisdiction to entertain and decide the applications arisen from 55 districts specified in the notification dated 05.12.2017, without noticing S. 19 of the 1993 Act and Section 17(1A) of the SARFAESI Act, as also the judgment of Hon'ble Supreme Court in case of Sri Nasiruddin (supra) lays down the law correctly ? (Para 58)**

**C. Civil Law - Tribunal - Jurisdiction - SARFAESI Act, 2002 - Section 17 - Whether in a case where part of cause of action to maintain an application under Section 17(1) of the SARFAESI Act, arises within the limits of territorial jurisdiction of Debts Recovery Tribunal, Lucknow, the Debts Recovery Tribunal, Lucknow will have the jurisdiction, power and authority to entertain and decide such application in**

**view of Sub section (1-A) of Section 17 of the SARFAESI Act or not ? (Para 58)**

**Referred to Larger Bench**.(E-5)

**List of Cases cited:**

1. Amish Jain & ors.. Vs ICICI Bank Ltd. 2018 LawSuit (Del) 2370,

2. Ramsay Exim & Technology Pvt. Ltd. & ors. Vs ICICI Bank Ltd. & anr. 2019 LawSuit (Cal) 1238

3. Y. Abraham Ajith & ors. Vs Inspector of Police, Chennai & anr.. (2004) 8 SCC 100

4. Swamy Atmananda & ors. Vs Sri Ramakrishna Tapovanam & ors. (2005) 10 SCC 51

5. Alchemist Ltd. & anr. Vs State Bank of Sikkim & ors., (2007) 11 SCC 335

6. Saurabh Gupta Vs U.O.I. & ors. Writ-C No. 46965 of 2017

7. Sri Nasiruddin Vs S.T.A.T. (1975) 2 SCC 671

8. Jagannath Temple Managing Committee Vs Siddha Math & ors., (2015) 16 SCC 542

9. K. P. Manu Vs Chairman Scrutiny Committee for Verification of Community Certificate, (2015) 4 SCC 1

10. Jayant Verma Vs U.O.I. (2018) 4 SCC 743

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

1. Heard Shri Ambika Prasad Mishra, learned counsel for the petitioners, Shri J. P. Maurya, learned Additional Chief Standing Counsel for the opposite party No. 1, Shri Anand Kumar Singh, learned counsel for the opposite party Nos. 3 & 4 through video conferencing. The opposite party No. 2 is Debts Recovery Appellate Tribunal, Allahabad, which has passed the order under challenge.

2. For the reasons assigned in the order dated 02.07.2021, issuance of notice to the opposite party No. 5 was dispensed with.

3. The writ petition has been filed for the following reliefs:

*(i) Issue a writ, order or direction in the nature of CERTIORARI, Quashing/Setting aside the impugned judgment and order dated 25-03-2021 passed by opposite party No.2 in Regular Appeal No. 14 of 2021 UCO Bank Vs Ram Pal Soni and another which is contained in Annexure No.1 to this writ petition.*

*(ii) Issue a writ or direction in the nature of mandamus commanding the opposite parties concerned not to disturb peaceful possession of the petitioners regarding property in question during the pendency of the writ petition in the interest of Justice.*

*(iii) Issue any other writ, order or direction be passed which this Hon'ble Court may deem just and proper under the facts and circumstances of the case.*

*(iv) Allow the writ petition with cost in favour of the petitioner.*

4. The petitioner No.1 is the borrower from opposite party No.4, United Commercial Bank, Branch Amethi, District Amethi (in short, "UCO Bank'). The petitioner No. 2 is the guarantor. The loan account of petitioners became non productive asset (NPA) on 31.03.2017.

5. The opposite party No. 3-Zonal Manager/ Authorized Officer, UCO Bank from its Zonal Office at Lucknow, issued notice dated 03.05.2019, Annexure-3, under Rule 8(6) of the Security Interest (Enforcement), Rules, 2002 (in short, "Rules, 2002'), framed under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securtiy Interest Act, 2002 (in short, "SARFAESI Act'), to hold public-e-auction of the property, i.e., the secured assets, fixing the date as 10.06.2019. Another notice dated 27.06.2019 was issued from the Branch Office of the UCO Bank-opposite party No. 4, to the petitioners to deposit the amount which had become overdue. The e-auction of the property was held by the Zonal Authority, Lucknow on 28.06.2019 and the petitioners were informed vide letter dated 03.07.2019. The petitioner No. 1 filed Writ Petition No. 19204 (MB) of 2019, Ram Pal Soni Vs. State of U.P. and others, which was dismissed by a Division Bench of this Court on 16.07.2019 on the ground of alternative remedy, available under Section 17 of the SARFAESI Act.

6. The petitioners, thereafter, filed Securitisation Application (SA) No. 541 of 2019, Ram Pal Soni and another Vs. Zonal Manager/ Authorized Officer, UCO Bank and others, before the Debts Recovery Tribunal, Lucknow (in short, "DRT, Lucknow'), under Section 17 (1) of the SARFAESI Act, in which the respondent Bank raised a preliminary objection that as the security asset was located at Amethi, the DRT, Lucknow, had no jurisdiction, which was contested by the petitioners. The D.R.T., Lucknow vide order dated 06.08.2019, rejected the preliminary objection about its territorial jurisdiction finding that the demand notice and the sale notice were issued from the Authorized Officer at Zonal Office of the UCO Bank at Lucknow, the cause of action in part had arisen at Lucknow, and the Tribunal had the jurisdiction to deal with the matter. An interim protection was also granted that till the date fixed, the respondent Bank may proceed with sale, but the sale deed will not be executed in favour of the auction purchaser.

7. The Bank, opposite parties filed Regular Appeal No. 14 of 2020, under Section 18 of the SARFAESI Act, UCO Bank, Branch Office-Amethi, District Amethi Vs. Ram Pal Soni and another, which, the Debts Recovery Appellate Tribunal, Allahabad (in short, "Appellate Tribunal'), has allowed and has set aside the judgment of the Tribunal dated 06.08.2019 vide judgment and order dated 25.03.2021, holding that the S.A. No. 541 of 2019 is not maintainable before the DRT, Lucknow, for lack of territorial jurisdiction in as much as according to it the issuance of notices cannot be treated as cause of action.

8. The Appellate Tribunal, by the same order dated 25.03.2021, also transferred the Securitisation Application to the Debts Recovery Tribunal, Allahabad (in short, "DRT, Allahabad').

9. It is this judgment dated 25.03.2021 passed by the Appellate Tribunal, Allahabad, which is under challenge in the writ petition.

10. Shri Ambika Prasad Mishra, submits that an application under Sub section (1) of Section 17(1-A) of SARFAESI Act shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction the cause of

action, wholly or in part arises; where the secured asset is located or the branch or any other office of the bank is maintaining an account in which debt claimed is outstanding for the time being. He submits that the cause of action has arisen partly within the territorial jurisdiction of the DRT, Lucknow, as the demand notice and sale notice were issued by the zonal authority of the Bank at Lucknow, and as the e-auction was also conducted by the officer sitting at Lucknow, and as such the DRT, Lucknow had the territorial jurisdiction.

11. Shri Anand Kumar Singh, submits that the DRT, within whose territorial jurisdiction, the secured asset is located, will have the jurisdiction and as the secured asset is located at Amethi, the DRT, Lucknow, had no territorial jurisdiction. He has placed reliance on Section 16 of the Civil Procedure Code (in short, "CPC'), that the suits are to be instituted, subject to the pecuniary or other limitations prescribed by any law, in court within the local limits of whose jurisdiction the property situates. The notices in question, according to him, would not furnish any part of cause of action at Lucknow. He placed reliance on the judgments of **Amish Jain & Ors. Vs. ICICI Bank Ltd., 2018 LawSuit (Del) 2370, and Ramsay Exim and Technology Private Limited and others Vs. ICICI Bank Limited and another, 2019 LawSuit (Cal) 1238,** which have also been referred in the impugned judgment of the Appellate Tribunal.

12. Shri Anand Kumar Singh further submitted that the Chairman of the appellate tribunal has the jurisdiction to transfer the securitisation application from one DRT to another DRT in view of Section 17(A)(2) of the SARFAESI Act. Consequently he submits that the order under challenge passed by the Chairman of Appellate Tribunal is within jurisdiction and calls for no interference.

13. Shri J. P. Maurya, learned Additional Chief Standing Counsel, submits that the petitioners' application was maintainable before the DRT, Lucknow, as the issuance of notice under Section 13(2), (4) of the SARFAESI Act, as also holding of e-auction by the Bank authority from Lucknow, would, form part of the cause of action, and in view of Section 17(1-A) of the SARFAESI Act, the DRT, Lucknow has the territorial jurisdiction to entertain the application.

14. Shri J. P. Maurya, has placed the judgment of this Court at Allahabad in Writ-C No. 46965 of 2017, Saurabh Gupta Vs. Union of India and others, and submits that in that case it has been held that the DRT, Allahabad has exclusive territorial jurisdiction over all the fifty five districts specified in the notification dated 15.02.2017, under Section 3 of the Debts Recovery Tribunal Act, but he submits that Section 17(1-A) of the SARFAESI Act finds no consideration.

15. I have considered the submissions advanced by the learned counsels for the parties and perused the material on record.

16. In view of the submissions advanced, points for determination which arise for consideration are being formulated as under:-

*(i) Whether the Debts Recovery Tribunal within whose territorial jurisdiction the secured asset is located, would only have the jurisdiction where the application under Section 17(1) of the SARFAESI Act can be filed, or it can also*

*be filed with such Debts Recovery Tribunal where, the secured asset might not be located, but the part of cause of action had arisen?*

*(ii) Whether by issuance of notice under Section 13(2), (4) as also holding of e-auction, from Lucknow by the opposite party No. 3 at Lucknow, any part of cause of action has arisen within the territorial jurisdiction of DRT, Lucknow?*

*(iii) If the DRT, Lucknow also had the territorial jurisdiction in view of Section 17(1A)(a) of SARFAESI Act, the order of the Appellate Tribunal, Allahabad, setting aside the order of the Debts Recovery Tribunal, Lucknow, and transferring the case to DRT, Allahabad, can be sustained in law?*

17. To consider the aforesaid points and to appreciate the rival submissions, it is apt to refer the provisions of Sections 13 and 17 of the SARFAESI Act.

18. Section 13 of the SARFAESI Act reads as under:

***13. Enforcement of security interest.--****(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.*

***(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).***

*[Provided that--*

*(i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and*

*(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modiifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee.]*

*(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.*

*(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within fifteen days of receipt of such representation or objection the reasons for nonacceptance of the*

*representation or objection to the borrower.*

*Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.*

*(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--*

*(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;*

*(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:*

*Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:*

*Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;*

*(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;*

*(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.*

*(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.*

*(5A) Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorised by the secured creditor in this behaalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.*

*(5B) Where the secured creditor, referred to in sub-section (5A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken by the secured creditor, under sub-section (4) of section 13.*

*(5C) The provisions of section 9 of the Banking Regulation Act, 1949 (10 of 1949) shall, as far as may be, apply to the*

*immovable property acquired by secured creditor under sub-section (5A).*

*(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.*

*(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.*

*(8) Where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets,-*

*(i) the secured assets shall not be transferred by way of lease assignment or sale by the secured creditor; and*

*(ii) in case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this sub-section, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.*

*(9) Subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:*

*Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956):*

*Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act:*

*Provided also that liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimate dues with the liquidator:*

*Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:*

*Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.*

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

*(a) "record date" means the date agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding on such date;*

*(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.*

*(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.*

*(11) Without prejudice to the rights conferred on the secured creditor under or by this section, secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measured specifies in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.*

*(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.*

*(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business)any of his secured assets referred to in the notice, without prior written consent of the secured creditor.*

19. Section 17 of the SARFAESI Act reads as under:-

***17. Application against measures to recover secured debts]****.--(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within forty five*

*days from the date on which such measure had been taken:*

*Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.*

*Explanation.--For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.*

***(1A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction--***

***(a) the cause of action, wholly or in part, arises;***

***(b) where the secured asset is located; or***

***(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.***

*(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.*

*(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,--*

*(a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and*

*(b) restore the possession of secured assets or management of secured assets to the bo rrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and*

*(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.*

*(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.*

*(4A) Where--(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,--*

*(a) has expired or stood determined; or*

*(b) is contrary to section 65A of the Transfer of Property Act, 1882 (4 of 1882); or*

*(c) is contrary to terms of mortgage; or*

*(d) is created after the issuance of notice of default and demand by the Bank under subsection (2) of section 13 of the Act; and*

*(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.*

*(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:*

*Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).*

*(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any part to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.*

*(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.*

20. ub section (1-A) of Section 17 of the SARFAESI Act was inserted by the Act No. 44 of of 2016 w.e.f. 01.09.2016, which clearly provides that an application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction-

*(a) the cause of action, wholly or in part, arises;*

*(b) where the secured asset is located; or*

*(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.*

21. Section 17(1A) of SARFAESI Act is very specific and unambiguous. Therefore, an application under Section 17(1) of the Act is maintainable before the Debts Recovery Tribunal within the local limits of whose jurisdiction the cause of action wholly; or in part arises, even if the secured asset is not located within the territorial limits of such Debts Recovery Tribunal. This is not to say that an application under Section 17(1) cannot be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction the secured assets is located, but, this is to say that if the jurisdiction falls within the two or more Debts Recovery Tribunal, in view of clauses (a), (b) and (c) of Section 17(1A), the application under Section 17(1) can be filed before any of those Debts Recovery Tribunals by any person, including the borrower aggrieved by any of measures referred to in Section 13(4) of the SARFAESI Act.

22. Now, the Court proceeds to consider the judgment delivered by the Full Bench of the Delhi High Court in the case of **Amish Jain (supra)**, on which the learned counsel for the opposite parties has placed much reliance and which has also been relied upon by the Appellate Tribunal.

23. In **Amish Jain (supra)**, the question before the Full Bench was, if an application under Section 17(1) SARFAESI Act can be filed, not only in the Debts Recovery Tribunal having jurisdiction where the mortgaged property is situated, but also in DRT having jurisdiction where the branch of the Bank / Financial Institution, which has disbursed the loan is situated, as well as in all DRTs, which would have jurisdiction in terms of Section 19(1) of The Recoveries of Debts Due to Banks and Financial Institutions Act, 1993 (DRT Act) read with Rule 6 of the Debts Recovery Tribunal (Procedure) Rules, 1993 (DRT Rules).

24. In **Amish Jain (supra)**, it was held as under in paragraph Nos. 16 to 24:

*16. We are therefore of the view that the question of territorial jurisdiction for the remedy of appeal provided in Section 17(1) of the SARFAESI Act has to be construed in the said light and not in the light of the DRT Act making a departure from the principle enshrined in Section 16 of the CPC.*

*17. Section 17(1) of the SARFAESI Act provides for filing of the appeal / application thereunder not to any DRT but only to the "DRT having jurisdiction in the matter". However, such jurisdiction is not specified. To determine which DRT will have jurisdiction in the matter, we have to find as to what is to be the matter for adjudication in a proceeding under Section 17(1) of the SARFAESI Act and what relief the DRT is empowered to grant in the said proceeding. The scope of a proceeding under Section 17(1) of the SARFAESI Act is described in Section 17(2) of the SARFAESI Act as of "whether any of the measures referred to in Sub-Section (4) of Section 13 of the SARFAESI Act taken by the secured creditor for enforcement of security are in accordance with the provisions of the SARFAESI Act and the Rules made thereunder". The*

*measures which the Bank / Financial Institution is empowered to take under Section 13(4) of the SARFAESI Act are of taking over possession or management as aforesaid of the secured asset. Of course, the action of so taking over possession or management is to be preceded by (a) the borrower under a liability under a secured agreement making any default in repayment of the secured debt or any installment thereof; (b) the borrowers account in respect of such debt being classified as non-performing asset; (c) the Bank / Financial Institution requiring the borrower by notice in writing to discharge in full his liabilities within sixty days and giving details of the amount payable and the secured asset intended to be enforced in the event of non-payment; d) consideration of representation if any made by the borrower thereagainst and communication to the borrower of the reasons for non-acceptance of such representation. Though, it could well be argued that the DRT within whose jurisdiction Bank / Financial Institution to whom the borrower is indebted is situated, would also have jurisdiction to adjudicate whether the action under Section 13(4) of taking over possession / management is in accordance with the aforesaid procedure but the explanation to Section 17(1) of the SARFAESI Act clarifies that the communication of the reasons to the borrower for not accepting the representation or the likely action of the Bank / Financial Institution shall not entitle the borrower to make an application under Section 17(1) of the SARFAESI Act. Thus the cause of action for the appeal under Section 17(1) of the SARFAESI Act is the taking over of the possession / management of the secured asset and which cause of action can be said to have accrued only within the jurisdiction of the DRT where the secured asset is so situated and the possession thereof is taken over. We are thus of the view that it is the said DRT only which can be said to be having "jurisdiction in the matter" within the meaning of Section 17(1) of the Act.*

*18. Further, the relief to be granted by the DRT in an appeal under Section 17(1) of the SARFAESI Act, if successful, is (under Section 17(3)) of restoration of possession / management of the secured asset to the borrower and to pass such order as it may consider appropriate and necessary in relation to the recourse taken by the Banks / Financial Institution under Sub-Section (4) of Section 13 of the SARFAESI Act. This relief also, we find, the DRT within whose jurisdiction the secured asset to be so restored to the borrower is situated, to be the most competent to grant and implement. The orders which the DRT under Section 17(3) of the SARFAESI Act may be required to pass may also entail exercising jurisdiction over the CMM / DM which is approached by the Bank / Financial Institution for assistance for taking over possession / management. Notice in this regard may be taken of* ***Kanaiyalal Lalchand Sachdev Vs. State of Maharashtra (2011) 2 SCC 782 and of United Bank of India Vs. Satyawati Tandon (2010) 8 SCC 110*** *suggesting that appeal under Section 17(1) can be filed after the Bank has filed application under Section 14, even if possession / management has not been taken. In such a situation, DRT may be required to issue direction to the CMM / DM approached by the Bank / Financial Institution. As already noticed in the referral order dated 26.07.2012, Section 3(2) of the DRT Act requires the notification constituting the DRT to specify the area within which the said DRT shall exercise jurisdiction. A*

*DRT at Delhi, as in the facts of the present case, would have no jurisdiction over the DM at Meerut or for that matter over the property at Meerut. We are of the view that exercise of jurisdiction under Section 17(1) of the SARFAESI Act by DRTs of a place other than where the secured asset is situated is likely to lead to complexities and difficulties and which are best avoided. It may also be mentioned that the remedy under Section 17(1) is available not only to the borrower or mortgagor, but also to any other person aggrieved from the measures under Section 13(4). In Satyawati Tandon supra it was invoked by the guarantor. If it were to be held that more than one DRT will have jurisdiction, it may also lead to remedy under Section 17(1) against same action under Section 13(4) being invoked by different persons before different DRTs.*

*There is no provision in the DRT Act for transfer of proceedings from one DRT to another. The Supreme Court, in* ***Authorized Officer, Indian Overseas Bank Vs. Ashok Saw Mill (2009) 8 SCC 366*** *has held the scope of a proceeding under Section 17(1) to be extending to scrutinizing even the steps taken by the Bank / Financial Institution subsequent to measures under Section 13(4). Such scrutiny by the DRT may entail adjudication of disputes as to preservation and protection of the secured asset (see Rule 4 of the Security Interest (Enforcement) Rules, 2002), valuation of the secured asset (Rule 5), sale thereof (Rules 6 to 8) and in the case of the borrower being a company in liquidation, distribution of sale proceeds thereof or between more than one secured creditor of the secured asset (see Section 13(9) of the SARFAESI Act). Such scrutiny by DRT of post Section 13(4) measures may yet further enlarge the number of persons interested in invoking the remedy under Section 17(1). Also, all these disputes bear closest proximity to the place where the secured asset is situated and the DRT having jurisdiction over that place would be the most suitable DRT to entertain such disputes.*

*19. As far as Section 17(7) of the SARFAESI Act requiring disposal of appeals under Section 17(1) of the SARFAESI Act, "as far as may be" in accordance with the provisions of the DRT Act and the Rules framed thereunder is concerned, though the learned Single Judge of this Court in* ***Upendra Kumar Vs. Harpriya Kumar MANU/DE/0136/1978*** *had held that Section 21 of the Hindu Marriage Act, 1955 providing for the proceedings thereunder to be regulated as far as may be by the CPC, could not be read as incorporating every provision of CPC or making applicable the provisions of CPC to substantive aspects like jurisdiction but the Supreme Court in* ***Guda Vijayalakshmi Vs. Guda Ramachandra Sekhara Sastry AIR 1981 SC 114****3 took a contrary view and held that Section 21 of the Hindu Marriage Act does not make a distinction between procedural and substantive provisions of CPC and thus the provisions of CPC as partake of the character of substantive law are also by implication to apply to the proceedings under the Hindu Marriage Act and the use of the expression "as far as may be" is intended to exclude only such provisions of CPC as may be inconsistent with any of the provisions of the Hindu Marriage Act. Applying the said law, Section 17(7) of the SARFAESI Act is to be read as providing for disposal of appeal under Section 17(1) of the SARFAESI Act in accordance with the provisions of the DRT Act and the Rules made thereunder save as otherwise provided in the SARFAESI Act.*

*20. The expression "as far as may be" still means "to the extent necessary and practical". Supreme Court in* ***Dr. Pratap***

***Singh Vs. Director of Enforcement (1985) 3 SCC 72*** *held that the expression so far as may be has always been construed to mean that those provisions may be generally followed to the extent possible but if a deviation becomes necessary to carry out the purposes of the Act in which reference to another legislation is made, it would be permissible. Similarly, in* ***Ujagar Prints Vs. Union of India (1989) 3 SCC 488*** *a five Judge Bench of the Supreme Court held that the Legislature sometimes takes a shortcut and tries to reduce the length of a statute by omitting elaborate provisions where such provisions have already been enacted earlier and can be adopted for the purpose in hand. The expression "so far as may be" was held to be meaning "to the extent necessary and practical".*

***21. What we however find is that the DRT Act is not containing any provision for territorial jurisdiction of an appeal as under Section 17(1) of the SARFAESI Act, even if it were to be construed not as an appeal and as an original application. The jurisdictional provision under Section 19(1) of the DRT Act is only for applications by the Bank / Financial Institution for recovery of debt from any person. An application by a Bank / Financial Institution for recovery of debt can by no stretch of imagination be equated with an appeal under Section 17(1) of the SARFAESI Act. We are therefore of the view that there is no provision in the DRT Act providing for territorial jurisdiction of an appeal under Section 17(1) of the SARFAESI Act and the question of application thereof under Section 17(7) does not arise. Under Section 17(7) of the SARFAESI Act only that much of the DRT Act can be said to be incorporated therein as is contained in the DRT Act and not more. Whether a particular provision of DRT Act would apply or not, would depend upon the nature and scope of proceeding under the SARFAESI Act.***

***22. Once it is held that an appeal under Section 17(1) of the SARFAESI Act cannot be equated with an application by the Bank / Financial Institution for recovery of debt under Section 19 of the DRT Act, the limits of territorial jurisdiction described under Section 19(1) of the DRT Act cannot be made applicable to Section 17(1) of the SARFAESI Act.***

***23. It would thus be seen that the provision for territorial jurisdiction under Section 19 (1) of the DRT Act is only qua the applications to be made by the Bank or Financial Institution for recovery of its debt. However, a proceeding under Section 17(1) of the SARFAESI Act is initiated not by the Bank or the Financial Institution but by a person including the borrower aggrieved from the measures taken by the Bank or Financial Institution under Section 13 (4) of the SARFAESI Act. We are thus of the view that notwithstanding Section 17(7) of the SARFAESI Act providing for the disposal of the proceedings under Section 17(1) of the SARFAESI Act in accordance with the provisions of the DRT Act and the Rules made thereunder, the same cannot make the provisions of Section 19(1) of the DRT Act applicable to proceedings under Section 17(1) of the SARFAESI Act. As aforesaid, Section 19(1) of the DRT Act is not an omnibus provision qua territorial jurisdiction. It is concerned only with providing for territorial jurisdiction for applications for recovery of debts by the Banks / Financial Institutions. The same can have no application to the appeals under Section***

***17(1) of the SARFAESI Act which are to be preferred, not by the Banks / Financial Institutions, but against the Banks / Financial Institutions.***

*24. We are further of the view that the use, in Section 17(7) of the SARFAESI Act, of the words "as far as may be" and "save as otherwise provided in this Act" also exclude applicability even of the principles contained in Section 19(1) of the DRT Act to determine the territorial jurisdiction of an appeal under Section 17(1) of the SARFAESI Act. Our reasons therefor are stated herein below.*

25. A careful reading of **Amish Jain (supra)** shows that it was held therein that an appeal/ application under Section 17(1) of the SARFAESI Act can be filed only before the DRT within whose jurisdiction the property/ secured asset against which action is taken is situated and in no other DRT, considering that Section 17(1) of the SARFAESI Act provides for filing of the appeal/ application thereunder not to any DRT but only to the "DRT having jurisdiction" in the matter, but such jurisdiction was not specified and the DRT Act was not containing any provision for territorial jurisdiction of an appeal as under Section 17(1) of the SARFAESI Act. The jurisdictional provision under Section 19(1) of the DRT Act was held to be only for applications by the Bank / Financial Institution for recovery of debt from any person. An application by a Bank / Financial Institution for recovery of debt, it was held, could by no stretch of imagination be equated with an appeal under Section 17(1) of the SARFAESI Act, and, therefore, it concluded that the limits of territorial jurisdiction described under Section 19(1) of the DRT Act could not be made applicable to Section 17(1) of the SARFAESI Act. As the proceeding under Section 17(1) of the SARFAESI Act is initiated, not by the Bank or the Financial Institution, but by a person including the borrower aggrieved from the measures taken by the Bank or Financial Institution under Section 13 (4) of the SARFAESI Act, the Full Bench, was of the view that notwithstanding Section 17(7) of the SARFAESI Act providing for the disposal of the proceedings under Section 17(1) of the SARFAESI Act in accordance with the provisions of the DRT Act and the Rules made thereunder, Section 19(1) of the DRT Act could not be made applicable to proceedings under Section 17(1) of the SARFAESI Act.

26. The case of **Amish Jain (supra)** was decided on 13.09.2012 whereas, in SARFAESI Act, Sub section (1-A) was inserted in Section 17, by the Act 44 of 2016 with effect from 01.09.2016, therefore, in **Amish Jain (supra),** Sub section (1-A) of Section 17, was not under consideration, which specifically provides for filing of an application under Section 17(1) to the DRT, within the local limits of whose jurisdiction, (a) the cause of action, wholly or in part arises. So, even if, in view of the Full Bench of Delhi High Court in **Amish Jain (supra)**, Section 19 of the DRT Act is not applicable to determine the jurisdiction with respect to an application/ appeal under Section 17(1) of SARFAESI Act, the jurisdiction of the DRT concerned will have to be determined as per Section 17(1-A) of SARFAESI Act, under which, if the applicant can show that his case falls within any of the clauses (a), (b) or (c), the DRT, within the local limits of whose jurisdiction, (a) the cause of action, wholly or in part arises; (b) where the secured asset is located; or (c) the branch or any other office of a bank or financial institution is

maintaining an account in which debt claimed is outstanding for the time being, shall have jurisdiction to entertain the application under Section 17(1), subject of course, at the option of the applicant to choose any one of those DRTs.

27. This Court is of the considered view that the amendment in Section 17 SARFAESI Act, by insertion of Sub section (1-A), w.e.f. 01.09.2016, has taken away the very basis of the judgment in **Amish Jain (supra).**

28. In **Ramsay Exim (supra),** upon which also reliance has been placed by Shri Anand Kumar Singh, learned counsel for the Bank-opposite parties, the Calcutta High Court, while considering the provisions of Section 17(1A) of the SARFAESI Act, clearly held that the primary consideration for ascertaining the jurisdiction of the tribunal is not restricted to the situs of the secured asset, but, is primarily based on the debt itself, be it with regard to the place where the cause of action, wholly or in part arises, or the branch or any other office of a bank or financial institution where it is maintaining an account in which the debt claimed is outstanding for the time being, or the defendant resides or works. It further held that clauses (a), (b) and (c) of subsection (1A) are disjunctive and it is the option for the applicant in an application under Section 17(1) of the SARFAESI Act to choose any of the forums. The location of the asset cannot be the sole determinant of the jurisdiction of the tribunal. Paragraphs-25 to 29 of **Ramsay Exim (supra)** read as under:

*25. Section 17(1) of the DRT Act provides that a tribunal shall exercise the jurisdiction, powers and authority to entertain and decide applications from banks and financial institutions for recovery of debts due to such banks and financial institutions. Section 19(1) of the DRT Act, on the other hand, provides as follows:*

*"19. Application to the Tribunal. - (1) Where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction,-*

*(a) the branch or any other office of the bank or financial institution is maintaining an account in which debt claimed is outstanding, for the time being; or*

*(aa) the defendant, or each of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business, or personally works for gain; or*

*(c) the cause of action, wholly or in part, arises:*

*Provided that the bank or financial institution may, with the permission of the Debts Recovery Tribunal, on an application made by it, withdraw the application, whether made before or after the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 for the purpose of taking action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), if no such action had been taken earlier under that Act:*

*Provided further that any application made under the first proviso for seeking permission from the Debts Recovery Tribunal to withdraw the application made under subsection (1) shall be dealt with by it as expeditiously as*

*possible and disposed of within thirty days from the date of such application:*

*Provided also that in case of Debts Recovery Tribunal refuses to grant permission for withdrawal of the application filed under this subsection, it shall pass such orders after recording the reasons therefor."*

*26. A perusal of Section 19(1) of the DRT Act, in conjunction with Section 17(1A) of the SARFAESI Act, indicates that the primary consideration for* ***ascertaining the jurisdiction of the tribunal is not restricted to the situs of the secured asset but is primarily based on the debt itself, be it with regard to the place where the cause of action, wholly or in part, arises or the branch or any other office of a bank or financial institution where it is maintaining an account in which the debt claimed is outstanding for the time being or (in the DRT Act) the defendant resides or works.***

*27. The only additional feature in subsection (1A) of Section 17 of the SARFAESI Act is clause (b) thereof, which confers jurisdiction additionally on the Debts Recovery Tribunal where the secured asset is located.*

***28. However, clauses (a), (b) and (c) of subsection (1A) are disjunctive and it is the option of the applicant in an application under Section 17 of the SARFAESI Act to choose any of the forums.***

***29. In such view of the matter, the location of the asset cannot be the sole determinant of the jurisdiction of the tribunal.***

29. In view of the aforesaid, on point No. 1, I am of the view that the location of the secured asset is not the only criterion to determine the jurisdiction of the Debts Recovery Tribunal(s) under Section 17(1A). If a part of cause of action arises within the limits of jurisdiction of a Debts Recovery Tribunal, an application under Section 17(1) shall lie there also, even if, the secured asset is not located within the limits of its jurisdiction. It is, in such a case, for the applicant, to frame the case appropriately to adopt the jurisdiction of either of the Debts Recovery Tribunals.

30. Now, I proceed to consider the second point, for which it is required to consider the meaning of "cause of action'.

31. In **Y. Abraham Ajith and others Vs. Inspector of Police, Chennai and another, (2004) 8 SCC 100,** the Hon'ble Supreme Court, in paragraph Nos. 14 to 17, has held as under:

*14. It is settled law that cause of action consists of bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the allegedly affected party a right to claim relief against the opponent. It must include some act done by the latter since in the absence of such an act no cause of action would possibly accrue or would arise.*

*15. The expression "cause of action" has acquired a judicially settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action.* ***In the wider sense, it means the necessary conditions for the maintenance of the proceeding including***

***not only the alleged infraction, but also the infraction coupled with the right itself.*** *Compendiously the expression means every fact, which it would be necessary for the complainant to prove, if traversed, in order to support his right or grievance to the judgment of the Court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary to prove such fact, comprises in "cause of action".*

*16. The expression "cause of action" has sometimes been employed to convey the restricted idea of facts or circumstances which constitute either the infringement or the basis of a right and no more.* ***In a wider and more comprehensive sense, it has been used to denote the whole bundle of material facts.***

*17. The expression "cause of action" is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more bases for sitting; a factual situation that entitles one person to obtain a remedy in court from another person. (Black's Law Dictionary a "cause of action" is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact, which, if traversed, the plaintiff must prove in order to obtain judgment. In "Words and Phrases" (4th Edn.) the meaning attributed to the phrase "cause of action" in common legal parlance is existence of those facts, which give a party a right to judicial interference on his behalf.*

32. In **Swamy Atmananda and others Vs. Sri Ramakrishna Tapovanam and others, (2005) 10 SCC 51**, the Hon'ble Supreme Court in paragraphs 23 and 24 has held as under:

*23. Osborn's Concise Law Dictionary defines 'cause of action' as the fact or combination of facts which give rise to a right or action. In Black's Law Dictionary it has been stated that the expression cause of action is the fact or facts which give a person a right to judicial relief. In Stroud's Judicial Dictionary a cause of action is stated to be the entire set of facts that give rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment.*

*24. A cause of action, thus, means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant.* ***It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded.***

33. In **Alchemist Ltd. and another Vs. State Bank of Sikkim and others, (2007) 11 SCC 335, t**he Hon'ble Supreme Court, in paragraph Nos. 20 to 28 and 37, has held as under:

*20. It may be stated that the expression 'cause of action' has neither been defined in the Constitution nor in the Code of Civil Procedure, 1908. It may, however, be described as a bundle of*

*essential facts necessary for the plaintiff to prove before he can succeed. Failure to prove such facts would give the defendant a right to judgment in his favour.* ***Cause of action thus gives occasion for and forms the foundation of the suit.***

*21. The classic definition of the expression "cause of action" is found in Cooke v Gill. Wherein Lord Brett observed:*

*" "Cause of action' means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court".*

*22. For every action, there has to be a cause of action. If there is no cause of action, the plaint or petition has to be dismissed.*

*23. Mr. Soli J. Sorabjee, Senior Advocate appearing for the Appellant-Company placed strong reliance on A.B.C. Laminart Pvt. Ltd. & Anr. v. A.P. Agencies, [(1989) 2 SCC 163] and submitted that the High Court had committed an error of law and of jurisdiction in holding that no part of cause of action could be said to have arisen within the territorial jurisdiction of the High Court of Punjab & Haryana. He particularly referred to the following observations: (SCC p. 170, para12)*

*"12. A cause of action means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. I****t must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded.*** *It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant* ***nor does it depend upon the character of the relief prayed for by the plaintiff".***

*24. In our opinion, the High Court was wholly justified in upholding the preliminary objection raised by the respondents and in dismissing the petition on the ground of want of territorial jurisdiction.*

*25. The learned counsel for the respondents referred to several decisions of this Court and submitted that whether a particular fact constitutes a cause of action or not must be decided on the basis of the facts and circumstances of each case.* ***In our judgment, the test is whether a particular fact(s) is (are) of substance and can be said to be material, integral or essential part of the lis between the parties. If it is, it forms a part of cause of action. If it is not, it does not form a part of cause of action. It is also well settled that in determining the question, the substance of the matter and not the form thereof has to be considered.***

*26. In Union of India & Ors. v. Oswal Woollen Mills Ltd. & Ors., [(1984) 3 SCR 342], the registered office of the Company was situated at Ludhiana, but a petition was field in the High Court of*

*Calcutta on the ground that the Company had its branch office there. The order was challenged by the Union of India. And this Court held that since the registered office of the Company was at Ludhiana and the principal respondents against whom primary relief was sought were at New Delhi, one would have expected the writ petitioner to approach either the High Court of Punjab & Haryana or the High Court of Delhi. The forum chosen by the writ petitioners could not be said to be in accordance with law and the High Court of Calcutta could not have entertained the writ petition.*

*27. In State of Rajasthan & Ors. v. M/s Swaika Properties, (1985) 3 SCC 217 : AIR 1985 SC 1289, the Company whose registered office was at Calcutta filed a petition in the High Court of Calcutta challenging the notice issued by the Special Town Planning Officer, Jaipur for acquisition of immovable property situated in Jaipur. Observing that the entire cause of action arose within the territorial jurisdiction of the High Court of Rajasthan at Jaipur Bench, the Supreme Court held that the High Court of Calcutta had no territorial jurisdiction to entertain the writ petition.*

*28. This Court held that mere service of notice on the petitioner at Calcutta under the Rajasthan Urban Improvement Act, 1959 could not give rise to a cause of action* ***unless such notice was 'an integral part of the cause of action'.***

*37. From the aforesaid discussion and keeping in view the ratio laid down in catena of decisions by this Court, it is clear that for the purpose of deciding whether facts averred by the appellant-petitioner, would or would not constitute a part of cause of action,* ***one has to consider whether such fact constitutes a material, essential, or integral part of the cause of action. It is no doubt true that even if a small fraction of the cause of action arises within the jurisdiction of the Court, the Court would have territorial jurisdiction to entertain the suit/petition. Nevertheless it must be a 'part of cause of action', nothing less than that.***

34. In **Alchemist (supra),** the Hon'ble Supreme Court referred to its previous judgment in the case of **State of Rajasthan Vs. Swaika Properties, (1985) 3 SCC 217**, in which it was held that mere service of notice on the petitioner at Calcutta under the Rajasthan Urban Improvement Act, 1959 could not give rise to a cause of action, **unless such notice was 'an integral part of the cause of action'**. It is not limited to the actual infringement of the right sued on, but includes all the material facts on which it is founded. The test is whether a particular fact is of substance and can be said to be material, integral or essential part of the lis between the parties, if it is, it forms a part of cause of action.

35. Thus, the "cause of action' consists of bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. It is a bundle of facts which taken with the law applicable to them, gives the affected party a right to claim relief against the opponent. It must include some act done by the latter, since in the absence of such an act no cause of action would arise. In the restricted sense, cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the proceeding including not only the alleged

infraction, but also the infraction coupled with the right itself. In the wider sense it has been used to denote all the material facts on which the right to sue is founded. It is not dependent merely upon the character of the relief prayed for. A notice may also be an integral part of the cause of action.

36. The demand notice and the sale notice under the SARFAESI Act read with Rules, 2002, were issued by the Zonal Manager/ Authorized Officer, UCO Bank at Lucknow. The e-auction was conducted on 28.06.2019 from Zonal Officer/ opposite party No. 3, UCO Bank at Lucknow. These are the facts noticed by the Tribunals as undisputed.

37. Looking to the scheme of the SARFAESI Act, without there being any notice under Section 13(2), there could be no cause of action at all. In the absence of any such notice the Bank authorities could not legally proceed any further under Section 13(4) of the SARFAESI Act. The notice, therefore, is an integral part of the cause of action. Though the application under Section 17(1) lies, against the measures taken under Section 13(4), but any measure under Section 13(4) cannot be taken without first complying with Section 13(2) of the SARFAESI Act. The cause of action as it consists of bundle of facts which give cause to enforce the legal enquiry/ redress in a court of law, it must be some act done by the other side, since in the absence of such an act no cause of action would arise and, therefore, every act which is necessary to be taken and is taken by the other side, i.e., the Bank here, would form part of cause of action, as in a wider sense, it has been used to denote the whole bundle of material facts.

38. The Appellate Tribunal has taken the view that the issuance of the notice could not be treated as cause of action as according to it a part of cause of action implies when the branch of the Bank is under jurisdiction of DRT-"A' and the secured asset is situated under the jurisdiction of DRT-"B', then only it can be treated that a part of cause of action has arisen under the jurisdiction of both DRT(s) "A' and "B'. In the considered view of this Court, the Appellate Tribunal legally erred in holding so. All the clauses (a), (b) & (c) are disjunctive.

39. It is true that if the secured asset is located within the local limits of the jurisdiction of one Tribunal, and the Branch or any other office of the Bank or Financial Institution maintaining an account in which debt claim is outstanding for the time being, is situated under the jurisdiction of other Tribunal, then both the Tribunals shall have jurisdiction and it will be for the applicant to file the application before any of such Tribunals, but the expression "part of cause of action' cannot be restricted to clauses (b) or/ and (c), otherwise, clause (a) would be rendered nugatory. If, that had been the intention of the legislature, that only the Tribunal within the local limits of whose jurisdiction, the secured asset is located or the Branch of the Bank concerned is located, then the legislature would not have framed clause (a), because in that case there was no need to frame clause (a), everything being clear from clause (b) and (c). This Court, therefore, is of the considered view that the "cause of action, wholly or in part, arises' is not to be restricted to clauses (b) or/ and (c). But is to be considered also independently from clause (b), or/ and (c) of Sub section (1-A) of Section 17 of the SARFAESI Act and if in view of any other fact, amounting to part

of cause of action the jurisdiction lies with a Tribunal, such fact will have to be considered giving rise to part of cause of action under clause (a). By giving the interpretation as given by the Appellate Tribunal, clause (a) cannot be rendered nugatory. Even if a small fraction of the cause of action arises within the jurisdiction of the court, that court would have territorial jurisdiction to entertain the suit, petition application. The notices under Section 13(2), under Section 13(4) and holding of e-auction are integral part of the cause of action.

40. In view of the aforesaid, I am of the view that a part of cause of action had arises within the local limits of the debts recovery tribunal at Lucknow, which had the jurisdiction to entertain the application filed under Section 17(1) of the SARFAESI Act, in the present case.

41. Now, I proceed to consider the judgment of the coordinate Bench in the case of **Saurabh Gupta (supra).**

42. In **Saurabh Gupta (supra),** this Court held that the Tribunal established under Section 3 of the Recoveries of Debts Due to Banks and Financial Institutions Act, 1993, can entertain and decide the applications of such areas which have been specified by notification, therefore, the DRT, Allahabad shall have exclusive jurisdiction to entertain and decide the applications arisen from 55 districts specified in the notification dated 15.02.2017 and in view of Section 3 read with Section 17(1) of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, the Debt Recovery Tribunal, Lucknow completely lacks jurisdiction to entertain and decide all those applications which fall within the territorial jurisdiction of Debt Recovery Tribunal, Allahabad.

43. In holding that, reliance was placed on Sections 3 & 17 of the Recoveries of Debts Due to Banks and Financial Institutions Act, 1993 and the notification issued under Section 3 of the Act, 1993.

44. It is apt to reproduce paragraphs-10, 11, 12, 13, 28 and 32 of **Saurabh Gupta(supra)** as under:

*10. I have carefully considered the submissions of the learned counsel for the parties and perused the record before me.*

*11. There is no dispute that in view of Notification No. SO 454(E)[F.NO.1/3/2016-DRT] dated 15-2-2017 issued under Section 3 of the Act, district Shahjahanpur falls within the territorial jurisdiction of D.R.T., Allahabad. For ready reference, the aforesaid Notification No.454(E)[F.NO.1/3/2016-DRT] dated 15-2-2017 is reproduced below:*

***SECTION 3 OF THE RECOVERY OF DEBTS DUE TO BANKS AND FINACIAL INSTITUTIONS ACT, 1993 - TRIBUNAL - ESTABLISHMENT OF - NOTIFIED DEBTS RECOVERY TRIBUNAL - SUPERSESSION OF NOTIFICATIONS NO.GSR 274(E), DATED 31-3-2000 AND GSR 71(E), DATED 31-1-2002***

***NOTIFICATION NO. SO 454(E)[F.NO.1/3/2016-DRT], DATED 15-2-2017***

*In exercise of the powers conferred by section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and in supersession of the notifications of the Government of India, published in the Gazette of India, Extraordinary, Part-II,*

*Section 3, Sub-section (i) vide number G.S.R. 274 (E), dated the 31st March 2000 and G.S.R. 71 (E), dated the 31st January, 2002, except as respects things done or omitted to be done before such supersession, the Central Government hereby establish the Debts Recovery Tribunal at Dehradun with effect from the 16th day of February, 2017 and hereby specifies the area of jurisdiction of the Debts Recovery Tribunals at Allahabad, Lucknow and Dehradun in the States of Uttar Pradesh and Uttarakhand, as mentioned in column (4) of the Table below, namely:--*

***TABLE***

| ***S. No.*** | ***Name of Debts Recovery Tribunal*** | ***Location*** | ***Area of Jurisdiction*** |
|---|---|---|---|
| ***(1)*** | ***(2)*** | ***(3)*** | ***(4)*** |
| *1.* | *Debts Recovery Tribunal, Allahabad* | *9/2A, Panna Lal Road, Allahabad.* | *Agra, Aligarh, Allahabad, Ambedkar Nagar, Amethi (CSM Nagar), Auariya, Azamgarh, Bahraich, Ballia, Balrampur, Banda, Barabanki, Bareilly, Basti, Bhadohi (Sant Ravidas Nagar), Budaun, Chandauli, Chitrakoot, Deoria, Etah, Etawah, Faizabad, Farrukhabad, Fatehpur, Firozabad, Ghazipur, Gonda, Gorakhpur, Hamipur, Hathras (Mahamaya Nagar), Jalaun, Jaunpur, Jhansi, Kannauj, Kanpur Dehat, Kanpur Nagar, Kasganj, Kaushambi, Kushinagar, Lalitpur, Maharajganj, Mahoba, Mainpuri,* |

| | | | |
|---|---|---|---|
| | | | *Mathura, Mau, Mirzapur, Pilibhit, Pratapgarh, Sant Kabir Nagar, Shahjahanpur, Shrawasti, Siddharth Nagar, Sonebhadra, Sultanpur and Varanasi districts in the State of Uttar Pradesh.* |
| *2.* | *Debts Recovery Tribunal, Lucknow* | *600/1, University Road, Near Hanuman Setu Mandir, Lucknow-226007 (UP).* | *Baghpat, Bulandsahar, Gautam Buddha Nagar, Ghaziabad, Hapur, Meerut, Hardoi, Lakhimpur Kheri, Lucknow, Raebareli, Sitapur and Unnao districts in the State of Uttar Pradesh.* |
| *3.* | *Debts Recovery Tribunal, Dehradun* | *Paras Tower, 2nd Floor, Majra Niranjanpur, Saharanpur Road, Dehradun.* | *State of Uttarakhand and Amroha, Bijnor, Moradabad, Rampur, Sambhal, Muzaffarnagar, Saharanpur and Shamli districts in the State of Uttar Pradesh.* |

*12. Before I proceed to examine the effect of the afore-quoted notification, it would be useful to refer the provisions of Sections 3 and 17 of the Act, as under:*

***"3. Establishment of Tribunal.--****(1) The Central Government shall by notification, establish one or more Tribunals, to be known as the Debts Recovery Tribunal, to exercise the jurisdiction, powers and authority conferred on such Tribunal by or under this Act.*

*(2)* ***The Central Government shall also specify, in the notification referred to in sub-section (1), the areas within which the Tribunal may exercise jurisdiction for entertaining and deciding the applications filed before it.***

***17. Jurisdiction, powers and authority of Tribunals.--(1) A Tribunal***

***shall exercise, on and from the appointed day, the jurisdiction, powers and authority to* entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.**

*(2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act."*

*13. Section 3(1) of the Act confers legislative power upon the Central Government to establish one or more Tribunals, to be known as the Debts Recovery Tribunal, to exercise the jurisdiction, powers and authority conferred by or under the Act.* ***Sub-section (2) of Section 3 further confers legislative powers upon the Central Government to specify, in the notification referred to in sub-section (1), the areas within which the Tribunal may exercise jurisdiction for entertaining and deciding the applications filed before it.*** *Thus, a Tribunal established under Section 3 of the Act can entertain and decide applications of such areas only which have been specified by notification. Therefore, the D.R.T. Allahabad shall have exclusive jurisdiction to entertain and decide applications arising from fifty five districts specified in the afore-quoted notification dated 15.02.2017. Thus, in view of the provisions of Section 3 read with Section 17(1) of the Act, the Debt Recovery Tribunal, Lucknow (hereinafter referred to as 'D.R.T. Lucknow') completely lacks jurisdiction to entertain and decide all those applications which fall within the territorial jurisdiction of Debt Recovery Tribunal, Allahabad (hereinafter referred to as 'D.R.T. Allahabad').*

*28. Thus, the Tribunal created under the Act is bound to act and discharge its duties only with respect to the areas falling within its territorial jurisdiction conferred by the Notification under Section 3 of the Act.*

*32. In view of the above discussion, the writ petition is* ***allowed.*** *It is held that the D.R.T. Allahabad has exclusive territorial jurisdiction over all the fifty five districts specified in the notification dated 15.02.2017 under Section 3 of the Act to entertain, hear and decide fresh and pending securitisation applications under the Act, which has also been admitted by the learned Additional Solicitor General of India on behalf of the Union of India. Accordingly, the respondent No.2 is directed to remit immediately the record of S.A. No.559 of 2013 (Saurbah Gupta vs. Oriental Bank of Commerce) to the D.R.T. Allahabad which shall hear and decide the aforesaid application expeditiously.*

45. Section 3 of the Act, 1993 provides for establishment of the Tribunal, according to which, the Central Government shall, by notification, establish one or more Tribunals, to be known as the Debts Recovery Tribunal, to exercise the jurisdiction, powers and authority conferred on such Tribunal by or under this Act. Sub-Section (2) provides that the Central Government shall also specify, in the notification referred to in sub-section (1), the areas within which the Tribunal may exercise jurisdiction for entertaining and deciding the applications filed before it.

46. In exercise of power under Section 3 of the Act, 1993, the Central Government issued Notification No. SO 454 (E) [F.NO.1/3/2016-DRT] dated

15.2.2017 which is quoted in **Saurabh Gupta(supra)** and need not be reproduced again.

47. A careful reading of the judgment in **Saurabh Gupta (supra)** would show the following:

(i) that Section 17 (1-A) of the Securitization and Reconstruction of Financial Assets and Enforcment of Security Interest Act, 2002, which specifically provides that an application under Section 17 (1) of the Act, 2002, shall be filed before the D.R.T. within local limits of whose jurisdiction, *inter alia*, (a) the cause of action wholly or in part arises, **escaped consideration,**

(ii) Section 19(1) of the Recoveries of Debts Due to Banks and Financial Institutions Act, 1993, which also provides that, where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction:- (a) the branch or any other office of the bank or financial institution is maintaining an account in which debt claimed is outstanding, for the time being; or (aa) the defendant, or each of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business, or personally works for gain; or (b) any of the defendants, where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business, or personally works for gain; or (c) **the cause of action, wholly or in part, arises:, also escaped consideration.**

(iii) The law as laid down by Hon'ble Apex Court in the case of **Sri Nasiruddin Vs. State Transport Appellate Tribunal, (1975) 2 SCC 671, also escaped consideration.**

48. In **Sri Nasiruddin Vs. State Transport Appellate Tribunal, (1975) 2 SCC 671,** where the question was with respect to the jurisdiction of this High Court, sitting at Lucknow and at Allahabad, the Hon'ble Supreme Court held that if the cause of action in part arises in the specified areas of Oudh it will be open to the litigant to frame the case appropriately to adopt the jurisdiction at Lucknow or at Allahabad.

49. Section 3 of the Act, 1993 does not provide that the Tribunal, either at Allahabad or at Lucknow, shall exercise exclusive jurisdiction over the respective areas specified in the notification issued under Section 3 of the Act, 1993. Section 3 of the Act, 1993, only provides for establishment of Debts Recovery Tribunal, which has to exercise the jurisdiction, power and authority conferred on such Tribunal by or under the Act, 1993, and in considering this jurisdiction, power and authority of Tribunal, Section 19 of the Act, 1993, as also Section 17(1-A) of the SARFAESI Act, are required to be considered and cannot be ignored. The fact that a part of cause of action arises within the limit of the jurisdiction of more than one tribunal; in view of Section 19 of the Act, 1993 and Section 17(1-A) of the SARFAESI Act, would confer jurisdiction on all such Tribunals and in such a case the jurisdiction of any of such Tribunals can not be held to be exclusive based on the notification issued under Section 3 of the Act, 1993.

50. In **Jagannath Temple Managing Committee Vs. Siddha Math & Ors.,**

**(2015) 16 SCC 542** the Hon'ble Supreme Court held that While the doctrine of stare decisis is crucial to maintain judicial discipline, what cannot be lost sight of the fact, is, that decisions which are rendered in ignorance of existing statutes and law laid down by this Court cannot bind subsequent Benches of this Court.

51. In **K. P. Manu Vs. Chairman Scrutiny Committee for Verification of Community Certificate, (2015) 4 SCC 1**, the Hon'ble Supreme Court held that when a binding precedent is not taken note of and the judgment is rendered in ignorance or forgetfulness of the binding authority, the concept of per incuria comes into play. Referring to A.R. Antulay v. R.S. Nayak it was observed that, "**Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned**, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong and also that **it is a settled rule that if a decision has been given per incuriam the court can ignore it.**

52. In **Jayant Verma Vs. Union of India (2018) 4 SCC 743** the Hon'ble Supreme Court has held as under in para nos. 55 to 58:

*"55. In Dalbir Singh v. State of Punjab (1979) 3 SCR 1059 at 1073-1074, a dissenting judgment of A.P. Sen, J. sets out what is the ratio decidendi of a judgment:*

*According to the well-settled theory of precedents every decision contains three basic ingredients:*

*(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct or perceptible facts;*

*(ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and*

*(iii) judgment based on the combined effect of (i) and (ii) above.*

*For the purposes of the parties themselves and their privies, ingredient (iii) is the material element in the decision for it determines finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops the parties from reopening the dispute. However, for the purpose of the doctrine of precedents, ingredient (ii) is the vital element in the decision. This indeed is the ratio decidendi.* ***[R.J. Walker & M.G. Walker: The English Legal System. Butterworths, 1972, 3rd Edn., pp. 123-24]*** *It is not everything said by a judge when giving judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. In the leading case of* ***Qualcast (Wolverhampton) Ltd. v. Haynes [LR 1959 AC 7 43 : (1959) 2 All ER 38]*** *it was laid down that the ratio decidendi may be defined as a statement of law applied to the legal problems raised by the facts as found, upon which the decision is based. The other two elements in the decision are not precedents. The judgment is not binding (except directly on the parties themselves), nor are the findings of facts. This means that even where the direct facts of an earlier case appear to be identical to those of the case before the court, the judge is not*

*bound to draw the same inference as drawn in the earlier case."*

*56. Similarly, this Court in* ***Som Prakash Rekhi v. Union of India (1981) 2 SCR 111 at 139*** *referred to the "laconic discussion and limited ratio" in* ***Subhajit Tewary v. Union of India (1975) 3 SCR 616****, a judgment of a Constitution Bench of this Court, and was not bound by it. Krishna Iyer, J. put it thus: "We may first deal with* ***Subhajit Tewary v. Union of India (1975) 3 SCR 616,*** *where the question mooted was as to whether the C.S.I.R. (Council of Scientific and Industrial Research) was "State' under Art. 12. The C.S.I.R. is a registered society with official and non-official members appointed by Government and subject to some measure of control by Government in the Ministry of Science and Technology. The court held it was not "State' as defined in Art. 12. It is significant that the court implicitly assented to the proposition that if the society were really an agency of the Government it would be "State'. But on the facts and features present there the character of agency of Government was negatived. The rulings relied on are, unfortunately, in the province of Art. 311 and it is clear that a body may be "State' under Part III but not under Part XIV. Ray, C.J., rejected the argument that merely because the Prime Minister was the President or that the other members were appointed and removed by Government did not make the Society a "State'. With great respect, we agree that in the absence of the other features elaborated in* ***Airport Authority case (1979)*** *3 SCC 489, the composition of the Governing Body alone may not be decisive. The laconic discussion and the limited ratio in Tewary (supra) hardly help either side here."*

*57. Also, in* ***Municipal Corpn. of Delhi v. Gurnam Kaur, (1989) 1 SCC 101 at 110****, this Court stated:*

*"11. Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. With all respect to the learned Judge who passed the order in Jamna Das case [Writ Petitions Nos. 981-82 of 1984] and to the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it. It was delivered without argument, without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachments from any public place like pavements or public streets, and without any citation of authority. Accordingly, we do not propose to uphold the decision of the High Court because, it seems to us that it is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the court on the question whether or not any direction could properly be made compelling the Municipal Corporation to construct a stall at the pitching site of a pavement squatter." (Emphasis Supplied)*

*58. Further, in* ***State of M.P. v. Narmada Bachao Andolan, (2011) 7 SCC*** *639 at 679-680, it was stated:*

*"65. "Incuria" literally means "carelessness". In practice per incuriam is taken to mean per ignoratium. The courts have developed this principle in relaxation of the rule of stare decisis. Thus, the "quotable in law" is avoided and ignored if it is rendered in ignorance of a statute or other binding authority.*

*67. Thus, "per incuriam" are those decisions given in ignorance or*

*forgetfulness of some statutory provision or authority binding on the court concerned, or a statement of law caused by inadvertence or conclusion that has been arrived at without application of mind or proceeded without any reason so that in such a case some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."*

53. For the reasons as in paras-47 to 49, with respect, I am not in agreement with the judgment in the case of **Saurabh Gupta (supra)**, which holds that the D.R.T. Allahabad has exclusive territorial jurisdiction over all the fifty five districts specified in the Notification dated 15.2.2017 under Section 3 of the Act, 1993, to entertain, hear and decide afresh and pending securitisation applications under the Act.

54. In view of the aforesaid discussion and for the aforesaid reasons, I am of the view on point Nos. (i) and (ii) framed in para-16 as follows:

(i) That the location of the secured asset is not the sole criterion to determine the jurisdiction of the Debts Recovery Tribunal(s) under Section 17(1A). If a part of cause of action arises within the limits of jurisdiction of a Debts Recovery Tribunal, an application under Section 17(1) shall lie there also, even if, the secured asset is not located within the limits of its jurisdiction. It is, in such a case, for the applicant, who is dominus litis to frame the case appropriately to choose the jurisdiction either of the Debts Recovery Tribunals to have forum conveniences.

(ii) That the issuance of notice under Section 13(2), (4) of the SARFAESI Act, as also holding of e-auction from Lucknow by the opposite party No. 3 at Lucknow, form part of cause of action, which having arisen within the territorial jurisdiction of the DRT, Lucknow, it had the jurisdiction to entertain the application under Section 17(1) of the SARFAESI Act, filed by the petitioners.

55. Further, I find myself unable to be in agreement with the judgment in the case of **Saurabh Gupta (supra)**, which holds that the D.R.T. Allahabad has exclusive territorial jurisdiction over all the fifty five districts specified in the Notification dated 15.2.2017 under Section 3 of the Act, 1993, to entertain, hear and decide afresh and pending securitisation applications under the Act, for the reasons that:

(a) Section 19 of the Act, 1993, and Section 17(1-A) of the SARFAESI Act escaped kind consideration of the coordinate Bench;

(b) Section 3 of the Act only provides for establishment of Debts Recovery Tribunals, but their jurisdictions, powers and authority shall be determined as per Section 19 of the Act, 1993, with respect to the applications/ appeals filed under the Act, 1993 and as per Section 17(1-A) of the SARFAESI Act with respect to the applications/ appeals filed under the SARFAESI Act;

(c) Section 3 does not provide for the jurisdiction of tribunals for the area for which they have been established, to exercise the jurisdiction exclusively with respect to that area barring the jurisdiction of other tribunals, if part of cause of action arises within the jurisdiction of that other tribunal as well. If Section 3 of the Act, 1993 is read as conferring exclusive jurisdiction on a tribunal, that would render

Section 19 of the Act, 1993 and Section 17(1A) of the SARFAESI Act as nugatory, giving overriding effect to Section 3, whereas the statute does not make these Sections 19 and 17(1A) of the respective statutes subject to Section 3 or any notification issued under Section 3;

(d) The law laid down in **Sri Nasiruddin (supra)** by Hon'ble Apex Court to the effect that if the cause of action in part arises in the specified areas of Oudh, it will be open to the litigant to frame the case appropriately to adopt the jurisdiction at Lucknow or Allahabad, also escaped consideration.

(e) Applying the law laid down by the Hon'ble Apex Court in **Sri Nasiruddin (supra)**, I am of the view that if part of cause of action arises within the limits of the territorial jurisdiction of Debts Recovery Tribunal at Lucknow and part of cause of action arises within the limits of territorial jurisdiction of Debts Recovery Tribunal at Allahabad, then both the tribunals will have jurisdiction and none of the tribunals shall have exclusive jurisdiction.

(f) In such a case, it would be for the litigant/ applicant to choose either of the Tribunals, he being the *dominus litis* entitled to choose his convenience by framing the application appropriately.

(g) The judgment in **Saurabh Gupta (supra)** appears to be per incuriam in view of the law as laid down by Hon'ble Apex Court in the cases of **Jagannath Temple (supra), K. P. Manu (supra)** and **Jayant Verma (supra).**

56. The answer to point No. 3 for determination as framed in para-16 of this judgment cannot be answered, inspite of the answer on the points for determination Nos. (i) and (ii) in para-16, in view of the judgment in the case of **Saurabh Gupta (supra)**, with which this Court is not in agreement, therefore, I proceed to refer the questions formulated hereinafter to the Larger Bench for consideration and for there being an authoritative pronouncement on the issue under Chapter V Rule 2 of the Allahabad High Court Rules, 1952.

58. Accordingly, the following questions are being referred to the Larger Bench for consideration and for authoritative pronouncement:

(A) Whether in a case where part of cause of action to maintain an application under Section 17(1) of the SARFAESI Act, arises within the limits of territorial jurisdiction of Debts Recovery Tribunal, Lucknow, the Debts Recovery Tribunal, Lucknow will have the jurisdiction, power and authority to entertain and decide such application in view of Sub section (1-A) of Section 17 of the SARFAESI Act or not ?

(B) Whether Section 3 of the Recoveries of Debts Due to Banks and Financial Institutions Act, 1993, confers exclusive jurisdiction on Debts Recovery Tribunals established thereunder vide notifications of the Central Government ?

(C) Whether Section 3 of the Recoveries of Debts Due to Banks and Financial Institutions Act, 1993, can be read as conferring exclusive jurisdiction on the Tribunals established thereunder, irrespetive of Section 19 of the Recoveries of Debts Due to Banks and Financial Institutions Act, 1993 and Section 17(1A) of the SARFAESI Act, rendering Sections

19 and 17(1A) of the respective Acts as redundant or nugatory ?

(D) Whether the judgment in **Saurabh Gupta (supra**), which lays down that the Debts Recovery Tribunal, Allahabad shall have exclusive jurisdiction to entertain and decide the applications arisen from 55 districts specified in the notification dated 05.12.2017, without noticing Section 19 of the Recoveries of Debts Due to Banks and Financial Institutions Act, 1993 and Section 17(1A) of the SARFAESI Act, as also the judgment of Hon'ble Supreme Court in case of **Sri Nasiruddin (supra)** lays down the law correctly ?

(E) Whether the judgment in **Saurabh Gupta (supra)** is contrary to the law laid down by the Hon'ble Supreme Court in the case of **Sri Nasiruddin (supra)** and is liable to be declared as not good law ?

59. Let necessary papers be placed before Hon'ble The Chief Justice for necessary orders.

60. List this case before appropriate Bench after the reference is answered by the Larger Bench.

61. The interim order dated 02.07.2021 is extended till the next date of listing.

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**(2021)10ILR A996**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 23.10.2021**

**BEFORE**

**THE HON'BLE PANKAJ BHATIA, J.**

Misc. Single No. 13693 of 2021

**Arsad ...Petitioner**
**Versus**
**State of U.P. & Anr. ...Respondents**

**Counsel for the Petitioner:**
Devendra Pratap, Shashank Skekhar

**Counsel for the Respondents:**
G.A.

**Uttar Pradesh Prevention of Cow Slaughter Act, 1955 - Section 5A &7, Regulation on transport of cow, etc - District Magistrate/ Commissioner of Police has power to confiscate and seize the transport vehicle only if it is established that the beef or cow or its progeny is being transported by vehicle in violation of the provisions of the Act and the relevant Rules - said provision is expropriatory in nature & has to be interpreted strictly (Para 8, 9)**

Allegation in F.I.R. that five persons were taking a Cow towards Gomti river with a view to slaughter it – raid was conducted - from the site a motorcycle was recovered - owner of motorcycle moved application for release of the vehicle - District Magistrate passed an order confiscating the motorcycle – *Held* - FIR as well as the order of the D.M. does not even record that motorcycle in question which has been confiscated was being used for transport of either beef or cow or its progeny - there is no slaughter of the cow, there is no recovery of beef – no allegation that cow was been transported by the motorcycle in question - there is no material to justify the exercise of power under sub-Section 7 of Section 5-A - impugned order quashed (Para 2, 3, 10, 15)

**Allowed.**(E-5)

**List of Cases cited:**

1. Asfaq Ahmad & anr. Vs State of U.P. & anr Cri. Rev No. 141 of 2005 dt 07.11.2008

2. Mohd. Saddam Vs State of U.P. & ors. passed in Cri. Misc. W.P. No.1721 of 2021 dt 18.03.2021

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. The present writ petition has been filed challenging the order dated 05.10.2020 as well as the order dated 09.03.2021 passed in revision whereby the revision filed by the petitioner challenging the order dated 05.10.2020 has been dismissed.

2. The facts in brief are that on 17.06.2020, an FIR was lodged as Case Crime No.417 of 2020, under Section 3/5/8 of the Uttar Pradesh Prevention of Cow Slaughter Act, 1955 (in short "the Cow Slaughter Act') as well as under Section 11 of the Prevention of Cruelty to Animals Act, 1960. The FIR in question (Annexure-3 to the writ petition) indicates that an information was received that five persons named in the FIR (does not include the name of the petitioner) were taking a Cow towards Gomti river with a view to slaughter it. Out of the said five persons, two were carrying weapons for the purpose of slaughter. On the basis of the said information, a raid was conducted and the information was found to be correct. On challenge to the said five persons, they run away and from the site, the weapons were recovered and a motorcycle U.P. 31 BH 4280 bearing Chassis No.MBLJAW062K9E07926 and Engine No.JA06EHK9E08120 was also recovered. The FIR also indicates that when information was sought with regard to the persons, who were eloped, it was revealed that the said persons would slaughter the animals and will divide the proceeds from sale which is punishable under Sections 3/5/8 of the Cow Slaughter Act read with Section 11 of the Animals Cruelty Act.

3. The petitioner claiming himself to be the owner of the vehicle moved an application for release of the vehicle mainly on the ground that he was neither named in the FIR nor was there any allegation against him on which the District Magistrate proceeded to pass an order dated 05.10.2020 confiscating the vehicle i.e. motorcycle in purported exercise of power under Section 5-A (7) of the Cow Slaughter Act. The said order was challenged by the petitioner by filing a criminal revision before the District Magistrate, Lakhimpur Kheri which was dismissed on the ground that no revision lies against an order passed under Section 5-A(7) of the Cow Slaughter Act.

4. The Counsel for the petitioner argues that the Cow Slaughter Act, 1955 was enacted with a view to prevent the slaughter of cows. Section 2 (a) defines the beef and is as under:

*"2(a). "beef" means flesh of cow but does not include such flesh contained in sealed containers and imported as such into Uttar Pradesh."*

5. Section 2(b) defines "Cow' and Section 3 of the Cow Slaughter Act bars any person from slaughtering cow, bull and bullock in any place of Uttar Pradesh.

6. Section 5 of the said Act prohibits the sale of beef and specifically prevents any person from selling or transporting or offering for sale or transport beef or beef products in any form except for medical purposes as may be prescribed.

7. Section 5-A for which we have concern provides for regulation on transport of cow. Section 5-A is quoted herein below:

*"5-A. **Regulation on transport of cow, etc.** - (1) No person shall transport or offer for transport or cause to be*

*transported any cow, or bull or bullock, the slaughter whereof in any place in Uttar Pradesh is punishable under this Act, from any place within the State to any place outside the State, except under a permit issued by an officer authorised by the State Government in this behalf by notified order and except in accordance with the terms and conditions of such permit.*

*(2) Such officer shall issue the permit on payment of such fee not exceeding [five hundred rupees] for every cow, bull or bullock as may be prescribed:*

*Provided that no fee shall be chargeable where the permit is for transport of the cow, bull or bullock for a limited period not exceeding six months as may be specified in the permit.*

*(3) Where the person transporting a cow, bull or bullock on a permit for a limited period does not bring back such cow, bull or bullock into the State within the period specified in the permit, he shall be deemed to have contravened the provision of sub-section (1).*

*(4) The form of permit, the form of application therefor and the procedure for disposal of such application shall be such as may be prescribed.*

*(5) The State Government or any officer authorised by it in this behalf by general or special notified order, may, at any time, for the purpose of satisfying itself, or himself, as to the legality or propriety of the action taken under this section, call for and examine the record of any case and pass such orders thereon as it or he may deem fit.*

*(6) Where the said conveyance has been confirmed to be related to beef by the competent authority or authorised laboratory under this Act, the driver, operator and owner related to transport, shall be charged with the offence under this Act, unless it is not proved that the transport medium used in crime, despite all its precautions and without its knowledge, has been used by some other person for causing the offence.*

***(7) The vehicle by which the beef or cow and its progeny is transported in violation of the provisions of this Act and the relevant rules, shall be confiscated and seized by the law enforcement officers. The concerned District Magistrate/Commissioner of Police will do all proceedings of confiscation and release, as the case may be.***

*(8) The cow and its progeny or the beef transported by the seized vehicle shall also be confiscated and seized by the law enforcement officers. The concerned District Magistrate/ Commissioner will do all proceedings of the confiscation and release, as the case may be.*

*(9) The expenditure on the maintenance of the seized cows and its progeny shall be recovered from the accused for a period of one year or till the release of the cow and its progeny in favour of the owner thereof whichever is earlier.*

*(10) Where a person is prosecuted for committing, abetting, or attempting to an offence under Sections 3, 5 and 8 of this Act and the beef or cow-remains in the possession of accused has been proved by the prosecution and transported things are confirmed to be beef by the competent authority or authorised laboratory, then the court shall presume*

*that such person has committed such offence or attempt or abetment of such offence, as the case may be, unless the contrary is proved.*

*(11) Where the provisions of this Act or the related rules in context of search, acquisition, disposal and seizure are silent, the relevant provisions of the Code of Criminal Procedure, 1973 shall be effective thereto."*

8. The scheme of Section 5-A of the Cow Slaughter Act reveals that the transport of cow, bull or bullock is regulated under Section 5-A and Section 5-A(7) specifically confers the power on the District Magistrate/ Commissioner of Police to confiscate and seize the transport vehicle if the beef or cow or its progeny is being transported in violation of the provisions of the said Act and the relevant Rules.

9. A plain reading of sub-Section 7 of Section 5-A makes it clear that power of seizure and confiscation can be exercised only when it is established that the vehicle by which the beef or cow or its progeny is being transported contrary to the Act and the Rules framed under the Act. The said provision is clearly expropriatory in nature and has to be interpreted strictly.

10. A perusal of the FIR as well as the order of the District Magistrate does not even record that motorcycle in question which has been confiscated was being used for transport of either beef or cow or its progeny. Admittedly, the criminal proceedings initiated in terms of the FIR have not culminated, thus, it is yet to be established that the allegations as contained in the FIR related to beef, cow or its progeny. The FIR allegation only states that intention of the five accused in the FIR was to slaughter the cow and divide the proceeds thereafter.

11. Admittedly there is no slaughter of the cow, there is no recovery of beef and the recovery of the cow which is said to be measuring 4.5 feet is not even alleged to be transported by the motorcycle in question. Thus there is no material as exists on record to justify the exercise of power under sub-Section 7 of Section 5-A. The same is clearly contrary to the mandates and the powers conferred upon the District Magistrate.

12. At this stage, the Counsel for the petitioner has relied upon the judgment of this Court passed in ***Criminal Revision No. 141 of 2005 (Asfaq Ahmad and another vs State of U.P. and another)*** decided on 07.11.2008 wherein the Court was considering the power of seizure in respect of a transport vehicle as prohibited under the Act. The said judgment, I am afraid to note, has no applicability to the facts of the present case as the present case relates to confiscation and not seizure.

13. The learned A.G.A. has also relied upon an order dated 18.03.2021 passed in ***Criminal Misc. Writ Petition No.1721 of 2021 (Mohd. Saddam vs State of U.P. ad others)*** wherein a writ petition was filed before this Court challenging the order of the seizure, the Court was of the view that the order of seizure of vehicle can be challenged by filing an appropriate application before the court concerned. The said judgment also, I am afraid to note, has no applicability to the facts of the present case as the present case relates to confiscation of vehicle and not seizure alone.

14. The confiscation by its very connotation implies depriving a person of his property to which he is entitled to

retain. In term of mandate of Article 300-A of the Constitution of India any person can be deprived of his property only by and under the procedure established by law. The procedure prescribed by law for confiscating the property as contained in Section 5-A (7) of the Cow Slaughter Act empowers the District Magistrate/ the Commissioner of Police to confiscate/ seize the vehicle only if the condition so prescribed under sub-Section 7 are fulfilled.

15. In the present case, as recorded above, none of the conditions existed so as to empower the exercise of power of confiscation as has been done by the District Magistrate in the order impugned. The order is clearly not sustainable and is set aside with a direction to the District Magistrate to release the vehicle of the petitioner forthwith without any bond or sureties as none of the conditions for seizure/ confiscation exists in the present case.

16. I am not going to the question of maintainability of the revision in view of the fact that the order dated 05.10.2020 passed by the District Magistrate is clearly not sustainable and has been set aside by this Court.

17. The writ petition stands ***allowed*** in terms of the said order. No order as to costs.

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**(2021)10ILR A1000**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 08.10.2021**

**BEFORE**

**THE HON'BLE VIVEK CHAUDHARY, J.**

Misc. Single No. 14258 of 2021
and
Misc. Single No. 14381 of 2021
and
Misc. Single No. 14473 of 2021

**Ram Avatar Kalyani Devi Kanya Mahavidyalay & Ors. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Lalit Kishore Tiwari, Himanshu Shukla

**Counsel for the Respondents:**
C.S.C., Savitra Vardhan Singh

**Civil Law - Examination fee - Late Fee - Colleges collect fee from students for entire year, including examination fee required to be deposited by College with the University - However, examination fee is not deposited by College with University in time - Universities charge late fee from the erring colleges - Colleges transfer the said late fee upon the students – Court directed the Universities to frame specific provision providing that in such cases late fee and penalty would be imposed upon the colleges only, which they would be barred from recovering from their students (Para 4)**

**Allowed.** (E-5)

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard learned counsel for petitioner colleges, learned Standing Counsel for the State and Sri Savitra Vardhan Singh, learned counsel for respondent University.

2. Present writ petitions are filed by the petitioner colleges for quashing of the order dated 04.07.2021 whereby a penalty of Rs. 500/- per student was imposed by the University upon the colleges for deposit of late fee as the examination fee was

deposited by the colleges after the last date for deposit had expired.

3. This Court passed an interim order dated 12.07.2021 in Writ Petition No.14473 (M/S) of 2021 (C/M Sri Jagdev Singh Mahavidayalaya Vs. State of U.P. & Ors.) requiring the colleges to deposit only Rs. 250 per student as late fee for allowing students to appear in the examination. The University has permitted all the students to appear in the examination. Meanwhile, the University has also recalled its earlier order dated 04.07.2021 and permitted all the colleges to deposit only Rs. 250/- per students as late fee. Since, the University itself has modified its earlier order dated 04.07.2021, which stands complied in petitioners' case also, therefore, there is no requirement for passing of any further order with regard to late fees. The examination of students of the petitioner colleges, which the University has already taken, only result thereof is now required to be declared. The Court in the given circumstances, the colleges have already complied and deposited the required late fee, as per the amended order of the University, direct the University to declare their result within ten days from today.

4. Before parting with the case, the Court would like to point out the fraud being played by large number of colleges. The colleges collect fee from their students for the entire year, including the examination fee required to be deposited by them with the University. However, the examination fee is not deposited by them with the University in time. The amount is retained by the colleges in their bank accounts. This act amounts to playing fraud both upon the students as well as upon the University concerned. Such activity should be immediately stopped. The action in this regard ought to be taken by both, the University as well as the State Government. It has come before this Court that Universities charge late fee from the erring colleges. In absence of any specific provisions, the colleges transfer the said late fee upon the students, while there is no fault of the students. The Universities have not yet framed any specific provision providing that in such cases late fee and penalty would be imposed upon the colleges only, which they would be barred from recovering from their students. The Universities should specifically provide such a provision before opening of any academic session. Unless the Universities clarifies the same, it is very difficult to stop this fraudulent practice adopted by the colleges. It is expected that the Universities as well as the State Government shall expeditiously look into the matter.

5. Let a copy of this order be forwarded to the respondent no.1 Principal Secretary, Department of Higher Education, Government of U.P. Civil Secretariat, Lucknow. Mr. Pankaj Khare, learned Additional Chief Standing Counsel will take appropriate steps for the same.

6. With the aforesaid, present writ petition is ***disposed of.***

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**(2021)10ILR A1002**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 04.10.2021**

**BEFORE**

**THE HON'BLE RAMESH SINHA, J.**
**THE HON'BLE MRS. SAROJ YADAV, J.**

Misc. Bench No. 15164 of 2021

**Zubair ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Purnendu Chakravarty & Sri Anuuj Taandon

**Counsel for the Respondents:**
Sri S.P. Singh, Additional Government Advocate

**Criminal Law - Remission of Sentence - Code of Criminal Procedure, 1973 - Section 432, 433, 433-A - Uttar Pradesh Prisoner's Release on Probation Act, 1938 - Section 2 - U.P. Prisoner's Release on Probation Rules, 1938 - Rules 3 & 4 -** Form 'A' - Power to commute sentence - petitioner, aged about 72 years, already undergone sentence for more than 23 years with remission and more than 17 years without remission - similarly situated co-convicts of the case were released by granting remission - petitioner 'Form A' rejected on the ground that the offence for which he was punished was heinous offence & he jumped furlough & remained absconded for a period of 6 years 08 months and 27 days - *Held* - similarly situated co-convicts were released, so reason given that offence was heinous shows the discriminatory attitude of the Authorities - for jumping furlough, petitioner already received punishment of forfeiture of his total earned remission of 1087 days - impugned order Set aside - Authorities directed to release the petitioner on licence. (Para 10)

**Allowed.** (E-5)

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. Heard Shri Purnendu Chakravarty, learned counsel for the petitioner and Shri S.P. Singh, learned A.G.A. for the State-respondents and perused the material available on record.

2. The present writ petition has been filed by the petitioner- Zubair with the prayer to issue a writ, order or direction in the nature of certiorari to quash the order dated 30.06.2021 passed by the Joint Secretary, Government of Uttar Pradesh whereby the 'Form A' of the petitioner for grant of remission of his consequent release has been rejected, with a further prayer to release the petitioner forthwith in the light of recommendations made by the District Magistrate, Muzaffar Nagar, Senior Superintendent of Police, Muzaffar Nagar and Senior Superintendent, District Jail Haridwar on remission and pre-mature release.

3. Learned counsel for the petitioner submitted that 'Form A' of the petitioner, who is aged about 72 years, for grant of remission of his consequent release has been rejected by the State Government vide its order dated 30.06.2021 without application of mind. He further submitted that the petitioner has already undergone sentence for more than 23 years with remission and more than 17 years without remission as per the calculation shown in the report sent by the Jail Authorities, Haridwar. He further submitted that plea of remission taken by the petitioner was rejected on the unreasonable grounds of nature and gravity of the offence committed, whereas the similarly situated co-convicts of the case were released by

granting remission on the grounds of old age and good conduct. He further submitted that on the similar ground, petitioner had earlier filed a writ petition i.e. Misc. Bench No. 18216 of 2019 before this Court wherein this Court vide its order dated 21.01.2021 quashed the orders dated 13.01.2016 and 05.04.2018 passed by the State Government and disposed of the writ petition with a direction to the State Government to reconsider the case of the petitioner under the provisions of Section 2 of the Uttar Pradesh Prisoner's Release on Probation Act, 1938. Previous Form 'A' of the petitioner was rejected by the order dated 13.01.2016 passed by the Deputy Secretary, Government of Uttar Pradesh vide Government Order No. 181/2015/887/22-2-2015-17(204)/2012, wherein it had been mentioned that the plea was rejected on the grounds that the petitioner had jumped furlough when he was given home leave and that he remained absent for a period of 6 years 08 months and 27 days. However, the Deputy Secretary, Government of Uttar Pradesh, failed to take into consideration the fact that for this act of misconduct, the petitioner has already received the punishment of forfeiture of his total earned remission of 1087 days and with respect to such punishment, a certificate was issued on 17.02.2019, by the Jailer, District Jail, Haridwar. He further submitted that opposite party no. 1 failed to consider the recommendations made in the reports submitted by Senior Superintendent, District Jail, Haridwar, Senior Superintendent of Police, Muzaffar Nagar and District Magistrate, Muzaffar Nagar. He further submitted that respondent Authority committed a grave error in not appreciating that in terms of Rule 3 of the U.P. Prisoner's Release on Probation Rules, 1938, a prisoner may be eligible for consideration for release by the State Government if he has served imprisonment for a total period of fourteen years. Since the petitioner has already undergone a sentence of quite a long period, he deserves to be released forthwith.

4. On the contrary, learned A.G.A. appearing on behalf of the State has opposed the contention made by the learned counsel for the petitioner and stated that the Probation Board in its meeting dated 19.05.2021 had considered the case of the petitioner and given a finding that the petitioner was involved in murder of three persons and when he was detained in "Sampurnand Shivir Sitarganj Jail", he jumped from his home leave and absconded for a period of 6 years, 8 months and 27 days. Thereafter he was arrested on 29.01.2008 by the police and sent to jail on 31.01.2008. As the petitioner was involved in heinous crime and also jumped the furlough, therefore, 'Form A' of the petitioner has been rejected, as such, the present writ petition is liable to be dismissed. Learned A.G.A. also disputed the factum of age of the petitioner and submitted that petitioner is of 62 years instead of 72 years as mentioned by the petitioner.

5. Considered the rival submissions and perused the material available on recored.

In this regard, Rule 4 of the U.P. Prisoners' Release on Probation Rules, 1938 provides as under:

***"4. Eligibility for release. - Any prisoner other than a prisoner specified in Rule 3, may be eligible for consideration by the State Government for release on licence,-***

*(i) if he is a prisoner to whom Section 433-A of the Code of Criminal Procedure, 1973 applies and has served imprisonment for a total period of fourteen years;*

*(ii) if he is a prisoner sentenced to imprisonment for life to whom Section 433-A of the Code of Criminal Procedure, 1973 does not apply and has served imprisonment for a total period of fourteen years with remissions; and*

*(iii) in any other case if he has served one-third without remissions of the period of imprisonment to which he was sentenced."*

*The provisions under which premature release of the convicted prisoners is to be considered are as under:*

*"432.Power to suspend or remit sentences.-*

*(1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.*

*(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.*

*(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favor the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.*

*(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.*

*(5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:*

*Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and-*

*(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or*

*(b) where such petition is made by any other person, it contains a*

***declaration that the person sentenced is in jail.***

***(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.***

***(7) In this section and in section 433, the expression "appropriate Government" means,-***

***(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;***

***(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.***

***433. Power to commute sentence.-***

***The appropriate Government may, without the consent of the person sentenced, commute-***

***(a) a sentence of death, for any other punishment provided by the Indian Penal Code (45 of 1860);***

***(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;***

***(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;***

***(d) a sentence of simple imprisonment, for fine.***

***433 A. Restriction on powers of remission or commutation in certain cases.-Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of the person for an offence for which death is one of the punishments provided by laws, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life such person shall not be released from prison unless he had served at least fourteen years of imprisonment."***

6. Perusal of the record shows that on the previous occasion also, this Court in a Writ Petition i.e. Misc. Bench No. **18216 of 2019** (Zubair Versus State of U.P. & Others) directed the respondent no. 1 to reconsider the case of the petitioner under the provisions of Section 2 of the United Provinces Prisoners Release on Probation Act, 1938 after quashing the orders dated 13.01.2016 and 05.04.2018, whereby 'Form A' of the petitioner was rejected and communicated to the petitioner. The respondent no. 1 again rejected the 'Form A' of the petitioner vide order dated 30.06.2021, which is annexed as Annexure No. 2 to the writ petition. Learned counsel for the petitioner submitted that similarly situated co-convicts have been released accepting their 'Form A'. One co-convict was released on the ground of age of 65 years but the 'Form A' of the petitioner has been rejected arbitrarily without any reasonable basis. The Senior Superintendent, District Jail, Haridwar, Senior Superintendent of Police, Muzzafar Nagar and District Magistrate, Muzzafar Nagar have recommended the release of the

petitioner. Their report shows that conduct of the petitioner remained good during his imprisonment in jail and nothing adverse has been recorded in their reports. The petitioner has undergone more than 23 years sentence with remission and more than 17 years of sentence without remission as per the calculation shown in the report by the Jail Authorities. In fact, the age of the petitioner is 72 years and he is very old and weak, so the order impugned rejecting the Form A of the petitioner be set aside and the petitioner be directed to be released forthwith.

7. Learned A.G.A. disputed the age of the petitioner and submitted that his age is 62 years only and the co-convict was released when he was of 65 years. Previously, Jail Authorities reported the age of the petitioner as 72 years but subsequently mentioned the age of the petitioner as 62 years. On his point, this Court on 21.09.2021 had passed the following order:-

***"Heard Mr. Purnendu Chakravarty, learned counsel for the petitioner and Mr. S.P. Singh, learned A.G.A. for the State.***

***Learned counsel for the petitioner submitted the report of the Senior Superintendent of Police, Muzaffar Nagar dated 01.04.2021 wherein the S.S.P. has approved the premature release of the petitioner and in the said report, the age of the victim/petitioner is stated to be 73 years.***

***On the other hand, learned A.G.A. has disputed the said fact and stated that as per the jail record the age of the victim/petitioner is about 62 years, which has been stated in paragraph No.8 of his counter affidavit.***

***The learned A.G.A. is directed to file an affidavit verifying the exact age of the victim/petitioner by the next date.***

***List this case on 04.10.2021.***

8. In pursuance of the aforesaid order, no affidavit has been filed by the learned A.G.A. Learned A.G.A submitted that on this discrepancy, enquiry was made and it came out that age of the petitioner had been mentioned as 19 years in his statement recorded under Section 313 Cr.P.C. during trial in the concerned case. When the query was made by this Court that if the petitioner was of 19 years on the date of recording of his statement under Section 313 Cr.P.C., then the petitioner would be minor on the date of incident. Upon it, learned A.G.A. submitted that he is not pressing this argument and he conceded about the age what has been mentioned by the Jail Authorities in the previous papers. In the impugned order no valid reason has been shown for the discrimination with co-convicts. So far as the reason that petitioner jumped the furlough granted to him and absconded for a period of 6 years 8 months and 27 days is concerned, he is continuously in jail after his arrest on 29.01.2008 and he sought/granted no parole thereafter. He has undergone more than 23 years of sentence and similarly situated co-convicts have already been released on the basis of Form A. Hon'ble Apex Court in the case of ***Beche Lal Versus State of Uttar Pradesh and Another, 2021 SCC Online SC 499*** has observed in this regard as under:-

***"5. The High Court on 16.04.2018, in Chandrasi v. State of Uttar***

***Pradesh, Criminal Misc. Writ Petition No. 6041 of 2018, after noticing the lack of fairness and consistency in considering applications for premature release observed and directed as follows:***

***"13. The impugned orders ex facie appear to be lacking reason for rejection of such premature release particularly when there was recommendation made by the Committee headed by the District Magistrate as well as the opinion of the court was also not against the convicts and their conduct was reported to be satisfactory in jail. In these circumstances the impugned orders deserve to be set aside and are accordingly set aside with a direction that the Government shall reconsider their case for premature release in the light of fair and non-discriminatory principles by speaking order within a period of one month from the date a certified copy of this order is produced by the learned counsel for applicants. Needless to say that Government ought to lay down a transparent policy in regard to premature release of convicts who were lying in prison for a long time as has been directed on several occasions by this court in earlier writ petitions."***

***6. The State government then framed the policy dated 01.08.2018. Curiously, contrary to the direction of the High Court, the State Government, arbitrarily restricted it to premature release of prisoners sentenced to life imprisonment on the event of Republic day each year only. The restricted policy is patently bad for being in derogation of the orders of the High Court. Additionally, it is also discriminatory in nature as there is no nexus to be achieved by providing for premature release only on a specified date, when those eligible to be considered for premature release form a class of persons sentenced to life imprisonment. There is no criteria laid down on basis of which a convict shall be considered for release on the opportune date in contradistinction to another who may be relegated to consideration in normal course. Differentiation amongst this class of convicts on separate indicia based on specified parameters is an entirely different matter. The policy having statutory force under Article 161 of the Constitution will naturally apply to all persons sentenced to life imprisonment. Having been framed subsequent to the U.P. Jail Manual, 1956 and the U.P. Prisoners Release on Probation Rules, 1938 will take precedence over the latter. The fact that any application for premature release submitted before the formulation of the new policy may have been rejected, cannot be bar to fresh consideration without being prejudiced by the earlier rejection. If premature release of a convict can be denied on parity because a similar application of a co-accused had been rejected, conversely if a co-accused has been granted the benefit of premature release, it cannot be denied to another co-accused."***

9. The impugned order does not reveal any sound ground of rejection of 'Form A' of the petitioner, particularly when there were recommendations made by the Jail Authority, S.S.P. and D.M. concerned and also the fact that similarly situated co-convicts have already been granted relief and released on the basis of 'Form A'. Previously before this Court in Writ Petition i.e. Misc. Bench No. **18216 of 2019** (Zubair Versus State of Uttar Pradesh through Secretary Home & Others), learned A.G.A. conceded the fact that on the over

staying on the home visit parole, the remission period of 1087 days have been forfeited by the jail authority and he also does not raise any dispute in relation to good conduct of the petitioner and the recommendation of Superintendent of Police, Superintendent of Jail and District Magistrate, Muzaffar Nagar for premature release of the petitioner. Keeping in view this fact, this Court passed the following order on 21.01.2021:-

***"12. Considering the arguments of the learned counsel for the parties and going through the records, it is evident that the petitioner was aged about 72 years on 08.04.2013 when the recommendation of Senior Superintendent of Police, Muzaffar Nagar was sent for his premature release. It is also undisputed that co-convicts namely, (i) Yasin s/o Alimuddin was released vide Government Order No.5101/22-2-98-18 (98) dated 22.01.1999, (ii) Meera @ Mirhasan s/o Karamat was released vide Government Order No. 631/22-2-2011-17 (132)/2011, dated 27.07.2011 and (iii) Javed @ Zahid s/o Sunda @ Hasan was released vide Government Order No.630/22-2-2011-17 (81)/2011, dated 27.07.2011 (release orders of the co-convicts have been mentioned in para-5 of the supplementary counter affidavit) and Form-A of petitioner was rejected by way of impugned order dated 13.01.2016. As it is also evident from the impugned orders itself that one co-convict was released on the ground that he was aged about 65 years and in the present case, admittedly the petitioner was aged about 72 years on 08.04.2013, as mentioned in the report of Senior Superintendent of Police, Muzaffar Nagar, therefore, the impugned orders dated 13.01.2016 and 05.04.2018 are hereby quashed.***

***13. The respondent No.1 is directed to reconsider the case of the petitioner under the provisions of Section 2 of the Uttar Pradesh Prisoner's Release on Probation Act, 1938, within a period of two months from the date of production of certified copy of this order in accordance with law.***

***14. With the aforesaid observations, the writ petition is disposed of.***"

10. The impugned order/communication dated 30.06.2021 denotes that Form "A" of the petitioner has been rejected giving reasons that the petitioner had jumped furlough when he was released on parole and remained absent for about 6 years 8 months and 27 days and also that the offence was very heinous. The similarly situated co-convicts namely Yasin son of Alimuddin, Meera @ Mirhasan son of Karamat and Javed @ Zahid son of Sunda @ Hasan were released on the basis of Form 'A' submitted by them, so reason given that offence was heinous in relation to Form 'A' of the petitioner shows the discriminatory attitude of the Authorities. As far as the fact of jumping furlough is concerned, it has also been mentioned in the report of jail authorities that the period for which the petitioner remained out of jail, has already been deducted from the total earned remission of 1087 days, and has also been mentioned by the petitioner in paragraph 15 of the writ petition. Hence, it appears that the impugned order/communication has been passed without considering the observations made in the Writ Petition i.e. Misc. Bench No. 18216 of 2019 and without application of mind.

11. Section 2 of the United Provinces Prisoners Release on Probation Act, 1938 lays down as under:-

***2.Power of Government to release by licence on conditions imposed by them.- Notwithstanding anything contained in [Section 401] of the Code of Criminal Procedure, 1898 (Act V of 1898), where a person is confined in prison under a sentence of imprisonment and it appears to the State Government from his antecedents and his conduct in the prison that he is likely to abstain from crime and lead a peaceable life, if he is released from prison, the State Government may by licence permit him to be released on condition that he be placed under the supervision or authority of a Government Officer or of a person professing the same religion as the prisoner,or such secular institution or such society belonging to the same religion as the prisoner as may be recognized by the State Government for this purpose,provided such other person, institution or society is willing to take charge of him***.

***Explanations.-The expression "sentence of imprisonment" in this Section shall include imprisonment in default of payment of fine and imprisonment for failure to furnish security under Chapter VIII of the [Code of Criminal Procedure, 1898 (Act V of 1898)].***

12. In the light of the above discussions, the impugned order/communication dated 30.06.2021 and other consequential orders rejecting the Form 'A' of the petitioner are hereby set aside and the writ petition stands allowed.

13. Respondent-Authorities are directed to release the petitioner on licence as provided under the provisions of the United Provinces Prisoners Release on Probation Act, 1938 read with U.P. Prisoners' Release on Probation Rules, 1938, forthwith, if not required any other case.

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**(2021)10ILR A1009**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 08.10.2021**

**BEFORE**

**THE HON'BLE RAMESH SINHA, J.**
**THE HON'BLE MRS. SAROJ YADAV, J.**

Misc. Bench No. 19311 of 2019

**Durga Dutt Tripathi ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Akhilesh Kumar Kalra, Sri Rajesh Vhandra Mishra

**Counsel for the Respondents:**
Sri S.P. Singh, Aditional Government Advocate

**Criminal Law - Prevention of Corruption Act, 2018 - Section 19 - Code of Criminal Procedure, 1973 - Section 197 - Previous Sanction for prosecution - Challenge to sanction order under Article 226 - Held - absence of sanction vis-s-vis invalidity of sanction - absence of sanction could be raised at the inception and threshold by an aggrieved person - However, where sanction order exists, but its legality and validity is put in question, such issue has to be raised in the course of trial - validity of sanction should be examined during the trial (Para 8, 10)**

**Dismissed.** (E-5)

**List of Cases cited :**

1. Mansukhlal Vithaldas Chauhan Vs St. of Guj(1997) 7 SCC 622

2. Prakash Singh Badal & anr. Vs St. of Pun & ors. AIR 2007 SC 1274

3. Dinesh Kumar Vs Chairman, Airport Authority of India

4. C.B.I. Vs Ashok Kumar Aggarwal,

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. By means of the present writ petition, the petitioner has challenged the impugned order dated 28.05.2018 issued by the Secretary to His Excellency the Governor, whereby sanction has been accorded while exercising power vested under Section 197 of the Code of Criminal Procedure (in short 'Cr.P.C.') read with Section 19 of the Prevention of Corruption Act, 1988 to prosecute the petitioner under Section 120B of the Indian Penal Code (in short 'IPC') and Section 7, 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988 (in short 'P.C. Act'). The impugned order has been issued by the Director, Ayurvedic Services, U.P. Lucknow vide Letter No. 4896(I)/18A-397/16/Adhi. dated 19.06.2019.

2. Heard Sri Rajesh Chandra Mishra, learned counsel for the petitioner and Sri S.P. Singh, learned A.G.A. for the State.

3. Learned counsel for the petitioner argued that impugned order according sanction to prosecute the petitioner is a composite order whereby the competent authority has accorded sanction to prosecute several persons without there being any specific description about the petitioner. It is not there in the sanction-order, what material has been placed before him and what material he perused from which he got convinced himself to accord the sanction to prosecute the petitioner under Sections 409, 420, 465, 467, 471, 477, 120-B IPC and Section 13(1)(d) and 13(2) of the P.C. Act. The sanctioning authority while granting sanction ought to have recorded their satisfaction that on what basis he arrived at the conclusion to grant sanction. It is also argued that it is incumbent upon the competent authority to apply his mind independently and record satisfaction of being satisfied from the material collected during the course of investigating which has been placed before him. In the present matter, no such basis has been disclosed for according prosecution sanction. Hence, impugned sanction should be quashed. Learned counsel for the petitioner relied upon the decision of the Hon'ble Apex Court in the case of ***Mansukhlal Vithaldas Chauhan Versus State of Gujarat (1997) 7 Supreme Court Cases 622.***

4. Contrary to it, learned A.G.A. argued that validity of sanction can be raised before the Trial Court during trial. Learned A.G.A. referred paragraph 9 of the counter affidavit wherein it has been stated that ***"It is relevant to mention here that a financial scam was committed by the department of Ayurvedic and Unani Services, U.P., which was spread over throughout the State and every department connected with the Ayurvedic and Unani Services were involved in the financial scam. After registration of the FIR, the investigation was conducted and petitioner was interrogated by the Prosecuting Agency on 16.01.2007 and from the evidence which had been collected against him, it clearly establishes that he alongwith other co-accused was involved in spending the public money exceeding the budget, which was sanctioned by the department, in this way, the petitioner and other co-accused had misappropriated the public money and***

***they were also not able to give any evidence, justification and explanation for excess expenditure. Even accused was not able to show any entry on the contingency register and vouchers pertaining to excess expenditure, when explanation was called, he had stated that Class IV employee Surendra Singh Negi was responsible. The Prosecuting Agency had collected ample evidence against the petitioner and other co-accused."***

Learned A.G.A. further submitted that prosecution sanction cannot be quashed on th ground of delay. Further more, liberty lies with the petitioner to raise all his issues relating to sanction during the trial. Hence, this writ petition should be dismissed.

5. Considered the rival submission raised by the learned counsel for the parties, perused the record and the case laws cited by the learned counsel for the petitioner.

The Hon'ble Apex Court in the case of ***Mansukhlal Vithaldas Chauhan Versus State of Gujarat (Supra)*** (cited by the petitioner) in this regard has observed as under:-

***17. 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 Government Servants against frivolous prosecutions. ( See: Mohd. Iqbal Ahmed vs. State of Andhra Pradesh, AIR 1979 SC 677). Sanction is a weapon to ensure discouragement of frivolous and vexatious prosecutions and is a safeguard for the innocent but not a shield for the guilty.***

***18. The validity of the sanction would, therefore, depend upon the material placed before the sanctioning authority and the fact that all the relevant facts, material and evidence have been considered by the sanctioning authority. Consideration implies application of mind. The order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other material placed before it. This fact can also be established by extrinsic evidence by placing the relevant files before the Court to show that all relevant facts were considered by the sanctioning authority. (See also: Jaswant Singh vs. The State of Punjab, 1958 SCR 762 = AIR 1958 SC 124; State of Bihar & Anr. vs. P.P. Sharma, 1991 Cri.L.J. 1438 (SC)).***

***19. Since the validity of "Sanction" depends on the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation, it necessarily follows, that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any quarter nor should any external force be acting upon it to take decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration. If it is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be bad for the reason that the discretion of the authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution***

***22. Mandamus which is a discretionary remedy under Article 226 of the Constitution is requested to be issued, inter alia, to compel performance of public duties which may be administrative, ministerial or statutory in nature. Statutory duty may be either directory or mandatory. Statutory duties, if they are intended to be mandatory in character, are indicated by the use of the words "shall" or "must". But this is not conclusive as "shall" and "must" have, sometimes, been interpreted as "may" . What is determinative of the nature of duty, whether it is obligatory, mandatory or directory, is the scheme of the Statute in which the 'duty" has been set out. Even if the "Duty" is not set out clearly and specially in the Statute, it may be implied as co-relative to a "Right".***

***23. In the performance of this duty, if the authority in whom the discretion is vested under the Statute, does not act independently and passes an order under the instructions and orders of another authority, the Court would intervene in the matter, quash the orders and issue a mandamus to that authority to exercise its own discretion."***

6. Perusal of the above judgment shows that in that matter, the sanction was accorded by the sanctioning authority under the direction of the High Court. In such a situation, the Hon'ble Apex Court held that "***Secretary being the head of the Department stated on oath that he had granted the sanction, particularly as the mandamus was directed to him and he had to comply with that direction, Deputy Secretary, who actually issued the order of sanction, had signed it and, therefore, he owned the sanction and stated that he had sanctioned the prosecution. Both tried to exhibit that they had faithfully obeyed the mandamus issued by the High Court and attempted to save their skin, destroying, in the process, the legality and validity of the sanction which constituted the basis of appellant's prosecution with the consequence that whole proceedings stood void ab initio."***

7. The situation of the present matter is different. In the present matter the petitioner has no where stated that the Sanctioning Authority has acted under the direction or pressure of somebody. Hon'ble Apex Court in the case of ***Prakash Singh Badal and Another Versus State of Punjab and others, AIR 2007 SC 1274***, in this regard has held as under:-

***"The sanctioning authority is not required to separately specify each of the offence against the accused public servant. This is required to be done at the stage of framing of charge. Law requires that before the sanctioning authority materials must be placed so that the sanctioning authority can apply his mind and take a decision. Whether there is an application of mind or not would depend on the facts and circumstances of each case and there cannot be any generalized guidelines in that regard.***

***The sanction in the instant case related to offences relatable to Act. There is a distinction between the absence of sanction and the alleged invalidity on account of non application of mind. The former question can be agitated at the threshold but the latter is a question which has to be raised during trial."***

8. Further in ***Dinesh Kumar Vs. Chairman, Airport Authority of India***, Hon'ble Apex Court has held as under:-

"***While drawing a distinction between the absence of sanction and invalidity of the sanction, this Court in Parkash Singh Badal expressed in no uncertain terms that the absence of sanction could be raised at the inception and threshold by an aggrieved person. However, where sanction order exists, but its legality and validity is put in question, such issue has to be raised in the course of trial. Of course, in Parkash Singh Badal, this Court referred to invalidity of sanction on account of non- application of mind. In our view, invalidity of sanction where sanction order exists, can be raised on diverse grounds like non-availability of material before the sanctioning authority or bias of the sanctioning authority or the order of sanction having been passed by an authority not authorised or competent to grant such sanction. The above grounds are only illustrative and not exhaustive. All such grounds of invalidity or illegality of sanction would fall in the same category like the ground of invalidity of sanction on account of non-application of mind - a category carved out by this Court in Parkash Singh Badal, the challenge to which can always be raised in the course of trial."***

9. Again ***C.B.I. Versus Ashok Kumar Aggarwal***, the Hon'ble Apex Court has held as under:-

***"46. The most relevant issue involved herein is as at what stage the validity of sanction order can be raised. The issue is no more res- integra. In Dinesh Kumar v. Chairman Airport Authority of India & Anr., AIR 2012 SC 858, this Court dealt with an issue and placing reliance upon the judgment in Parkash Singh Badal & Anr. v. State of Punjab & Ors., AIR 2007 SC 1274, came to the conclusion as under:***

***"13. In our view, having regard to the facts of the present case, now since cognizance has already been taken against the appellant by the trial Judge, the High Court cannot be said to have erred in leaving the question of validity of sanction open for consideration by the trial court and giving liberty to the appellant to raise the issue concerning validity of sanction order in the course of trial. Such course is in accord with the decision of this Court in Parkash Singh Badal..."***

***47. Undoubtedly, the stage of examining the validity of sanction is during the trial and we do not propose to say that the validity should be examined during the stage of inquiry or at pretrial stage.***

10. It is clear from the above decisions of the Hon'ble Apex Court that the validity of sanction should be examined during the trial, hence in the light of the decisions laid down by the Hon'ble Apex Court, the relief prayed by the petitioner cannot be granted.

11. In view of the above, this writ petition is dismissed.

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**(2021)10ILR A1013**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 01.10.2021**

**BEFORE**

**THE HON'BLE RAJAN ROY, J.**
**THE HON'BLE SURESH KUMAR GUPTA, J.**

Misc. Bench No.22480 of 2021

**C/M Waqf Dargah Hazrat Peer Syed Mohammad Sahab (Rh) & Ors.**
**...Petitioners**
**Versus**
**U.P. Sunni Central Waqf Board & Ors.**
**...Respondents**

**Counsel for the Petitioners:**
Somesh Tripathi, Haider Abbas

**Counsel for the Respondents:**
Adil Hussain, Syed Qamar Hasan Rizvi

**Waqf - Waqf Al-al Khair i.e. a public waqf - Waqf Act, 1995 – Sections 63 &.67 - Mutawalli - Extension of term - there is no provision for extension of term of committee of management or mutawalli under the Act, 1995**

Petitioner /Committee of Management appointed for three years on 22.01.2015 - as alleged, its term extended for three years, which expired on 21.01.2021 - petitioner moved an application for extension of its term - In the meantime, another committee of management elected by the local persons - U.P. Sunni Central Waqf Board rejected petitioner's application for extension of term as the term of the petitioner having expired and another committee having been elected by the locals, the latter had been appointed to manage the Waqf in question - *Held* - petitioner's application for extension of its term was not maintainable - once the term of the committee of management expired on 21.01.2021 and it was not extended, then, it had no right to function after that, legally and substantively - In any case, there is no indefeasible right in favour of the petitioner to continue as Committee of Management or to be appointed as such (Para 12, 13)

**Waqf Act, 1995 – Sections 63 &.67- Supersession of committee of Management - S.67 applies only when there is a committee of management functioning in terms of S.63 - term of petitioner committee expired & in meantime another committee elected by local residents was appointed as mutawalli - *Held* - Since petitioner was not an existing committee of management as appointed under S. 63, S. 67 cannot be made applicable (Para 13)**

**Disposed of.** (E-5)

(Delivered by Hon'ble Rajan Roy, J.

&

Hon'ble Suresh Kumar Guta, J.)

1. Although there is a remedy against the impugned order before the U.P. Waqf Tribunal, Lucknow, as it is not functioning on account of vacancy on the post of presiding officer, therefore, we have entertained this petition and are deciding it with the consent of

2. Heard Shri Q.H. Rizwi, learned counsel for the opposite party Nos.1 and 2 as well as Shri Syed Aftab Ahmad, Advocate holding brief of Shri Adil Hussain, learned counsel for the opposite party Nos.3 to 5.

3. Considering the nature of the dispute, we do not propose to call for any counter affidavit in the matter.

4. The petitioners herein have challenged an order dated 16.08.2021 passed by the U.P. Sunni Central Waqf Board by which another Committee of Management/Mutwalli has been appointed.

5. The contention of the learned counsel for the petitioners is that the petitioner no.1/Committee of Management was initially appointed for three years on 22.01.2015. He says that the term of the Committee of Management was extended vide order dated 29.01.2018 w.e.f 22.01.2018 for three years. This term expired on 21.01.2021. The petitioner moved an application for extension of its term. In the meantime, as is mentioned in the impugned order, another committee of management is said to have been elected by the local persons. The Waqf in question being Waqf Al-al Khair that is a public waqf and the same was forwarded to the U.P. Sunni Central Waqf Board for

appointment as Committee of Management along with letter of one Sibtain Haider dated 06.07.2021. Thereafter it is said that some complaint was made against the petitioner no.1/committee of management which was ordered to be inquired by the Waqf inspector. However, as it was represented by the petitioners that a fair inquiry is not possible by him, the law officer of the Waqf Board was ordered to inquire into the matter, who submitted his report dated 11.08.2021, wherein two deficiencies were found in the Management of the Waqf. Firstly, the petitioner no.1 had undertaken some constructions in connection with the Waqf, but without permission of the Board. Moreover, the Board was not informed for making necessary entries about the said constructions in its records; Secondly, it is said that the Waqf also runs a Madarsa Darul Uloom Mohammadia. However on inquiry, it was found that its functioning is being managed by a separate society and not by the petitioner which has been taken as a deficiency, by the Board. The Board by means of the impugned order has opined that the term of the petitioner no.1 having expired and another committee having been elected by the locals, the latter had been appointed to manage the Waqf in question.

6. The contention of the learned counsel for the petitioner is that the impugned order has been passed without any opportunity of hearing and that it is a non speaking order. In this regard, he relies upon Sub section 2 of Section 67 of the Waqf Act, 1995.

7. The petitioner's application for extension of term has been rejected and another Committee of Management has been appointed to manage the Waqf in question.

8. First and foremost, we would like to refer to Section 3 (i) of the Waqf Act, 1995 which defines the term 'mutawalli' to mean any person appointed, either verbally or under any deed or instrument by which a waqf has been created, or by a competent authority, to be the mutawalli of a waqf and includes any person who is a mutawalli of a waqf by virtue of any custom or who is a naib-mutawalli, khandim, mujawar, sajjadanashin, amin or other person appointed by a mutawalli to perform the duties of a mutawalli and save as otherwise provided in this Act, any person, committee or corporation for the time being, managing or administering any waqf or waqf property.

9. The definition of mutawalli, as referred herein above, thus includes a committee. We now consider the provisions of Section 63 of the Act, 1995 which reads as under:

*"**63. Power to appoint mutawallis in certain cases**.--When there is a vacancy in the office of the mutawalli of a waqf and there is no one to be appointed under the terms of the deed of the waqf, or where the right of any person to act as mutawalli is disputed, the board may appoint any person to act as mutawalli for such period and on such conditions as it may think fit."*

10. The provision for appointment of mutawalli is contained in the above quoted Section 63. As already stated mutawalli includes a committee, therefore, provision for appointment of a committee of management to manage the Waqf is also contained in Section 63 of the Act, 1995.

11. We asked the counsel for the parties as to where is the provision for extension of term of committee of

management or mutawalli under the Act, 1995, but none of the counsels could place before the Court any such provision nor could the Court find any such provision in the Act, 1995. The provision for appointment of a mutawalli/committee of management is Section 63, unless of course, there is a provision in this regard in the Waqf deed in which case it is governed by such deed independent of Section 63. Now, it is the admitted factual position that the petitioner's term expired initially on 22.01.2018 which was extended till 21.01.2021. This extension, in fact, was a fresh appointment, as there is no provision for extension. In this scenario, the application of the petitioner, as claimed, for extension of its term was not maintainable in the first place. At best it could be treated as an application for appointment as mutawalli of the Waqf concerned.

12. On being asked, we have also been informed that in case of Waqf Al-al Khair that is a public waqf, the local residents elect a committee of management and then forward the same to the concerned Board which considers appointment of such committee of management. In the present case, there is nothing to show that the petitioner-Committee of Management was ever so elected for appointment as mutawalli under Section 63 of the Act, 1995. We are of the view that the petitioner's application for extension of its term was not maintainable in the first place. In any case, there is no indefeasible right in favour of the petitioner to continue as Committee of Management or to be appointed as such afresh.

13. Now, coming to the other aspect of the matter as already noticed earlier, another committee of management was elected by the local residents and their names were forwarded to the Board which has been appointed as mutawalli of the Waqf. However, while doing so on a complaint being made, a report was called for wherein two deficiencies have been discussed in the impugned order. It is only on account of this that the petitioner is claiming the application of Section 67 of the Act, 1995. We are of the opinion that once the term of the committee of management expired on 21.01.2021 and it was not extended, then, it had no right to function after that, legally and substantively. Therefore, as Section 67 applies only when there is a committee of management functioning in terms of Section 63, there was no question of application of Section 67 of the Act, 1995. Section 67 deals with supervision and supersession of committee of management, meaning thereby, an existing committee of management as appointed under Section 63. The petitioner was not such a committee, therefore, there is no question of application of Section 67. We are in fact of the opinion that the Board could have avoided commenting on the alleged deficiencies brought to its notice in the inquiry ordered especially, as the said inquiry report was never given to the petitioners nor was the petitioner confronted with the same with an opportunity of hearing as alleged. Therefore, in these circumstances, we uphold the order appointing another committee of management and decline the claim of the petitioner for extension of its term. We, at the same time, provide that none of the observations in the order of the Board as regards the alleged deficiencies by the petitioner shall be read against it, unless of course, there is any occasion to take action against any member of the committee of management which can be done only in accordance with law after due

opportunity of hearing. With these observations, we decline to interfere with the impugned order.

14. With these observations, this petition is **disposed of.**

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**(2021)10ILR A1017**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 05.10.2021**

**BEFORE**

**THE HON'BLE RAMESH SINHA, J.**
**THE HON'BLE MRS. SAROJ YADAV, J.**

Misc. Bench No. 22784 of 2021

**Smt. Radha Shukla & Anr. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Ashish Kumar Rastogi

**Counsel for the Respondents:**
C.S.C., Anand Kumar Singh

**Civil Law -Constitution of India, Article 226 - Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), S. 17 - Auction sale by Bank - auction challenged under Article 226 - Held - efficacious remedy of questioning the auction proceedings as well as the sale certificate under Section 17 of the Act, 2002 before the Debt Recovery Tribunal, hence the instant writ petition is not maintainable (Para 13)**

**Dismissed.** (E-5)

**List of Cases cited :**

1. Harshad Govardhan Sondagar Vs International Assets Reconstruction Company Ltd. & ors. (2014) 6 SCC 1

2. Mathew Varghese Vs M. Amritha Kumar & ors. (2014) 5 SCC 610

3. United Bank of India Vs Satyawati Tandon & ors. 2010 (8) SCC 110

4. Standard Chartered Bank Vs V. Noble Kumar & ors. (2013) 9 SCC 620

5. I.C.I.C.I. Bank Limited & ors. Vs Umakanta Mohapatra & ors. 2019 13 SCC 497

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

(1) Heard Sri Ashish Kumar Rastogi, learned Counsel for the petitioners, Sri Amitabh Rai, learned Additional Chief Standing Counsel for the State/respondents no. 1 and 2 and Sri Anand Kumar Singh, learned Counsel for the respondent no.3/Bank.

(2) The instant writ petition under Article 226 of the Constitution of India has been filed by the petitioners, **Smt. Radha Shukla, Ajay Kumar Shukla**, challenging the auction sale performed by the respondent no.3/Bank on 18.08.2021. The petitioners are also seeking a writ of mandamus directing the respondents to not interfere in the peaceful possession of the petitioners.

(3) It appears that the petitioners took housing loan of Rs.8,00,000/- on 12.06.2013 and thereafter Rs.4,00,000/- in the year 2014, for the purpose of construction of house, from the respondent no.3-UCO Bank, Branch Office, Barabanki after mortgaging House No. L-5/98, Awas Vikas Colony, Obari Awas Yojna, District Barabanki and paid regular installments till 2018 as per the agreement executed between them and the respondent no.3/Bank but on account of financial constraint and illness, the petitioners failed to pay the balance outstanding amount as

per the agreement, hence proceedings for recovery of the outstanding amount under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "**Act, 2002**") has been initiated against the petitioners.

(4) Learned Counsel for the petitioners has argued that on 12.09.2018, the respondent no.3/Bank has issued demand notice under Section 13 (2) of the Act, 2002, requiring the petitioners to pay Rs.11,07,122.17/-. On receipt of the aforesaid demand notice, the petitioners approached the respondent no.3/Bank and sought time for repayment of his dues on humanitarian grounds but the bank authorities have informed them that they have to deposit Rs.11,07,122.17/-, otherwise the auction proceedings under Act, 2002 would be initiated against them. Subsequently, the respondent no.3/Bank filed a suit, bearing no. 21 of 2020 (Computerized No. D202004120000004 : UCO Bank Vs. Ajay Kumar Shukla) for taking possession of secured assets of the petitioners mortgaged against the aforesaid loan amount before the District Magistrate, Barabanki under Section 14 of the Act, 2002, in which notice was issued to the petitioners on 01.01.2020. In pursuance of the notice, the petitioners appeared before the District Magistrate, Barabanki and filed an application for grant of time to deposit the loan installment, to which the District Magistrate, Barabanki allowed his application and fixed the date on 05.02.2020. On 05.02.2020, the petitioner appeared before the District Magistrate, Barabanki again and informed the District Magistrate, Barabanki that amount of Rs.15,000/- has been deposited by him in the branch of the respondent no.3/Bank and moved an application for grant of further time to deposit the balance amount in the installments. In the meantime, the petitioners tried to approach the respondent no.3/Bank for depositing the outstanding amount as indicated in the demand notice dated 19.09.2018 but it was informed by the officers of the respondent no.3/Bank that they have to appear befor the District Magistrate and the respondent no.3/Bank will follow the order of the District Magistrate, Barabanki.

(5) Learned Counsel for the petitioners submits that during pendency of the aforesaid suit, the respondent no.3/Bank published e-auction notice of the petitioners' property on 02.08.2021 under Section 6 (2) and 8 (6) of the Security Interest (Enforcement) Rules, 2002 in daily newspaper stating therein that respondent no.3/Bank has taken the possession of the petitioners' property and it is going to perform e-auction on 18.08.2021, without giving any notice or information through any mode to the petitioners.

(6) It has been argued by the learned Counsel for the petitioners that in terms of Rule 8 of the Security Interest (Enforcement) Rules, 2002, the authorized officer is bound to issue possession notice in the format as provided in Appendix-IV to the borrower by affixing the possession notice on the outer door or at such conspicuous place of the property. In addition to this, Rule 8 (2) further provides that the possession notice shall be published in two leading newspapers. Rule 8 (6) provides that the authorized officer shall serve the borrower a notice of 30 days for sale of the immovable secured assets under sub-rule (5). He argued that the respondent no.3/Bank has not followed the aforesaid rules, as the public notice as published by the respondent/Bank clearly

demonstrates that it is a notice of sale of property not a possession notice as stipulated and provided under Rule 8 of the Rules, 2002. His submission is that the entire auction proceedings initiated by the authorities of the respondent no.3/Bank under Act, 2002 are void ab initio, hence the same is liable to be quashed.

(7) In support of the aforesaid submissions, learned Counsel for the petitioners has placed reliance upon judgments of the Apex Court in H**arshad Govardhan Sondagar Vs. International Assets Reconstruction Company Ltd. and others :** (2014) 6 SCC 1 **and Mathew Varghese Vs. M. Amritha Kumar and others :** (2014) 5 SCC 610.

(8) Per contra, learned Counsel for the respondent no.3/Bank submits that the auction of the property in question has already been held and the same has also been confirmed. He further argued that in view of the decision of the Apex Court in the case of United Bank of India Vs. Satyawati Tandon and others : 2010 (8) SCC 110, the petitioners have an efficacious remedy of questioning the auction proceedings as well as the sale certificate under Section 17 of the Act, 2002 before the Debt Recovery Tribunal, hence the instant writ petition is not maintainable.

(9) We have examined the submissions of the learned Counsel for the parties and gone through the record.

(10) Admittedly, the petitioners are the defaulter of the loan account and they have a remedy under Section 17 (1) of the Act, 2002 to approach the Debt Recovery Tribunal. Therefore, no ground for interference is made out particularly, in view of the judgement of the Supreme Court in the case of **United Bank of India vs. Satyawati Tandon and others** : (2010) 8 SCC 110, wherein the Apex Court in paragraph 42 & 43 h

*"42. There is another reason why the impugned order should be set aside. If Respondent 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression "any person" used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pas interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.*

*43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch*

*as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute."*

(11) In the case of **Standard Chartered Bank Vs. V. Noble Kumar and others :** (2013) 9 SCC 620, the Apex Court in paragraph 27 has held as under:

*"27.The "appeal" under section 17 is available to the borrower against any measure taken under section 13(4). Taking possession of the secured asset is only one of the measures that can be taken by the secured creditor. Depending upon the nature of the secured asset and the terms and conditions of the security agreement, measures other than taking the possession of the secured asset are possible under section 13(4). Alienating the asset either by lease or sale, etc. and appointing a person to manage the secured asset are some of those possible measures. On the other hand, section 14 authorises the Magistrate only to take possession of the property and forward the asset along with the connected documents to the borrower (sic the secured creditor). Therefore, the borrower is always entitled to prefer an "appeal" under section 17 after the possession of the secured asset is handed over to the secured creditor. Section 13(4)(a) declares that the secured creditor may take possession of the secured assets. It does not specify whether such a possession is to be obtained directly by the secured creditor or by resorting to the procedure under section 14. We are of the opinion that by whatever manner the secured creditor obtains possession either through the process contemplated under section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under section 17 is available."*

(12) In **I.C.I.C.I. Bank Limited and Others v. Umakanta Mohapatra and Others :** 2019 13 SCC 497, the Apex Court has held as under :-

*"Delay Condoned.*

*Leave granted.*

*Despite several judgements of this Court, including a judgment by Hon'ble Mr. Justice Navin Sinha, as recently as on 30.01.2018 , in Authorized Officer, State Bank of Travancore and Anr. vs. Mathew K.C., (2018) 3 SCC 85, the High Courts continue to entertain matters which arise under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), and keep granting interim orders in favour of persons who are Non-Performing Assets (NPAs).*

*The writ petition itself was not maintainable, as a result of which, in view of our recent judgment, which has followed earlier judgments of this Court, held as follows :*

*"18. We cannot help but disapprove the approach of the High Court for reasons already noticed in Dwarikesh Sugar Industrict Ltd. vs. Prem Heavy Engineering Works (P) Ltd. and Another, (1997) 6 SCC 450, observing :-*

*"32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would*

*amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."*

*The writ petition, in this case, being not maintainable, obviously, all orders passed must perish, including the impugned order, which is set aside.*

*The appeals are allowed in the aforesaid terms.*

*Pending applications, if any, shall stand disposed of."*

(13) In view of the aforesaid judgments of the Apex Court, this writ petition is not maintainable as the petitioners have a remedy by way of filing of application/appeal under Section 17(1) of the Act, 2002.

(14) The judgments, which have been placed reliance by the learned Counsel for the petitioners, are not applicable in the facts and circumstances of the case.

(15) The writ petition is **dismissed**, as not maintainable.

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**(2021)10ILR A1021**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:ALLAHABAD 01.09.2021**

**BEFORE**

**THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.**
**THE HON'BLE SUBHASH CHAND, J.**

FAFO No. 3390 of 2016

**Satypal Singh & Ors. ...Appellants**
**Versus**
**Manoj Kumar & Ors. ...Respondents**

**Counsel for the Appellants:**
Sri Nipun Singh, Sri Sumit Suri

**Counsel for the Respondents:**
GA, Sri Atul Kumar Srivastava

**Criminal Law - Motor Vehicles Act,1988 – Section 166 - Claim petition - Pleading - what has not been contended in the written statement cannot be permitted to be proved which is beyond record - where the pleadings are silent, the same cannot be agitated so as to dismiss the claim of the claimants**

Tribunal rejected claim petition - Tribunal felt there is collusion between the parties - No rebuttal evidence led by insurance company - W.S. totally silent on the point involvement of any other vehicle in the accident and that it has sent the matter for - All of a sudden without amending W.S. private investigator produced by insurance company - Insurance company did not produce investigator's report - on what basis private investigator found that another vehicle was involved is not projected- no reason to falsely implicate a vehicle - insurance company not led any evidence that the vehicle has been falsely implicated - police authorities never summoned by Tribunal - judgment passed on surmises & conjectures that there is fraud, deception and cheating investigation - Order rejecting claim petition, set aside - Matter remitted back to Tribunal to decide the issue of negligence & quantum of compensation (Para 10, 11,12)

**Allowed.** (E-5)

**List of Cases cited :**

1. Mangla Ram Vs Oriental Insurance Co. Ltd. & ors. 2018 LawSuit (SC) 303

2. Sunita & ors. Vs RSRTC & Anr 2019 LawSuit (SC) 190

3. New India Assurance Company Vs Urmila Shukla MANU/SCOR/24098/2021

4. Vimla Devi & ors. Vs National Insurance Company Ltd. & anr. (2019) 2 SCC 186

5. Anita Sharma & ors. Vs The New India Assurance Com. Ltd. & anr. 2021 (1) SCC 171

6. Chandrakanta Tiwari Vs New India Assurance Company Ltd. C.A. No. 2527 of 2020 08.06.2020

7. United India Insurance Company Vs Shaila Dutta 2011 (10) SCC 509

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard Sri Sumit Suri, Advocate, holding brief of Sri Nipun Singh, learned counsel for appellants, Sri Atul Kumar Srivastava, learned counsel for respondents-Insurance Company and perused the record of Tribunal.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 29.09.2015 passed by Motor Accident Claims Tribunal, Baghpat (hereinafter referred to as 'Tribunal') in M.A.C.P. No. 24 of 2013 whereby the claim petition has been dismissed.

3. The facts as culled out, from the record are that the deceased was a pillion rider on the two wheeler driven by Akash son of Bhanwar Singh. Both of them were returning home one Wagon-R was being driven rashly and negligently, dashed with the motorcycle whereby the driver and the deceased were injured. The accident occurred on 22.2.2013 and for a period of two days he survives.

4. On 23.02.2013, the respondent filed its reply disputing the fact that the driver of the vehicle was driving the vehicle rashly and negligently and was driving the vehicle without taking proper care and caution and the vehicle was insured with insurance company.

5. The claimants filed documentary evidence so as to prove oral documentary evidence. The tribunal has framed five issues and decided all the issues and dismissed the claim petition. The tribunal dismissed the claim petition on totally ungermane grounds which could not be made on the basis of surmises and conjectures. The tribunal disbelieved the involvement of the vehicle on the ground that driver of the vehicle did not sustain serious injuries. He has disbelieved the evidence of PW 1 to 5 that they are not to be disbelieved and has relied on the decision of Orissa High Court. The investigator report, who has produces PW1 has been believed. According to D.W.1 the accident occurred due to involvement with some other vehicle and not that of Wagon-R. It is held that the evidence of PW.1 is not trustworthy and that accident occurred with unknown vehicle and the FIR has been given after two days. The tribunal has considered the facts which are not proved, the fact that charge-sheet is led against the driver and owner of Wagon-R. The charge-sheet and FIR prima facie prove the accident between the two vehicle. During investigation DW1 did not mention the fact that the accident occurred with which

vehicle. The investigator just because of the investigator found that the vehicle involved in the accident was also really involved in the accident in the year 2012 and on the same basis he has come to the conclusion that the vehicle was not involved. He has not examined any other person as driver of the motorcycle. The charge-sheet led against Manoj Kumar just because Satpal Singh and Harpal Singh did not carry said vehicle that it is full proof investigation. He has not come out with number of vehicle which he suspects was involved. All these facts will go against the respondent-insurance company. Thus eye witnesses opined we will have to upturn the findings as far as non involvement of the vehicles, hence the matter is allowed. We would have decided the quantum of compensation as it is composite negligence of both the drivers. The driver and owner of the insurance company of the motor cycle is not joined as respondent party.

6. The order of the Tribunal is based on hyper technical ground that the FIR did not disclose the number of vehicle and that it was lodged against unknown vehicle. It is further submitted that the Tribunal has held that the driver of the vehicle did not sustain any injury. The Tribunal has rejected the claim petition of the appellants, who have lost the bread earner of the family.

7. Learned counsel for the appellant has heavily relied on the decision of the Apex Court in the case of **Mangla Ram Vs. Oriental Insurance Co. Ltd. and others [2018 LawSuit (SC) 303].** He further relied in the case of **Sunita and others Vs. Rajasthan State Road Transport Corporation and another [2019 LawSuit (SC) 190]** so as to discard the statement of the counsel for the respondent. The said submission of the counsel for the respondent cannot be accepted for the reason that the driver, owner of the vehicle whose vehicle was involved in the accident has filed written statement wherein the accident having been taken place with their vehicle is not denied. The Tribunal on surmises and conjectures has disbelieved the evidence of eye witnesses.

8. The paragraph-18 of **Mangla Ram (Supra)** reads as under:

*"18. It will be useful to advert to the dictum in N.K.V. Bros. (P) Ltd. Vs. M. Karumai Ammal and others.16, wherein it was contended by the vehicle owner that the criminal case in relation to the accident had ended in acquittal and for which reason the claim under the Motor Vehicles Act ought to be rejected. This Court negatived the said argument by observing that the nature of proof required to establish culpable rashness, punishable under the IPC, is more stringent than negligence sufficient under the law of tort to create liability. The observation made in paragraph 3 of the judgment would throw some light as to what should be the approach of the Tribunal in motor accident cases. The same reads thus:*

*3. Road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the court, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accident Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain*

*cases, culpability must be inferred from the circumstances where it is fairly reasonable. The Court should not succumb to niceties, technicalities and mystic maybes. We are emphasizing this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient (1980) 3 SCC 457 disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their neighbour. Indeed, the Stat must seriously consider no fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parsimony practised by tribunals. We must remember that judicial tribunals are State organs and Article 41 of the Constitution lays the jurisprudential foundation for State relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Courts should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard."*

9. Learned counsel for the appellant has relied on the decisions of Apex Court in **New India Assurance Company Vs. Urmila Shukla decided on 6.8.2021 reported in MANU/SCOR/24098/2021, Vimla Devi and others Vs. National Insurance Company Ltd. and another (2019) 2 SCC 186** and **Anita Sharma and others Vs. The New India Assurance Company Limited and another 2021 (1) SCC 171.**

**Sections 166, 168 and 147 of the Motor Vehicle Act are reproduced as under:**

**"166. Application for compensation.-** (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of Section 165 may be made--

*(a) by the person who has sustained the injury; or*

*(b) by the owner of the property; or*

*(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or*

*(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be:*

*Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.*

*(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred, or to the Claims Tribunal within the local limits of whose*

*jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed:*

*Provided that where no claim for compensation under Section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.*

*(3) * * * **

*(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act."*

**"168. Award of the Claims Tribunal.-**

*(1)*
.....

*(2)*
.....

*(3) When an award is made under this section, the person who is required to pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct."*

**"147. Requirements of policies and limits of liability:**

*(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which--*

*(a) is issued by a person who is an authorised insurer; and*

*(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)--*

*(i) against any liability which may be incurred by him in respect of the death of or bodily 27 [injury to any person, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;*

*(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:*

*Provided that a policy shall not be required--*

*(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee--*

*(a) engaged in driving the vehicle, or*

*(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or*

*(c) if it is a goods carriage, being carried in the vehicle, or*

*(iii) to cover any contractual liability.*

*Explanation. --For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.*

*(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely:--*

*(a) save as provided in clause (b), the amount of liability incurred;*

*(b) in respect of damage to any property of a third party, a limit of rupees six thousand:*

*Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier.*

*(3) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.*

*(4) Where a cover note issued by the insurer under the provisions of this Chapter or the rules made thereunder is not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.*

*(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."*

10. Three aspects which we would highlight would be (1) though the Tribunal has felt that there is collusion between the parties. No rebuttal evidence is led by the insurance company except the evidence of the so called private investigator. We will have to go by the pleadings of the parties also. The written statement of the insurance company is totally silent on the point involvement of any other vehicle in the accident and that it has sent the matter for investigation. The written statement was filed on 22.02.2013. The evidence of witnesses of the claimants and their cross-examination also silent to the said fact. Not

a single question in rebuttal is asked to any of the witnesses. The Tribunal has permitted evidence being led by the insurance company. Even if, we go by the evidence of D.W.1, he has unfortunately not produced his investigation report. He on what basis has found that another vehicle was involved is also not projected. Had there been a collusion between the owner, driver of the composite vehicle, the respondent would not have filed the reply of denial. They totally denied the negligence. The factum of charge-sheet has not been proved by D.W.1 to a concocted one. If we peruse the written statement filed on behalf of insurance company, which runs into 23 paragraphs they should he saddled with principles of ***falsus in uno falsus in omnius*** meaning thereby false one thing would be false in everything should be applied to the facts of this case also. The reason being the insurance company has nowhere in its reply mentioned even that they had appointed an investigator. They did not produce investigator's report and therefore, we are unable to fathom how all of a sudden they have examined so called investigator as D.W. 1. The police authorities have never been summoned by the Tribunal and the judgment has been passed on surmises and conjectures that there is fraud, deception and cheating. Even in the additional pleas which runs up to paragraph-40 also does not state anywhere that they have given the matter for special investigation to any person. All of a sudden without amending the written statement D.W.1 has been produced. Even if, we consider his submission, he has heavily relied on the FIR which was lodged against unknown vehicle. The fact that the record is silent about this aspect of the matter will also permit us to discord the said fact as having not been proved. Recently the Apex Court in **Chandrakanta Tiwari Vs. New India Assurance Company Ltd. (Civil Appeal No. 2527 of 2020) decided on June 08, 2020** has held that what has not been contended in the written statement cannot be permitted to be proved which is beyond record. The insurance company if it wanted to heavily relied on the report of the private investigator, the investigator's report should have been produced. The trapping of Civil Court should not be adhered to in such a way that it does not give so as to the claimants of the accident. The fact that the judgment in **United India Insurance Company Vs. Shaila Dutta, 2011 (10) SCC 509** will also enure for the benefit of the appellants. Further the Apex Court has held that where the pleadings are silent, the same cannot be agitated so as to dismiss the claim of the claimants. In the present case also the written statement of the insurance company is totally silent on this aspect, hence we cannot concur with the award of the Tribunal.

11. There is no reason to falsely implicate a vehicle and the insurance company has not led any evidence that the vehicle has been falsely implicated. This is one of the aspect which goes against the insurance company. Thus, the appeal stands allowed and the judgment and award dated 29.09.2015 passed by Motor Accident Claims Tribunal, Baghpat in M.A.C.P. No. 24 of 2013 is set aside. We remit the matter to the Tribunal to hear the matter afresh on the negligence as record is already there after affording proper opportunity of hearing to the parties concerned. The judgment in **Mangla Ram (Supra)** will favour the appellants and not to the respondents as submitted by the respondents.

12. We direct the Tribunal to decide the issue of negligence and quantum of

compensation as all other issues are already decided, it would be a question of composite negligence as the deceased was a pillion rider on the vehicle being driven by Akash son of Bhanwar Singh and if ultimately the Tribunal holds both the drivers negligent, they may give rights to recover from the owner, driver of the vehicle, who was not made party to the case.

13. We are thankful to the Advocates, who assisted the Court in disposing of the matter finally.

14. Let the record of court below be sent back to the Tribunal concerned.

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**(2021)10ILR A1028**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED:ALLAHABAD 10.08.2021**

**BEFORE**

**THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.**
**THE HON'BLE SUBHASH CHAND, J.**

FAFO No. 3462 of 2016

**Smt. Saroj Devi & Ors. ...Appellants**
**Versus**
**Amar Jeet Singh & Anr. ...Respondents**

**Counsel for the Appellants:**
Sri Anubhav Sinha

**Counsel for the Respondents:**
Sri Rahul Sahai

**A. Criminal Law - Motor Vehicles Act, (59 of 1988) – Section 168 - Compensation - contributory negligence - Motor Accident claim - Burden of proof - burden of proof ordinarily on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side (Para 13)**

**B. Criminal Law - Motor Vehicles Act (59 of 1988) – Section 168 - Compensation - Determination - income of the deceased as per salary slip Rs.10,736/- per month - tribunal wrongly considered his income to be Rs. 7413/ - deceased in age bracket of 36 to 40 years - 50% future loss of income requires to be added - non-pecuniary damages should be Rs.70,000/- + 10% rounded to Rs. 30,000/- increase as per Pranay Sethi case as three years have elapsed hence, the lump sum amount under this head Rs.1,00,000/- - deceased in hospital from 15.11.2013 to 22.11.2013 - entitled for trauma and medical expenses to Rs. 25,000/- - rate of interest should be 7.5%**

**Allowed.** (E-5)

**List of Cases cited :**

1. National Insurance Com. Ltd. Vs Pranay Sethi & ors. 2017 0 Supreme (SC) 105

2. Vimal Kanwar Vs Kishor Dan & ors. (2013) 7 SCC

3. Malarvizhi & ors. Vs United India Insurance Company Ltd. 2020 (4) SCC 228

4. United India Insurance Co. Ltd. Vs Indira Devi & ors. 2018 (7) SCC 715

5. The Oriental Insurance Company Ltd. Vs Mangey Ram & Ors 2019 0 Supreme (All) 1067

6. New India Assurance Com. Vs Urmila Shukla MANU/SCOR/24098/2021

7. Kirti & ors. Vs Oriental Insurance Company Ltd 2021(1) TAC

8. Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & Ors FAFO No. 1818 of 2012 dated 19.7.2016 -

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Subhash Chand, J.)

1. Heard Shri Anubhav Sinha, learned counsel for the appellant and Sri.Rahul Sahai, learned counsel for the respondent-Insurance Company.

2. This appeal , at the behest of the claimants, challenges the judgement and award dated 01.10.2016 passed M.A.C.T/Additional District Judge, Court No. 3, Gautam Budh Nagar (hereinafter referred to as "Tribunal") in M.A.C. No. 101 of 2014.

3. Brief facts as culled out from the record are that on 15.11.2013 at 7:00 p.m in the evening Lakphat Singh was going to Pari Chauk, Greater Noida by riding bicycle to attend his duty and when he reached near gram Garhi, he was hit by a car bearing No. U.P.-16 A.L. 2432 due to the rash driving of the driver of car. Lakhpat Singh sustained injuries and was admitted to Yatharth Hospital, Noida, then to E.S.I. Hospital, Noida and because of his deteriorating condition he was shifted to AIIMS Hospital, New Delhi where he succumbed to his injuries at 5:00 a.m on 22.11.2013.

4. The deceased was 38 years of age at the time of accident. He was a security guard in I.S.S. S.D.B Security Services Private Limited and was earning Rs. 10,000/- p.m. He was survived by his mother, wife, son and daughter. The tribunal has considered his income to be Rs. 7413 p.m, deducted 1/4th towards personal expenses of the deceased, granted multiplier 15, granted Rs. 1,00,000/- towards loss of love and affection, loss of consortium, loss of estate, Rs. 25,000/- towards funeral expenses and Rs. 10,000/- towards transport and ultimately assessed the total compensation to be Rs. 16,36,200/-.

5. It is submitted by learned counsel for the appellants that the Tribunal has deducted 50% of the award holding deceased to be negligent which is bad as the deceased was not plying the vehicle which met with accident.

6. Learned counsel for the appellant has submitted that the deceased was an security guard in I.S.S. S.D.B Security Services Private Limited, hence, his income as considered by the Tribunal is on the lower side and it should be considered to be Rs.10,000/Per month. It is further submitted that the Tribunal though has granted amount for future loss of income of the deceased and also the amount awarded under non-pecuniary heads granted by the Tribunal is on the lower side and which should be as per the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 105**. Lastly, learned counsel for the appellant has submitted that the interest as awarded by the Tribunal is on the lower side and requires to be enhanced.

7. As against this, ld advocate Sri Rahul Sahai, learned counsel for the respondent-Insurance Company submits that income as suggested by the appellants cannot be granted even in the year of accident. It is further submitted by ld counsel for respondent that the Tribunal has erred in granting future loss of income to be 40% as it should be 30% in view of the decision of the Apex Court in **Pranay Sethi (Supra).**

8. It is submitted by Sri Rahul Sahai that the quantum of compensation and the interest awarded by the Tribunal is not just and proper and calls for interference by this Court and requires recalculation. Issue of negligence is also required to be argued by the respondent in this appeal though no cross appeal is filed.

9. Having heard the learned counsels for the parties, we will have to consider the negligence from the perspective of the law laid down.

10. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply.

11. The principle of negligence has been discussed time and again. A person who either contributes or is author of the accident would be liable for his contribution to the accident having taken place and not otherwise.

12. The Division Bench of this Court in **First Appeal From Order No. 1818 of 2012 ( Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 has held as under :

*"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.*

*17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to c*

*"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasors. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or*

*counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.*

*14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence;whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748] has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :*

*"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.*

*7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly*

*responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."*

*18. This Court in Challa Bharathamma &Nanjappan (supra) has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.*

*What emerges from the aforesaid discussion is as follows :*

*(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.*

*(ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.*

*(iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.*

*(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of*

*impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."*

*emphasis added*

*18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.*

*19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in Rylands V/s. Fletcher, (1868) 3 HL (LR) 330. From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.*

*20. These provisions (sec.110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.*

*21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits (per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).*

*22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim*

*petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side."*

*emphasis added*

14. The deceased was a cyclist. The Tribunal has rightly held him not to have contributed to the accident taken place. It is not proved by the driver of the offending vehicle that the deceased had contributed to the accident having taken place, thus oral submission of respondent is rejected.

15. This takes this Court to the issue of compensation. We would place reliance on the Apex court decision in **Vimal Kanwar Vs. Kishor Dan and others (2013) 7 SCC, Malarvizhi & Ors Vs. United India Insurance Company Limited, 2020 (4) SCC 228 and United India Insurance Co. Ltd. Vs. Indira Devi & Ors, 2018 (7) SCC 715. and in The Oriental Insurance Company Ltd. Vs. Mangey Ram and others, 2019 0 Supreme (All) 1067** and the recent judgment of the Apex Court in **New India Assurance Company Vs. Urmila Shukla decided by the Apex Court on 6.8.2021 reported in MANU/SCOR/24098/2021 and Kirti and others vs Oriental Insurance company Ltd reported in 2021(1) TAC. It could not be culled out from record that** on what basis, the Tribunal has deducted the pecuniary benefits from the income cannot be fathomed. The income of the deceased in the year of accident and looking to his salary slip was Rs.10,736/- per month and the tribunal could not have considered his income to be Rs. 7413/- as judgement of **Vimal Kanwar (Supra)** will not permit such deductions. Hence, his income is considered to be Rs. 10,000/- per month to which as the deceased was in the age bracket of 36 to 40 years, 50% future loss of income requires to be added in view of the decision of the Apex Court in **Pranay Sethi (Supra**). As far as amount under the head of non-pecuniary damages are concerned, it should be Rs.70,000/- + 10% rounded to Rs. 30,000/- increase as per the decision of the Apex Court in **Pranay Sethi (Supra)** as three years have elapsed hence, the lump sum amount under this head would be Rs.1,00,000/-. The deceased was in hospital from 15.11.2013 to 22.11.2013. The Tribunal has not given any reasons why family was not entitle to trauma expenses and medical expenses. Let trauma and medical expenses to be Rs. 25,000/-

16. Hence, the total compensation payable to the appellants is computed herein below:

i. Income Rs.10,000/-

ii. Percentage towards future prospects : (50%) Rs.5000/-

iii.Total income : Rs. 10,000 + 5,000= Rs.15,000/-

iv. Income after deduction of 1/3rd : Rs. 10,000/- (rounded up)

v. Annual income : Rs. 10,000 x 12 = Rs.1,20,000/-

vi. Multiplier applicable : 15

vii. Loss of dependency: Rs.1,20,000 x 15 = Rs.18,00,000/-

viii. Amount under non-pecuniary head= 70,000/-Plus Rs 30,000/as per pranay sethi (supra) = 1,00,000/-

ix.Trauma and Medical expenses = 25,000/-

x. Total compensation :RS: 19,25,000/-

17. As far as issue of the rate of interest is concerned, it should be 7.5%. In the view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

*"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."*

18. No other grounds are urged orally when the matter was heard.

19. In view of the above, the appeal is partly allowed. Oral objections are allowed and compensation recalculated. The judgment and award 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.

20. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagori P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291** and this High Court in , total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (**Smt. Sudesna and others Vs. Hari Singh and another)** and in First Appeal From Order No.2871 of 2016 (**Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.)** decided on 19.3.2021 while disbursing the amount.

21. Record be sent to tribunal forthwith.

22. This Court is thankful to both the learned Advocates for getting this matter disposed of during this pandemic.

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**(2021)10ILR A1035**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 03.03.2021**

**BEFORE**

**THE HON'BLE SUBHASH CHAND, J.**

Criminal Appeal No. 5374 of 2019

**Raju ...Appellant(In Jail)**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**

Sri Anuj Kumar Gupta, Sri Bharat singh, Sri Irshad Ahmad

**Counsel for the Respondent:**
A.G.A.

**A. Criminal Law - Indian Penal Code, 1860 – Section 364 - Evidence Act,1872- Section 106 - Kidnapping in order to commit murder - corpus delicti - conviction in absence of recovery of dead body - it is the trite law that the corpus delicti need not be proved - Discovery of the dead body is a rule of caution and not of law - In event there exists strong circumstantial evidence, the judgment of conviction can be recorded even in absence of dead body under Section 364 and 302 of I.P.C - burden to proof under Section 106 of Evidence Act shifts upon the accused Raju to explain how he dealt with Shivaji after having kidnapped him on the day of occurrence - in view of the testimony of eye witness P.W-2, kidnapped Shivaji was last seen along-with accused on the day of occurrence but no explanation was given on behalf of accused in defence to rebutt this fact, which has been proved beyond reasonable doubt by the prosecution evidence - In the instant case kidnapped Shivaji was not recovered but in view of the strong circumstantial evidence of which chain in itself complete the conviction of appellant under Section 364 of I.P.C was held to be proper. (Para 24, 25)**

**B. Criminal Law - Evidence Act,1872 - Motive - in a case based only on circumstantial evidence, prosecution should prove the motive as well; as it would supply the link in chain of circumstantial evidence - It is very difficult to prove the motive for the commission of crime - If motive is proved it would supply the chain of links but absence of the motive is no ground to reject the prosecution case – In case based on circumstantial evidence absence of motive is of no consequence when the chain of proved circumstances is complete (Para 19)**

**Dismissed.** (E-5)

**Cases Relied on :**

1. Ravindra Vs St. of Pun. 2001 (2) JIC 981 SC

2. G. Parsavnath Vs St. of Karn. AIR 2010 SC

3. Mujendra Langeshwaran Vs State (NCT, Delhi) AIR 2013

4. Paramshivam Vs State through Inspector of Police AIR 2014 SC

5. Ramji Rai and others Vs St. of Bihar, 2007 (57) ACC pg. 385 SC

(Delivered by Hon'ble Subhash Chand, J.)

1. The instant Criminal Appeal has been preferred on behalf of the appellant-convict Raju against the judgment and order dated 20.07.2019 passed by the Additional Sessions Judge/Fast Track Court, Sambhal at Chandausi in Sessions Trial No. 395 of 2017 (State of U.P Vs. Raju) arising out of Case Crime No. 400 of 2016 under Sections 364 I.P.C., P.S. Rajpura, District Sambhal whereby the appellant was convicted for the offence under Section 364 of I.P.C and was sentenced for ten years rigorous imprisonment and fine of Rs. 20,000/-, in default of payment of fine the convict was also directed to under go additional rigorous imprisonment for one year.

2. The brief facts giving rise to this criminal appeal are that the informant Ram Kishore moved a written information with the police station concerned with these allegations that his son Shivaji had gone to B.S.V.D school, Gava to study therein on 22.08.2016 at 7 'O' clock by his own cycle. His son was studying in class VIIIth, his age was 15 years. His son did not come back from the school to his house, on

queries the informant came to know that the cycle and bag of his son was in the school. He made hectic search of his son but no whereabouts could be known. Someone has kidnapped his son. This written information was written by Pradeep Kumar son of Virendra resident of Jaigera Sagarpur, P.S Rajpura, same was signed by the informant Ram Kishore. On this written information case crime no. 400 of 2016 was registered against unknown persons under Section 363 of I.P.C. The Investigating Officer after having concluded investigation filed charge-sheet against the accused Raju son of Ramveer resident of village Rora, P.S Dhaneri, District Sambhal under Section 364 of I.P.C in the court of concerned Magistrate.

3. The concerned Magistrate took cognizance on the charge-sheet and the offence been triable by the court of Sessions committed this case to the court of Sessions Judge for trial.

4. The trial court summoned the accused and the charge was framed against accused Raju under Section 364 of I.P.C. The charge framed was read over and explained to him who denied the charge and claimed for trial.

5. On behalf of prosecution to prove the charge against the accused Raju in **documentary evidence** adduced the written information Exhibit Ka-1, photocopy of the register Exhibit Ka-2, the charge-sheet Exhibit Ka-3, chick F.I.R. Exhibit Ka-4, G.D entry in regard to registering case crime Exhibit Ka-5, site plan of the place of occurrence Exhibit Ka-6, carbon copy of the G.D Exhibit Ka-7, recovery memo of one mobile Exhibit Ka-8.

**In oral evidence** examined **P.W-1, Ram Kishore, P.W-2, Nazar Mohd., P.W-3, Pitambar, P.W-4, Lokesh, P.W-5, Inspector Rajvir Singh Yadav, P.W-6, S.I Ravindra Singh,** incharge Cyber Cell.

6. The statement of accused Raju under section 313 Cr.P.C., was recorded in which he denied the incriminating circumstances in the evidence against him and said that he was not familiar with Naresh, nothing was recovered from his possession and Shivaji was never seen by anyone along-with him. He has been prosecuted in this case due to enmity.

7. On behalf of prosecution in defence evidence examined **D.W-1, Raju** and **D.W-2, Rajesh.**

8. The learned trial court after hearing the contentions of the learned counsel for the parties convicted accused Raju vide judgment and order dated 20.07.2019 for the offence under Section 364 of I.P.C and sentenced him with rigorous imprisonment for 10 years and the fine of Rs. 20,000/-, in default of payment of fine the convict was directed to under go additional rigorous imprisonment of one year. Half of the amount of the fine was to be paid to the victim party.

9. Aggrieved from the impugned judgment and sentence dated 20.07.2019, this criminal appeal has been preferred on behalf of the appellant Raju on the grounds that the impugned judgment is based on circumstantial evidence. The learned trial court has passed the impugned judgment on the basis of wrong appreciation of the evidence of record. No alleged mobile or SIM was recovered from the possession of the appellant. During investigation Investigating Officer could not get any clue

in regard to the abducted boy and filed charge-sheet against the appellant and trial court had convicted him while the case is still been investigated by C.B.C.I.D and further investigation is going on. The learned trial court did not consider the defence evidence adduced on behalf of appellant. Accordingly, prayed to allow this Criminal Appeal and to set aside the impugned judgment of conviction and to acquit the appellant from the charge framed against him.

10. I have heard submissions made by the learned counsel for the appellant and also learned A.G.A. for the State, and perused the materials brought on record.

11. In chain of circumstantial evidence **first link circumstantial evidence** adduced on behalf of prosecution is missing of the son of the informant Ram Kishore from the school on 22.08.2016 after he left his house at 7 'O' clock in the morning to attend the class in the school. When Shivaji did not came back after closing of the school, the informant Ram Kishore went to the school of Shivaji and came to know that the cycle and bag of his son was in the school but his son was not found there. Thereafter, the informant moved a report with the police station concerned Exhibit Ka-1 in regard to missing of his son Shivaji. The contents of this written information has been proved by **P.W-1/informant Ram Kishore. The fact of leaving the house at 7 'O' clock in morning on 22.08.2016 by the son of informant to attend the school and not coming back to his house after closing of the school and on reaching to the school of Shivaji, the informant came to know that his son Shivaji was missing from the school while his school bag and cycle was there, has been proved by the statement of P.W-1, Ram Kishore.** This circumstantial evidence is also linked with the statement of **P.W-3, Pitambar Singh**, principal of the school B.S.V.D, Inter College, Gava.

12. The **second link circumstantial evidence** in the chain of circumstantial evidence on behalf of prosecution has examined **P.W-3, Pitambar Singh**, this witness in his statement says that he had been posted as principal of B.S.V.D, Inter College, Gava since 2007, he has brought the attendance register of the students and on its first page at serial no. 23 name of Shivaji son of Ram Kishore resident of village Mubarakpur and his mother name recorded as Smt. Urmila Devi, date of birth of Shivaji is 07.07.2003, Shivaji was studying in this school class VIIIth. On 22.08.2016 in the attendance register he was shown absent. The bag of Shivaji was in the classroom and cycle was parked at the cycle stand. Photocopy of the attendance register after having compared with the original attendance register and after having attested has been filed as Exhibit Ka-2 as marked.

This witness in his cross-examination says that at that time there was no CCTV camera in the school and there was no arrangement of the chaukidar. This information was communicated to Shivaji's house that his bag and cycle was in the school. **Therefore, from the statement of this witness, the fact of attending the school by Shivaji on 22.08.2016 and the fact of studying Shivaji in class VIIIth in B.S.V.D, Inter College, Gava is proved, although this witness says that in the attendance register Shivaji was shown absent on 22.08.2016 yet on the very date the school bag was in the classroom and cycle was in the school cycle stand proves**

**this fact that on 22.08.2016 Shivaji had reached to the school B.S.V.D, Inter College, Gava and after leaving his bag and cycle in the school he remained absent from the class till the closing of the school.**

13. The **third link circumstantial evidence** in the chain of circumstantial evidence is the **evidence of last seen of Shivaji with the accused Raju by the witness P.W-2, Nazar Mohd.** and also missing of Raju on the very date of occurrence.. In this regard on behalf of prosecution **P.W-1, Ram Kishore** in his statement says that accused Raju present in the court is his relative, he usually helped him and Raju occasionally came to his house and stayed there. He had got complaint of Raju from his mother, therefore, **he scolded Raju. Raju was also missing from the very day when son Shivaji was also missing. On the day of occurrence his son along-with Raju was seen by Nazar Mohd. Till date no whereabouts is known of his son and he has utter belief that his son was made missing by Raju.** It is correct to say that his son is not recovered till date and he had moved an application for investigation by C.B.C.I.D.

**P.W-2, Nazar Mohd.** in his statement says that on 22.08.2016 at 7 'O' clock of morning he was going to the shop where he does the labour of battery and self repair. He has acquainted with Shivaji. **On the day of occurrence, he had seen Shivaji along-with accused Raju at the Sambhal Chauraha.** Shivaji was also his friend and he was also acquainted with accused Raju who usually visited Shivaji at his house. **It was 7 'O' clock and some minutes when he saw Shivaji at Sambhal Chauraha on the day of occurrence, he has heard the talks exchanged between Raju and Shivaji.** Accused present in the court was saying to Shivaji to get his goods handed over to him. Both these went to take jalebi and he went to his shop. **On that day Shivaji was in school uniform of school B.S.V.D. On the day of occurrence he came to know from the house of Shiivaji that Shivaji was missing, so he had told Ram Kishore that Shivaji was seen by him along-with Raju.**

**Therefore, the statement of P.W-1, Ram Kishore is admissible in evidence. In view of the the direct evidence of P.W-2, Nazar Mohd. who had seen missing Shivaji along-with accused Raju on the date of occurrence and since the date no whereabouts of Shivaji was known.**

14. **Next link evidence** in the chain of circumstantial evidence is the **messages and phone call on the mobile phone of P.W-1, Ram Kishore** in the night of date of occurrence on 22.08.2016. In this regard **P.W-1, Ram Kishore** in his statement says that **on missing of his child on the date of occurrence in the night he got two messages on his mobile 9759708801.** In that messages it was said that his son was with them, thereafter, phone call was also came on his mobile in which the same statement as in the message was repeated. In cross-examination this witness says that he does not recollect the complete number of the person sending the message on his mobile phone but the last digit was 50, he is not aware whose number was it. It was also in those messages that his son was wearing white shirt and pant of B.S.V.D school, he was of sharp intellect and was with him, if he wanted the life of his son come to him in failure, the life of his son would be finished. The second message was that if he wanted to know his name, he

was terrorist Kangaroo who hated India. These two messages came on 23rd day. One call also came in which same statement was reiterated. He could not recognize the sound of the persons calling him. **After these messages he reached to the police station to show his mobile Darogiji arrested Raju on the 25th day and took in custody two mobiles and three SIMS from the possession of Raju,** his mobile was given back to him by Darogiji.

15. **Next link evidence** in the chain of circumstantial evidence is **the testimony of P.W-4, Lokesh,** this witness in his statement says that his shop of mobile repair is at Gava. He sells vodaphone SIM. The SIM number 9719058850 was purchased from his shop. It was purchased by Raju and Naresh, it was 1 'O' clock of the day time this SIM was issued on the I.D of Naresh and it was activated on 22nd day while the SIM was issued on the 19th day. The entry of this SIM is at serial number 5 of his register. The attested photocopy of the same was filed by him which is Exhibit Ka-3. **On the 22nd day Raju came to him taking the mobile to activate this SIM on his mobile and he activated this SIM in mobile of Raju. This witness identified Raju who was present in the court and stated that he was the very Raju who had came to his shop to get the SIM activated on his mobile.** In cross-examination this witness says that he is a authorized seller of Vodaphone company. He had got the summon to give evidence in the court.

This **link evidence in the chain of circumstantial evidence is further corroborated with the link evidence of CDR details on the mobile set and recovery of the mobile and also the evidence of sending messages and calling with the SIM 9719058850 from the mobile set of accused Raju.** In this regard on behalf of prosecution has examined **P.W-6, Ravindra Singh.** This witness in his cross-examination says that on 24.08.2016, he had got information that on the mobile number of informant 9759708801 the message were received in regard to kidnapped Shivaji from mobile number 9719058850. **He received CDR of mobile no. 9719058850. This CDR is paper no. 9Kha(3). From the CDR it is evident that the mobile set of EMEI 911483706280880 was of dual SIM in which a few days before SIM no. 7409221184 was also used which was of Raju.** He being the Investigating Officer recorded the statement of informant who had told Raju to be his relative and also recorded the statement of eye witness Naresh Mohd. who had seen Shivaji along-with Raju on the date of occurrence at the Sambhal Chauraha. **On 27.08.2016, he also recorded the statement of Lokesh who had issued the SIM no. 9719058850, it was told by Lokesh to him that this SIM was on the I.D of Naresh which was activated on mobile of Raju. He also recorded the statement of Naresh. Thereafter, on 30.08.2016 he arrested Raju and a mobile was recovered from the possession of the Raju.** The entry of the same was made in the G.D No. 65 at 23:40 hrs on 30.08.2016. Carbon copy of the G.D 9Kha/5 is recorded which is in his writing and signed by him Exhibit Ka-7 was marked on it. **The mobile which was recovered from the accused Raju is the material Exhibit-1** and the cloth in which it was packed material Exhibit-2. **The recovery memo of this mobile** was prepared by him, it is in his hand writing and signature **Exhibit Ka-8** was marked therein. He informed DCRB and adjoining

district Delhi, NCR but nothing was known in regard to whereabouts of Shivaji, publication was made in the newspaper on 12.10.2016. He was transferred. In cross-examination this witness says that **as per CDR call details, it was found that the messages and calls were made by the device recovered from the possession of Raju.** From the beginning of investigation till the closing of investigation Shivaji was not recovered. During investigation no such evidence was collected by him in regard of murder of Shivaji or any evidence of dead body of Shivaji. **The EMEI number was of this mobile recovered from the accused Raju from which messages was sent.**

16. **P.W-5, Rajvir Singh Yadav,** filed the charge-sheet against accused Raju after collecting the evidence under Section 364 of I.P.C.

17. On behalf of accused in defence evidence has examined **D.W-1 Raju son of Harpal.** This witness says that he is the real nephew of informant and accused Raju is real brother-in-law (bahnoi). His maternal uncle wanted to get his sister-in-law married with his younger brother and same was opposed by Raju and due to this enmity Raju has been falsely implicated in this case. This witness in his cross-examination says that this fact he has told in the court for the first time. The complaint of the same was never made by him to any of the police station concerned.

18. **D.W-2, Rajesh** in his statement says that Ram Kishore is the maternal father-in-law of his sister. Ram Kishore wanted to get his nephew Viresh married with their 14 years old minor sister. Raju was falsely implicated in this case by Ram Kishore due to enmity of opposing by Raju. In his cross-examination this witness says that Raju is his real brother-in-law.

19. It is submitted by the learned counsel for the appellant that there is no motive of committing the offence and the appellant has been falsely implicated in this case due to enmity. The motive of commission of any crime gets locked in the mind of the maker. It is very difficult to prove the motive for the commission of crime if it is proved. It would supply the chain of links but absence of the motive is no ground to reject the prosecution case. Since the motive of any crime is always hidden in the mind of the perpetrator of the crime, therefore, in case of circumstantial evidence the evidence of motive becomes relevant if the motive is given in the prosecution version**. In present case no motive has been mentioned in prosecution case, therefore, the absence of motive could not be ground to reject the prosecution evidence. The Hon'ble Apex Court in Ravindra Vs. State of Punjab 2001 (2) JIC 981 SC held:**

*"in a case based only on circumstantial evidence, prosecution should prove the motive as well; as it would supply the link in chain of circumstantial evidence. Absence thereof cannot be ground to reject the prosecution case."*

20. From the evidence adduced on behalf of prosecution, it is found that the chain of circumstantial evidence is interlinked none of the link is missing to indicate the perpetrator of the crime all above circumstantial evidence proved that it is the accused Raju who had committed the offence.

21. The Hon'ble Apex Court in **G. Parsavnath Vs. State of Karnataka AIR 2010 SC pg. 2914,** held:

*"the circumstantial evidence appreciation of the same must be made to the common course of natural events and human conduct. Facts established should be consistent only with hypothesis of guilt of accused. It is not mean that each and every hypothesis suggested by the accused must be excluded by the brief facts.*

*The case based on circumstantial evidence absence of motive is of no consequence when the chain of proved circumstances is complete."*

22. The Hon'ble Apex Court in **Mujendra Langeshwaran Vs. State (NCT, Delhi) AIR 2013 pg. 2790 SC**, held:

*"in case of circumstantial of the circumstances must lead to the conclusion that the accused alone committed crime none else."*

23. The plea in defence taken by the accused is plea of enmity in false implication. The false implication is the enmity of refusal of getting married of the relatives of accused Raju as per wish of informant is not found sustainable. This fact is well proved from the statement of eye witness **P.W-2, Nazar Mohd.** Which is also corroborated with the statement of **P.W-4, Lokesh** and also from the statement of **P.W-6, Ravindra Singh** that missing Shivaji was seen with accused Raju last time on the dated of occurrence and the CDR details on the mobile set of Raju also affirm this fact that Shivaji was with Raju on the day of occurrence, therefore, burden to proof under **Section 106** of **Evidence Act** shifts upon the accused Raju to explain how he dealt with Shivaji after having kidnapped him on the day of occurrence.

24. The Hon'ble Apex Court in Paramshivam Vs. State through Inspector of Police, AIR 2014 SC pg. 2936, held:

*"burden of proof the evidence of the eye witness that the accused had abducted deceased. No explanation by the accused as to how he dealt with abducted persons. Presumption could be drawn that the accused persons have murdered deceased."*

25. In this case in view of the testimony of eye witness **P.W-2, Nazar Mohd.** kidnapped Shivaji was last seen along-with accused Raju on the day of occurrence but no explanation was given on behalf of accused in defence to rebutt this fact which has been proved beyond reasonable doubt by the prosecution evidence.

26. In present case kidnapped Shivaji is not recovered till date. Section 364 of I.P.C reads as under:

***"364. Kidnapping or abducting in order to murder.-*** *Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with [imprisonment for life] or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."*

From the bare perusal of this Section 364 of I.P.C, it is evident that the kidnapping or abduction is made of made of any person in order such persons may be murdered.

Kidnapped or abducted person may be disposed of as to put such person in danger of being murdered.

27. **Even if the victim Shivaji is not recovered but in view of the strong circumstantial evidence of which chain in itself complete the conviction of appellant under Section 364 of I.P.C is proper.**

28. Hon'ble Apex Court in **Ramji Rai and others Vs. State of Bihar, 2007 (57) ACC pg. 385 SC,** held:

*"Now it is the trite law that the corpus delicti need not be proved. Discovery of the dead body is a rule of caution and not of law. In event there exists strong circumstantial evidence, the judgment of conviction can be recorded even in absence of dead body under Section 364 and 302 of I.P.C".*

29. Therefore, in view of the over all assessment and re-appreciation of the evidence on record, it is found that the prosecution had proved its case beyond reasonable doubt. The impugned judgment of conviction and sentence passed by the court below does not bear any infirmity and needs no interference. Accordingly, criminal appeal deserves to be dismissed.

30. Accordingly, Criminal Appeal is dismissed. Judgment and order dated 20.07.2019 passed by the Additional Sessions Judge/Fast Track Court, Sambhal at Chandausi in Sessions Trial No. 395 of 2017 (State of U.P Vs. Raju) is hereby affirmed. The appellant is in jail. He is directed to serve the remaining sentence as has been awarded by the trial court.

31. Let a copy of this judgment/order be certified to the court concerned for necessary information and follow up action.

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**(2021)10ILR A1043**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 07.10.2021**

**BEFORE**

**THE HON'BLE SUBHASH CHANDRA SHARMA, J.**

Criminal Appeal No. 7380 of 2019
with
Criminal Appeal No. 6840 of 2019

**Mohit Kumar ...Appellant(In Jail)**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Sri Jagmohan Singh, Sri Lavkush Kumar Bhatt

**Counsel for the Respondent:**
A.G.A.

**A. Criminal Law - Dowry Death - Indian Penal Code, 1860 – Section 304B - Conviction - conviction u/s 304-B I.P.C. cannot be made unless all of the ingredients of Section 304-B I.P.C are satisfied even though some of the ingredients are fulfilled - Ingredients - death of woman by burns or bodily injury or otherwise than under normal circumstances; within 7 years of her marriage; cruelty or harassment by husband or his relatives; for or in connection with, the demand of dowry soon before her death (Para 28)**

**B. Criminal Law - Dowry Death - Indian Penal Code, 1860 – Section 304B - *'death occurring otherwise than in normal circumstances'* - Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the 'death occurring otherwise than in normal circumstances' (Para 36)**

**C. Criminal Law - Dowry Prohibition Act, 1961 - Section 2 - Dowry - 'dowry' means any property or valuable security given or**

***agreed to be given*** **either directly or indirectly - court did not accepted the argument that there has to be an agreement for dowry at the time of the marriage in view of the words "agreed to be given" occurring - Section 304B I.P.C. makes *"demand of dowry"* i.e. demand of property or valuable security itself punishable - Demand neither conceives nor would conceive of any agreement - If for convicting any offender, agreement for dowry is to be proved; hardly any offenders would come under the clutches of law - interpretation that conviction can only be, if there is agreement for dowry, is misconceived - It is not always necessary that there be any agreement for dowry (Para 33)**

**D. Criminal Law - Dowry Death - Indian Penal Code,1860 – Section 304B - Evidence Act,1872 - Section 113B - "soon before her death" - Prosecution is obliged to show that soon before the death there was cruelty or harassment - *proximity test* - expression 'soon before' normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question- there must be existence of a *proximate and live-link* between the effects of cruelty based on dowry demand and the concerned death - If alleged incident of cruelty is remote in time and has become stale enough not be disturb mental equilibrium of the woman concerned, it would be of no consequence (Para 36)**

**E. Criminal Law - Evidence Act, 1872 - Section 154 - Testimony of Hostile witness - Hostile witness testimony of the hostile witness cannot be rejected totally as his evidence is not washed off from the record and the parties can take support of such evidence to the extent it is favourable to them – however it does not mean that a conviction can be recorded on solitary statement of a witness who has disowned his testimony of examination-in-chief and has turned hostile during the beginning of the cross-examination - though the credibility of a hostile witness cannot be discarded altogether, but this puts the court on guard and cautions the court against acceptance of such evidence without satisfactory corroboration - where other reliable and trustworthy evidence is available on record, the same can be used in support thereof (Para 44, 46, 47)**

Informant daughter set her ablaze by pouring kerosene oil, being aggrieved with daily torture for chain and other items not being given in the marriage, in the presence of all family members - Father/informant supported the prosecution version in his examination-in-chief but afterwards he turned hostile and retracted from his testimony already deposed before the trial court - Held - evidence of father/informant as made during examination-in-chief is shaky, unreliable and not worthy of credence - Other witnesses do not supported the prosecution version - prosecution miserably failed to prove the charges against the appellants under Section 304B, 498A I.P.C. and ¾ Dowry Prohibition Act - conviction by trial court set aside. (Para 51)

**Allowed.** (E-5)

**Cases Relied on :**

1**.** Pawan Kumar & ors. Vs St. of Har., 1998 (3) SCC 309

2. Prithi Vs St. of Har. 2011 ACC (72) 398

3. Ramesh Vs St.of Har. (2017) 1 SCC 529

4. Mahender Chawla Vs U.O.I. 2018 SCC Online 2679

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

1. These appeals have been preferred against the judgment and order dated 28.09.2019 passed in S.T. No.27 of 2016 (State of U.P. vs. Jai Jai Ram and 2 others) arising out of Crime No.255 of 2015, under Sections 498-A, 304-B I.P.C. & ¾ D.P. Act, Police Station Jahanganj, District

Farrukhabad by which appellants Jai Jai Ram and Smt. Bhagyawati have been convicted and sentenced under Section 304-B for a period of 7 years rigorous imprisonment and appellant Mohit Kumar for a period of 10 years rigorous imprisonment, under Section 498-A I.P.C. for a period of 1 year rigorous imprisonment with fine of Rs.5000/- for each and under Section 4 D.P. Act for a period of 6 months rigorous imprisonment with fine of Rs.1000 for each.

2. Facts in brief are that informant Ramprasad is resident of village Nagariya Jawahar, Police Station Rajepur, District Farrukhabad and his daughter Rinky @ Neelam was married to Mohit Kumar in May, 2013 who is resident of Jahanganj. After some days of marriage, the in-laws began to torture her daughter for chain and other items not being given in the marriage. They took off the jewelry from her which was given by her parents. On 24th July, Mohit Kumar sent S.M.S. which meant that he did not need her. Her father Ramprasad came and took her daughter. On 17.08.2015 her mother-in-law levelled the charge of theft of Rs.2500/- on her and said, give the money otherwise result will be bad. Thereafter, his daughter being aggrieved with daily torture poured kerosene oil on herself and set her ablaze in the presence of all family members but no one tried to save his daughter. If her mother-in-law, father-in-law, sister-in-law and husband had tried to save her, she would have survived. On 21.08.2015 *tehrir* as aforesaid was given by informant at the Police Station Jahanganj where case was registered as Crime No.255 of 2015, under Sections 498-A, 304-B I.P.C. and ¾ D.P. Act. The detail of which was entered into G.D. as Report No.24.

3. On the date of incident i.e. 17.08.2015 at about 17:30 Rinky @ Neelam died in the hospital and information thereof was given to police on the basis of which H.C.P. Rajendra Prasad proceeded to the hospital at Farrukhabad for conducting inquest of deceased where Rajendra Prasad Chaudhari, Tehsildar Sadar, Farrukhabad, constable Satyapal and home guard Pawanesh Pratap were present. Inquest of deceased Smt. Rinky @ Neelam was conducted by Tehsildar, R.P. Chaudhari in presence of the witnesses. Thereafter, dead body was got sealed, necessary papers were prepared with the inquest report and dead body was sent for post-morem to District Hospital, Farrukhabad by constable Satyapal Singh and home guard Pawnesh Pratap Singh.

4. On 18.08.2015 at about 3:00 P.M. Dr. Brajesh Singh and B.S. Verma, Medical Officer, Fatehgarh conducted autopsy of the dead body of the deceased Smt. Rinky @ Neelam and prepared post-mortem report Ex Ka- 6. Details of which are as under :-

**External Examination**

(I) age 23 years.

(ii) Average built body, eyes closed, mouth partly open

(iii) Dressing ointment all over the body at places, rigor mortis present both exremities, body kept in ice, cut open mark on medial side left ankle.

**Antemortem Injuries**

(I) Superficial to deep burn all over the body except head, lower part of both legs, head and sole skin black and peeled off at places, subcutaneous tissue present.

**Internal Examination**

(i) Head, Skull and Membrane - NAD

(ii) Brain - congested

(iii) Oribal, Nasal and Aural Cavities Findings - NAD

(iv) Neck, Mouth, Tongue Pharynx, Thyroid, Larynx and Vocal Cords - NAD

(v)Chest, Ribs and Chest Wall - NAD

(vi)Oesophagus, Trachea and Bronchial Tree- NAD (vii) Pleaura,

Pleaural Cavities and Lung Findings - Congested

(viii) Pericardium and Pericardial Sac. - NAD

(ix) Heart findings and weight - Both Chambers Full

(x) Large Blood Vessels - NAD

(xi) Abdomen and Abdominal Wall - Opened

(xii) Peritoneum and Peritonial cavity - NAD

(xiii) Stomach - liquid material

(xiv) Small and large intestine, Liver - NAD

(xv) Spleen - Congested

(xvi) Pancreas - NAD

(xvii) Kidney - Congested

(xviii) Pelvic Cavity and Pelvic Bones - NAD

(xix) Uterus - Non Gravid

(xx) Spinal Cord - Not opened

In the opinion of the doctor cause of death is shock as a result of

antemortem burn.

5. Investigation of the case was handed over to Circle Officer, Lekhraj Singh who recorded the statements of witnesses, made spot inspection, prepared site-plan and collected the relevant evidence. On the basis of material collected during investigation prima facie case was found to be made out against the appellants Jai Jai Ram, Smt. Bhagyawati and Mohit Kumar so charge-sheet was submitted under Sections 498-A, 304-B and ¾ D.P. Act to the court concerned. The court concerned took cognizance of the offences and after providing copies of prosecution papers to the appellants in compliance of Section 207 Cr.P.C., case was committed to the court of session for trial.

6. The court of session framed charges against the appellants under Section 498-A, 304-B I.P.C. & Section ¾ D.P. Act and in alternate under Section 302 read with Section 34 I.P.C. on the basis of material on record. Charge was read over and explained to the appellants from which they denied and did not plead guilty but claimed for trial.

7. The prosecution adduced evidence in support of its case, PW-1 Ram Prasad informant (father of the deceased), PW-2 Smt. Rekha Saxena (mother of the deceased), PW-3 Mukesh Singh @ Umesh Singh neighbour of informant and witness of inquest, PW-4 Rajeev Kumar neighbour of informant, PW-5 Motiram witness of inquest, PW-6 Nem Singh neighbour of informant, PW-7 Rajendra Prasad Chaudhary, Tehsildar who conducted inquest of the deceased, PW-8 Rajat Kumar borther of the deceased, PW-9 Dr. Brajesh Singh, medical officer who conducted autopsy of the deceased, PW-10 constable Smt. Meena Singh who prepared check F.I.R. and PW-11 Lekhraj Singh, Circle Officer who investigated the case, have been examined.

8. After prosecution closed its evidence, statements of appellants under Section 313 were recorded by the trial court in which they admitted the marriage of deceased on 07.05.2013 with appellant

Mohit Kumar and her death on 17.08.2015. They stated the story of demand of dowry, torture relating thereto and setting her ablaze by pouring kerosene oil in their house, to be false. The deposition of PW-2 Smt. Rekha Saxena, PW-3 Mukesh Singh, PW-4 Rajeev Kumar, PW-5 Motiram, PW-6 Nem Singh neighbour of informant, PW-8 Rajat Kumar have been said to be correct. They stated about the statement of PW-7 Rajendra Prasad Chaudhari and PW-9 Dr. Brajesh Singh that they did not prepare the papers in the right way. They also stated about the PW-10 constable Smt. Meena Singh that she prepared wrong F.I.R. About PW-13 Investigating Officer, they said that wrong site plan and charge-sheet was prepared and submitted, thereafter, case was instituted falsely. Appellant Smt. Bhagyawati said that her daughter-in-law and son Mohit Kumar used to live in separate room of the same house. Neither she made any additional demand of dowry from her daughter-in-law nor subjected her to torture and further stated that she was innocent. Appellant Mohit Kumar also made similar statements and stated that he never made demand of additional dowry from her wife and kept her very affectionately but his wife was ill-tempered and in his absence she committed suicide by setting her ablaze. At the time of the occurrence he was working in a private company at Shahjahanpur. Appellant Jai Jai Ram has also made similar statement to that of appellant Smt. Bhagyawati. Opportunity of defense was given to the appellants and they examined DW-1 Umakant and DW-2 Amar Singh.

9. After conclusion of evidence on both the sides, learned trial court heard the arguments made on behalf of the parties, considered the evidence on record and passed the judgment in question by which it held appellants guilty and sentenced them as aforesaid. Being aggrieved with this judgment and order they preferred this appeal.

10. Heard Sri Lavkush Kumar Bhatt, learned counsel for the appellants as well as learned A.G.A. and perused the record.

11. Learned counsel for the appellants submitted that in this case no additional demand of dowry was made by the appellants from the deceased or from her parents. She was ill-tempered lady. On account of being prevented from studying further, she committed suicide by setting her ablaze. Appellants never made any kind of harassment or torture to her in relation to the demand of dowry or otherwise. They kept her happily. After she set her ablaze, they took her to the District Hospital for treatment and informed about it to her parents who came there but unfortunately she could not be saved and succumbed to burn injuries on the same day. Information was given to the appellants by the hospital and inquest was conducted in presence of her father and cremation was also done in his presence. After three days of incident this F.I.R. was lodged by the father of the deceased under misconception which he has admitted during his cross-examination before the trial court. He has categorically stated that there was no additional demand of dowry made by her in-laws and husband of the deceased but she committed suicide when he himself prevented her from higher studies. Other witnesses adduced on behalf of the prosecution have also not supported the prosecution version. They have categorically denied the fact of demand of dowry and harassment by the in-laws of the deceased and said that deceased herself committed suicide by setting her ablaze under the impression of her own ill-

temperament. No any injury except superficial burn was found on the person of the deceased which infers that no harassment or injury was caused to the deceased prior to her death. Learned trial court has not considered all these facts but convicted and sentenced the appellants illegally without making proper appreciation of evidence on record especially making reliance on the statements made during examination-in-chief by PW-1/informant turning hostile later on and also considering the fact that deceased died in her sasural within 7 years of her marriage, therefore, inmates of her in sasural are responsible for that. So far as conviction of the appellants under Section 304-B I.P.C. is concerned, it cannot be made unless all of the ingredients of Section 304-B I.P.C are satisfied even though some of the ingredients are fulfilled. In this particular case, it is true that deceased died of burn injuries which is otherwise than under normal circumstances and within 7 years of her marriage but other two ingredients required to be proved for conviction under Section 304-B I.P.C. i.e. harassment by husband or his relatives for, or in connection with, the demand of dowry soon before her death are absent. In this way, conviction under Section 304-B I.P.C. cannot be said to be legal. Likewise, in absence of proof of demand of dowry and harassment, conviction under Section 498-A I.P.C. and Section ¾ D.P. Act can also not be held. The judgment and order passed by learned trial court being illegal and perverse requires to be set aside and appeal is liable to be allowed.

12. Learned A.G.A. opposed vehemently the submissions advanced by learned counsel for the appellants and urged that in this case informant/PW-1 is father of deceased who lodged the F.I.R. stating the circumstances in which deceased died. All the ingredients required for constitution of offence under Section 304-B, 498-A I.P.C. and Section ¾ D.P. Act are fulfilled. The deceased died of burn injuries within 7 years of her marriage. Demand of additional dowry and harassment was also made by the husband and his relatives soon before her death and this fact stands proved with the testimony of PW-1 who is father of the deceased. Though other witnesses i.e. mother and brother of deceased turned hostile and they did not support the prosecution case but they were owned by the appellants either owing to their pressure, threat or any kind of allurement on their part. PW-1 supported the prosecution version in his examination-in-chief but afterwards he turned hostile and retracted from his testimony already deposed before the learned trial court. It was the result of undue influence of the appellants on him. After considering all these facts, learned trial court has passed the judgment in question and convicted the appellants which is just, proper and lawful. There is no perversity in the judgment but appeal is forceless and liable to be dismissed.

13. Before proceeding to deal with the contentions raised by learned counsel for the appellant, it will be convenient to take note of the evidence as adduced by the prosecution.

14. PW-1 Ram Prasad is father of the deceased who has stated that marriage of her daughter took place on 13.05.2013 with Mohit Kumar resident of village Nagariya Police Station Jahanganj, District Farrukhabad. Jai Jai Ram, Smt. Bhagyawati and Mohini are father, mother and sister of Mohit Kumar. He gave sufficient dowry but the in-laws of her daughter were not

satisfied with it. They were insisting on demand of golden chain from the time of marriage for which he promised to arrange later on but he could not give them golden chain. They kept on insisting the demand of golden chain with his daughter (the deceased) whenever she came to her parents house, she narrated it all to them and also about the ill-treatment by the inmates. On 17.08.2015 he was informed that his daughter has died of burning. Accused persons Jai Jai Ram, Smt. Bhagyawati, Mohit Kumar and Mohini used to make harassment to her for dowry. He has also proved the *tehrir* given by him in his hand writing and signature as Exibit Ka-1. He has also proved the invitation card as material Exibit Ka-1. He has further stated that he was witness in inquest proceedings and in his cross-examination he has stated that he has not seen the incident that took place with his daughter. He has not made any complaint or proceeding against the husband or in-laws of the deceased. He was in relation with the father of the Mohit Kumar prior to his marriage and known to them very well. His sarhu Ram Naresh and his brother-in-law Ram Niwas were mediator in the marriage. Before marriage they told him that family of Mohit Kumar was good and I should marry and as a result marriage was performed in good manner. His daughter lived in her in-laws house near about three and a half month and she died on 17.08.2015. He was not present there at the time of her death. Ram Niwas was at Panipat and he (informant) was at Aligarh. The information about the incident was given to him by Ram Niwas by mobile at about 10:00 A.M. on 17.08.2015. At the time of marriage age of the deceased was about 21 years and after 2 years of marriage she died. Marriage was performed in cheerful atmosphere. After marriage his daughter came to his house 3-4 times. He has further stated that in the marriage his son-in-law Mohit Kumar, his father Jai Jai Ram or any other person did not make any demand of dowry. No demand was made from his wife Smt. Rekha. His daughter died of burning. Unfortunately the fire broke in the kitchen at the time of cooking food. She was taken to R.M.L. Hospital, Farrukhabad for treatment by his son-in-law Mohit Kumar and his father Jai Jai Ram but she could not be saved. His son-in-law Mohit Kumar informed him on telephone that Rinky @ Neelam has burnt and they are to reach there at once. When they reached R.M.L. Hospital, Farrukhabad they saw the dead body of Rinky @ Neelam. Police sealed the dead body in his presence and sent it for post-mortem. His daughter committed suicide or unfortunately she was burnt but he told it to be true that in *Tehrir* Exibit Ka-1 he has mentioned that being aggrieved by torture his daughter set her ablaze by pouring kerosene oil. He got it written on the paper that no one set her at fire. Rinky @ Neelam was ill-tempered and used to become angry on trivial matters. She used to give up eating and also strike with hands and fists on the wall and on the floor. She passed B.A. And was insisting to complete M.A. He and his wife Rekha prevented her from further study thereafter prior to 2 days of this incident, Rinky @ Neelam threatened them if she had been prevented from further study she would die. When they went to her sasural to participate in a birth day programme he and his wife convinced her that it would not be good to study further on account of this she committed suicide.

15. PW-2 is Smt. Rekha Saxena mother of the deceased who has stated that Rinky @ Neelam was her daughter. She

was married to Mohit Kumar. They gave sufficient dowry in the marriage and it was performed cheerfully. Her son-in-law Mohit Kumar, his father Jai Jai Ram and mother Smt. Bhagyawati did not make any demand of dowry. They never ill-treated her daughter. Her daughter Rinky @ Neelam was happy in her sasural. She committed suicide by setting her at fire. Mohit Kumar and his parents were not responsible for her death. This witness was declared hostile and cross-examination was made by learned A.D.G.C. in which she stated that death of Rinky @ Neelam took place in her sasural. She went there on the information of her death, she was informed that Rinky @ Neelam was taken to R.M.L. Hopsital, Farrukhabad for treatment by her husband. Hence, she reached to the hospital where Rinky @ Neelam was unconscious. Rinky @ Neelam was admitted into hospital in the morning and afterwards she died. Information was given to her by son-in-law Mohit Kumar on mobile phone. Son-in-law Mohit Kumar did not make demand of golden chain. Police did not make query with her. She has also denied the statement as recorded by Investigating Officer u/s 161 Cr.P.C. and said that she did not make such statement before any police personnel, how this was written she could not explain. She has denied the suggestion that in relation to the demand of dowry accused persons used to torture deceased physically and mentally as a result she committed suicide by setting her at fire. She has also denied the suggestion about compromise after taking money from the accused persons. During cross-examination made on behalf of accused persons, she has stated that when she reached R.M.L. Hospital, Farrukhabad, Mohit Kumar, his father Jai Jai Ram and mother Bhagyawati met her. They were making arrangements of treatment of the deceased. At the time of last rites of deceased they were present at Ghatiya Ghat on the bank of river Ganges. Her daughter committed suicide on account of being ill-tempered, having no issue she was tensed and also remained disturbed. Owing to these factors she committed suicide. Mohit Kumar, Jai Jai Ram and Bhagyawati are not responsible for death of her daughter and they are innocent.

16. PW-3 Mukesh Singh @ Umesh Singh is neighbour of informant. He has stated that Rinky @ Neelam daughter of his neighbour Ram Prasad was married to Mohit Kumar. On receiving information of her death he also reached to R.M.L. Hospital, Farrukhabad. In his presence Tehsildar examined the dead body and he made his signature on the inquest report. Dead body was sealed and sent for post-mortem. Rinky @ Neelam used to go his house but she never told him that her in-laws made ill-treatment with her in relation to demand of dowry. This witness was also declared hostile and cross-examination was made by learned prosecutor. During cross-examination he has denied the statement recorded by Investigating Officer during investigation under Section 161 Cr.P.C. He also denied the suggestion that informant entered into compromise with accused Jai Jai Ram by taking money. During cross-examination by defence he has stated that Rinky @ Neelam went to his house and told his wife Suman that her in-laws were very good they keep her affectionately. Whenever he went to her sasural with her father Ram Prasad the in-laws always respected them and appreciated Rinky @ Neelam.

17. PW-4 Rajiv Kumar is also neighbour of informant Ram Prasad. He has stated that Rinky @ Neelam died of

burning two and a half years ago. Unfortunately at the time of cooking in the kitchen, it caught fire. He heard this fact from the villagers and Ram Prasad has also told him. He does not know the cause of death. Deceased never told him about the ill-treatment in relation to demand of dowry by her in-laws. This witness was also declared hostile and cross-examination was made by learned prosecutor in which he denied the statement recorded u/s 161 Cr.P.C. by Investigating Officer during investigation. He also denied the suggestion about compromise between accused and the informant. During cross-examination by defense he has stated that Rinky @ Neelam was happy in her sasural, they kept her with love and affection.

18. PW-5 Motiram is also resident of village of the informant. He has stated that on receiving information of death of Rinky @ Neelam he went to R.M.L. Hospital, Farrukhabad where police sealed her dead body and sent it for post-mortem. In his presence proceedings of inquest were conducted. Rinky @ Neelam never told him about ill-treatment made by her in-laws in relation to demand of dowry. During cross-examination made by learned A.D.G.C. he has denied the statement as recorded u/s 161 Cr.P.C. by Investigating Officer.

19. PW-6 Nem Singh has also stated that deceased Rinky @ Neelam never told him or members of his family about the ill-treatment made by her in-laws in relation to demand of dowry. During cross-examination made by learned prosecutor he has admitted the marriage of Rinky @ Neelam in year 2013 and also told that her death was caused due to burning but he could not tell whether she committed suicide or her death was caused. He has denied the statement made by him before the Investigating Officer. During cross-examination by defense he has told that Rinky @ Neelam was died of accidental burn injuries. Her in-laws kept her happily.

20. PW-7 Rajendra Prasad Chaudhary, Tehsildar has said that at the information of S.H.O., Police Station Jahanganj, he conducted inquest of deceased Rinky @ Neelam w/o Mohit Kumar at 5:30 P.M. on 17.08.2015. He proved the inquest report as Exibit Ka-2 in his writing and signature. He has also proved other papers prepared at the time of inquest in his writing and signature as Exibit Ka-3, 4 & 5. During cross-examination by defence he has stated that nobody showed him any paper in relation to the cause of death of deceased. The cause of death of deceased appeared to be by burn as per information of panchan.

21. PW-8 Rajat Kumar is brother of deceased Rinky @ Neelam. He has stated that she was married to Mohit Kumar on 13.05.2013 by his parents. They gave sufficient dowry according to their status. Mohit Kumar and his parents were satisfied with his sister. They did not torture her for such demand. On 17.08.2015 when incident took place he was not at his home. Later on his father told him that Rinky @ Neelam committed suicide by setting her at fire. This witness was also declared hostile and was cross-examined by learned prosecutor in which he has stated that accused persons never demanded additional dowry, golden chain and other domestic items. His sister never told him anything in this regard. Mohit Kumar did not send s.m.s. to him that he would not keep his sister Rinky @ Neelam unless his demand would be fulfilled. At the time of incident he was out at Gola Gokaran Nath after

return he came to know that Rinky @ Neelam has committed suicide by setting her at fire. This witness has denied the statement recorded u/s 161 Cr.P.C. by Investigating Officer. During cross-examination made by learned prosecutor he has stated that his sister deceased Rinky @ Neelam never made complaint against her in-laws in relation to demand of dowry and ill-treatment before the incident took place. His inmates also did not tell him anything in this regard.

22. PW-9 Dr. Brajesh Singh conducted post-mortem of the deceased Rinky @ Neelam on 17.08.2015 and opined that cause of death was shock as a result of antemortem burn. He has also proved the post-mortem report in his hand writing and signature as Exibit Ka-6. During cross-examination by defence he has stated that except burn injuries there was no any other antemortem injury on the dead body of the deceased. There was no any mark of external or internal injury on her body.

23. PW-10 Constable Smt. Meena Singh has stated that on 21.08.2015 she lodged F.I.R. as Crime No.255/15, under Section 498-A, 304-B & under Section ¾ Dowry Prohibition Act, against Jai Jai Ram, Smt. Bhagyawati, Mohini and Mohit Kumar on the basis of written *tehrir* given by informant Ram Prasad, the detail of F.I.R. was entered into G.D. as report no.24. She has proved G.D. as Exibit Ka-7 and F.I.R. as Exibit Ka-8.

24. PW-11 Lekhraj Singh, Circle Officer who investigated the case has proved the investigation and the papers prepared by him. He proved site plan as Exibit Ka-9 and charge-sheet as Exibit Ka-10.

25. DW-1 Umakant has stated that on 17th, August daughter-in-law of Jai Jai Ram set her at fire. Appellants Jai Jai Ram and Smt. Bhagyawati both were in the village school. Jai Jai Ram cooks food and Smt. Bhagyawati is sahayika in Anganwadi. Before one hour of the incident they were going towards the school and about one hour later incident took place. He also went there. Other residents of mohalla were also present there who set off the fire. Thereafter, Jai Jai Ram and his wife came on the spot and took the deceased to the hospital by ambulance.

26. DW-2 Amar Singh has also made similar statements.

27. Now the court is to deal with the submissions made by learned counsel for the appellants i.e. that the ingredients of Section 498A, 304B I.P.C. and Section ¾ D.P. Act have not been fulfilled; and the learned trial court has convicted on the uncorroborated testimony of PW-1 who turned hostile and did not support the prosecution case, hence the conviction by learned trial court is bad in the eyes of law.

28. Before I proceed to evaluate the evidence on record led by the prosecution in support of charges framed against the accused, it is necessary to examine the law relating to 'dowry death'. The Hon'ble Supreme Court has highlighted all the aspects of law relating to 'dowry demand' and 'dowry death' in recent case of ***Prem Kanwar vs. State of Rajasthan, 2009(1) JT 197,*** para 6 of the report is as under:-

*"6. In order to attract Section 304B I.P.C., the following ingredients are to be satisfied:*

*(i) The death of a woman must have been caused by burns or bodily injury*

*or otherwise that under normal circumstances;*

*(ii) Such death must have been occurred within 7 years of the marriage;*

*(iii) Soon before her death, the woman must have been subjected to cruelty or harassment by her husband or any relative of her husband; and*

*(iv) Such cruelty or harassment must be in connection with the demand of dowry.*

29. Section 304B and Section 498A I.P.C. Reads as follows:-

*"304B. Dowry death.-(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.*

*Explanation.-- For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).*

*(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."*

30. "498A. Husband or relative of husband of a woman subjecting her to cruelty.--

*Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.*

*Explanation.--For the purpose of this section, "cruelty" means--*

*(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or*

*(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."*

31. The term "dowry" has been defined in Section 2 of the Dowry Prohibition Act, 1961 (in short 'Dowry Act') as under :-

*"Section 2. Definition of 'dowry'- In this Act, 'dowry' means any property or valuable security given or agreed to be given either directly or indirectly."*

*(a) by one party to a marriage to the other party of the marriage; or*

*(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dowry or mehr in the case of person whom the Muslim Personal Law (Shariat) applies.*

*Explanation I- For the removal of doubts, it is hereby declared that any presents made at the time of a marriage to either party to the marriage in the form of cash, ornaments, clothes or other articles, shall not be deemed to be dowry within the*

*meaning of this Section unless they are made as consideration of the marriage of the said parties.*

*Explanation II- The expression 'valuable security' has the same meaning in Section 30 of the Indian Penal Code (45 of 1861)."*

32. Explanation to Section 304B refers to dowry" as having the same meaning as in Section 2 of the Act', the question "what is the periphery of the dowry as defined therein? The argument is, there has to be an agreement at the time of the marriage in view of the words "agreed to be given" occurring herein, and in the absence of any such evidence it would not constitute to be dowry. It is noticeable, as this definition by amendment includes not only the period before and at the marriage but also the period subsequent to the marriage. This position was highlighted in ***Pawan Kumar and others vs. State of Haryana, 1998 (3) SCC 309.***

33. The offence alleged against the accused is under Section 304B I.P.C. Which makes "demand of dowry" itself punishable. Demand neither conceives nor would conceive of any agreement. If for convicting any offender, agreement for dowry is to be proved; hardly any offenders would come under the clutches of law. When Section 304B refers to "demand of dowry", it refers to the demand of property or valuable security as referred to in the definition of "dowry" under the Act. The argument that there is no demand of dowry, in the present case, has no force. In cases of dowry deaths and suicides, circumstantial evidence plays an important role and inferences can be drawn on the basis of such evidence that could be either direct on indirect. It is significant that Section 4 of the Act, was also amended by means of Act 63 of 1984, under which it is an offence to demand dowry directly or indirectly from the parents or other relatives or guardian of a bride. The word "agreement" referred to in Section 2 has to be inferred on the facts and circumstances of each case. The interpretation that the accused seeks, that conviction can only be if there is agreement for dowry, is misconceived. This would be contrary to the mandate and object of the Act. "Dowry" definition is to be interpreted with the other provisions of the Act including Section 3, which refers to giving or taking dowry and Section 4, which deals with a penalty for demanding dowry under the Act and the I.P.C. makes it clear that even demand of dowry on other ingredients being satisfied is punishable. It is not always necessary that there be any agreement for dowry.

34. Section 113B of the Evidence Act is also relevant for the case at hand. Both Sections 304B I.P.C. And Section 113B of the Evidence Act were inserted as noted earlier by the dowry Prohibition (Amendment) Act 43 of 1986 with a view to combat the increasing menace of dowry deaths. Section 113B reads as follows:-

*"113B: Presumption as to dowry death- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with any demand for dowry, the Court shall presume that such persons has caused the dowry death.*

*Explanation- For the purposes of this Section' dowry death' shall has the same meaning as in Section 304B of the Indian Penal Code (45 of 1976).*

35. The necessity for insertion of the two provisions has been amply analyzed by

the Law Commission of India in its 21st Report dated 10th August, 1988 on 'Dowry Deaths and Law Reform'. Keeping in view the impediment in the pre-existing law in securing evidence to prove dowry related death, legislature through it wise to insert a provision relating to presumption of dowry death on proof of certain essentials. It is in this background presumptive Section 113B in the Evidence Act has been inserted. As per the definition of 'Dowry death; in Section 304B I.P.C. And the wording in the presumptive Section 113 B of the Evidence Act, one of the essential ingredients, amongst other, in both the provisions is that the concerned woman must have been "soon before her death" subjected to cruelty or harassment for or in connection with the demand of dowry".Presumption under Section 113B is a presumption of law. On proof of the essentials mentioned there in, it becomes obligatory on the Court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials:

*(1) The question before the Court must be whether the accused committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304B I.P.C.*

*(2) The woman was subjected to cruelty or harassment by her husband or his relatives.*

*(3) Such cruelty or harassment was for, or in connection with any demand for dowry.*

*(4) Such cruelty or harassment was soon before her death.*

36. A conjoint reading of Section 113B of the Evidence Act and Section 304B I.P.C. shows that there must be material to show that soon before the death, the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the 'death occurring otherwise than in normal circumstances'. The expression 'soon before' is very relevant where Section 113B of the Evidence Act and Section 304B I.P.C are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution. 'Soon before' is a relative term and it would depend upon circumstances of each case and no strait-jacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113B of the Evidence Act. The expression 'soon before her death' used in the substantive Section 304B I.P.C. and Section 113B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to expression 'soon before' used in Section 114B Illustration (a) of the Evidence Act is relevant. It lays down that Court may presume that a man who is in the possession of goods 'soon after' the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The determination of a period which can come within the term 'soon before' is to be determined by the Courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression 'soon before' would normally imply that the interval should not

be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effects of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not be disturb mental equilibrium of the woman concerned, it would be of no consequence."

37. In the instant case, so far as the first ingredient of Section 304B is concerned that the death of women must have been caused by burn or bodily injury or otherwise than under normal circumstances, record shows that PW-1 Ram Prasad, the informant lodged an F.I.R. alleging that her daughter set her ablaze by pouring kerosene oil. Exibit Ka-2 inquest report also shows that deceased was died of burn injuries. It has been proved by PW-7 Rajendra Prasad Chaudhary, Tehsildar who conducted inquest of the deceased. Post-mortem report Exibit Ka-6 also shows the cause of death shock as a result of ante-mortem burn. PW-9 Dr. Brajesh Singh has proved the post mortem report and opined about the cause of death as a result of ante mortem burn injury. Therefore, it stands proved that death of deceased was caused on account of ante mortem burn injuries which was otherwise than under normal circumstances, so first ingredient of Section 304B I.P.C. stands proved.

38. Second ingredient is that such death must have been occurred within 7 year of the marriage. In this regard, informant PW-1 Ram Prasad has mentioned in the *Tehrir* Exibit Ka-1 that he married his daughter with appellant Mohit Kumar in the month of May, 2013. Material Exibit Ka-1 invitation card is also on record which has been proved by the informant in which date of marriage got mentioned 7th May, 2013. Appellants have also admitted this fact of marriage on 7th May, 2013 in their statements made under Section 313 Cr.P.C. before the trial court. The incident took place on 17.08.2015. It is evident that death of deceased occurred within 7 years of her marriage with the appellant Mohit Kumar. Therefore, undisputedly this ingredient no.2 stands proved.

39. Ingredient no.3 & 4 require that soon before her death, the woman must have been subjected to cruelty or harassment by her husband or his relative and such cruelty or harassment must be in connection with the demand of dowry. In this regard PW-1 who is father of the deceased has been examined who has supported the prosecution version about the demand of dowry and harassment with the deceased in his examination-in-chief but he retracted from his statement during cross-examination. PW-2 Smt. Rekha Saxena is mother of the deceased who has not stated about the fact of demand of dowry by the appellants with the deceased and ill-treatment made with her in relation to the demand of dowry soon before her death. She has clearly denied this fact. She was declared hostile at the request of the prosecution and cross-examination was done by learned A.D.G.C. criminal but nothing was found to support the version of demand of dowry and harassment soon before her death. On the contrary she has stated that her daughter committed suicide on account of being ill-tempered. She had no issue, so she was tensed and also remained disturbed. She has also deposed that son-in-law Mohit Kumar, father-in-law Jai Jai Ram and mother-in-law Smt. Bhagyawati did not make demand of golden chain and other things and they never ill-treated her daughter. She was

happy in her sasural. Mohit Kumar and his parents were not responsible for her death. PW-8 Rajan Kumar is brother of the deceased who has also stated that Mohit Kumar and his parents were satisfied with his sister and they did not torture her for such demand. His father told him that Rinky @ Neelam committed suicide by setting her at fire. This witness was also cross examined by learned prosecutor who has clearly stated that accused persons never demanded additional dowry, golden chain and other domestic things and his sister never told him anything in this regard. PW-3 Mukesh Singh, PW-4 Rajeev Kumar, PW-5 Motiram and PW-6 Nem Singh all these witness are neighbours of informant Ram Prasad have also not supported the prosecution version relating to the demand of dowry and harassment made by the appellants in relation thereof soon before her death. Even during their cross-examination nothing was found to support the version of demand of dowry and harassment.

40. From perusal of the testimony of PW-2, 3, 4, 5, 6 & 8 as aforesaid, it becomes evident that there was no demand of dowry on the part of the appellants with the deceased or with members of her family and no any kind of harassment was made by them soon before her death.

41. In this regard the testimony of PW-1 informant who is father of the victim is the only basis on which learned trial court has convicted the appellants. PW-1 Ram Prasad lodged F.I.R. mentioning the fact of demand of dowry by the appellants and harassment made by them soon before her death. He supported the version mentioned in the F.I.R. during his examination-in-chief but during cross-examination by defense he retracted from his previous statement made during examination-in-chief.

42. Now the question before this Court is to decide as to whether the testimony of PW-1 as deposed during examination-in-chief and retracted in cross-examination is wholly reliable and conviction can be based on it.

43. The learned trial court has assigned the reason for conviction stating that PW-1 Ram Prasad has supported the version of the first information report in his examination-in-chief, thereafter he turned hostile. Believing on his examination-in-chief, the learned trial court has convicted the accused-appellants. It is pertinent to mention that subsequently, the mother and brother of the deceased who are PW-2 and PW-8 were also examined and they have also not supported the statement of PW-1 which he has made in his examination-in-chief. Other witnesses of fact PW-3, 4, 5 & 6 those are neighbours of informant have also not supported the prosecution version and they have also been declared hostile but nothing was found in support of case during their cross-examination by learned A.D.G.C.

44. The learned trial court appears to have relied upon the settled proposition of law that the testimony of the hostile witness cannot be rejected totally as his evidence is not washed off from the record and the parties can take support of such evidence to the extent it is favourable to them. Judgement in ***Prithi vs State of Haryana, 2011 ACC (72) 398*** is often referred in which it was reiterated that the testimony of hostile witness cannot be rejected totally and his evidence is not washed off the record. The evidence is acceptable to the extent it is found to be dependable on

careful scrutiny thereof and supports the version of prosecution. It is pertinent to mention that it was a case of murder under section 302 I.P.C. and one of the eyewitness (informant) who was injured also, did not name the assailant but supported prosecution version. Other eyewitness who was a related witness named and supported the prosecution version and gave full account of the incident. In the instant case, PW-2 and PW-8 who are mother and brother of the deceased turned hostile and did not support the prosecution case or what was stated by PW-1 in his examination-in-chief, and as such on fact it can be distinguished.

45. In a recent judgement, ***Ramesh vs State of Haryana, (2017) 1 SCC 529,*** the Hon'ble Supreme Court expressed concern on witnesses turning hostile, particularly in high profile cases. In the instant case even the injured witness who was present on spot, turned hostile and the trial court disbelieved the dying declaration of the deceased on the basis of the statement of a hostile witness whose testimony was found false on the basis of evidence on record. The Supreme Court after analysis of various cases underlined the reasons of hostility to be (1) threat/intimidation (2) Inducement by various means (3) Use of muscle and money power by the accused (4) Use of stock witness (5) Protracted trial (6) Hassles faced by the witnesses during investigation or trial (7) Non-existence of any clear-cut legislation to check hostility of witness. (8) Culture of compromise which results from various factors like village and family solidarity, compensation, false case, false statement recorded by police, subsequent good relationship developed between the parties and the like. This view has been further reiterated in Mahender Chawla vs Union of India, 2018 SCC Online 2679.

46. The purpose of the above discussion is to point out that there may be various reasons for hostility and while appreciating the evidentiary value of a hostile witness, the trial courts should not be mechanical and should consider the evidence in the light of factual matrix in each case. In case the witness has turned hostile during cross-examination, the statement in examination-in-chief may be taken in support of other reliable and trustworthy evidence available on record. It should be always kept in mind that right of cross-examination is available to the accused as part of his right to fair trial and unless there is evidence of threat, fear or pressure or the like to procure hostility, the trial courts should be very cautious in placing reliance on it, otherwise, the valuable right of the accused of cross-examination and fair trial will become futile and nugatory.

47. The principle of law as laid down in different judgements of the Hon'ble Supreme Court that the testimony of hostile witnesses shall not be completely discarded and the part of the statement which supports the prosecution version can always be taken into consideration cannot be disputed, but the way it has been applied in the facts and circumstances of this case, that was totally uncalled for and unwarranted. It has been held in ***Ram Swaroop v. State of Rajasthan, AIR 2004 SC 2243; 2005 SCC (Cri) 61,*** that the credibility of a hostile witness cannot be discarded altogether, but this puts the court on guard and cautions the court against acceptance of such evidence without satisfactory corroboration. Thus, it appears that the aforesaid principle of law was

misread and misunderstood by the learned trial court to mean that a conviction can be recorded on solitary statement of a witness who has disowned his testimony of examination-in-chief and has turned hostile during the beginning of the cross-examination. No doubt, where other reliable and trustworthy evidence is available on record, the same can be used in support thereof.

48. Otherwise also, the learned trial court should have tested and scrutinized the evidence of PW-1 Ram Prasad carefully before deposing confidence on him, particularly when mother and brother of the deceased were also examined and they did not support the prosecution version. PW-1 Ram Prasad is father of deceased. PW-2 is mother who is not supporting prosecution version. It cannot be said that daughter will not tell about the ill-treatment done with her in her sasural to her mother. Mother is primary caretaker of her children in the house. Often children tell about their grief, sufferings to their mother who tell it to the father. On the contrary it cannot be possible to conceal such things from mother and to disclose it before the father only. Even brother may also not remain unknown to such fact. Further PW-1 has stated categorically in his cross-examination that her daughter committed suicide and set herself ablaze on account of being prevented from making higher studies. This cause behind her suicide is again supported by the mother of deceased PW-2 and brother PW-8. In such circumstances, it was not proper and safe to place reliance on his statement given in examination-in-chief, so as to hold the appellants guilty, particularly when there was no specific mention of any incident of dowry demand and harassment or any cruelty of such nature which could drive the deceased to end her life. On the contrary, they have stated that she was ill-tempered and she herself committed suicide.

49. Thus, I find that the evidence of PW-1 as made during examination-in-chief is shaky, unreliable and not worthy of credence. Other witnesses have not supported the prosecution version, therefore, prosecution has miserably failed to prove the charges against the appellants under Section 304B, 498A I.P.C. and ¾ Dowry Prohibition Act.

50. Consequently the finding recorded by learned trial court becomes perverse and conviction based on it cannot sustain. The judgment and order dated 28.09.2019 is, hereby, set aside.

51. Accordingly, the appeals are **allowed.** Appellants, if in custody, are directed to be released forthwith, if not wanted in any other case.

52. 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.

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**(2021)10ILR A1059**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 30.09.2021**

**BEFORE**

**THE HON'BLE ARVIND KUMAR MISHRA-I, J.**
**THE HON'BLE NAVEEN SRIVASTAVA, J.**

Criminal Appeal No. 3092 of 1985

**Mahendra @ Motey ...Appellant(In Jail)**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Sri A.R.B. Kher, Sri Amit Kumar Srivastava, Sri Amit Kumar Srivastava (AC), Sri Hare Krishna Tripathi, Seema Pandey (Amicus Curiae), Sri Shiv Bahadur Yadav

**Counsel for the Respondent:**
A.G.A.

**Criminal Law - Murder - Indian Penal Code, 1860 – Section 302** - Murder - Proof - while several persons were gambling on street accused took his position behind deceased and several axe blows on deceased, on account of which deceased died - doctor witness categorically opined that injury nos.1 to 3 could have been caused by axe & that injury no.4 could have been caused by the blunt side of the axe - injury nos. 1 to 4 were sufficient to cause death of the deceased - chemical examination report also indicated human blood on axe - use of axe in the commission of the offence stood proved - manner and description of committing the offence by the present accused-appellant proved satisfactorily to the hilt - Conviction, proper (25, 26, 27)

**Allowed.** (E-5)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Ms. Seema Pandey, learned Amicus Curiae for the appellant, Sri Bhanu Prakash Singh and Sri Rajeev Kumar Rai, learned Brief Holders for the State and perused the material available on record.

2. By way of instant criminal appeal, challenge has been made to the correctness and sustainability of the judgment and order of conviction dated 31.10.1985 passed by the Sessions Judge, Jhansi in Sessions Trial No. 37 of 1985 *(State vs. Mahendra alias Motey and another)*, arising out of Case Crime No.326 of 1984, Police Station - Kotwali, District - Jhansi, whereby the accused-appellant- Mahendra alias Motey has been convicted under Section - 302 I.P.C. and sentenced to undergo imprisonment for life.

3. The relevant factual matrix of this case as discernible from record appears to be that the informant- Ghamandi Lal orally lodged report at Police Station - Kotwali, District - Jhansi on 22.12.1984 at about 12:45 p.m. regarding the occurrence of the same day, which took place around 11:00-11:30 a.m. with the following assertions that informant is Ghamandi Lal son of Ramdas Kori, resident of Mohalla - Sagar Gate, Police Station - Kotwali, District - Jhansi. On 22.12.1984, one Bal Krishna son of Hardas, resident of Mohalla - Sagar Gate, District - Jhansi came to the house of the informant and informed him that his son Narsi has been done to death by an axe by Mahendra alias Motey s/o Rameshwar Badhai and Ghanshyam alias Ramu son of Dayaram Badhai around 11:00 a.m. in the street of *'Potey Baba'* near the house of Hari Ram Chamar. The incident has been witnessed by Narendra son of Panna Lal, Pramod son of Ayodhya, Rajju son of Sarman Dheemar, all residents of Mohalla - Sagar Gate, District - Jhansi. Hearing this, the informant rushed to the spot and found his son dead and an axe was also found lying over there. The informant also saw injury on the head and neck of his son, Narsi.

4. It was also informed that informant's son, Ramu and Motey are pick-pockets and there was some dispute over share of the money obtained by pick-pocketing, due to which some quarrel took place between the informant's son and Mahendra alias Motey (the present appellant), the report in that regard was lodged about one year ago. Thereafter, three-four months before the occurrence, an

altercation took place between Ramu and Narsi with regard to outraging the modesty of the sister of Ramu. The father of Ramu also complained about it to the informant. On account of the aforesaid enmity, the informant's son was done to death.

5. On the oral statement, the report was taken down in the Check F.I.R. by Constable - Moharrir, Ranjit Singh Sengar, who after writing the report, read over the same to the informant and obtained his signature on it. This oral report as contained in the Check F.I.R. is Ext. Ka.1 appears at Case Crime No. 326 of 1984, under Section - 302 I.P.C., Police Station - Kotwali, District - Jhansi and, accordingly a case was registered in the general diary at Rapat No. 16, at aforesaid case crime number under aforesaid sections of I.P.C. The General Diary entry is Ext. Ka.8.

6. The investigation ensued and was entrusted to P.W.4 Yashpal Singh Punia, who started the investigation on 22.12.1984. The investigating officer has testified to the fact of oral report being lodged by the informant- Ghamandi Lal, while the investigating officer was present at the police station around 12:45 p.m. on 22.12.1984. As per his version, the Check F.I.R. was entered at the instance and on the dictation of the informant, Ghamandi Lal (P.W.1) given to the Constable-Moharrir- Ranjit Singh Sengar. After the report was so taken down in the Check F.I.R., it was read over to the informant who after hearing the same, appended his signature on it. The Check F.I.R. was proved as Ext. Ka.1. The investigating officer has also proved the concerned general diary entry as Ext. Ka.8. He proceeded to the spot in the street of *'Potey Baba'* , where he found the dead body and prepared the inquest report (Ext. Ka.2), the very same day. In the opinion of the inquest witnesses and the investigating officer, it was found convenient to send the body for postmortem examination. Therefore, relevant papers were prepared, form no.13, challan dead body, specimen seal and letter to C.M.O./C.M.S. for conducting postmortem examination. These papers are Ext. Ka.3 to Ext. Ka.6.

7. Thereafter, the dead body was sent for postmortem examination at the mortuary, Jhansi, where the postmortem examination was conducted by Dr. Sudarshan Bhuinya P.W.5 on 23.12.1984 at 1:00 p.m., wherein the doctor found the following ante-mortem injuries on the body of the deceased :-

*(1) Incised wound, 11 c.m. x 1.5 c.m. over ocipital bone in middle in horizontal manner, bone deep and the bone is divided into pieces.*

*(2) Incised wound 8 c.m. x 2.5 c.m., bone deep in horizontal manner from lateral angle of left mandible to back of neck. All the underlying things were cut.*

*(3) Incised wound bone deep, 11.5 c.m. x 5 c.m. in horizontal manner, 1 c.m. below injury no.2 and all underlying things were cut.*

*(4) Lacerated wound 4 c.m. x ½ c.m. in horizontal manner, 2 c.m. below the injury no.3.*

*(5) Abrasion 3.5 c.m. x ½ c.m. over left deltoid muscle in upper part.*

*(6) Abrasion 0.5 c.m. x 0.3 c.m. over middle of right middle and ring finger on dorsal aspect.*

8. In the opinion of doctor, the cause of death was stated to be due to shock and haemorrhage on account of ante-mortem injuries.

9. The investigating officer also prepared the site-plan of the spot, which is Ext. Ka.9. He took into his possession an axe (Material Ext.1), which allegedly Motey had left behind on the spot, while running away after committing the murder of Naresh Kumar alias Narsi, sealed it in a bundle and prepared a memo Ext. Ka.10. Besides, he also took into his possession, blood stained and simple earth Ext. 5 and Ext. 6 respectively, and sealed them in containers and prepared a memo of the same Ext. Ka.11. Further, the investigating officer also prepared memo of slipper belonging to the deceased as Ext. Ka.12. Besides the above exhibits, other papers are Ext. Ka.14 and Ext. Ka.15. After completing the investigation, charge-sheet (Ext. Ka.13) was filed against the appellant.

10. Pursuant thereto, the Sessions Judge, Jhansi, heard both the sides on point of charge and was prima-facie satisfied with case against the accused-appellant, accordingly, framed charge under Section 302 I.P.C. charge was read over and explained to the accused-appellant who abjured the charge and opted for trial.

12. The prosecution, in order to prove guilt of the appellant examined as many as five witnesses namely P.W.1 who is the informant- Ghamandi Lal, P.W.2 Narendra and P.W.3 Bal Krishna are the two eye witnesses of the occurrence. P.W.4 Yashpal Singh Punia is the investigating officer of this case and Dr. Sudarshan Bhuinya (P.W.5), who conducted autopsy on the body of the deceased Narsi.

13. Learned Sessions Judge, after due appraisal of facts and evidence on record found charge under Section - 302 I.P.C. proved against the appellant beyond doubt. Consequently, finding of conviction was recorded and accused was sentenced to imprisonment for life, which paved way for this appeal.

14. Ms. Seema Pandey, learned Amicus Curiae for the appellant has vehemently claimed that in this case, in so far as the F.I.R. is concerned, the same is ante-timed and the occurrence was not seen by any person. The witnesses of occurrence, particularly P.W.2 Narendra and P.W.3 Bal Krishna, respectively are pocket witnesses of the police, their testimony on the whole does not inspire confidence and the same is contradictory. The site-plan of the occurrence does not show the place where the accused-appellant Mahendra @ Motey was standing. The incident in question is not supported by any independent witness. The motive suggested for committing the offence is trivial and the same is not properly established by the prosecution.

15. Learned A.G.A. has refuted the aforesaid contention raised by learned amicus curiae for the appellant by claiming that the entire incident has been duly proved by the clinching evidence and there is no material contradiction in the testimony of the prosecution witnesses. To claim that the F.I.R. is ante-timed is neither proved nor gathered from the attendant facts and circumstances of the case. The prosecution evidence inspires confidence and is clinching on the point of occurrence. The presence of the eye witnesses near the place of occurrence is quite natural and both the witnesses of fact P.W.2 and P.W.3 are residents of the same locality/village. The conviction and the sentence imposed upon the appellant is justified. Upon consideration of the rival submissions, the following moot point arises for adjudication of this appeal, whether the

prosecution has been able to prove its case against the accused-appellant beyond all reasonable doubt under Section - 302 I.P.C. ?

16. The occurrence is stated to have taken place on 22.12.1984 around 11:30 a.m. in locality Sagar Gate. After the occurrence took place, information of the occurrence was received by the informant, Ghamandi Lal, son of Ramdas Kori, resident of Sagar Gate, Police Station - Kotwali, District - Jhansi, the very same day on being informed by P.W.3 Bal Krishna, son of Hardas, resident of Sagar Gate, District - Jhansi. He informed that informant's son- Narsi has been done to death by the appellant around 11:30 a.m. and the occurrence took place near the house of Hari Ram Chamar, in the street of *'Potey Baba'* by assaulting with axe and the incident has been witnessed by Narendra son of Panna Lal, Pramod son of Ayodhya, Rajju son of Sarman Dheemar, all residents of Sagar Gate, District - Jhansi. Upon coming to know about the occurrence, the informant rushed to the spot, where he found his son dead and one axe lying near him. He also noticed wound/injury on the head and neck of deceased-Narsi.

17. Bare perusal of the oral report (Ext. Ka.10) reflects that the informant's son and the appellant were indulged in pick-pocketing and some dispute arose on account of share of money so obtained by pick-pocketing. There was also some dispute that took place between the deceased and the appellant one year ago from the date of the incident, regarding which, a report was lodged. It was also alleged in the report that one Daya Ram of the locality had complained that his daughter was teased by the deceased-Narsi and there was some quarrel three months ago between the deceased Narsi and Ghanshyam and because of which, the informant's son was done to death.

18. Now insofar as lodging of the F.I.R. is concerned, it appears from the testimony of P.W.1- Ghamandi Lal- the informant that as soon as he came to know about the occurrence from P.W.3 Bal Krishna, he rushed to the spot where he found his son dead and he also found the blood stained axe lying on the spot. He went to Police Station - Kotwali, District Jhansi and lodged the report orally to Munshi ji at Police Station - Kotwali and after the same was noted in the Check F.I.R., it was read over to him and then he appended his signature on it. This report in the form of Check F.I.R. has been proved as Ext. Ka.1.

19. It has been testified by P.W.1 that he was accompanied by one Suresh Dixit to the police station and the distance of the police station from the place of occurrence is stated to be one and a half kilometers. It being so, the oral report was lodged around 12:45 p.m. on 22.12.1984, whereas, the occurrence took place around 11:30 a.m. The inquest report was prepared the very same day and its preparation commenced at 2:10 p.m. on 22.12.1984.

20. As per the testimony of P.W.4 Yashpal Singh Punia, the report was taken down in the Check F.I.R. by the Constable-Moharrir- Ranjit Singh Sengar orally dictated to him by the informant Ghamandi Lal and at that point of time around 12:45 p.m., the investigating officer was also present at the police station and he has proved the Check F.I.R. as Ext. Ka.1. Nothing has emerged in the cross examination of both the informant P.W.1 Ghamandi Lal and Yashpal Singh Punia,

the investigating officer, P.W.4, which may lead to infer about fact that the Check F.I.R. lodged on 22.12.1984 at Police Station - Kotwali, District - Jhansi at 12:45 p.m. is either ante-timed or by any attendant circumstances as well.

21. Consequently, arguments raised to that ambit is not sustainable. Insofar as the point of occurrence is concerned, then obviously P.W.1, the informant is not a witness of the occurrence. The star witnesses of the occurrence are both Narendra (P.W.2) and Bal Krishna (P.W.3). A conjoint reading of the testimony of both the witnesses brings to the surface fact of occurrence when it has been testified by them that several persons were gambling in the street of *'Potey Baba'* near the house of *Bhagirath*. In the meanwhile, appellant and one Ramu said that they are not having any money. Ramu kept sitting over there, whereas, the appellant (Mahendra @ Motey) went to take money and came back on the spot with one axe. The deceased-Narsi saw the axe and commented the axe is nice *'(कुल्हाड़ी अच्छी है)'* but the appellant did not respond as the gambling bet was going on. The appellant took his position behind the deceased Narsi and caused axe blow on his head. The accused Ramu present over there also exhorted him and the appellant caused several axe blows on the deceased. The first axe blow given by the appellant made Narsi to fall on the ground and after that two separate axe blows were given by him, on account of which, Narsi died. The other co-accused, who were present on the spot, fled away from the scene. The appellant left behind the axe on the spot .

22. It has been specifically testified by Narendra P.W.2 that he was guarding the place, lest some policemen should come. Thus, presence of Narendra on the spot is undoubtedly proved and on this point, nothing adverse has emerged in his cross examination. Only this much has been asked that he is pursuing his studies, then he stated that he has passed 9th class. Now, he has left his studies and at that point of time when the occurrence took place, he was studying in Higher Secondary School, but on on that date of occurrence, he did not attend his school. He also has stated about the place of occurrence that he was standing at a distance of eight steps from the gamblers in front of the house of Soni. Narsi arrived on the spot as soon as betting started and Motey went to his home to take money, but he came back possessing an axe. No one present over there did ask him as to whether he brought the money or not and no one asked him to participate in the gambling.

23. In his cross examination, this witness (P.W.2) has categorically stated that he used to keep guarding as and when the gamblers indulged in betting on previous occasion too. In his cross examination, he has testified in clear cut terms about the manner of occurrence as to how it occurred. He has stated that the first blow of axe was given to Narsi, which caused him fell on the ground with mouth towards the earth. Thereafter, several axe blows were given to him. He also has stated that he was examined by the investigating officer. It is relevant to take note of fact that a suggestion has been given by the defence to P.W.2 as appearing on page no.31 of the paper book that on the date of occurrence, Narsi, Pramod and Rajju were gambling and the bet was won by Narsi, then they began to snatch money from him, which caused quarrel among them and due to which, the above persons killed Narsi and made their escape goat. The suggestion

has been specifically denied. Now, the import of this specific suggestion is that the incident of gambling on the day of occurrence at the particular place is admitted to the defence itself and there is no denying of fact that no such gambling ever took place.

24. Conversely, the defence has not been able to establish fact that in fact some quarrel arose among Narendra P.W.2, Pramod and Rajju and they murdered Narsi. Here suggestion has been made to another witness Bal Krishna P.W.3 too that he was not present on the spot. However, he has categorically stated that he was present on the spot, not only he but also Narendra P.W.2 was present on the spot and he has dittoed the version of the occurrence in line with that of P.W.2 Narendra. In his cross examination P.W. 3 Bal Krishna has stated that he is not related to Ghamandi Lal and he has clarified to the point of axe blow being caused to Narsi by the appellant-Mahendra @ Motey.

25. From bare perusal of the ante mortem injuries, we discover that as many as six ante-mortem injuries have been caused on the body of the deceased. The doctor witness has categorically opined that injury nos.1 to 3 could have been caused by axe. Here the testimony of doctor witness, Sudarshan Bhuiyan is worthy of examination. He has proved the postmortem examination report Ext. Ka.7. However, genuineness of postmortem examination report is admitted to the defence. The doctor has opined that these injuries could have been caused around 11:30 a.m. on 22.12.1984 and injury no.4 could have been caused by the blunt side of the axe and injury nos. 1 to 4 as above were sufficient to cause death of the deceased, whereas, injury nos.5 and 6 could have been caused, while falling on the ground. That way, the manner and description of committing the offence by the present accused-appellant is proved satisfactorily to the hilt.

26. Further, vide general diary entry no. 44, dated 19.02.1985, which is Ext. Ka. 15, the case property was sent for chemical examination at the laboratory concerned at Agra, whereby chemical examination, report dated 21.08.1985 Ext. Ka.16 has been obtained and the report indicates that human blood of Group-A was found on T-shirt, *Angauchha* and axe. That way, the use of axe in the commission of the offence also stood proved. This particular aspect regarding the manner of occurrence being caused by the appellant has been taken into consideration by the trial court too in a consistent manner. In the cross examination, Dr. Sudarshan Bhuinya P.W. 5 has stated that injury nos.1, 2 and 3 were caused by separate blows and these injuries are admitted to the defence and this was sufficient to cause death in the ordinary course of nature, as per testimony of the doctor witness.

27. We have already considered the material aspects of the occurrence, which reasonably fit in the attendant circumstances and facts of this case and it eventually turns out that the prosecution has been able to prove charge against the accused-appellant beyond shadow of doubt. The learned trial court has also taken comprehensive view of the entire occurrence and has discussed its various aspects and rightly recorded conviction against the present appellant and passed sentence against him, which needs no interference, at this juncture, for aforesaid specific reasons.

28. Accordingly, we uphold the judgment of conviction and order dated 31.10.1985 passed by the Sessions Judge,

Jhansi, in Sessions Trial No. 37 of 1985 *(State vs. Mahendra alias Motey and another)*, arising out of Case Crime No. 326 of 1984, under Section - 302 I.P.C. Police Station - Kotwali, District - Jhansi. Consequently, the aforesaid appeal lacks merit and the same is ***dismissed.***

29. In this case, appellant - Mahendra alias Motey is in jail. The appellant shall serve out the remaining sentence imposed upon him by the trial court.

30. Let a copy of this judgment/order be certified to the court concerned for necessary information and follow up action.

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**(2021)10ILR A1066**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 06.10.2021**

**BEFORE**

**THE HON'BLE RAJESH SINGH CHAUHAN, J**

Service Bench No. 1800 of 2015(Now S/S)

**Bipul Raman ...Petitioner**
**Versus**
**State of U.P. & Ors. ....Respondents**

**Counsel for the Petitioner:**
Sanjay Kumar Srivastava

**Counsel for the Respondents:**
C.S.C., Amar Chaudhary, Lalit Shukla

**A. Service Law – Disciplinary enquiry - If the charge (s), as indicated in the charge-sheet, has/have been declared as 'not proved' then nothing can be said to be 'proved' or 'partially proved' on the basis of additional findings regarding any allegation which is not the subject matter of the enquiry in question and such findings, if any, shall be treated as perverse finding.** (Para 18)

Hence, in the present case, the charge no. 5 and 6 shall be treated to be not proved inasmuch as the inquiry officer has himself indicated that the charge no. 5 and 6 are not proved against the petitioner. (Para 18)

**B. The disciplinary authority may not award any punishment banking upon findings of inquiry officer, wherein none of the charges are proved against the petitioner, without being disagreed thereon and without issuing any show cause notice or seeking explanation from the petitioner on the point of disagreement.** Since the inquiry officer has said that charges no. 5 and 6 are partly proved so disciplinary authority may not legally say that both the charges are proved as said by him in the punishment order. If the disciplinary authority was of the view that both the charges should be treated proved, a show cause notice of disagreement must have been issued seeking explanation from the petitioner. In absence of aforesaid legal requirement the impugned punishment order (dated 26/29-9-2015) shall not survive as it would be nullity in the eyes of law. (Para 19)

**Writ petition allowed.** (E-4)

**Present petition assails order dated 26/29.09.2015, passed by Chairman, Administrative Committee, U.P. Cooperative Dairy Federation, Lucknow.**

(Delivered by Hon'ble Rajesh Singh Chuahan, J.)

1. Heard Sri Sanjay Kumar Srivastava, leaned counsel for the petitioner, learned Standing Counsel for the State respondents and Sri Lalit Shukla, learned counsel for the U.P. Cooperative Dairy Federation.

2. By means of present writ petition the petitioner has assailed the order dated 26/29-9-2015 passed by the opposite party no. 4 i.e. Chairman, Administrative Committee, U.P. Cooperative Dairy

Federation, Lucknow, awarding two punishments against the petitioner i.e. (i) he has been repatriated to his basic pay, and (ii) Censure entry for the year 2013-14 and his integrity for the year 2009-10 has been declared doubtful.

3. At the very outset Sri Srivastava has informed that during the pendency of the present writ petition the petitioner has attained the age of superannuation.

4. The questions to be considered are that:

(i) As to whether the inquiry officer may give his findings beyond the charges so leveled against the petitioner by means of charge-sheet ?

(ii) As to whether the disciplinary authority may award any punishment contrary to the findings of inquiry report without giving any notice to the petitioner on the disagreement of the findings?

5. The precise facts giving rise for disposal of the aforesaid issues are that the petitioner was serving under the opposite parties no. 4 & 5. In the year 2009 he was serving on the post of Manager, Grade-IV (Finance) at Barabanki. While serving on the aforesaid post the petitioner has been served the charge-sheet dated 21.7.2014 (Annexure no. 7) wherein there were six charges against the petitioner. The petitioner participated in the departmental inquiry and disputed all the allegations so leveled against him, thereafter the inquiry officer concluded his inquiry and submitted his findings before the disciplinary authority on 30.3.2015(Annexure no. 11).

6. Admittedly, the petitioner has been exonerated from charges no. 1 to 4. However, charge nos. 5 and 6 were said to be proved partially against the petitioner.

Precisely charges no. 5 and 6 are being reproduced herein below:

*"आरोप सं0–5*

*दुग्ध संघ बाराबंकी के जनरल प्रमाणक सं0 339 दिनांक 31.03.2010 द्वारा रू0 115414.83 की धनराशि लाभ हानि समायोजन खाते को डेबिट करते हुए अपने व्यक्तिगत खाते में इस धनराशि को क्रेडिट कर त्रुटिपूर्णढंग से भुगतान प्राप्त किया गया है। यह पाया गया कि उक्त धनराशि कानपुर दुग्ध संघ की जिस एडवाइज सं0 27/01 दिनांक 31.03.2010 का उल्लेख करते हुए उपरोक्त लेखा प्रविष्टि की गयी है, उसका लेखांकन कानपुर दुग्ध संघ से प्राप्त दुग्ध संघ बाराबंकी के वित्तीय वर्ष 2009–10 व 2010–11 के लेजर एकाउन्ट में नही है। उक्त से स्पष्ट है कि आप द्वारा फर्जी एडवाइज के आधार पर उपरोक्त लेखा प्रविष्टि कर दुग्ध संघ बाराबंकी से रू0 115414.83 की धनराशि का आहरण किया गया है, जिसके लिये आप दोषी है एवं आपकी सत्यनिष्ठा भी संदिग्ध है।*

*साक्ष्य–*

*1. बाराबंकी दुग्ध संघ के वित्तीय वर्ष 2009–10 के लाभ हानि समायोजन खाते की छाया प्रति।*

*2. कानपुर दुग्ध संघ से प्राप्त वित्तीय वर्ष 2009–10 व 2010–11 के लेजर एकाउन्ट की छायाप्रति।*

*आरोप संख्या 6*

*दुग्ध संघ बाराबंकी को दिनांक 1.4.08 से दिनांक 31.3.13 तक रू0 1,05,74,656.25 की हानियॉ हुई। माह अप्रैल 13 से दिसम्बर 13 तक दुग्ध संघ द्वारा प्रेषित ट्रेडिंग आपरेटिंग विवरण के अुनसार रू0 53,20,115,00 की नकद हानियॉ हो चुकी है। वित्तीय वर्ष 2012–13 के समिति कमीशन की धनराशि रू0 33,53,495.00 जनरल वाउचर सं0 218 दिनांक 31.03.2014 एवं वित्तीय वर्ष 2013–14(1.4.2013 से 31.12.2013) के समिति कमीशन की धनराशि रू0 1945449.00 जनरल वाउचर सं0 219 दिनांक 31.03.2014 द्वारा डेबिट की गयी है। इसके अतिरिक्त वित्तीय वर्ष 13–14 में लाभ हानि समायोजन खाते में रू0 38,22,496.51 की धनराशि दिनांक 26.1.14 तक डेबिट की गयी है। इस प्रकार दुग्ध संघ बाराबंकी को 1.4.08 से*

*दिसम्बर, 13 तक रू0 2,50,16,211.76 की हानि हुई है जिसके लिये आप उत्तरदायी है।*

*साक्ष्य–*

*1. दुग्ध संघ बाराबंकी की माह अप्रैल 13 से दिसम्बर , 13 तक दुग्ध संघ द्वारा प्रेषित ट्रेडिंग आपरेटिंग विवरण की छायाप्रति।*

*2. दुग्ध संघ बाराबंकी के जनरल वाउचर सं0 218 व 219 दिनांक 31.03.2014 की छया प्रति।*

*3. दुग्ध संघ बाराबंकी के लाभ हानि खाते के समायोजन की छाया प्रति।*

*4. दुग्ध संघ बाराबंकी की वित्तीय वर्ष 2008–09 से वर्ष 2012–13 तक के सन्तुलन पत्र की छाया प्रतियॉ।*

7. The perusal of the aforesaid charges reveal that charge no. 5 says that a sum of Rs. 115414.83/- has been credited by the petitioner in his account in stead of crediting the same in the account of Dugdh Sangh concerned, therefore, he has usurped that amount. The findings of inquiry officer regarding aforesaid charge clearly says that after perusing the personal account details of the petitioner as well as the other relevant papers of the Dugdh Sangh concerned the said charge is not proved against the petitioner. It has been further indicated by the inquiry officer that the said charge appears to be erroneously leveled against the petitioner as there might have been some narrational error in the accounts. However, the inquiry officer has observed submitted that the petitioner must have informed the headquarter about the aforesaid entry which caused confusion, therefore, the charge is partially proved against the petitioner.

8. Sri Srivastava has submitted that if the amount in question has not been credited in the personal account of the petitioner rather it was a narrational error then that amount cannot be said to have been usurped by the petitioner so for all practical purposes the petitioner should have been exonerated from that charge. However, indicating that such information regarding aforesaid erroneous entry which has not been intimated to the headquarter should be intimated by the petitioner is an additional charge for which no explanation has been called from him, rather there was no such charge in the charge-sheet. Therefore, as per trite law the inquiry officer may not give his findings beyond the charge for which the ample opportunity of hearing has not been provided to the employee.

9. So far as the charge no. 6 is concerned which says that the Dugdh Sangh, Barabanki has suffered the losses to the tune of Rs. 25016211.76 w.e.f. 1.4.2008 to December, 2013 for the reason that proper entries have not been made in the accounts of the Sangh.

10. Sri Srivastava has submitted that it is not very clear in this charge as to what lapse has been committed by the petitioner, only this much can be gathered that such Dugdh Sangh, Barabanki has suffered losses. The inquiry officer has given his clear findings on the aforesaid charge that for the loss in question the petitioner may not be held liable. However, being the In-charge (Finance) he should have taken due care and precaution to avoid the losses.

11. Sri Srivastava has further submitted that if the petitioner has been exonerated from the charge that he is not responsible for the losses in question then the additional charge to the effect that being In-charge (Finance) he should have taken due care and precaution to avoid the losses is unwarranted and misconceived

inasmuch as no such charge has been leveled against the petitioner vide charge no. 6.

12. Therefore, as per Sri Srivastava in all six charges leveled against the petitioner the petitioner has been exonerated by the inquiry officer for all practical purposes inasmuch as the additional charges so leveled against the petitioner while giving findings on charge no. 5 and 6 the petitioner has not been afforded an opportunity of hearing as said additional charges were not the part of charges no. 5 and 6, therefore, to that extent the findings of inquiry officer is unwarranted, uncalled for and nonest in the eyes of law.

13. Sri Srivastava has drawn attention of this Court towards Annexure no. 12 to this writ petition which is explanation to the show cause notice submitted by the petitioner before the disciplinary authority wherein he has explained that he had preferred a letter dated 2.4.2010 to the General Manager, Finance and Accounts, apprising that the amount to the tune of Rs. 115414.83/- has not been credited in his account. He had enclosed that letter dated 2.4.2010 with his explanation. He has also apprised the disciplinary authority that he was not in-charge of the Dugdh Sangh, Barabanki at that point of time and it was not his administrative authority to run the Dugdh Sangh, Barabanki inasmuch as he was only In-charge (Finance) and he discharged his duties with utmost sincerity and dedication which is very much clear perusing the inquiry report that none of the charges have been found proved against him. Therefore, he requested from the disciplinary authority that he might be exonerated from the charges / allegations.

14. Sri Srivastava has also drawn attention of this Court towards Annexure no. 13 which is an order passed by the same disciplinary authority in the case of Sri A.K. Pachori, the then in-charge of Dugdh Sangh, Barabanki wherein charge no. 8 leveled against Sri Pachori is the same charge which has been leveled against the present petitioner by means of charge no. 6. Sri Pachori despite being in-charge of Dugdh Sangh has been exonerated from this charge. However, the preliminary inquiry is said to have been directed against him.

15. In view of the above Sri Srivastava has submitted that the in-charge of the Dugdh Sangh, Barabanki who should be held responsible administratively for the charge regarding loss of the Dugdh Sangh has been exonerated but the present petitioner despite being exonerated from that charge has been held responsible for administrative lapse, however, he was not administrative in-charge but was the In-charge (Finance).

16. Sri Srivastava has also submitted that he has categorically indicated all the aforesaid facts and circumstances in detail in para 28,29,30,31,32 and 34 of the writ petition but no denial of the aforesaid contentions of writ petition has been made in para 13 and 14 of the counter affidavit rather those contentions have been accepted as admitted. Therefore, the punishment order dated 26/29-9-2015 is not sustainable in the eyes of law and is liable to be quashed.

17. Per contra, Sri Lalit Shukla, learned counsel for the U.P. Cooperative Dairy Federation has submitted that if this Court finds that the inquiry officer has given his finding beyond the charge, the matter may be remanded back to the inquiry officer to submit his appropriate findings. Further, if the disciplinary

authority without being disagreed from the findings of the inquiry officer has treated charge nos. 5 and 6 proved, the matter may be remanded back to the disciplinary authority to pass appropriate orders on the findings of the inquiry officer. Sri Shukla has also submitted that if it is a case of defective inquiry or defective punishment order then in view of the settled law the matter may be remanded back to the competent authority to pass appropriate orders in accordance with law.

18. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that the inquiry officer may not travel beyond the charges, therefore, such findings of inquiry officer which are beyond the charges no. 5 and 6 are patently unwarranted, uncalled for and nonest in the eyes of law. Law is settled that if the charge (s), as indicated in the charge-sheet, has / have been declared as 'not proved' then nothing can be said to be 'proved' or 'partially proved' on the basis of additional findings regarding any allegation which is not the subject matter of the enquiry in question and such findings, if any, shall be treated as perverse finding.

Hence, the charge no. 5 and 6 shall be treated to be not proved inasmuch as the inquiry officer has himself indicated that the charge no. 5 and 6 are not proved against the petitioner.

19. Now question comes as to whether the disciplinary authority may award any punishment on the basis of inquiry report wherein none of the charges are proved against the petitioner, without being disagreed thereon, the legal position is very clear to the effect that the disciplinary authority may not award any punishment banking upon such findings of inquiry officer, without being disagreed on such finding and without issuing any show cause notice or seeking explanation from the petitioner on the point of disagreement. Since the inquiry officer has said that charges no. 5 and 6 are partly proved so disciplinary authority may not legally say that both the charges are proved as said by him in the punishment order. If the disciplinary authority was of the view that both the charges should be treated proved, a show cause notice of disagreement must have been issued seeking explanation from the petitioner. In absence of aforesaid legal requirement the impugned punishment order shall not survive as it would be nullity in the eyes of law. Therefore, the impugned punishment order dated 26/29-9-2015 is also nonest in the eyes of law.

20. So far as the contention of Sri Lalit Shukla, learned counsel for the U.P.C.D.F. is concerned that the matter may be remanded back from the stage of defect of inquiry or from the stage of defect of punishment order is concerned, I am of the considered opinion that the inquiry officer has conducted the departmental inquiry as per law by affording an opportunity of hearing to the petitioner as the petitioner is not aggrieved from the manner the inquiry has been conducted, therefore, I do not find any defect in the inquiry proceedings. So far as the additional findings given by the inquiry officer regarding charge no. 5 and 6 are concerned, he cannot give such finding beyond the charges as observed above and admittedly no specific charges were leveled against the petitioner by means of charge-sheet on which the inquiry officer has given that findings, therefore, to that extent such findings are perverse and are not sustainable in the eyes of law. Further, the

impugned punishment order has been passed by the disciplinary authority without issuing any show cause notice on the disagreement from the findings of inquiry officer, therefore, such punishment order is not sustainable in the eyes of law on that score. Hence, I do not find any good ground to remand back the issue to the inquiry officer or disciplinary authority to pass appropriate orders, more particularly, in view of the fact that during the pendency of the writ petition the petitioner has retired from service.

21. Accordingly the writ petition is allowed.

22. The impugned order dated 26/29-9-2015 passed by the opposite party no. 4 is hereby ***quashed.***

23. Consequences to follow.

24. No order as to costs.

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**(2021)10ILR A1071**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 07.10.2021**

**BEFORE**

**THE HON'BLE ANJANI KUMAR MISHRA, J.**
**THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.**

Criminal Appeal No. 3422 of 2007

**Mobin @ Nanha & Ors....Appellants(In Jail)**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellants:**
Sri J.B. Singh, Sri Ali Hasan, Alpana Dwivedi, Sri J.B. Singh, Sri Manish Tiwary, Sri Noor Mohammad, Sri Rajiv Kumar, Sri Vineet Kumar Singh, Sri Yogesh Srivastava, Sri Anil Kumar Yadav, Sri M.N. Pathak, Sri Balram Singh, Sri Vidya Kant Tripathi, Sri Ashwini Kumar Awasthi, Sri H.N. Singh, Sri Mohd. Masood Raja, Sri Manoj Singh, Sri Vidyanand Tripathi, Sri H.M. Singh

**Counsel for the Respondent:**
A.G.A., Sri N.I. Zafari

**A. Criminal Law - Evidence Act, 1872 – Section 154 - Hostile witnesses - Testimony of – It is settled law that the testimony of the hostile witnesses need not to be discarded in toto and that portion of the testimony which supports the prosecution case can be taken for consideration - portion of the cross-examination in which the witness turn hostile, if can be separated from remaining statements, are liable to be discarded but previous statements which are trustworthy can be safely relied upon (Para 13 )**

**B. Criminal Law - Evidence Act,1872 - Interested witnesses - Testimony of - There is no rule of law that testimony of a interested or related witness should be discarded out rightly - What is required is cautious scrutiny of the oral testimony of such a witness (Para 13 )**

**C. Criminal Law - Evidence Act,1872 – Section 154 – Non- Examination of material witness - Non-examination of a material witness is not a mathematical formula for discarding the weight of the testimony available on record - Court is required first to assess the trustworthiness of the evidence available on record and if the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted upon though there may be other witnesses available who could also have been examined but were not examined - quality of evidence and not quantity which matters - prosecution is not under any obligation to multiply the evidence - non production of material witness or any person said to be present at the time of occurrence, by the**

**prosecution, does not adversely affect the prosecution case (Para 15)**

**D. Criminal Trial - Indian Penal Code - Unlawful Assembly, Section 149 - Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence - It is a well established principle of law that when the conviction is recorded with the aid of Section 149, relevant question to be examined by the court is whether the accused was a member of unlawful assembly and not whether he actually took active part in the crime or not - this defence is not available to the accused that it is not established as to which or any of the five accused assaulted or fired - Under Section 149 I.P.C. all accused are equally liable (Para 17)**

Accused persons riddled deceased with bullets while shouting that they have taken the revenge of the murder of their relative - Deceased died on the spot - it stands proved that four empty cartridge of 315 bore pistol, one live cartridge, one bullet taken in possession by the Investigating Officer - 3 bullets recovered from the body of the deceased in post-mortem - It clearly establishes several rounds of firing at the time of occurrence - Evidence produced by the prosecution is reliable and trustworthy - all accused in a pre-planned manner and in furtherance of the common object came from behind holding fire arm in their hands and opened fire on deceased and his companions - accused persons chased deceased and fired on him inside the Madarsa and he died instantaneously - all the ingredients of Section 149 I.P.C. are fulfilled - number of accused persons are five and they made an unlawful assembly armed with pistols and in prosecution of the common object of such assembly they have committed the crime - PW-1 & PW-3 although have turned hostile at a later stage but their previous statements fully corroborates the prosecution version and is true and reliable - Part of the statement in which they have turned hostile is made under a deal and not true and so cannot be believed - It is separable from the earlier statements - oral evidence is fully corroborated by the medical evidence - guilt of the accused persons is fully proved - findings given by Trial Court are just and proper - conviction recorded upheld (Para 20)

**Dismissed.** (E-5)

**List of Cases cited:-**

1. Koli Lakhmanbhai Chanabhai Vs St. of Guj. (1999) 8 SCC 624

2. Bhagwan Singh (1976) 1 SCC 389

3. Syed Akbar Vs St. of Karn. AIR 1979 SC 1848

4. Deny Bora Vs St.of Ass. (2014) 14 SCC 22

5. Jalpat Rai & ors. Vs St. of Har. (2011) 14 SCC 208

6. Lalji AIR 1989 SC 754

7. Masalti AIR 1965 SC 202

8. State Vs Krishan Chand (2004) 7 SCC 629

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri Noor Mohammad, learned counsel for the appellants no. 2 and 3 and Sri H.M. Singh, learned Senior Advocate for the appellants no. 4 and 5 assisted by Sri Vidyanand Tripathi, Advocate and Sri Ashwani Prakash Tripathi, learned A.G.A. for the State and perused the record.

2. This criminal appeal has been filed against the common judgment and order dated 04.05.2007 passed by the Additional Session Judge, Court No.1, District-Meerut in S.T. Nos. 545 of 2004 (State vs. Mobin @ Nanha, Hasrat, Anees, Kamil, Istakbaal) Case Crime No. 83 of 2004, under Sections 148, 149, 302/149, 307 I.P.C., S.T. No.588 of 2004 (State vs. Mobin @ Nanha) Case Crime No.103 of 2004, under Sections 25 of Arms Act, S.T.

No.589 of 2004 (State vs. Kamil) Case Crime No.104 of 2004, under Section 25 of Arms Act, S.T. No.568 of 2004 (State vs. Anees) Case Crime No.91 of 2004, under Sections 25 of Arms Act and S.T. No.669 of 2004 (State vs. Istakbaal) Case Crime No.90 of 2004, under Section 25 of Arms Act, Police Station- Bhawanpur, District-Meerut, convicting the accused-appellants (Mobin @ Nanha, Hasrat, Anees, Kamil, Istakbaal) under Section 147, 148, 307, 302 read with Section 149 I.P.C. and sentencing each of them to undergo one year imprisonment under Section 147 I.P.C. to undergo two years imprisonment, under Section 148 I.P.C. to undergo seven years imprisonment under Section 307 I.P.C. to undergo life imprisonment under Section 302 read with Section 149 I.P.C.. All the sentences to run concurrently.

3. In brief, the prosecution case is that on 19.04.2004 at about 9:20 a.m. Shafayat (informant) his brother Shahadat along with Kamil, Nanhi the sister of Kamil, and Matloob were going to the Court on their date and when they were standing near Madarsa on the Rasta of Naglasahu waiting for the bus to go Meerut, Mobin, Hasrat, Anees, Kamil, and Istakbaal holding pistols in their hands came from behind the Madarsa and started firing on them. To save their lives, they ran here and there. Shahadat the brother of the informant and Kamil ran inside the Madarsa, chasing them all the five accused entered into Madarsa and riddled Shahadat the brother of the informant with bullets. The accused threatened them with death while firing shots and said that today they have taken the revenge of the murder of Nafees. Shahadat died on the spot. Due to firing by the accused the road was blocked and the passersby ran away in the fields to save their lives.

The report of the above incident was registered on 19.04.2004 at 10:30 a.m. on the application of Shafayat as Crime No. 83 of 2004 under Sections 147, 148, 149, 307, 302, 506 I.P.C. and 7 Criminal Law Amendment Act at Police Station-Bhawanpur. The investigation of the case was taken over by S.O. Bhawanpur, C.P. Katheriya. He recorded the statements of the complainant and the eyewitnesses, visited the spot, and prepared the site plan. From the place of occurrence, 4 empty cartridge, 1 bullet, and 1 live cartridge were also taken into possession, and a memo was prepared. He also collected bloodstained and plain soil from the spot and sealed it in separate containers and prepared a memo. The inquest proceeding of the dead body of deceased Shahadat was conducted by S.I. Ram Sevak under the directions of investigating office, related papers were also prepared and the body was sealed and sent for postmortem examination. Investigating Officer further recorded the statements of other witnesses and after completion of the investigation submitted a charge-sheet against all 5 accused Mobin @ Nanha, Hasrat, Anees, Kamil and Istakbaal under Sections 147, 148, 149, 307, 302, 506 I.P.C., and 7 Criminal Law Amendment Act.

During the course of investigation on 04.05.2004, a police party led by S.O. C.P. Katheriya at 7:30 p.m. arrested accused Istakbaal and Anees and recovered one country made pistol from each, alleged to be used in the crime. In the barrel of each country made pistols one live cartridge was also found. A recovery memo was prepared and separate Case Crime No. 90 of 2004 and 91 of 2004 under Section 25 Arms Act were registered against accused Istakbaal and Anees. Further on 24.05.2005, in police custody on interrogation, the accused Mobin and

Kamil disclosed the facts of concealing country made pistols used in the crime and at their instance two country made pistols with one empty cartridge in each of its barrel were recovered under the heap of bricks near the tubewell of Sattar. The recovered articles were sealed and a memo was prepared and separate Case Crime No. 103 of 2004 and 104 of 2004 under Section 25 Arms Act were registered against Mobin @ Nanhe and Kamil. The investigation of the aforesaid cases under Section 25 Arms Act were conducted by S.I. Surendra Singh and S.I. R.S. Yadava/ H.C.P. Suresh Gupta respectively who after taking necessary steps and completing all the formalities submitted separate charge sheets against each four accused under Section 25 Arms Act.

4. The learned trial court framed charges against accused Mobin @ Nanhe, Hasrat, Anees, Kamil, and Istakbaal under Sections 148, 302 read with 149 and 307 I.P.C. and separate charges under Section 25 Arms Act against accused Mobin @ Nanhe, Kamil, Anees, and Istakbaal. All accused pleaded not guilty and claimed for trial. The prosecution has examined 11 witnesses who have proved 33 documents Ex.Ka-1 to Ka 33 and 13 material exhibits. The statements of the accused were recorded under Section 313 Cr.P.C. in which they have denied the prosecution case and have further stated that they are residents of the same village but they are not of the same family and Kamil is not their friend. In the murder of Nafees, Matloob, Shahadat, Kamil, and her sister Nanhi are accused. Regarding F.I.R. it has been said that it has been lodged after the return of S.O. from the spot much later. It has been further stated that all the papers have been fabricated at the police station itself, nothing was recovered from the spot, no empty cartridges were recovered from near the dead body and nothing was recovered from the possession of the accused or at their instance. Witnesses PW-1 to PW-3 are accused in the murder of Nafees and they have deposed due to enmity and have falsely implicated the accused persons to save themselves from the murder case of Nafees. One defence witness Afsar Ali DW-1 has been produced. No documentary evidence has been produced. The learned Trial Court by the impugned common judgment has convicted accused Mobin @ Nanhe, Hasrat, Anees, Kamil, and Istakbaal for offence under Sections 147, 148, 307 read with section 149 and 302 read with section 149 while acquitted accused Mobin @ Nanhe, Kamil, Anees, and Istakbaal from charges under Section 25 Arms Act.

5. No appeal has been preferred against the acquittal of accused Mobin @ Nanhe, Kamil, Anees, and Istakbaal from charges under Section 25 Arms Act. So the point of consideration in this appeal is only the convictions of the accused persons under Sections 147, 148, 307, 302/149 I.P.C.

6. The post-mortem of the deceased Sadahat was conducted on 19.04.2004 at 4:30 p.m. by Dr. J.P. Sharma who has appeared as PW-5 and proved the post-mortem report as Ex.Ka-4.

According to post-mortem, the age of the deceased was about 22 years, average build body. No decomposition. Rigor mortis was present all over the the body. Eyes were closed.

Following ante-mortem injuries were present:-

*(i) Lacerated wound of 1 cm x 1.5 cm x scalp deep, left and back of head, 8 cm from left ear.*

*(ii) Gun shot wound of entry 1.5 cm x 1 cm x bone deep front of neck above sternal notch, trachea and esophagus lacerated.*

*(iii) Gun shot wound of entry 0.9 cm x 0.9 cm x chest cavity deep on front side of chest, 8 cm from right nipple at about 1:30 O'clock position. Margins inverted, one bullet recovered from chest cavity.*

*(iv) Gun shot wound of entry 0.9 cm x 0.8 cm x chest cavity deep, on front of left side of chest blackening 4 cm x 4 cm around, margins inverted, 12 cm below the left nipple at about 6 "O" clock position. One bullet recovered from left side of chest from chest wall, left lung lacerated.*

*(v) Gun shot wound 4 cm x 3 cm x muscle deep on posterior part of right hand just below right wrist, blackening present 3 cm x 2 cm on outer side of wound.*

In internal examination both lungs, trachea and esophagus were lacerated, liver and kidney were pale.

Cause of death was shock and hemorrhage as a result of ante-mortem injuries and duration of death was within half day.

Dr. J.P. Sharma, PW-5 in examination-in-chief has also stated that during post-mortem examination three bullets were recovered which were kept in sealed cover and handed over to the police constable. The doctor has further stated that the death of the deceased may occur on 19.04.2004 at 09:30 a.m. and ante-mortem injuries may come from fire arms.

7. The prosecution has produced three eyewitnesses. Kamil PW-1 in his examination-in-chief supporting the prosecution version has said that accused Anees, Hasrat, Kamil, Istakbaal, Mobin @ Nanhe are of his village and belong to one family while Kamil is their friend. Accused bear enmity with him and deceased Shahadat. Nafees, the son of accused Hasrat was murdered. In that case of murder besides Matloob and Shahadat, he and his sister were also made accused. The incident is of 19.04.2004. They all five, the witness along with his sister Nanhi, Shahadat, Matloob, and Shafayat were waiting for the bus at the culvert (puliya) near Madarsa on Parichitgarh Road to go Meerut on the date of the murder case of Nafees. It was 9:20 a.m. The accused holding pistols in their hands came through the field behind the Madarsa and started firing from the back. They narrowly escaped the firing and ran away to save their lives. Kamil and Shahadat ran inside the Madarsa. The accused entered into the Madarsa to kill them. Shahadat entered into the room of Molwi Sahab. The accused shot him dead at the door of the room while he saved his life by climbing the stairs. The accused waving their pistols abusing and saying that they have taken the revenge of Nafees, ran away. This incident was also seen by Molwi Sahab, the students, Matloob and Shafayat, and others.

8. Shafayat PW-2 is also the informant and brother of the deceased Shahadat. The witness has reiterated the averments made in the F.I.R. and in addition has also said that Shahadat was his real brother. Accused Mobin @ Nanhe, Hasrat, Anees, Kamil, and Istakbaal are of his village. Except Kamil, the rest are of the same family. Kamil is their friend. Nafees son of accused Hasrat was murdered and in that case, his brother Shahadat was named as an accused and because of this the accused bear enmity with Shahadat. The witness has also said

that when he returned he saw his brother lying dead. Accused were firing with pistols on his brother and he has seen this from the window of Madarsa which open towards the main road. Kamil saved himself while climbing the stairs. The accused while leaving said that today they have taken revenge of the murder of Nafees. The witness has further said that he got the report of this incident written by Mustafa who wrote it on his dictation, read over to him and then he signed it. The witness has proved it as exhibit Ka 1. The witness has further stated that he gave the report at the police station and got the case registered.

9. Matloob PW-3 in his examination-in-chief has also supported the prosecution case and said that the accused bear enmity with them. They were facing trial for the murder of Nafees son of accused Hasrat, Shahadat, Kamil, Nanhi, and he himself are accused in that case. On the day of incident, the date was fixed in that case for which he, Safayat, Shahadat, Kamil, and Nanhi were going to Meerut. The incident is of 14-15 months earlier and it was 9-9:15 a.m. They were standing near culvert (puliya) waiting for the bus. After some time Mobin, Anees, Istakbaal, Kamil, and Hasrat came from behind the Madarsa and fired shots at them but they escaped it. Kamil and Shahadat ran towards Madarsa, while he, Safayat, and Nanhi ran towards the field. All five accused chasing Shahadat and Kamil entered into Madarsa and fired at Shahadat causing his death on the spot. Kamil saved himself by climbing on the roof. Shahadat was shot at the door of the room of Molwi Sahab. He has seen the occurrence Shafayat and Kamil also saw it. The accused fired shots at them with the intention to kill them.

10. Kamil PW-1 was produced before the trial court on 24.01.2005 and on that date his examination-in-chief was recorded and the opportunity of cross-examination was closed by a detailed order as none appeared for the accused to cross-examine the witness. Later on, on the application of defence, the witness was recalled for cross-examination and his part cross-examination was recorded on 7.11.2005 and further on 17.11.2005, and in both the cross-examination the witness stood by his earlier statement and supported the prosecution case but when on 24.02.2006 the witness appeared again for further cross-examination he retracted from his earlier statement and said that on the day of the incident only three persons proceeded from the village, Matloob and Shahadat were with him. Safayat and Nanhi were not with him. He has further said that when he was standing on the culvert (puliya) the assailants came from behind, their faces were covered with clothes. When shots were fired he ran towards backside. He didn't know in which direction Shahadat and Matloob escaped. He has not seen the shot being fired. He has escaped. The witness has further said that he had seen Shahadat entering into the Madarsa because he and Shahadat both entered into the Madarsa together. He has not seen the accused entering into the Madarsa, he has also not seen anyone firing at Shahadat. He was much ahead of Shahadat and climbing the stairs jumped in the backside. The witness has also disowned his statement recorded under Section 161 Cr.P.C.. As the witness retracted from his earlier statements, on the prayer of the prosecution the witness was declared hostile and the prosecution got opportunity of cross-examination. In this cross-examination, the witness has admitted that on 24.01.2005 he has given the statement that accused Kamil, Istakbaal, Mobin, etc. are of their village and they bear enmity with him and

Shahadat. In the murder case of Nafees besides he and his sister Nanhi, Matloob and Shahadat are accused and that trial is still going on against them. It was date in the murder case of Nafees on the day of the incident. He has earlier given the statement that he and Shahadat ran into the Madarsa and the accused followed them inside the Madarsa to kill them. The witness has shown ignorance about his earlier statement that the accused shot dead Shahadat at the door of the room of Molwi Sahab and further that the incident was seen by Molwi Sahab, the students, Matloob, and Shafayat. He has also said that he is not aware of what he has said in his earlier statements and if those statements are true or false? The witness has denied that he has settled the matter with the accused. The witness has admitted that in the murder case of Nafees, Anees, Hasrat and their family members are witnesses against him, but has denied the prosecution suggestion that due to settlement with the accused he has given false statement today. The position of Matloob PW-3 is almost similar. His examination-in-chief and partial cross-examination was recorded on 15.07.2005 but it could not be completed on that date and deferred on oral request of defence counsel. His further cross-examination was recorded on 20.03.2006 in which he retracted from his earlier statement and said that he has not seen the accused Mobin alias Nanhe, Hasrat, Anees, Kamil, and Istakbaal firing at Shahadat. He has also said that on the day of the incident 3 persons, he himself, Shahadat, and Kamil proceeded from the village and Shafayat was not with them. When assiliants were firing their faces were covered with clothes and he couldn't identify them, the accused persons present in the court were not involved in the firing or killing. He has also said that the statement which he gave on 15.07.2005 was given under the pressure and intimidation of the police. This witness has also disowned his statement under Section 161 Cr.P.C. and further said that seeing the weapons he ran away from the spot and has not seen anyone entering into the Madarsa. As the witness has not supported the prosecution version, the prosecution got him declared hostile. In cross-examination, by the prosecution, the witness has admitted that Nafees, the son of accused Hasrat was murdered and the case of that murder is still pending against him, Shahadat (deceased), Nanhi, and Kamil and on the day of the incident, the date was fixed in that murder case. Regarding his previous statement, he has said that he has given the earlier statement under the fear of police. The police have threatened him in the village. He has further said that he has not made any complaint in court about police intimidation because the policemen have said that if he made any complaint in court he will be falsely implicated in other case. He has further said that he has not made any complaint in this respect to any police officer or court or any other authority. He has further said that his earlier statement is not true while today's statement is true and the whole earlier statement was under police duress, and now the fear of the police has faded and he has come to depose true facts. The witness has denied that any settlement has taken place. He has shown ignorance about the fact that Dafadar, Anees, and Hasrat, etc. are witnesses in the murder case of Nafees. The witness has denied the suggestion that he has retracted from his earlier statement under the pressure of the accused.

11. The prosecution case stands fully corroborated with the oral testimony of PW-2 Shafayat. It also got corroboration from the examination-in-chief and partial

cross-examination of both eye witnesses Kamil PW-1 and Matloob PW-3. The medical evidence also corroborates the aforesaid oral evidence. According to medical evidence, deceased Shahadat has suffered four fire arm injuries. Three of them are on the chest and neck while one is on the right hand. He has also suffered one lacerated wound on left side on his head. 3 bullets were also recovered from the body of the deceased, during the post-mortem examination. Dr. J.P. Sharma PW-5 has corroborated that death of the deceased has occurred due to ante-mortem fire arm injuries and death may have occurred on 19.04.2004 at 09:30 a.m.. So date and time, manner of assault and weapons used, got full corroboration from the medical evidence on record.

12. It is also pertinent to mention that the oral statement of Kamil PW-1 started on 24.01.2005 and finally concluded on 24.02.2006, in a span of one year. In between his partial cross-examination were recorded on 07.11.2005 and 17.11.2005 and till then he stood by his statement supporting the prosecution version. Likewise, the examination of Matloob PW-3 started on 15.07.2005 and on this date his examination-in-chief and partial cross-examination was recorded in which he fully supported the prosecution version, thereafter his cross-examination was recorded on 20.03.2006 more than 8 months after in which he turned hostile. The order sheet also reveals that just from starting of recording statement of prosecution witnesses the defence tried its best to keep the case lingering and frequent adjournments were moved by the defence when witnesses appeared in the Court for recording their statements and because of this, such a long period have elapsed between commencig of recording of statement and its completion. It also appears that defence was trying to won over the witnesses and ultimately succeeded. Defence has produced one witness namely Afsar Ali as DW-1. This witness has admitted the facts of enmity between the parties and village party bandi and has also said that a Panchayat of 8 villages was held with regard to murder of Shahadat and Nafees and he was present in it. In this Panchayat, the case of Nafees and Shahadat were settled and it was decided that both the parties will get their cases dismissed. Shafayat was also present in Panchayat and accepted the decision of Panchayat and on this basis the murder case of Nafees was decided from the Court. This witness in his cross-examination has admitted that the case of Nafees's murder was proceeding against Nanhi, Shahadat, Matloob and Kamil. On the date of murder they were going on their date. He further said that it is true that after Panchayat, Matloob and Kamil withdrawn from the evidence. He has further said that he knows that Hazi Julfkar of the village has suffered gun shot injuries in which Mobin and Kamil are accused, that case was also settled and Hazi Julfkar gave statement in it. The witness has shown ignorance about the fact that the accused have settled their matter with Matloob and Kamil and because of this these witnesses have turned hostile. Witness has not specifically contradicted the aforesaid suggestion of the prosecution. So from the evidence on record, it is clear that the statement of cross-examination of Kamil PW-1 recorded on 24.02.2006 and Matloob PW-3 recorded on 20.03.2006 are a result of settlement of the matter between the parties. It is also clear from the evidence on record that witness Kamil PW-1 and Matloob PW-3 are the accused in the murder case of Nafees who is blood relation of accused

persons, so they have struck a deal with the accused and under the said deal they have turned hostile just to save themselves from the conviction in the case of Nafees's murder. In these circumstances, it is fully established that the portion of their statement in cross-examination in which they turned hostile are not true and it has been made under the influence/pressure and deal with the accused and not from their own free will. The previous statement of both the witnesses are true and out of their free will. The portion of the cross-examination in which these witnesses have turned hostile can be separated from remaining statements and liable to be discarded. The previous statements are trustworthy and can be safely relied upon.

13. Learned counsel for the appellants contended that out of three eye witnesses produced by the prosecution Kamil PW-1 and Matloob PW-3 have turned hostile. There remains sole testimony of Shafayat PW-2 who is real brother of the deceased so related and interested witness. His presence at the time of occurrence is doubtful as there is no good reason to accompany the deceased who was going to Meerut to attend the court. He has stated that he was also going to Meerut to fetch Khal Chunni which is highly improbable because these materials are available in the local market and even in the village itself, so it cannot be believed that a person will go to Meerut for the same purpose. Learned counsel for the appellants also contended that from the evidence on record pre-existing enmity between the complainant and accused are established and that may be the motive for false implication. In such a situation the sole testimony of Shafayat PW-2 who is also inimical cannot be relied. He has further contended that Shafayat PW-2 in his statement has stated that he has seen the accused firing at his brother inside the Madarsa from the window which open towards the road but there is no such window and this statement of the witness is wholly untrue and cannot be believed.

Learned A.G.A. submitted that the oral statement of Shafayat PW-2 is consistent. Kamil PW-1 and Matloob PW-3 have turned hostile at a later stage under the influence of accused. Pre-existing enmity proves the motive of the incident. It is specific in the F.I.R. as well as in the oral statement that after the execution of the incident the accused said that today they have taken revenge of the murder of Nafees. So testimony of Shafayat cannot be disbelieved merely because he is real brother of deceased or inimical.

The arguments of learned counsel for the appellants are misconceived and have no force. It is not a case based on evidence of a solitary witness. As discussed above, the oral testimony of Kamil PW-1 and Matloob PW-3 cannot be wholly discarded on the ground that they turned hostile at a later stage. It is settled law that the testimony of the hostile witnesses need not to be discarded in *toto* and that portion of the testimony which supports the prosecution case can be taken for consideration.

**In Koli Lakhmanbhai Chanabhai Vs. State of Gujarat (1999) 8 SCC 624** Hon'ble Supreme Court has held that the testimony of a hostile witness is useful to the extent to which its supports the prosecution case.

In **Bhagwan Singh (1976) 1 SCC 389** the Hon'ble Apex Court has held that when witness declared hostile and cross-examined with the permission of the

Court, his evidence remains admissible and there is no legal bar to have a conviction upon his testimony, if corroborated by other reliable evidence.

In the case of **Syed Akbar Vs. State of Karnataka** reported in **AIR 1979 SC 1848** the Hon'ble Supreme Court has expressed the view that if some portion of the statement of the hostile witness inspires confidence, it can be relied upon. He cannot be thrown out as wholly unreliable.

Applying the aforesaid preposition of law on the facts, it is clear that the previous statement of Kamil PW-1 and Matloob PW-3 (examination-in-chief and partial examination) is consistent. There is no major discrepancy or contradiction in it and it fully corroborates the medical evidence and F.I.R. version. So this part of statement of the two witnesses is reliable and statement of PW-2 Shafayat got corroboration from the aforesaid oral testimony. Both these witnesses have said that at the time of occurrence Shafayat (complainant) was accompanying them and Shafayat PW-2 has also affirmed this in his cross-examination. His presence on the spot cannot be doubted merely on the ground that purpose of his going to Meerut seems improbable.

There is no rule of law that testimony of a interested or related witness should be discarded out rightly. What is required is cautious scrutiny of the oral testimony of such a witness. This part of oral testimony of Shafayat PW-2 that he seen the accused firing at Shahadat inside the Madarsa from the window, opening towards the road is not worth to believe and it appears that the witnesses just in over zealousness to support that he has also seen the accused firing shots at Shahadat inside the Madarsa has made the aforesaid statement. It appears that he may not have an opportunity of watching the aforesaid incident as he himself has ran towards the fields to save his life but rest of his oral testimony is consistent and there is no major discrepancy which makes him unreliable.

Previous enmity is a double edged weapon. It may be a motive for committing the crime and also for the false implication but considering the entire facts and evidence in this case the previous enmity appears to be motive behind the incident. The incident has occurred in day light and in public place seen by many persons. Deceased was chased and killed inside the Madarsa from where empty cartridges, bullets etc. have been recovered. There is eye-witness account of the incident. So it is improbable that real assailants of such daylight incident should be spared and on account of previous enmity the accused have been falsely implicated. The oral testimony of Shafayat PW-2 is consistent and reliable. It further got support from the examination-in-chief and partial cross-examination of other two witnesses Kamil PW-1 and Matloob PW-3 and their presence at the place of occurrence is fully established. The eye-witness account of Kamil PW-1 in particular is about whole incident and it implicates the accused and fully proves that accused shot dead the deceased Shahadat inside the Madarsa. Even if the presence of Shafayat PW-2 at the time of occurrence is not believed and his oral testimony is discarded even then there is sufficient evidence on record to prove the prosecution case that the accused have shot dead the deceased Shahadat.

14. Learned counsel for the appellants further contended that it has come in the evidence that accused persons fired shots while chasing. In this situation the injuries should have come from back side but in the

post-mortem examination of the deceased all the injuries found on the body are on the front side hence ocular testimony do not match with the medical evidence. Learned counsel for the appellants further contented that it has also come in the evidence that during the course of incident Shafayat, Matbool and Nanhi ran in one direction towards the road in the north while Shahadat and Kamil ran towards the Madarsa and entered into it. The accused persons chased Shahadat and Kamil into Madarsa and Kamil to save his life climb the stairs and jumped in the back side while Shahadat was fired and killed near the room of Molwi Sahab, so Shafayat and Matloob have no opportunity to watch the shooting incident which has occurred inside the Madarsa and Kamil was also not in a position to watch the same and there is no eye witness account of the real incident of shooting.

Learned A.G.A. submitted that accused started firing when all the five (deceased and witnesses) were standing at the Puliya. Shahadat and Kamil ran towards Madarsa and entered into it. Accused chased Shahadat and Kamil and shot Shahadat at the door of the room of Nazim and pumped several bullets on him. At this time Kamil was with Shahadat inside the Madarsa so he has opportunity to watch the incident. He further contended that Shafayat PW-2 and Matloob PW-3 have witnessed the occurrence which has occurred out side the Madarsa. So all the witnesses are eye-witness of the incident.

From the site plan Ex.Ka-13 and evidence on record, it is clear that at the time of occurrence Shahadat, witness Kamil, Shafayat, Matloob and Nanhi sister of Kamil were standing at Puliya waiting for the bus. Accused persons came from behind the Madarsa through open field and started firing. Three of them namely, Shafayat, Matloob and Nanhi ran in one direction towards the road in the north while Shahadat and Kamil ran in the west towards the gate of Madarsa and entered into it. All the accused entered into Madarsa chasing Shahadat and Kamil. Kamil ran towards the stairs while Shahadat ran towards the room of the Molwi Sahab. Accused fired several shots on Shahadat and he fell down at the door of the room while Kamil saved himself climbing the stairs. The site plan also shows that the stairs are adjacent to the room of Molwi Sahab. So Kamil was very much present near the place of actual shooting and he has full opportunity to watch the incident that has occurred inside the Madarsa. Further the whole incident has occurred in one sequence and transaction without any time gap and all the three witnesses have seen it and they are all in the category of eye witnesses. Even if Shafayat PW-2 and Matloob PW-3 are not presumed to be eye-witnesses of the incident which has occurred inside the Madarsa, their oral testimony is relevant under Section 6 of the Evidence Act being res gestae. With regard to the argument that prosecution case is that accused chased and fired shots from behind but all the injuries on the body of Shahadat in on the front part, it is worth while to mention that according to post-mortem report Shahadat has suffered five injuries. Four injuries are of fire arm. Injury no.5 is on the posterior part of the right hand which may have been caused from behind while he was running. Further, the location of the injuries depends upon the position of the deceased when shots were fired at him. Kamil PW-1 who was with Shahadat inside the Madarsa was himself running to save his own life, so threadbare description of the incident is not expected from him and it can only be guessed. Shahadat ran towards the room of

Molwi Sahab, so it may be probable that on reaching at the door of the room he may have turned to shut the door but accused got him and pumped bullets on him before he can shut the door. It may also be probable that finding himself cornered he may have turned and in that position the bullets were fired at him, so the probability that shots were fired at him from front cannot be ruled out and on this ground it cannot be said that there is any contradiction between oral evidence and medical evidence.

15. Learned counsel for the appellants also contended that Nanhi was an important witness but she has not been examined by the prosecution. It is further contended that it has came in the evidence that at the time of occurrence students, teachers and Molwi Sahab were also present in the Madarsa but none of them has been made a witness nor examined in the Court. Learned counsel for the appellant cited the case of **Deny Bora Vs. State of Assam (2014) 14 SCC 22** and referred para 9 which is as follows:-

*"The question that arises for consideration is whether the prosecution has been able to establish the involvement of the appellant in the crime in question. As is manifest, neither the wife nor the daughter of the deceased has been examined. Submission of Mr. Goswami is that they are natural witnesses and no explanation has been given for their non-examination and hence, adverse inference against the prosecution deserves to be drawn. He has drawn inspiration from the authority in Surinder Kumar v. State of Haryana1 wherein it has been held, though in a different context, that a failure on the part of the prosecution in non-examining the two children, aged about six and four years respectively, when both of them were present at the site of the crime, amounted to failure on the part of the prosecution. In this context, reference to the decision in State of H.P. v. Gian Chand2 would be profitable. The Court while dealing with non-examination of material witnesses has expressed that:-*

*"14 ... Non-examination of a material witness is not a mathematical formula for discarding the weight of the testimony available on record, howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court leveled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses are available for being examined in the court and were yet withheld by the prosecution."*

*The three-Judge Bench further proceeded to observe that the court is required first to assess the trustworthiness of the evidence available on record and if the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted upon though there may be other witnesses available who could also have been examined but were not examined."*

In this respect, it is sufficient to say that the quality of evidence and not quantity which matters. The prosecution is not under any obligation to multiply the evidence. So non production of Nanhi or any other person said to be present at the time of occurrence by the prosecution does not adversely affect the prosecution case. In the ruling cited by learned counsel for the appellants, the Hon'ble Supreme Court has also laid down that the Court is required first to assess the trustworthiness of the evidence available on record and if the court finds the evidence adduced worthy of being relied on, then the testimony has to

be accepted and acted upon though there may be other witnesses available who could also have been examined but were not examined. .

16. Learned counsel for the appellants also contended that according to prosecution five persons armed with pistols fired indiscriminately upon the deceased and his companions right from the culvert (Puliya) through the road and also inside the Madarsa but only four injuries of fire arm have been found on the body of the deceased and the Doctor in his cross-examination has said that the injuries no.2 and 3 may be from the same weapon. No bullet, empty cartridge or any mark or sign has been found near the Puliya or on the road or inside the Madarsa except at the door of the room of Molwi Sahab. This fact also doubts the prosecution story about manner of assault and makes the statement of witnesss in this respect unreliable. Learned counsel for the appellants placed reliance on the judgment in the case of **Jalpat Rai and others Vs State of Haryana (2011) 14 SCC 208** and referred para 41 and 45 of the aforesaid citation which reads as follows:

*"41. PW-1, PW-4 and PW-8 are not only much interested in the prosecution case but they are inimically disposed towards the accused party as well. The deep rooted enmity and serious disputes between PW-1 on the one hand and A-1 and his sons on the other and their unflinching interest in the prosecution case necessitate that the evidence of PW-1, PW-4 and PW-8 is considered with care and caution. To find out 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.*

*45. If the evidence of PW-1, PW-4 and PW-8 is to be believed then there was indiscriminate firing by the accused party at the complainant party. PW-1 has said so in so many words. Four members of the accused party - A-1, A-2, A-3 and A-4 - were armed with firearms. According to these witnesses, all of them fired shots from the firearms they were carrying. The first shot was fired by A-2 from the pistol he was carrying (although in the FIR it is recorded that A-2 was armed with revolver but this inconsistency is not very material). That shot did not hit anyone. A-2 then again fired shot that hit Chand. A-4 fired a shot with pistol that hit Sunil. A-3 and A-1 fired shots from their guns and A-2 and A-4 also fired shots from the pistols causing injuries to Pawan and PW-4. However, at the place of occurrence, only three empties were found. Had the firing taken place in the manner deposed by PW-1, PW-4 and PW-8, obviously there should have been more empties at the place of occurrence."*

Learned A.G.A. submitted that four empty cartridge, one live cartridge and one bullet have been recovered from the place of occurrence inside the Madarsa. Investigating Officer has taken it in possession and also prepared a memo which is Ex.Ka- 14, so there is no discrepancy in the evidence in this respect.

It is true that no empty cartridge/ bullets or sign of firing has been found outside the Madarsa but it stands proved that four empty cartridge of 315 bore pistol, one live cartridge and one bullet have been taken in possession by the Investigating Officer from inside the Madarsa near the door of the room of Nazim. Apart from it, 3 bullets have also been recovered from the body of the deceased in post-mortem which has been sealed by the doctor. It clearly

establishes several rounds of firing at the time of occurrence and there is no discrepancy in prosecution case in this regard.

17. Learned counsel for the appellants contended that according to the prosecution five accused persons armed with pistols opened fire, chased the deceased and his companions and Shahadat died due to gun shot injuries but it is not specific as to which or any of five committed assault and fired. This argument of the learned counsel for the appellants has no legal sanctity. The accused have been charged with Section 149 I.P.C. also and from evidence on record it is clear that all accused in a pre-planed manner and in furtherance of the common object came from behind the Madarsa holding fire arm in their hands and opened fire on deceased and his companions. The deceased and Kamil ran towards the Madarsa and accused persons chased and fired on him inside the Madarsa and he died instantaneously. So all the ingredients of Section 149 I.P.C. are fulfilled. The number of accused persons are five and they made an unlawful assembly armed with pistols and in prosecution of the common object of such assembly they have committed the crime. The principle of Section 149 I.P.C. has been explained at length by the Hon'ble Apex Court in the Case of **Lalji AIR 1989 SC 754** as follows:

*"Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. Thus this section created a specific and distinct offence. In other words, it created a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common object of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person fails within the ingredients of the section the question that he did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not with his own hands commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined. It is not necessary that all the persons forming an unlawful assembly must do some overt act. When the accused persons assembled together, armed with lathis, and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific overt act was done by which of the accused. This section makes a member of the unlawful assembly responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149. It must be noted that the basis of the constructive guilt under Section 149 is mere membership of the unlawful assembly, with the requisite common object or knowledge.*

*Thus, once the Court hold that certain accused persons formed in unlawful*

*assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence was a member of the same assembly is to be held guilty of that offence. After such a finding it would not be open to the Court to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. The prosecution would have no obligation to prove it. " (emphasis supplied.)*

The Constitution Bench of the Hon'ble Supreme Court in the Case of **Masalti AIR 1965 SC 202** has held thus:

*"What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly ,and he entertained along with the other members of the assembly the common object as defined by Section 141 IPC.*

*.....The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141."*

In **State Vs. Krishan Chand (2004) 7 SCC 629** it has been further held by the Hon'ble Supreme Court that:

*"It is a well established principle of law that when the conviction is recorded with the aid of Section 149, relevant question to be examined by the court is whether the accused was a member of unlawful assembly and not whether he actually took active part in the crime or not."*

So this defence is not available to the accused that it is not established as to which or any of the five accused assaulted or fired. Under Section 149 I.P.C. all accused are equally liable. Further in this case the actual participation of all the accused is also established.

18. The prosecution has also produced the evidence of recovery of one live cartridge and one country made pistol from each accused, Istaqbaal, Anish and one country made pistol and one empty cartridge at the instance of accused Mobin and Kamil, alleged to have be used in the incident. Separate charges under Section 25 Arms Act were also framed against each accused. The learned Trial Court has not believed this evidence and have acquitted all the aforesaid four accused persons from charges under Section 25 Arms Act. The said acquittal has not been challenged and no appeal has been filed against the same, so this evidence is not taken into consideration.

19. PW-4 Leela Singh is the formal witness who has proved the Chik report of Crime No. 83 of 2004 and related G.D. as Ex.Ka-2 and 3 while Ram Singh Yadav PW-7 has prepared the inquest report and related papers and has proved these papers as Ex.Ka-7 to 13. Sub-Inspector C.P. Katheria PW-8 is Investigating Officer of Case No. 83 of 2004 under Section 147, 148, 149, 307, 302, 506 and 7 Criminal Amendment Act. He has proved the site plan, memo of bloodstained and plain soil, memo of bullets, empty cartridge collected from the spot and charge-sheet as Ex.Ka-13, 14, 15 and 19.

20. From material on record and appreciation of evidence, it is clear that evidence produced by the prosecution is reliable and trustworthy. The eye-witness account of the witnesses can be relied on.

Kamil PW-1 and Matloob PW-3 although have turned hostile at a later stage but their previous statements fully corroborates the prosecution version and is true and reliable. It is fully established that the witnesses have turned hostile under a settlement so as to get benefited and to save themselves from incarceration in Nafees's murder case. So the part of the statement in which they have turned hostile is made under a deal and not true and so cannot be believed. It is separable from the earlier statements. The oral evidence is fully corroborated by the medical evidence on record and the guilt of the accused persons is fully proved. The learned Trial Court has properly appreciated the entire evidence on record and findings given by it are just and proper. There is no infirmity or perversity in the findings of the learned Trial Court. The conviction recorded by learned Trial Court is liable to be upheld. Criminal Appeal is liable to be dismissed.

21. The criminal appeal is hereby **dismissed.**

22. Learned counsel for the appellants informed that appellant no.2 Hasrat while serving sentence after getting remittance has been released from jail on 09.02.2021.

23. Remaining appellants are in jail, they shall serve their sentences.

24. Lower court record along with copy of the judgment be transmitted immediately to the trial Court.

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